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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 v.) WD No. 66271
)
 RYAN WILLIAM FERGUSON,)
)
 Appellant.)

IN THE CIRCUIT COURT OF MISSOURI
BOONE COUNTY, 13th JUDICIAL CIRCUIT, DIVISION III
Honorable Ellen S. Roper, Judge

STATE OF MISSOURI,)
)
 Plaintiff,)
)
 v.) Case No. 04CR165368-01
)
 RYAN WILLIAM FERGUSON,)
)
 Defendant.)

RECORD ON APPEAL - TRANSCRIPT
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APPEARANCES

For Plaintiff:	For Defendant:
Mr. Kevin M. J. Crane	Mr. Charles M. Rogers
Prosecuting Attorney	Mr. Jeremy S. Weis
Mr. Daniel Knight	1000 Walnut, Suite 1600
Ms. Nichole Gorovsky	Kansas City, Missouri
Assts. Prosecuting Attorney	Ms. Kathryn Benson
705 East Walnut	222 North Eighth Street
Columbia, Missouri	Columbia, Missouri

Diana M. Taylor, RDR, CRR, CCR #293

Official Court Reporter, Division III
Thirteenth Judicial Circuit of Missouri

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T R I A L

The trial began in Lincoln County on October 14, 2005, before the Honorable Ellen S. Roper, Judge of Division III of the Thirteenth Judicial Circuit of Missouri, at Columbia.

Mr. Kevin M. J. Crane, Boone County Prosecuting Attorney, and Mr. Daniel K. Knight and Ms. Nicole Gorovsky, Assistants Prosecuting Attorney, appeared for the state.

Mr. Charles M. Rogers, Mr. Jeremy S. Weis, and Ms. Kathryn Benson appeared for the defendant.

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(On October 13, 2005, Deputy Court Marshals Les Werner, Fred Baer, and Jeff Vogan were sworn by the Court to take charge of the jury.)

- - -

The following proceedings were held out of the presence of the jury:

THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: And tell me for the record who appears for the state today.

MR. CRANE: I'm Kevin Crane. Dan Knight, assistant prosecutor.

THE COURT: All right.

MR. CRANE: First assistant prosecutor, I should

1 say. Sorry.

2 THE COURT: And what says the defendant?

3 MR. ROGERS: Defendant is ready for trial, Your
4 Honor. The defendant, Ryan Ferguson, appears in person and
5 by counsel: Charles Rogers, Jeremy Weis, and Kathryn Benson.

6 THE COURT: All right. Are there any preliminary
7 matters for the state?

8 MR. CRANE: Judge, we've filed, for your acceptance,
9 a Substitute Information that incorporates various
10 endorsements that the state has made, and further gives the
11 defense notice that, if there is a lesser included
12 instruction as to felony murder, it would be in the --
13 premised on the crime of robbery in the first degree. There
14 was a typographical error I believe in Count II, wherein we
15 repeated the defendant's name instead of Chuck Erickson's
16 name, and some other esoteric things I might have forgotten.
17 I don't believe there's any objection to the filing of that.

18 MR. ROGERS: That is correct, Your Honor. We have
19 no objection to the filing of the Substitute Information or
20 to the endorsement of the additional witnesses. And

21 Mr. Ferguson would waive formal arraignment on the Substitute
22 Information and of course enter pleas of not guilty to all
23 charges.

24 THE COURT: Well, the clerk has anticipated my
25 ruling and your lack of objection, because it's shown as

1 filed on the 6th of October. But I will actually show that
2 it is filed on today's date, which is October the 14th. And
3 that defendant does waive formal arraignment, enters pleas of
4 not guilty to Counts I and II. And the motion to endorse
5 Keith Hoskins and Jenny Atwell are -- that is sustained.
6 They are not shown on this original --

7 MR. CRANE: I'm sorry?

8 THE COURT: They're not shown on the Substitute
9 Information? Or they included on the Substitute Information?

10 MR. CRANE: The last two people?

11 THE COURT: Yes.

12 MR. CRANE: Yeah. Keith Hoskins and Jenny Atwell.

13 THE COURT: Yes. I see they're shown as the last
14 two witnesses on that.

15 MR. CRANE: Yeah.

16 THE COURT: So that's just duplicative; is that
17 correct?

18 MR. CRANE: Yeah.

19 THE COURT: Okay. Are there any other preliminary
20 matters for the state?

21 MR. CRANE: Judge, by agreement, and I'll stand
22 corrected if I'm wrong on that, we would ask that Juror
23 Number 46, Riney, who is a member of the court personnel, in
24 fact a bailiff, that he be excused prior to bringing the
25 panel in.

1 THE COURT: What is --

2 MR. ROGERS: No objection, Your Honor.

3 THE COURT: All right.

4 MR. CRANE: He's on this morning's group. Number

5 46.

6 THE COURT: 46 is excused then, with consent of

7 counsel. Any other?

8 MR. CRANE: Yeah. This afternoon, Number 105, I

9 think it's Fletcher, is a current member of the Lincoln

10 County prosecutor's staff. We'd ask that she be -- is that

11 the number? 105? Fletcher?

12 THE COURT: I don't have 105 with me. I just

13 brought in the morning jurors. But --

14 MR. ROGERS: That is the correct name and number,

15 Your Honor.

16 THE COURT: And he should -- is it a he or she?

17 MR. ROGERS: She. Catherine.

18 THE COURT: Catherine? She should be excused?

19 MR. ROGERS: Yes, Your Honor.

20 THE COURT: And so someone will notify her, I assume

21 she may be in the courthouse as we speak, that she needn't --

22 MR. ROGERS: Oh, she's not supposed to be here until

23 1:30. Oh, she's probably, yeah, someplace around here.

24 THE COURT: She's probably working here.

25 MR. ROGERS: Right.

1 THE COURT: All right. Any other jurors? We had
2 previously determined that Juror Number 30 was a convicted
3 felon, did not have rights restored, from the morning panel,
4 and he is excused as well. Any others that we know have not
5 disclosed that they are convicted felons and should be
6 excused? Mr. Crane?

7 MR. CRANE: Not that I -- not that I'm aware off.
8 I'm all ears if there's somebody else.

9 MR. ROGERS: I'm not aware of --

10 CIRCUIT CLERK HOUSTON: I think we might want to
11 check on David Rice.

12 THE COURT: David Rice?

13 CIRCUIT CLERK HOUSTON: We may want to check on him.

14 THE COURT: What number is he?

15 CIRCUIT CLERK HOUSTON: He's Number 77.

16 THE COURT: Okay. He's in the afternoon? Number
17 77.

18 MR. CRANE: Wait a minute. What was the number
19 again on that, Judge?

20 THE COURT: 77. Rice. R-i-c-e.

21 CIRCUIT CLERK HOUSTON: I'm not -- it may be a
22 different one, but I'm --

23 THE COURT: Our circuit clerk here thinks that she
24 may know of one that has a conviction.

25 MR. CRANE: Okay. That's afternoon?

1 THE COURT: An afternoon.

2 MR. CRANE: Can we -- maybe we can check on that.

3 THE COURT: During a recess.

4 CIRCUIT CLERK HOUSTON: Yes, I will.

5 MR. CRANE: Judge, what about Number 9, Gary
6 Dennison? We're showing he has a 1997 DWI conviction.

7 Received a three-year sentence in the department of
8 corrections.

9 THE COURT: He was one of the ones that had
10 indicated that he had been convicted of a traffic -- of a
11 crime other than traffic offenses. And I was going to -- I'm
12 not going to ask each one of those individually, but I'll ask
13 those that checked it if they -- if it was perhaps a felony.
14 I have to believe that, if he served time in the department
15 of corrections, it wasn't on a misdemeanor.

16 MR. CRANE: Well, we show -- our records indicate
17 that he has -- he was convicted and received a three-year
18 sentence. Whether or not he did the time or got probation, I
19 don't know, but we'd ask that he be excused.

20 MR. ROGERS: I don't have a problem with that,
21 Judge. We don't have obviously access to the records that
22 the state has access to, so.

23 THE COURT: Do you know where he was convicted,
24 Mr. Crane? Was it in Lincoln County?

25 MS. MARSDEN: I can find it in just a minute.

1 THE COURT: While we're waiting for that, I note
2 that the prosecuting attorney of Lincoln County will be
3 assisting in this case; is that correct? Just in the voir
4 dire?

5 MR. CRANE: Yeah. He's going to be sitting with my
6 investigator during voir dire.

7 THE COURT: All right. And I suspect there may be
8 people that know him or might be related to him. If you
9 would, for the record, give me your name, please.

10 MR. RICHARDS: John Richards.

11 THE COURT: Yes, Mr. Richards.

12 MR. CRANE: Judge, I'm going to show the -- what's
13 that guy's name? Dennison information --

14 THE COURT: Gary Dennison.

15 MR. CRANE: -- on that felony to the defense
16 attorney here.

17 (Mr. Crane tendering information to Mr. Rogers.)

18 MR. ROGERS: This record does, in fact, indicate a
19 felony conviction, Your Honor. And we would have no
20 objection to him being stricken. There's no need to bring
21 him in and embarrass him in front of everybody else.

22 THE COURT: No. I try not to. And that's why I
23 said, of those that have checked that they had convictions
24 other than traffic offenses, he was one, 22 was one, 34 was
25 one, 35, 36 was one, of course 30, who's now off the panel,

1 and 40 all had said they had convictions other than traffic
2 offenses. I mean, it may be a misdemeanor assault, for all I
3 know, which is certainly an offense other than a traffic
4 offense.

5 Other than those issues --

6 MR. ROGERS: Your Honor, there was another juror who
7 was excused for a medical emergency in his family. And I
8 didn't get the number of that juror.

9 THE COURT: That was Number 71. It was in the
10 afternoon.

11 MR. ROGERS: Right.

12 THE COURT: As I recall.

13 MR. ROGERS: Yeah.

14 THE COURT: I don't have the name with me right
15 here, because I don't have the afternoon docket.

16 MR. ROGERS: That triggered my recollection.

17 THE COURT: But it was 71, I believe.

18 MR. ROGERS: Right.

19 THE COURT: Can you tell me the name and it will
20 ring a bell maybe?

21 MR. ROGERS: The name is Richard Wienecke.

22 THE COURT: Yeah, Wienecke. That was the one that
23 -- whose wife had a blood clot.

24 MR. ROGERS: For the record, we have no objection to
25 that either.

1 THE COURT: All right.

2 MR. CRANE: Which one was that?

3 MR. ROGERS: 71 --

4 THE COURT: Wienecke.

5 MR. ROGERS: -- Wienecke --

6 THE COURT: We already --

7 MR. ROGERS: -- from this afternoon. We already did

8 that, yes.

9 THE COURT: Well, I think we talked about it off the

10 record, but did not make a record of it.

11 Any other things we need to take up before we bring

12 the jurors in?

13 MR. CRANE: Are we going to start at 9 or --

14 THE COURT: We'll start -- I imagine we'll start at

15 9.

16 Do we know how many --

17 BAILIFF BOEDEKER: I'm going to check now, ma'am.

18 THE COURT: Okay. We may have some empty spaces,

19 and I want to give them an opportunity to be here. I was

20 sort of hoping we might have enough in the first group to get

21 a jury, but I think it's -- oh. I will mention this to you.

22 I do want to have at least three alternates. And I assume we

23 could get four for the price of three. I just hate to have

24 something happen. I think two alternates would be sort of

25 iffy, not to have an extra third one.

1 What is the state's position.

2 MR. CRANE: I don't know. I -- I -- we've got two
3 groups. If we got to do two voir dices, so be it. I mean, I
4 was going to say, if we get this morning group done and we
5 got enough for two alternates, I'm willing to role the dice
6 and go back to Boone County and try the case. I would just
7 think, golly, doing a whole afternoon for one alternate, I
8 don't know if that's going to happen, but I'd almost say the
9 same thing if we just got one alternate. Rather than doing
10 an afternoon of voir dire for two more. But I'll --

11 THE COURT: Considering how much time it takes to
12 organize these kinds of trials. And with one alternate, I --
13 I know, from past experiences, we've had to use alternates.

14 MR. CRANE: Yeah, I know, but -- but --

15 THE COURT: Like the man who was taking -- or the
16 wife that was taking the kids to South America and the
17 husband was on the jury. And she was about to leave the
18 country, and he needed to -- I mean, all kinds of things can
19 happen that you would never think would happen.

20 MR. CRANE: Well, I know. Can we cross that bridge
21 when we get to it?

22 THE COURT: All right.

23 MR. CRANE: What I'm saying may not even, you
24 know --

25 THE COURT: It may not be there. But I -- just let

1 me have a feeling for what the defense feels.

2 MR. ROGERS: Your Honor, I tend to agree with
3 Mr. Crane; that if we've got enough for two alternates at the
4 end of the morning, it's kind of a waste of time for a third
5 alternate.

6 THE COURT: I would probably --

7 MR. ROGERS: Two of the last three trials I've had,
8 we've used alternates. And in one of those trials, we
9 actually used two alternates. But that was a trial that
10 lasted six weeks. And I don't know that a -- in one week,
11 losing more than one alternate would be beyond my experience.
12 Having said that, I don't want to jinx us by --

13 THE COURT: Well, I would tend to go with two
14 alternates. But not to have -- just to have one alternate
15 would really concern me a great deal. You just never know --
16 like this man's wife that had a blood clot. You just don't
17 know when things like that in the family might come up. And
18 I --

19 MR. ROGERS: And especially in a case where there is
20 going to be a sequestered -- or an out-of-town experience for
21 them. There might be somebody who something happens tomorrow
22 or Sunday that keeps them from being there, so --

23 THE COURT: That's true.

24 MR. ROGERS: -- start off using an alternate before
25 we get started, so.

1 THE COURT: That would concern me.

2 That brings me to the question of how long you
3 anticipate, assuming we start Monday, this case -- the
4 longest that it would go would be through Saturday, you
5 believe?

6 MR. CRANE: Yeah. I mean, we've always been saying
7 we thought we'd get done by Friday, but, you know.

8 THE COURT: But I want to give people the longest.
9 If someone's favorite niece is getting married on Saturday,
10 and I tell them they can go home on Friday, and they can't, I
11 don't want to have a problem with that situation.

12 MR. ROGERS: I could anticipate there still being
13 deliberations on Saturday.

14 THE COURT: Yeah. So if I tell them through
15 Saturday, they should plan on being here through Saturday,
16 although we'll do our best to finish earlier than then --
17 than that, that's the latest you think that they would be
18 here. Absent some very unusual circumstance. Because they
19 can't --

20 MR. CRANE: I think that's put -- fine by me, yeah.

21 THE COURT: I mean -- and we're not talking about a
22 two-week trial, are we?

23 MR. ROGERS: No. I hope not, Your Honor.

24 THE COURT: Okay. And I assume that everyone that's
25 endorsed on this Substitute Information, possibly not

1 everyone is going to be called.

2 MR. CRANE: We're going to call every single one of
3 them.

4 MR. ROGERS: In the order that --

5 MR. CRANE: No. No, we're not.

6 THE COURT: All right.
7 How many jurors do --

8 BAILIFF BOEDEKER: Ma'am, there's only two.

9 THE COURT: Two missing?

10 BAILIFF BOEDEKER: Yes, ma'am.

11 THE COURT: And who are the two that are missing?

12 BAILIFF BOEDEKER: I didn't get that.

13 THE COURT: Okay. That's all right. What is your
14 procedure here if someone doesn't show up? Do you call them
15 and say --

16 BAILIFF BOEDEKER: We call them and --

17 THE COURT: Tell them to come in right away?

18 BAILIFF BOEDEKER: Yes, ma'am.

19 THE COURT: Okay.

20 BAILIFF BOEDEKER: I tell them to come in at 12:30.

21 THE COURT: You'd put them in the afternoon.

22 BAILIFF BOEDEKER: Yes, ma'am.

23 THE COURT: Okay. So out of these 52, we already
24 have three that are excused. And so that would bring us down
25 to 49. And two more off of that would be 47. Okay. Well,

1 let's just cross our fingers and give them until 9:00 to
2 appear.

3 BAILIFF BOEDEKER: All right, ma'am. May I tell
4 Mr. Riney he can leave?

5 THE COURT: Absolutely.

6 BAILIFF BOEDEKER: So he could go home and change
7 and -- I need the help downstairs.

8 THE COURT: Okay. You may tell Mr. Riney -- you may
9 tell Mr. Dennison, Number 9; Mr. Riney, who is Number --

10 BAILIFF BOEDEKER: 46.

11 THE COURT: -- 46; Mr. Dennison, who is Number 9 --

12 BAILIFF BOEDEKER: All right, ma'am.

13 THE COURT: -- and Mr. Stever, S-t-e-v-e-r. And he
14 may have been already excused --

15 BAILIFF BOEDEKER: Yes, ma'am.

16 THE COURT: -- and left the building, but he may
17 leave. 9, 30, and 46.

18 BAILIFF BOEDEKER: Yes, ma'am. Thank you.

19 THE COURT: All right. And we'll just hope that
20 maybe one or -- one or two extra will be here.

21 MR. ROGERS: Your Honor, while we're talking about
22 numbers, I just want to remind the Court for the record that
23 in our pleading concerning voir dire procedures, which also
24 talked about a jury questionnaire and things like that, we
25 did assert the position that we should be entitled to nine

1 strikes per side because this is a -- the crime of first
2 degree murder is punishable by death, according to the
3 statute, even though the death penalty is not a possibility
4 in this case. And I don't know that you've specifically
5 ruled on that issue. I think we're operating under the
6 assumption that you're going to say no, you get six strikes
7 per side, but I did want to bring that to your attention so I
8 wouldn't be sandbagging you and just leaving it buried in the
9 file.

10 THE COURT: I appreciate your bringing that to my
11 attention. I have tried first degree murder cases where the
12 death penalty has been waived, for one reason or another.
13 Not sought or waived at the time of trial.

14 MR. ROGERS: Right.

15 THE COURT: And the procedure has always been to do
16 six strikes. But if you have an appellate court opinion that
17 says you're entitled to nine strikes, I certainly will give
18 you nine strikes.

19 MR. ROGERS: Your Honor, in the pleading I point out
20 the appellate courts' opinions that say that what you have
21 done in the past is the correct thing to do. I attempt to
22 distinguish them and point out how they're wrongly decided.

23 THE COURT: All right. Well, I sometimes don't
24 agree with them myself, sir, but I'm bound to follow their
25 opinions. And by ruling of the U. S. Supreme Court,

1 Mr. Ferguson, if convicted, could not be sentenced to death,
2 under the current state of the law, even if the state had
3 chosen to ask for the death penalty in this case, because of
4 the age that he was at the time that the alleged crime
5 occurred. So I will overrule your request to have nine
6 strikes in this case.

7 Anything else we need to take up?

8 MR. ROGERS: Just from procedural aspects, assuming
9 that a juror gives answers which appear to be disqualifying,
10 would you like us to wait and make our motions for strikes
11 for cause at the end of the voir dire?

12 THE COURT: Absolutely.

13 MR. ROGERS: Okay.

14 THE COURT: Since we're having two different panels,
15 yes. Because I don't want Juror Number 22 to figure out from
16 Juror 21's absence what to say in order -- I notice there was
17 one person that said they can't judge other people.

18 MR. ROGERS: Right.

19 THE COURT: And, you know, I would -- I'll give you
20 full opportunity to explore with whatever juror, you know,
21 says something, but... Absent someone saying, "I came in
22 with the flu and I think I'm going to throw up right now," I
23 let those go right away.

24 MR. ROGERS: Fair enough.

25 THE COURT: But anything that would be a challenge

1 for cause, certainly if you'll wait until the panel goes out,
2 so that the others -- and I'll give you full opportunity to
3 make an objection --

4 MR. ROGERS: Okay. Thank you.

5 THE COURT: -- before we seat any --

6 MR. ROGERS: That's how I prefer to do it too, but
7 some judges do it differently.

8 THE COURT: Well, I think -- and if you're
9 overruled, I imagine, and the juror somehow stays on that
10 jury, that would be a very unpleasant thing for an attorney
11 to have to deal with, so I agree, that's what we need to do.

12 DEPUTY COURT MARSHAL WERNER: As of right now, we're
13 just missing one.

14 THE COURT: Oh.

15 DEPUTY COURT MARSHAL WERNER: And they don't
16 anticipate that individual being here.

17 THE COURT: Is this the one that has failed to
18 appear on three prior occasions?

19 DEPUTY COURT MARSHAL WERNER: I don't know that.

20 THE COURT: And who has -- is the absent juror the
21 one who doesn't --

22 BAILIFF BOEDEKER: Well --

23 THE COURT: -- seem to want to come to court?

24 BAILIFF BOEDEKER: We have one, ma'am.

25 THE COURT: Yes. And there was one juror I was

1 informed previously who had been summoned and then the
2 sheriff went after him --

3 BAILIFF BOEDEKER: Oh, yes, ma'am. That was
4 Number --

5 DEPUTY COURT MARSHAL WERNER: He's here.

6 THE COURT: He's here.

7 BAILIFF BOEDEKER: -- Number 14.

8 THE COURT: Number 14's here.

9 BAILIFF BOEDEKER: Yes, ma'am.

10 THE COURT: And you -- and there's reason to believe
11 that you don't think that the other juror will appear?

12 BAILIFF BOEDEKER: Probably not, ma'am.

13 THE COURT: Okay.

14 BAILIFF BOEDEKER: The clerk is -- the other clerk
15 is calling them, lining them up in the hallway now. So
16 whenever you're ready, we'll --

17 THE COURT: Okay. Well, we're ready when you're
18 ready.

19 BAILIFF BOEDEKER: All right.

20 MR. ROGERS: Break first, Judge?

21 THE COURT: Oh, yeah. Wait. Let the attorneys go
22 out and take a quick break.

23 BAILIFF BOEDEKER: All right, ma'am.

24 THE COURT: I mean, they can be lined up.

25 Anyone else that needs to take a quick break.

1 (Recess taken.)

2 - - -

3 The following proceedings were held in the presence of
4 the jury:

5 THE COURT: Be seated, please.

6 Good morning, ladies and gentlemen. Thank you so
7 much for arriving so promptly. I'm Ellen Roper. I'm a
8 circuit judge up in Boone and Callaway Counties. 13th
9 Judicial Circuit.

10 I will be introducing some of the other parties here
11 shortly, but my court reporter is sitting in front of the
12 bench, and her name is Diana Taylor. She's writing down what
13 I'm saying at this particular point, but most importantly
14 she'll be writing down your answers to questions concerning
15 your qualifications as jurors as the trial goes on.

16 Because this is a large courtroom, and you don't
17 have the advantage of having a hand mic or even a standing
18 mic to come up to, I'm going to ask you that, if you are
19 going to answer a question, that you stand. And I know some
20 jurors are hesitant for their names to be used, and that's
21 why on your tags you have a number. And if you are -- if you
22 would rather not give your last name and you want to just say
23 "Number 2" or "Number 6" or whatever your number is, that's
24 fine, because we have a list both with names and numbers.
25 You may give your last name if you wish. But if you would do

1 that, that would help Diana make a record here, so that we
2 would attribute your remark to you and not to someone else.

3 If your answer is a "yes" or a "no" to a question, I
4 know what shaking your head up and down or sideways means,
5 and I would bet that all the attorneys and even Diana knows
6 what that means also, but she'll just write you're shaking
7 your head, and we won't know if you're looking at the
8 ceiling, at the lights, or mean a yes or a no. So we're
9 going to have to ask you to say "yes" or "no" if that is the
10 response to a question.

11 I'm assuming that everyone whose names were called
12 were here. There were some people who couldn't come to our
13 affair today, but we're sorry, and maybe they'll get an
14 opportunity in the future to appear.

15 Today's trial for which you have been called for
16 jury service is a criminal case. The State of Missouri has
17 charged that the defendant, Ryan William Ferguson, has
18 committed the offenses of murder in the first degree and
19 robbery in the first degree. The defendant has pled not
20 guilty to the charges. Thus, there are issues of fact which
21 must be decided by a jury, subject to instructions concerning
22 the law, which the Court will give to the jury. The jury is
23 obligated to follow those instructions.

24 A trial of a criminal case does begin with a
25 selection of a jury of qualified and impartial people. In

1 order to obtain such a jury, all of you have been summoned as
2 prospective jurors. From your number, a jury will be
3 selected to hear the case.

4 It is necessary that you be asked various questions.
5 Your answers will assist the Court in determining whether it
6 should excuse you from serving in this case and will assist
7 the attorneys in making their selection of those of you who
8 will hear the case. Thus, the questions which will be asked
9 of you are not meant to pry into your personal affairs.
10 Rather they are the necessary process of selecting a jury.

11 Since this is an important part of the trial, you
12 are required to be sworn before questions are asked. Please
13 rise now and be sworn to answer questions.

14 THE COURT: If you'd raise your right hands, please.

15 (Venire panel sworn by Melba Houston, Circuit
16 Clerk.)

17 - - -

18 VOIR DIRE EXAMINATION

19 BY THE COURT:

20 Be seated, ladies and gentlemen.

21 Please listen carefully to all questions. Take your
22 time in answering questions. Some of the questions may
23 require you to recall experiences during your entire
24 lifetime. Therefore, search your memory before answering.
25 If you do not understand the question, raise your hand and

1 say so. If, later on, during your examination, you remember
2 something which you failed to answer before, or which would
3 modify an answer that you gave before, please raise your hand
4 and you will be asked about it. Your answers must not only
5 be truthful but they must be full and complete. If your
6 answer to any of these questions involves matters which are
7 personal or private, you may so indicate and you will be
8 given the opportunity to state your answer up here at the
9 bench. The attorneys will hear your answers, but the other
10 jurors will not.

11 The trial of a lawsuit involves considerable time
12 and effort, and the parties are entitled to have their rights
13 finally determined. The failure on your part to fully and
14 truthfully answer questions during this stage of the trial
15 could force the parties to have to retry this lawsuit at some
16 future date.

17 The Court will now read to you an instruction on the
18 law applicable to all criminal cases.

19 The charge of any offense is not evidence, and it
20 creates no inference that any offense was committed or that
21 the defendant is guilty of an offense.

22 The defendant is presumed to be innocent unless and
23 until, during your deliberations upon your verdict, you find
24 him guilty. This presumption of innocence places upon the
25 state the burden of proving beyond a reasonable doubt that

1 the defendant is guilty.

2 A reasonable doubt is a doubt based upon reason and
3 common sense after careful and impartial consideration of all
4 the evidence in the case.

5 Proof beyond a reasonable doubt is proof that leaves
6 you firmly convinced of the defendant's guilt. The law does
7 not require proof that overcomes every possible doubt. If,
8 after your consideration of all the evidence, you are firmly
9 convinced the defendant is guilty of the crime charged, you
10 will find him guilty. If you are not so convinced, you must
11 give him the benefit of the doubt and find him not guilty.

12 Is there any of you who, if selected for a juror,
13 could not, for any reason, follow that instruction? If so,
14 would you please raise your hand? I see no hands, so I have
15 to assume, and counsel likewise will assume, that you would
16 be able to follow that instruction.

17 It is your duty to follow the law as the Court gives
18 it to you in these instructions even though you may disagree
19 with it. Are there any of you who would not be willing to
20 follow all instructions that the Court will give to the jury?
21 If so, would you please raise your hand.

22 And I understand that that might be a difficult
23 question, ladies and gentlemen. I've just read to you the
24 one on reasonable doubt. I haven't read you all the other
25 instructions the Court would give you. The point of the

1 question is to find out whether you feel so strongly about
2 some area of law, or perhaps the law that might relate to the
3 charges in this case, that you would not be able to follow
4 the law. And I see no hands in response. So I am assuming
5 that, even if you disagreed with what the law was, you would
6 be able to follow it.

7 The State of Missouri in this case is represented by
8 two attorneys. Mr. Kevin Crane is the prosecuting
9 attorney --

10 MR. CRANE: Good morning.

11 THE COURT: -- of Boone County, Missouri. And this
12 is where this case originated.

13 I need to know if any of you know him personally,
14 related to him by blood or marriage, or have had any kind of
15 dealings of a professional nature with him in any sense of
16 that word. If you'd raise your hand, please. I don't see
17 any hands, so I assume that you do not.

18 His first assistant attorney -- assistant
19 prosecuting attorney is Mr. Dan Knight. And he is standing
20 at counsel table.

21 I'd ask the same question of Mr. Knight. Are any of
22 you personally acquainted with him, related to him by blood
23 or marriage, or have you had any kind of professional
24 dealings with him at any time? He practices with Mr. Crane
25 in Boone County.

1 You may be seated.

2 I don't see any hands there.

3 Let me introduce -- and you probably know him.

4 Mr. John Richards is assisting Mr. Crane today, just for

5 today. He is the prosecuting attorney here in Lincoln

6 County. And I need to know if any of you are acquainted with

7 him, related to him by blood or marriage, or have had any

8 kind of dealings with him of a professional nature. If you

9 would raise your hand and let me call on you.

10 Juror Number 6, would you stand and tell me, how do

11 you know Mr. Richards?

12 VENIREPERSON GALES: I am one of his son's baseball

13 coach. Out of Moscow Mills.

14 THE COURT: Okay. And is that currently? A

15 baseball co -- you're doing --

16 VENIREPERSON GALES: In the summertime.

17 THE COURT: -- whenever the season is appropriate.

18 VENIREPERSON GALES: Yes. In the summertime.

19 THE COURT: Okay. Have you had any social

20 relationship with him, such as visiting in his home or having

21 him in your home?

22 VENIREPERSON GALES: Yes.

23 THE COURT: Okay. And was that just last summer?

24 VENIREPERSON GALES: Yes.

25 THE COURT: How long have you known him?

1 VENIREPERSON GALES: Six, seven months. Eight
2 months, tops.

3 THE COURT: Would the fact that he is not an
4 attorney of record, but assisting the state here in selecting
5 a jury, would that in any way influence your decision here
6 today?

7 VENIREPERSON GALES: No, it would not.

8 THE COURT: Would it influence your decision later
9 on in the case if you're selected as a juror?

10 VENIREPERSON GALES: No.

11 THE COURT: Would you be able, if chosen as a juror,
12 to reach verdicts in this case based only on the evidence
13 that you might see and hear in the courtroom?

14 VENIREPERSON GALES: Yes, I would.

15 THE COURT: Okay. Thank you so much, Juror Number
16 6.

17 VENIREPERSON GALES: You're welcome.

18 THE COURT: Anyone else that might know
19 Mr. Richards? And let me -- let me go across on the first
20 row, and then I'll go into the second row.

21 Is your name -- it's Juror Number 7?

22 VENIREPERSON WAECHTER: Yes, ma'am.

23 THE COURT: Okay. Those sitting on the first row
24 probably don't need to stand, unless you have a really soft
25 voice.

1 How do you know Mr. Richards?

2 VENIREPERSON WAECHTER: Just from professional

3 business dealings with --

4 THE COURT: Okay.

5 VENIREPERSON WAECHTER: -- insufficient checks, bad

6 checks.

7 THE COURT: Okay. And in connection with your

8 business, he has filed on or collected bad checks for you.

9 VENIREPERSON WAECHTER: Yes.

10 THE COURT: How long a period of time has that gone

11 on?

12 VENIREPERSON WAECHTER: What? Five years, six --

13 THE COURT: Do you have a social relationship with

14 him?

15 VENIREPERSON WAECHTER: No.

16 THE COURT: You don't visit in his home or he comes

17 to your house?

18 VENIREPERSON WAECHTER: No.

19 THE COURT: Would the fact that he -- that you've

20 had a business relationship with him over that period of

21 time, would that influence your decision if you're selected

22 as a juror?

23 VENIREPERSON WAECHTER: No, ma'am.

24 THE COURT: Would you be able to reach verdicts in

25 this case, if selected, based only on the evidence that you

1 see and hear in the courtroom?

2 VENIREPERSON WAECHTER: Yes.

3 THE COURT: Thank you, sir.

4 I saw -- let me go to this side, and then I'll go to
5 the other. I don't see any on the second row. Yes, I do.

6 Are you Juror Number 16?

7 VENIREPERSON CAVINESS: Yes.

8 THE COURT: And how do you know Mr. Richards?

9 VENIREPERSON CAVINESS: I worked for the Lincoln
10 County Sheriff's Department, in their processing of their
11 court cases.

12 THE COURT: Okay. In the warrant section?

13 VENIREPERSON CAVINESS: Yes.

14 THE COURT: And do you -- you don't still work
15 there.

16 VENIREPERSON CAVINESS: No, I don't.

17 THE COURT: So in connection with process -- were
18 they criminal warrants as well as serving other process?

19 VENIREPERSON CAVINESS: Yes.

20 THE COURT: Okay. And how long did you work in that
21 department?

22 VENIREPERSON CAVINESS: Four years.

23 THE COURT: Pardon?

24 VENIREPERSON CAVINESS: Four years.

25 THE COURT: And during that four-year period of

1 time, was Mr. Richards the prosecuting attorney here?

2 VENIREPERSON CAVINESS: Yes, he was.

3 THE COURT: And anything more than receiving
4 paperwork from his office? Did you have any other kind of
5 business dealings with him?

6 VENIREPERSON CAVINESS: No, I did not.

7 THE COURT: Do you have a social relationship with
8 him?

9 VENIREPERSON CAVINESS: No.

10 THE COURT: Would the fact that -- and how long has
11 it been since you worked there?

12 VENIREPERSON CAVINESS: Four years.

13 THE COURT: Okay. It was four years ago that you
14 worked there?

15 VENIREPERSON CAVINESS: Yes.

16 THE COURT: And for how long a period of time?

17 VENIREPERSON CAVINESS: Four years.

18 THE COURT: Four years also. Okay. Would the fact
19 that that length of time ago and for four years that you have
20 dealt with him on serving -- or the serving of warrants,
21 would that influence your decision in any way?

22 VENIREPERSON CAVINESS: No.

23 THE COURT: And that's a no?

24 VENIREPERSON CAVINESS: No.

25 THE COURT: Okay. Thank you. And if selected,

1 Juror Number 16, would you be able to reach a verdict based
2 only -- or verdicts based only on the evidence that you might
3 see and hear in this courtroom?

4 VENIREPERSON CAVINESS: Yes.

5 THE COURT: Thank you, ma'am.

6 All right. I did see a hand over here. And would
7 you tell me your number, sir.

8 VENIREPERSON HARRIS: 22.

9 THE COURT: Yes. Juror 22, how do you know
10 Mr. Richards?

11 VENIREPERSON HARRIS: Mr. Richards' office has
12 prosecuted me in court before. And -- misdemeanor trials.
13 DWI and domestic violence.

14 THE COURT: Okay.

15 VENIREPERSON HARRIS: And also, my fiancée's sister
16 worked for Mr. Richards for quite a few years.

17 THE COURT: All right. No longer does, but did.

18 VENIREPERSON HARRIS: No longer does.

19 THE COURT: How long ago was it that Mr. Richards'
20 office had some dealings with you of a professional --

21 VENIREPERSON HARRIS: The last one was in 1996, I
22 believe.

23 THE COURT: So that's nine years ago, approximately?

24 VENIREPERSON HARRIS: Yes, ma'am.

25 THE COURT: And it didn't involve a felony, but --

1 VENIREPERSON HARRIS: No, ma'am.

2 THE COURT: -- were only misdemeanor charges. And

3 Mr. Richards was the prosecutor at that time.

4 VENIREPERSON HARRIS: His office. Yes, his office

5 was.

6 THE COURT: He was --

7 VENIREPERSON HARRIS: Yes, he was. I'm sorry.

8 THE COURT: -- the prosecutor, but he may not have

9 been the attorney that you dealt with.

10 VENIREPERSON HARRIS: Yes, ma'am.

11 THE COURT: Okay. And I don't mean to embarrass

12 you, but do you have hard feelings either against

13 Mr. Richards or the state in general?

14 VENIREPERSON HARRIS: No, ma'am.

15 THE COURT: If selected, Juror 22, as a juror, would

16 you be able to reach a verdict in this -- or verdicts in this

17 case based solely on the evidence that you would see and hear

18 in this courtroom -- or here in the courtroom?

19 VENIREPERSON HARRIS: Yes, ma'am.

20 THE COURT: Okay. Thank you, sir.

21 Anyone else on the second row, either side? Okay.

22 Let us go back to the third row. Anyone who knows

23 Mr. Richards, on either side of the aisle? Okay. The fourth

24 row.

25 Okay. If you would stand, please. And tell me your

1 number. Or you can tell me your name, if you don't care
2 to -- I mean, if you don't -- it doesn't bother you to reveal
3 it.

4 VENIREPERSON SCHISLER: Annette Schisler, Number 45.

5 THE COURT: Okay. And how do you know Mr. Richards?

6 VENIREPERSON SCHISLER: Mr. Richards helped draw up
7 a will for my husband and I about 10 or 12 years ago.

8 THE COURT: Okay. And that's in the civil practice
9 of law, not in connection with his duties as prosecuting
10 attorney.

11 VENIREPERSON SCHISLER: Right.

12 THE COURT: And has he done any other legal business
13 for you?

14 VENIREPERSON SCHISLER: No.

15 THE COURT: And you said that was three or four
16 years ago?

17 VENIREPERSON SCHISLER: No. 10 or 12 years ago.

18 THE COURT: 10 or 12 years ago. Would the fact that
19 you chose to have him draft your wills that long ago
20 influence your decision in this particular case?

21 VENIREPERSON SCHISLER: No.

22 THE COURT: Would you be able, Miss Schisler, to
23 reach a verdict, if selected in this case, on both counts,
24 based only on the evidence that you would see and hear in the
25 courtroom?

1 VENIREPERSON SCHISLER: Yes.

2 THE COURT: Yes?

3 VENIREPERSON SCHISLER: Yes.

4 THE COURT: Okay. Thank you so much. You may be
5 seated.

6 Anyone else on that row? And then on the very back
7 row, that would be the fifth row on the very back, is anyone
8 acquainted with the prosecuting attorney in any way? All
9 right. I don't see any hands, so I assume that you do not
10 know him. And again, he's not an attorney in the case of
11 record, but he is just assisting, and I thought I needed to
12 ask those questions.

13 Representing the defendant in this case is
14 Mr. Charles Rogers. And he is standing at counsel table.

15 MR. ROGERS: Good morning.

16 THE COURT: He practices in Kansas City, but all
17 throughout the state as well. And I need to know if any of
18 you are acquainted with him, related to him by blood or
19 marriage, or have had any kind of legal business with him. I
20 do not see any hands, so I am assuming that you do not know
21 him in any way.

22 Also representing the defendant is Mr. Jeremy Weis.
23 He is standing at counsel table. Need to know if any of you
24 are acquainted with him, related to him by blood or marriage,
25 have any legal business with him. And he too practices in

1 Kansas City, but also throughout the state. I don't see any
2 hands, so I assume that you do not know him in any way.

3 Representing the defendant also is Miss Kathryn
4 Benson.

5 MS. BENSON: Good morning.

6 THE COURT: She practices throughout the state, but
7 she -- her office is in Columbia. I need to know if any of
8 you are acquainted with her, related to her by blood or
9 marriage, or whether she has done any legal business for you.
10 All right. I don't see any hands, so I assume that you do
11 not know her.

12 The defendant in this case is sitting at counsel
13 table. His name is Ryan William Ferguson.

14 And Mr. Ferguson, if you would stand.

15 I need to know if any of you are acquainted with
16 Mr. Ferguson or related to him by blood or marriage. He is a
17 resident of Columbia. I need to -- and that more I can
18 only -- that is all that I know about him to tell you. But
19 need to know if any of you are acquainted with him in any
20 way. Okay.

21 You may sit down, Mr. Ferguson.

22 I don't see any hands.

23 Ladies and gentlemen, I have some questions to ask
24 you. Then you'll be relieved to know only one attorney on
25 each side may ask questions. And hopefully we can move

1 along.

2 Let me just get a little bit of water, because my
3 voice is giving out here.

4 As I mentioned originally, this case originated in
5 Boone County, Missouri. We are selecting a jury here in
6 Lincoln County. And the jury in its work will have to be
7 brought back to Columbia to hear the evidence in this case.
8 We will provide transportation. We will provide room and
9 board while you're there. And the very latest that I
10 understand that the case will last will be into Saturday.
11 Although we're hopeful that the case will conclude prior to
12 Saturday. But I can't tell you that exactly at 4 p.m. on
13 Friday that you would be back in Lincoln County.

14 Understanding that, and understanding now is the
15 time that you need to tell me and the attorneys in this case
16 whether there is any kind of conflict that you would have in
17 serving in this case, whatever the conflict is, we need to
18 hear it now. And if it involves something of a personal
19 nature, as I mentioned before, you may approach the bench.

20 Let me start on the first row, and then I will move
21 backwards into the jury box, to see what your conflicts might
22 be.

23 Anyone in the first row that has a conflict in
24 serving in this case, understanding -- and I guess I should
25 give you a little more information. It will be Sunday that

1 you would be picked up and taken to Columbia, and trial would
2 begin first thing on Monday morning. So if you have your
3 favorite niece's wedding Saturday night, that is something
4 you could go to.

5 First row, any kind of conflict?

6 Yes. Juror Number 7. What is your conflict?

7 VENIREPERSON WAECHTER: I'm very sorry. I have to
8 be in court here as a witness, and I just can't tell you the
9 date. It's within the next week.

10 THE COURT: Okay. Is it on a criminal case or a
11 civil case? Do you know? Is it --

12 VENIREPERSON WAECHTER: I'm sure this is on a
13 criminal case. We had a robbery committed against us.

14 THE COURT: Okay. And is -- I guess I would have to
15 find out from the prosecuting attorney here and/or --

16 VENIREPERSON WAECHTER: I can step outside and call
17 and tell you exactly what it is or what date.

18 THE COURT: All right. Can you tell me -- do you
19 know the name of the defendant who is involved in the case?

20 VENIREPERSON WAECHTER: No, I don't. I can get that
21 for you if I step out in the hall --

22 THE COURT: Okay.

23 VENIREPERSON WAECHTER: -- and I'll call and get
24 that for you.

25 THE COURT: Well, I tell you what. We are going to

1 be taking a recess. I'm sure that we can't ask all the
2 questions we need to ask in the time that would be
3 reasonable. And we do take recesses from time to time,
4 ladies and gentlemen.

5 The prosecutor has indicated that he may go and
6 check on that now anyway. But we do take recesses.

7 VENIREPERSON WAECHTER: Okay.

8 THE COURT: But you're not free just to wander
9 anywhere in the courthouse or go to the clerk's office and
10 look it up, so. We will -- we'll try to find that out and
11 come back to you. But in the event that you're needed as a
12 witness in a case next week, you would be unavailable, is
13 what you're saying.

14 VENIREPERSON WAECHTER: Yeah. I'm sure -- I just --
15 I never thought much about it, but it's the -- I think it's
16 the -- I'm sure it's -- I think it's the 19th.

17 THE COURT: All right. Well, we'll --

18 VENIREPERSON WAECHTER: I'm really sorry about it.
19 I should have -- I never --

20 THE COURT: We'll check on that.

21 VENIREPERSON WAECHTER: Okay.

22 THE COURT: And sometimes those cases get continued,
23 you understand. And you may not be notified until you show
24 up at the courthouse and find out your case isn't going to go
25 to trial.

1 VENIREPERSON WAECHTER: Sure.

2 THE COURT: That happens occasionally. Maybe it
3 doesn't happen in Lincoln County. It happens in Boone County
4 from time to time.

5 VENIREPERSON WAECHTER: But I am sorry I don't have
6 more information on it.

7 THE COURT: All right. We'll see if we can find out
8 that and get back to you.

9 Anyone else on that front row that has a conflict?

10 Yes, ma'am. You are Juror Number 12.

11 VENIREPERSON SCHUPMANN: My mother-in-law is 82
12 years old and has just been diagnosed with cancer.

13 THE COURT: Okay. Would you just speak -- maybe if
14 you stood up, since we are farther away than -- your
15 mother-in-law is in her 80s and has cancer?

16 VENIREPERSON SCHUPMANN: Right. And I've been
17 taking her back and forth to the hospital for treatments and
18 stuff. And I just really don't want to be away from her,
19 just in case.

20 THE COURT: Is her situation at this point critical?

21 VENIREPERSON SCHUPMANN: Yes. She's got both
22 terminal cancer, plus she's got a heart condition.

23 THE COURT: Is there anyone else in the family that
24 might be able to step in for you?

25 VENIREPERSON SCHUPMANN: Well, they could, but I'm

1 just saying, if something was to happen to her, I want to be
2 there for her.

3 THE COURT: Okay. I understand that very well.
4 Thank you so much.

5 MR. CRANE: Judge, I think Number 11 might have had
6 something.

7 THE COURT: All right.

8 I did not see your hand, Number 11.

9 VENIREPERSON BRININGER: Yeah. I got kids --

10 THE COURT: Would you stand up just a bit, because I
11 -- some people have louder voices than others, and it's --
12 I'm sorry we don't have a microphone for you.

13 VENIREPERSON BRININGER: If we got to stay down
14 there, I don't want to leave my kids overnight.

15 THE COURT: Okay. How old are your children?

16 VENIREPERSON BRININGER: The youngest one's 10
17 and --

18 THE COURT: I'm sorry?

19 VENIREPERSON BRININGER: The youngest one is 10 and
20 one is 15.

21 THE COURT: All right. So your children are 10 and
22 15, and they're not supposed to be home alone?

23 VENIREPERSON BRININGER: Not overnight. I mean, my
24 husband works nights.

25 THE COURT: All right.

1 VENIREPERSON BRININGER: I don't allow -- no, I
2 don't want them --

3 THE COURT: So tell me again, your family situation
4 is is that dad works evenings or nights and you're home with
5 the kids overnight and you would not feel comfortable leaving
6 a 15- and a 10-year-old by themselves.

7 VENIREPERSON BRININGER: Right.

8 THE COURT: Okay. I will certainly consider that.
9 Thank you.

10 VENIREPERSON BRININGER: Uh-huh.

11 THE COURT: Anyone else on the front row?

12 Yes, ma'am. You are -- are you Juror Number --

13 VENIREPERSON PUND: Juror Number 10.

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

15 VENIREPERSON PUND: I also have two small children,
16 five and three. And to stay overnight for a week would be
17 kind of hard.

18 THE COURT: Is there anyone else -- well, is your --
19 is the father at home --

20 VENIREPERSON PUND: Yes.

21 THE COURT: -- overnight?

22 VENIREPERSON PUND: Uh-huh.

23 THE COURT: Okay. And during the day do you
24 normally work?

25 VENIREPERSON PUND: Yes.

1 THE COURT: And so you have day care provided for
2 the children during the day?

3 VENIREPERSON PUND: I do, but not -- he usually
4 leaves earlier, before I take the children. It just would be
5 a little difficult.

6 THE COURT: Is there someone that could either take
7 them to day care when you would normally do that, like a
8 neighbor or someone else that uses the day care?

9 VENIREPERSON PUND: Yeah.

10 THE COURT: Is that a yes?

11 VENIREPERSON PUND: Yes. Uh-huh.

12 THE COURT: Okay. If maybe during a recess, if you
13 have access to a phone, if you would be kind enough just to
14 check to make sure that that would be a possibility.

15 VENIREPERSON PUND: (Nodding head up and down.)

16 THE COURT: Thank you.

17 Anyone else on that row?

18 Yes, sir. Are you Number 2?

19 VENIREPERSON ROBINSON: Yes.

20 THE COURT: Yes, sir. What is your conflict?

21 VENIREPERSON ROBINSON: I personally don't have the
22 finances to be able to be off work for a week. My daughter
23 was on welfare. She had welfare taken away from her. And I
24 now have to help her also, her and her baby. And I don't
25 feel I can afford to miss any more work.

1 THE COURT: Are you self-employed, sir?

2 VENIREPERSON ROBINSON: No.

3 THE COURT: And does your employer have other people
4 that can fill in for you when you're gone?

5 VENIREPERSON ROBINSON: No. I just went to work
6 for -- they started a brand new company. And my crew's off
7 today because I am not working. And I have no other way to
8 take care of them.

9 THE COURT: Are you telling me that if you're not
10 working, you don't get paid.

11 VENIREPERSON ROBINSON: Exactly.

12 THE COURT: In other words, you don't have a
13 straight salary, but you're paid by the day.

14 VENIREPERSON ROBINSON: By hourly.

15 THE COURT: Okay. All right. I will consider that,
16 sir.

17 Anyone else? Let's do the second row then. Anyone
18 on the second row who would find that to be a conflict?

19 And that's Number 15, are you?

20 VENIREPERSON DECLUE: Yes, Your Honor.

21 THE COURT: Okay. And what is your conflict?

22 VENIREPERSON DECLUE: My wife's travelling out of
23 town Wednesday to Indiana to be with my grandmother, with my
24 sister. My 82-year-old grandmother. And I need to be at the
25 house for my 15-year-old son. I wouldn't want to leave him

1 overnight.

2 THE COURT: Are there other relatives that he could
3 stay with?

4 VENIREPERSON DECLUE: No.

5 THE COURT: I'm sorry?

6 VENIREPERSON DECLUE: No, ma'am.

7 THE COURT: Do you work nights?

8 VENIREPERSON DECLUE: No.

9 THE COURT: And normally when he comes home -- I
10 assume he's in school?

11 VENIREPERSON DECLUE: Yes, ma'am.

12 THE COURT: When he comes home from school in the
13 afternoon, is he there by himself for a period of time --

14 VENIREPERSON DECLUE: No. My wife doesn't work.

15 THE COURT: Okay. Does he have any kind of
16 disability or problems that need attention?

17 VENIREPERSON DECLUE: Yes. He's ADHD and bipolar.

18 THE COURT: All right. And I don't -- again, I
19 don't mean to embarrass you, but --

20 VENIREPERSON DECLUE: No, it's fine.

21 THE COURT: -- some circumstances are different than
22 others. There's some 15-year-olds that are mature and able
23 to be on their own for a few hours after school and some that
24 aren't. Thank you, sir.

25 Anyone else on that row there?

1 Number 16.

2 VENIREPERSON CAVINESS: Mine is just the weekend.
3 We are leaving as soon as I leave here today and will not be
4 home until Monday. We have a prior commitment in
5 Springfield.

6 THE COURT: And you're planning on leaving today,
7 are you?

8 VENIREPERSON CAVINESS: Yes, ma'am.

9 THE COURT: And you're going out of town for some --

10 VENIREPERSON CAVINESS: Yes, ma'am.

11 THE COURT: -- planned trip?

12 VENIREPERSON CAVINESS: Yes. My husband and I set
13 on a committee for a sale. The sale's on Sunday at 1:00.

14 THE COURT: Are you -- do you have plane
15 reservations?

16 VENIREPERSON CAVINESS: No. We're driving.

17 THE COURT: And where will you be going?

18 VENIREPERSON CAVINESS: Springfield, Missouri.

19 THE COURT: This is relating to your work, is it?

20 VENIREPERSON CAVINESS: Yes. We have a livestock
21 business. Personal. Family business.

22 THE COURT: All right. Thank you.

23 Anyone else on this part of the second row? Over
24 here.

25 Are you Number 19?

1 VENIREPERSON KAIMANN: Yes.

2 THE COURT: All right. And what is your conflict?

3 VENIREPERSON KAIMANN: I got two small children at
4 home, five and three, and my wife works. It would be
5 difficult to both be gone all week long.

6 THE COURT: Does she work evenings?

7 VENIREPERSON KAIMANN: No.

8 THE COURT: Works during normal daytime hours?

9 VENIREPERSON KAIMANN: Yes.

10 THE COURT: I assume, with such young children, you
11 have some kind of day care during the day?

12 VENIREPERSON KAIMANN: Yes. I pick them up early.
13 She works until 5:00 every day. And I pick them up before
14 then.

15 THE COURT: What time of the day do you drop them
16 off?

17 VENIREPERSON KAIMANN: My wife drops them off at
18 7:30.

19 THE COURT: All right. Thank you, sir.
20 Anyone else on that row?

21 Yes, sir. And you -- are you Number 22?

22 VENIREPERSON HARRIS: Number 22.

23 THE COURT: Yes, sir.

24 VENIREPERSON HARRIS: If the trial and the
25 deliberations last longer than a week, I have a court

1 appearance on October 24th in the City of Troy on a
2 misdemeanor charge.

3 THE COURT: All right, sir. I'm hoping that won't
4 happen, because I have a conflict on that day myself, but --

5 VENIREPERSON HARRIS: And also --

6 THE COURT: -- sometimes we overlook those.

7 VENIREPERSON HARRIS: -- I'm self-employed, and I
8 really can't afford to take off a week's work.

9 THE COURT: I assume if you're not working, sir,
10 then you don't --

11 VENIREPERSON HARRIS: No.

12 THE COURT: -- get paid.

13 VENIREPERSON HARRIS: Nothing.

14 THE COURT: All right. Thank you.

15 Anyone else on that row?

16 Are you Number 23?

17 VENIREPERSON GIBBS: Yes.

18 THE COURT: And what is your conflict, sir?

19 VENIREPERSON GIBBS: I have a state-required CNA
20 class on Thursday.

21 THE COURT: And for those that don't know what a CNA
22 is, is that the certified nursing assistant?

23 VENIREPERSON GIBBS: Correct.

24 THE COURT: Is that correct? And that pertains to
25 your job?

1 VENIREPERSON GIBBS: Yes.

2 THE COURT: And if you don't get certified, you're
3 not able to continue in your job?

4 VENIREPERSON GIBBS: Yeah. I think I have 120 days
5 from the point that I began work, so.

6 THE COURT: Okay. And will -- will -- if you have
7 to take it the next time it's given, will that be past the
8 120 days?

9 VENIREPERSON GIBBS: Well, I'm not sure -- I'm not
10 sure if it will put me over or not.

11 THE COURT: Okay.

12 VENIREPERSON GIBBS: I don't know how many days I
13 can miss. I think it's maybe two days that I can miss.

14 THE COURT: When is this test to be given?

15 VENIREPERSON GIBBS: Thursday.

16 THE COURT: Thursday of next week?

17 VENIREPERSON GIBBS: Yes.

18 THE COURT: Okay. Thank you.

19 Anyone else on that row?

20 Yes. Mr. Number 13? You are Number 13?

21 VENIREPERSON STONEBARGER: Yes.

22 THE COURT: Yes. And what is your --

23 VENIREPERSON STONEBARGER: I also can't afford to
24 take off work for a week.

25 THE COURT: Are you self-employed?

1 VENIREPERSON STONEBARGER: No, I'm not.

2 THE COURT: Are you a salaried or an hourly
3 employee?

4 VENIREPERSON STONEBARGER: Hourly.

5 THE COURT: I will consider that, sir.

6 Anyone else? Let's go to the third row. Anyone on
7 that row? The third row back on this side. My left, your
8 right.

9 Yes. Are you Number 29?

10 VENIREPERSON WILLIAM THOMAS: Yes.

11 THE COURT: And what is your conflict, sir?

12 VENIREPERSON WILLIAM THOMAS: I have an 8-year-old
13 and a 9-year-old at home. I'm responsible for getting them
14 to school in the morning when my wife goes to school.

15 THE COURT: Okay. I'm -- you're going to have to
16 speak up just a bit.

17 VENIREPERSON WILLIAM THOMAS: My wife goes to school
18 in the morning. I get my kids to school. She goes -- she is
19 a practicum student. And she is required to be at her
20 practicum at 6:30 in the morning.

21 THE COURT: So you're the one that's there to take
22 them on -- you say they are -- there's an 8- and 9-year-old?

23 VENIREPERSON WILLIAM THOMAS: Yes.

24 THE COURT: And you get them to school.

25 VENIREPERSON WILLIAM THOMAS: Yes, I do.

1 THE COURT: Is there anyone that could -- they could
2 carpool with for this week to get to school?

3 VENIREPERSON WILLIAM THOMAS: Not that early.

4 THE COURT: Okay. Thank you, sir.

5 Anyone else on that row? Let me go across the aisle
6 to the third row. Is there anyone that has a conflict on
7 that row?

8 And are you Juror Number --

9 VENIREPERSON BLACK: 31.

10 THE COURT: -- 30?

11 VENIREPERSON BLACK: 31, ma'am.

12 THE COURT: 31. Yes, sir.

13 VENIREPERSON BLACK: I have a 3-month-old and a
14 9-year-old at home that I have to baby-sit Wednesday,
15 Thursday, and Friday.

16 THE COURT: What time?

17 VENIREPERSON BLACK: From the morning 'til the
18 evening.

19 THE COURT: And is there anyone else either in the
20 family or otherwise that could sit for these children?

21 VENIREPERSON BLACK: No. Family works, ma'am, and I
22 can't afford a baby-sitter for them three days.

23 THE COURT: I assume that the 9-year-old goes to
24 school?

25 VENIREPERSON BLACK: Yes.

1 THE COURT: But the 3-month-old is in need of care.
2 VENIREPERSON BLACK: Yes.
3 THE COURT: All right. Thank you.
4 Anyone else on that row?
5 I'm trying to see. Are you Number 33?
6 VENIREPERSON McCULLOUGH: Yes.
7 THE COURT: And would you stand, please, ma'am.
8 VENIREPERSON McCULLOUGH: Yes. I can't really
9 afford to take a whole week off work. And I'm not entirely
10 positive that my employer pays for jury service.
11 THE COURT: Are you a salaried employee?
12 VENIREPERSON McCULLOUGH: Hourly.
13 THE COURT: Hourly? Are you full time?
14 VENIREPERSON McCULLOUGH: (Nodding head up and
15 down.)
16 THE COURT: That's a yes?
17 VENIREPERSON McCULLOUGH: Yes.
18 THE COURT: Okay. I will certainly consider that.
19 VENIREPERSON McCULLOUGH: Thank you.
20 THE COURT: Anyone else on that row?
21 Yes, sir. And you are Number 35?
22 VENIREPERSON MOORE: 35.
23 THE COURT: Yes, sir.
24 VENIREPERSON MOORE: I'm very reluctant to leave my
25 wife alone for a week's time. It's just the two of us.

1 THE COURT: Does she suffer from any kind of illness
2 at this time?

3 VENIREPERSON MOORE: Not other than knee problems
4 and such.

5 THE COURT: Is she able to get around physically?
6 In other words, do you have to --

7 VENIREPERSON MOORE: Yes, she is.

8 THE COURT: She is.

9 VENIREPERSON MOORE: Yes, she is.

10 THE COURT: But you don't want to be apart from her
11 for that long.

12 VENIREPERSON MOORE: That's true.

13 THE COURT: She's a lucky lady, isn't she? All
14 right. I will certainly take that into consideration, sir.

15 VENIREPERSON MOORE: Thank you.

16 THE COURT: Anyone else on that row? Let's go to
17 the fourth row.

18 I can't see if you're on the end. Is this 37?

19 VENIREPERSON BETTS: Yes, ma'am.

20 THE COURT: And what is your conflict, ma'am?

21 VENIREPERSON BETTS: I have a boy in middle school.
22 He's 14. And besides that, my husband travels all over
23 Missouri state during the week, so.

24 THE COURT: Is he travelling today as we speak?

25 VENIREPERSON BETTS: Yes, he is.

1 THE COURT: And what -- does he generally come home
2 for the evening?

3 VENIREPERSON BETTS: It depends where they send him.
4 Usually he's gone --

5 THE COURT: Do you know what his schedule is next
6 week?

7 VENIREPERSON BETTS: I think it's to be down in
8 Mt. Vernon, Illinois.

9 THE COURT: And he would not be coming home
10 overnight.

11 VENIREPERSON BETTS: No.

12 THE COURT: All right. Is there any family member
13 that you have that could -- that your son could stay with
14 while you're gone?

15 VENIREPERSON BETTS: No, not really.

16 THE COURT: Pardon?

17 VENIREPERSON BETTS: No, ma'am.

18 THE COURT: All right. Thank you. You may sit
19 down.

20 Anyone else on that row?

21 Yes, sir. And if you would tell me your number,
22 sir.

23 VENIREPERSON SKIRVIN: 41.

24 THE COURT: Yes, sir.

25 VENIREPERSON SKIRVIN: Single-income family.

1 THE COURT: Are you self-employed?

2 VENIREPERSON SKIRVIN: No. I work for Marquitz

3 Motors.

4 THE COURT: I'm sorry?

5 VENIREPERSON SKIRVIN: I work over here at a

6 dealership.

7 THE COURT: And you're a salaried employee?

8 VENIREPERSON SKIRVIN: Hourly.

9 THE COURT: All right. You're full time, though.

10 VENIREPERSON SKIRVIN: Yes.

11 THE COURT: Okay. Thank you.

12 Anyone else over here on the fourth row? On the

13 fourth row, on the -- on your left, my right.

14 All right. If you'd stand, ma'am. And are you

15 Number 43?

16 VENIREPERSON BENNETT: Yes.

17 THE COURT: And please stand up so we can hear you.

18 VENIREPERSON BENNETT: I have a granddaughter that

19 her dad and her live with me. And I am responsible taking

20 her to school and home. And everybody works.

21 THE COURT: Including you?

22 VENIREPERSON BENNETT: No. I stay at home. But I

23 get her in the morning to the school bus, and after school I

24 pick her up.

25 THE COURT: And her dad is your son or --

1 VENIREPERSON BENNETT: Right.

2 THE COURT: All right.

3 VENIREPERSON BENNETT: And they all leave early --

4 early, early in the mornings.

5 THE COURT: What are we talking about, "early"?

6 VENIREPERSON BENNETT: Say about 6:00.

7 THE COURT: Pardon?

8 VENIREPERSON BENNETT: 6:00.

9 THE COURT: All right. And the school bus comes?

10 VENIREPERSON BENNETT: The bus is usually there at

11 quarter after 7.

12 THE COURT: Is there anyone else in the neighborhood

13 whose children --

14 VENIREPERSON BENNETT: No.

15 THE COURT: -- go --

16 VENIREPERSON BENNETT: Not that I would be, you

17 know, letting her with.

18 THE COURT: All right. Thank you.

19 Anyone else on that row?

20 Yes, ma'am. Are you Number 45?

21 VENIREPERSON SCHISLER: Yes, 45.

22 THE COURT: Yes.

23 VENIREPERSON SCHISLER: I just have a 16-year-old

24 daughter and my husband works nights.

25 THE COURT: And you don't feel comfortable leaving

1 her home alone at night?

2 VENIREPERSON SCHISLER: Oh, no. No.

3 THE COURT: Anyone else that she could stay with?

4 VENIREPERSON SCHISLER: Yes. She could stay with
5 friends.

6 THE COURT: Could -- and during a recess, would you
7 be able to call and see if that arrangement could be made?

8 VENIREPERSON SCHISLER: Yes.

9 THE COURT: All right. Thank you.

10 Anyone else on that fourth row?

11 Yes. Are you Number 48?

12 VENIREPERSON MILLER: Yes.

13 THE COURT: And what is your conflict?

14 VENIREPERSON MILLER: I'm self-employed, and if I
15 don't work, I don't get paid. I really can't afford to be
16 off for a week like that.

17 THE COURT: Are you married at this time?

18 VENIREPERSON MILLER: No.

19 THE COURT: I will consider that, sir.

20 Anyone else on the fourth row? Finally, the fifth
21 row, on this side, in the back. Anyone that has a conflict?

22 You may stand up. Is it Number 50?

23 VENIREPERSON STRAUGHTER: Right.

24 THE COURT: And what is your conflict, sir?

25 VENIREPERSON STRAUGHTER: I have a disabled wife,

1 and we have just received guardianship of our two
2 grandchildren. They both have behavioral problems. And my
3 services at home are very much needed. And I couldn't afford
4 to be off for -- or gone for that long.

5 THE COURT: You normally work.

6 VENIREPERSON STRAUGHTER: No. I'm retired.

7 THE COURT: You're retired. I'm sorry. And I don't
8 want to go into great details about your wife's disability,
9 but do you need to help her around physically at the house?

10 VENIREPERSON STRAUGHTER: I do the cooking, I do the
11 washing, I do the ironing, I clean the house.

12 THE COURT: All right. I will certainly consider
13 that, sir.

14 Did I see another hand go up? Is that Number 51?

15 VENIREPERSON GAINES: Yes, it is. I'm a national
16 trainer, and I've got a training session set up for Monday.
17 We're going to train 80 people across the country.

18 THE COURT: And where do you have to be?

19 VENIREPERSON GAINES: I actually do it from my
20 office, which is here in town. It's a Web-X and conference
21 call.

22 THE COURT: All right. And I assume that would be
23 something that you would find difficult to reschedule, or
24 not?

25 VENIREPERSON GAINES: I can't. We actually just

1 changed over a program and we go live with it Monday. So
2 I -- it can't be changed.

3 THE COURT: All right.

4 VENIREPERSON GAINES: If you can change the court, I
5 could be there next week.

6 THE COURT: Unfortunately there are lots of other
7 people that depend on next week's date. Thank you, sir.

8 Anyone else on that row?

9 Number 52.

10 VENIREPERSON FIELDS: I'm scheduled to work
11 midnights a couple nights next week.

12 THE COURT: Your shift changes from time to time, is
13 what you're --

14 VENIREPERSON FIELDS: Yeah. I normally work 7 to 3,
15 but sometimes they schedule me for 11 to 7.

16 THE COURT: And what happens if you're sick or on
17 vacation?

18 VENIREPERSON FIELDS: Well, then they get somebody
19 else to switch around.

20 THE COURT: All right. And you're a salaried
21 employee or hourly?

22 VENIREPERSON FIELDS: Hourly.

23 THE COURT: But full time?

24 VENIREPERSON FIELDS: Yes.

25 THE COURT: All right. Thank you.

1 Anyone else? Now's the time to be heard.

2 Yes, sir. You're Juror Number 1?

3 VENIREPERSON BROWN: Yes. I just thought, on Monday
4 morning I have -- I am a businessman, and I have a
5 teleconference scheduled for two hours, from 10:00 'til 12:00
6 on Monday. I also have an evening appointment next Wednesday
7 evening.

8 THE COURT: As to the teleconference, is this
9 something that can be rescheduled?

10 VENIREPERSON BROWN: I do not know.

11 THE COURT: Are you the presenter, or you're just
12 going to be listening?

13 VENIREPERSON BROWN: I'm going to be listening.

14 THE COURT: All right.

15 VENIREPERSON BROWN: It's a class that I have to
16 attend, but I don't know if they'll offer it again or not.

17 THE COURT: All right. Thank you.

18 Anyone else?

19 Yes, sir. You're Juror Number 7.

20 VENIREPERSON WAECHTER: Yeah. I thought about it.
21 We do have a business. As Mr. Richards, don't want to --
22 hope I'm not out of line. We're extremely busy. I just
23 don't know -- the City of Troy's got sewer mains going in,
24 and we furnish material. We do have employees. I could do
25 it. It's going to be hard.

1 THE COURT: All right.

2 VENIREPERSON WAECHTER: It's going to cause some
3 problems, but -- I'd be willing to serve. It's not something
4 I cannot do. But it is going to put a bind on us.

5 THE COURT: All right.

6 VENIREPERSON WAECHTER: It really is.

7 THE COURT: Well, I appreciate that, sir. And I
8 can't imagine being away from home for a week would be easy
9 for anyone.

10 VENIREPERSON WAECHTER: Well, it's just the City of
11 Troy is doing an awful lot of expansion, and they really
12 depend on us for -- the city, and also the contractors, on --

13 THE COURT: Well, we will consider that, sir.

14 VENIREPERSON WAECHTER: -- all these jobs. Thank
15 you.

16 THE COURT: Ladies and gentlemen, I need to know if
17 you have in any way heard anything about this case in the
18 media. The state has alleged that on or about the 1st of
19 November in the year 2001, in Boone County, Missouri, that
20 this defendant caused the death of one Kent Heitholt by
21 strangling him. And need to know, with that little bit of
22 information -- and I will tell you that this is -- the facts
23 of this case would be that this occurred near the Columbia
24 Daily Tribune business, which is a newspaper in Columbia.

25 With that information, can you recall having heard

1 on television, on radio, or read anything about this in any
2 newspaper, whether it's the local paper or whether you happen
3 to take the Post Dispatch or any other form of media. Has
4 anyone heard about the case?

5 Yes, ma'am. And you are Juror Number 12?

6 VENIREPERSON SCHUPMANN: Yes.

7 THE COURT: Okay. Without telling me what you heard
8 about the case or read about the case, and I'm mindful of
9 your mother-in-law's condition, but I -- this is another
10 question entirely. Would you be able to put whatever you've
11 heard about or read about the case in the media aside and, if
12 selected, make a decision based only on the evidence that you
13 would see and hear in the courtroom?

14 VENIREPERSON SCHUPMANN: Yes.

15 THE COURT: Okay. Thank you very much.

16 Anyone else? I don't see any hands.

17 Ladies and gentlemen, as -- a number of you have
18 made checkmarks on your questionnaire, and we appreciate your
19 doing those in advance, relating to several issues. And the
20 attorneys and I have had the opportunity of looking at that.
21 I notice that some of them were done in July and some in
22 August, and here we are mid-October. I need to know, since
23 that time, or even on that questionnaire, whether any of you
24 have been convicted of a felony offense.

25 And I know some of you checked that little box that

1 said you might have been convicted of offenses other than --
2 other than a traffic offense. And of course there are a
3 number of misdemeanor offenses that are not felony offenses.
4 And so you needn't answer on misdemeanor offenses, unless it
5 was a misdemeanor offense involving moral turpitude. That
6 means whether you tried to bribe a judge or a juror or a
7 witness or didn't pay your income tax. But I'm talking about
8 basically felony convictions. Anyone that has a felony
9 conviction that perhaps that happened after you filled out
10 the form. I don't see anything -- I don't see any hands, so
11 I assume that you -- that has not changed.

12 Anyone on this panel who has problems in reading and
13 writing in English? And I don't see hands now.

14 Anyone on the panel who -- and I don't know how to
15 ask this. Maybe I should ask it this way. Raise your left
16 hands, please.

17 (Venirepersons complying.)

18 THE COURT: You can leave them up.

19 All right. Put them down.

20 The point of the question is: Whether there's
21 anyone that has hearing difficulties, so that you're having
22 difficulty hearing me.

23 Yes, sir. And you're -- and you are Juror Number 8?

24 VENIREPERSON ORR: Yes.

25 THE COURT: Juror Number 8, understanding that we're

1 quite a distance from each other -- and I can tell you that
2 in Boone County, in the courthouse, the witness box might
3 be -- well, like this over here. And the jury box is quite
4 close to it. We also have amplification devices that you can
5 wear that amplifies the sound in the courtroom for you. Do
6 you believe that that would allow you -- and I know you
7 haven't tried it on. And I'm not sure whether they have
8 those hearings devices here or not. The Supreme Court has
9 given them to us, and I think to many courts. Do you think
10 you would have trouble hearing?

11 VENIREPERSON ORR: I really can't say.

12 THE COURT: I know it is a hard question. Do you
13 wear any kind of hearing aid?

14 VENIREPERSON ORR: No, ma'am.

15 THE COURT: Do you have one side that's better than
16 the other? One ear that hears better than the other?

17 VENIREPERSON ORR: All depends on how I turn my
18 head.

19 THE COURT: Okay. So you probably do hear better
20 out of one ear than the other?

21 VENIREPERSON ORR: Most likely.

22 THE COURT: If you were selected as a juror, and you
23 couldn't hear something, would it embarrass you to raise your
24 hand or put your hand on your ear so we would tell the
25 witness to speak up or tell the lawyer to speak up? There's

1 one lawyer here I know who speaks loud enough that you'd
2 probably hear without any problem. And I'm not going to say
3 who that is. You'll have to guess. But anyway, if you had
4 problems hearing -- we obviously would want you to hear all
5 the evidence in the case before reaching a decision in the
6 case. Would it embarrass you or bother you to let us know
7 that you couldn't hear?

8 VENIREPERSON ORR: No.

9 THE COURT: Would you be willing to try one of these
10 assisted hearing devices, if we can find one to provide for
11 you?

12 VENIREPERSON ORR: I guess.

13 THE COURT: It's really -- have you ever -- well,
14 let me ask you this way. Have you used an iPod? You know
15 what those are. They're little ear phones that a lot of
16 people, not only kids, but older people wear, that plays
17 music and so forth. It's probably like that. It has a
18 little -- has a little device that's sort of a square-looking
19 little device there, that is on the chest, and it makes it
20 louder to hear with. So, I need to ask if you would consider
21 wearing something like that, if we can find one -- I don't
22 know if they have one here, but if we have one, maybe we
23 could hunt it up and see if he's able to hear a little
24 better. Would you be willing to try that?

25 VENIREPERSON ORR: I guess.

1 THE COURT: Okay. Thank you.
2 Anyone else that knows they have a hearing problem?
3 Okay.
4 Anyone that came to court today, even though you
5 felt sick, but you know that the sheriff comes after people
6 if they don't come to court? And there may be one or two
7 that -- anyone -- I see no hands.
8 Anyone who has a sick family member who has not
9 already disclosed that to me? About whom you might be
10 concerned or worried here today, but you came anyway because
11 that was your civic duty to do that. Anyone that is in that
12 situation? Other than Juror Number 12.
13 Yes, sir.
14 VENIREPERSON ORR: My mother.
15 THE COURT: Your mother's ill?
16 VENIREPERSON ORR: Has been for the last six years.
17 THE COURT: Is she in some care facility?
18 VENIREPERSON ORR: No. I take care of her at home.
19 THE COURT: And are you her sole provider of care?
20 VENIREPERSON ORR: Yes.
21 THE COURT: Is she able to get on okay by herself if
22 you were in Columbia hearing a case?
23 VENIREPERSON ORR: Probably not. She's on
24 disability and she's on breathing machines 24/7.
25 THE COURT: All right.

1 VENIREPERSON ORR: And she has doctors' appointments
2 twice a week. Nobody in my family will take her because she
3 don't get along with no one in my family.

4 THE COURT: Well, she's lucky to have you, isn't
5 she?

6 VENIREPERSON ORR: That's because I live with her.
7 So I have to help her. But she helps me.

8 THE COURT: I see. And so that really would be a
9 hardship to leave her by herself.

10 VENIREPERSON ORR: Right.

11 THE COURT: All right. Anyone else who has a sick
12 family member? And you may not be caring for them, but they
13 may be in the hospital in real serious condition. I'm not
14 talking about someone that has a cold or, you know, a sore
15 throat or something like that, but something that's more
16 serious. All right. I don't see anyone here who's raised
17 their hand, other than Juror Number 8.

18 Ladies and gentlemen, the state will have the
19 opportunity to question you first. State gets to go forward
20 first because the state has the burden of proof. After the
21 state concludes its questioning, defense counsel will have
22 the opportunity to ask you additional questions concerning
23 your qualifications.

24 We will take a recess around 10:30. It may be at
25 10:35 or 10:40, but somewhere around that time.

1 So we will proceed then with the questioning by the
2 state. Mr. Crane.

3 MR. CRANE: Please the Court?

4 THE COURT: Yes.

5 MR. CRANE: Counsel.

6 - - -

7 VOIR DIRE EXAMINATION

8 BY MR. CRANE:

9 As the Judge told you, my name's Kevin Crane. I'm
10 the prosecutor in Boone County, Missouri. This is my
11 assistant prosecutor, Dan Knight. You all have already
12 talked about John Richards. And over there to John's left is
13 Ruby Marsden. And she's an investigator in my office.

14 I want to express, on behalf of both of us, our
15 appreciation for your service today. Realize that it's
16 inconvenient for a lot of you to be here, but I'm sure you
17 understand that participating in this is crucial to our
18 justice system.

19 The process we're going through right now is to pick
20 12 people who will produce a fair and impartial decision as
21 to whether or not the defendant is guilty in this case.

22 By my questions to you, I sure don't mean to pry
23 into your personal affairs or embarrass you. In the event --
24 and I don't think this is going to necessarily happen, but
25 you never know. In the event there is something that you

1 would rather not talk about out here in front of God and
2 everybody, let us know, and at a break, when the rest of the
3 panel's out, I'm sure the Judge will take that up with you.
4 Okay?

5 The -- I wanted to ask a couple follow-up questions.

6 Mr. Orr, I stepped out for just a second. Did
7 you -- you said you were having potential hearing problems?

8 VENIREPERSON ORR: Yeah.

9 MR. CRANE: Okay. Which lawyer do you think the
10 Judge was referring to? You think they're going to get much
11 louder than I am? They might.

12 VENIREPERSON ORR: Unless you get in my ear and
13 scream.

14 MR. CRANE: Okay. Do you also have back problems?

15 VENIREPERSON ORR: Yes, sir.

16 MR. CRANE: Okay. And I imagine some of the rest of
17 you all are starting to feel like you got back problems,
18 sitting in those chairs.

19 VENIREPERSON ORR: No, I got de -- my spinal cord is
20 deteriorating.

21 MR. CRANE: Okay.

22 VENIREPERSON ORR: I'm under doctor's care.

23 MR. CRANE: It looks like you're kind of
24 uncomfortable right now.

25 VENIREPERSON ORR: I can't sit very long and I can't

1 stand very long.

2 MR. CRANE: And you have hearing problems.

3 VENIREPERSON ORR: Uh-huh.

4 MR. CRANE: Okay. All right. Well, I mean, if you
5 get to a point where you feel like you can't make it, I mean,
6 let me know. Okay?

7 VENIREPERSON ORR: The only thing I got to do right
8 now is go to the bathroom.

9 MR. CRANE: Okay. Well, I can't make that call.
10 That's up to the Judge.

11 THE COURT: Well, let me -- let me just tell you
12 this. Not good to drink a lot of coffee when you come for
13 jury service. But if there is an issue, ladies and
14 gentlemen, where you feel that you can't wait a half an hour,
15 to 10:30 -- I'm not going to let one at a time to go out.
16 We'll break a little bit earlier than we normally would and
17 let you go out a little earlier. Maybe we should just sort
18 of take a roll call and see, is there any -- anyone that
19 feels they need to use the rest room now? And I don't want
20 to embarrass you, but I need to know, is there anyone that
21 feels they can't wait until 10:30?

22 (Show of hands.)

23 VENIREPERSON ORR: I guess I can hold it.

24 THE COURT: You don't know that there are several
25 people behind you --

1 VENIREPERSON ORR: Well, I'm looking that way.

2 THE COURT: Well, I don't usually break so soon, but
3 I hate to put people at a discomfort. I'd just ask you not
4 to load up on a lot of coffee if I take a break.

5 And I'm at a disadvantage now, because one of my
6 contact lenses popped out, and I need to read you an
7 instruction before we take a break. So you'll bear with me.
8 I've probably said this long -- many -- long enough times
9 over 30 years that I probably have it memorized, but I'll try
10 again.

11 And I'm sorry to have to break so early, for our
12 bailiff, but they're used to this kind of stuff --

13 BAILIFF BOEDEKER: Yes, ma'am.

14 THE COURT: -- happening, so.

15 Ladies and gentlemen, it is the Court's duty to
16 instruct you now upon a matter about which you will be
17 reminded at each recess or adjournment of Court. Until the
18 case is given to you to decide, you must not discuss any
19 subject connected with the trial among yourselves, or form or
20 express any opinion about it, and, until you are discharged
21 as jurors, you must not talk with others about the case or
22 permit them to discuss it with you or in your hearing, or
23 read, view, or listen to any newspaper, radio, or television
24 report of the trial.

25 The bailiff and other officers of the Court are not

1 permitted to talk to you about any subject connected with the
2 trial, and you are not permitted to talk to them about it.

3 The attorneys representing the state and the
4 defendant are under a duty not to do anything that may even
5 seem improper. Therefore, at recesses and adjournments they
6 will avoid saying anything to the jury except, perhaps,
7 something like "Good morning" or "Good afternoon." In doing
8 that they do not mean to be unfriendly, but are simply doing
9 their best to avoid even an appearance, that might be
10 misunderstood, that they or you are doing anything improper.

11 The same applies to witnesses and to the defendant.
12 They have been or will be instructed to avoid all contact
13 with the jury, even to talk about matters wholly unrelated to
14 the case.

15 If our bailiff will let us know when the jurors have
16 had an opportunity to use the rest rooms and so forth, we
17 will reconvene then. I can't tell you that it will be 10 or
18 15 minutes. It seems like it's a large group. It may take a
19 while longer.

20 The jury may be in recess at this time.

21 - - -

22 The following proceedings were held out of the presence
23 of the jury:

24 MR. CRANE: Can we approach, Judge?

25 THE COURT: All right. Yes. What is it?

1 MR. CRANE: We --

2 THE COURT: I think all the jurors -- yes.

3 Yes, ma'am.

4 CIRCUIT CLERK HOUSTON: I just have a note about the
5 listening device.

6 THE COURT: Okay. And what is that?

7 CIRCUIT CLERK HOUSTON: The information that I got
8 from the Judge's secretary is that it is not in the case, and
9 we had trouble with the lights interfering, and our IT person
10 was checking on it.

11 THE COURT: Okay.

12 CIRCUIT CLERK HOUSTON: So I assume he has it.

13 THE COURT: Okay.

14 MR. CRANE: Judge, we're okay with letting Mr. Orr
15 go now.

16 THE COURT: Okay. All right. Well, since he seems
17 to be in some degree of pain, we might do that. But thank
18 you for checking.

19 All right.

20 CIRCUIT CLERK HOUSTON: You're welcome.

21 THE COURT: Mr. Crane?

22 MR. CRANE: Yes, ma'am.

23 THE COURT: Was that the only issue that you --

24 MR. CRANE: Unless Mr. Rogers had something --
25 someone else.

1 MR. ROGERS: I had one thing. And I don't know if
2 you noticed this or not. I think Juror Number 5, Mr. Freese,
3 didn't raise his left hand. And didn't look like he heard a
4 word we were saying.

5 THE COURT: All right. Well, I didn't notice that,
6 but I certainly will ask either Mr. Crane or defense counsel,
7 whoever's going to be doing that, to --

8 MR. CRANE: I did not notice that, but I don't
9 dispute the observations.

10 MR. ROGERS: We'll take it up.

11 THE COURT: Okay.

12 MR. ROGERS: Do we have a report back --

13 THE COURT: Let's see. Where is the prosecutor?

14 MR. CRANE: Are you asking to let Mr. 5 -- Number 5
15 go?

16 THE COURT: No. Not --

17 MR. ROGERS: Not yet. We'll find out.

18 THE COURT: Mr. Crane, do we know about Juror Number
19 7, who is supposed to be a witness in a robbery case? Do we
20 know when that case --

21 MR. CRANE: Mr. Richards is checking on that.

22 THE COURT: Okay. And let's see. Was there
23 anything else we need to --

24 MR. CRANE: You know, the thing is: I mean, you can
25 explore that further. I -- I don't know that that would be a

1 hardship on him if he can't make it. It may be a hardship on
2 the state. But --

3 THE COURT: And the state may not want to continue
4 the case.

5 MR. CRANE: I don't -- yeah. That's why -- I think
6 he's going to check.

7 MR. ROGERS: May have a defendant filing for a
8 speedy trial this morning.

9 MR. CRANE: We can debate that issue later anyway.

10 THE COURT: All right. Well, let's --

11 MR. CRANE: I think that's being checked on, though,
12 Judge.

13 THE COURT: All right.

14 MR. CRANE: So we can release Number 8.

15 (Venireperson Freese entered the courtroom.)

16 MR. CRANE: Your Honor.

17 THE COURT: Yes, sir. You need to -- what is it,
18 sir?

19 VENIREPERSON FREESE: I'm just coming back.

20 THE COURT: You need to stay with the other jurors
21 in the jury assembly room. If we could -- if you would go
22 outside this door. And let's see if someone can open it for
23 you. If you'd go right in.

24 VENIREPERSON FREESE: Okay.

25 (Venireperson Freese left the courtroom.)

1 THE COURT: I think that may be the --

2 MR. CRANE: I don't disagree with observations of
3 Juror Number 5. He just walked in. Everybody else is
4 standing out there.

5 THE COURT: He doesn't look like he knows where he
6 is.

7 MR. CRANE: He looks like he may be infirm, with all
8 due respect to him. I'd ask that he be stricken now.

9 MR. ROGERS: I'll concur in that, Your Honor.

10 MR. CRANE: You all didn't see it. I was going
11 through the door, and he just walked in. And everybody else
12 is standing there.

13 MR. ROGERS: Yeah, I thought he was being brought in
14 to see --

15 MR. CRANE: None of them would have thought to come
16 in here.

17 THE COURT: He's Number 5.

18 MR. ROGERS: Right.

19 MR. CRANE: And also Mr. Rogers has indicated he did
20 not raise his right hand and also he did not appear
21 responsive.

22 THE COURT: It was his left hand actually, that I
23 asked them to raise. But whichever one, I know he didn't
24 raise either.

25 MR. CRANE: Oh, on the hearing thing? Okay. I

1 missed that.

2 THE COURT: I sort of do it the other way, just to
3 sort of -- all right. So 5 and 8 you want to have excused;
4 is that correct?

5 MR. ROGERS: That's correct, Your Honor.

6 THE COURT: And that's correct, Mr. Crane?

7 MR. CRANE: (Nodding head up and down.)

8 THE COURT: All right.

9 (Recess taken.)

10 - - -

11 The following proceedings were held out of the presence
12 of the jury:

13 THE COURT: State ready to proceed?

14 MR. CRANE: Ready.

15 THE COURT: Defense ready to proceed?

16 MR. ROGERS: As soon as Mr. -- yeah. He's coming
17 through the door. Yes.

18 THE COURT: All right. You can bring the jury back
19 in.

20 Do we know anything about --

21 MR. RICHARDS: Your Honor, it's not next week. I
22 don't -- you know, he is a victim in a case, a burglary, but
23 it's not set next week. So I think he's just confused.

24 THE COURT: Okay. All right. You're sure it's not
25 a preliminary hearing?

1 MR. RICHARDS: It's -- we've already -- they're
2 already past the prelim stage, so I don't think so.

3 THE COURT: Okay.

4 - - -

5 The following proceedings were held in the presence of
6 the jury:

7 THE COURT: If you'll take your seats, ladies and
8 gentlemen. If you remember where you were. If not, you'll
9 look for the person that has a number above or below you.

10 I just want to make sure we have everyone we started
11 with. And I don't know if we -- if it's possible to count
12 the number. Let's see.

13 Is Juror 16 here?

14 VENIREPERSON CAVINESS: Yes.

15 THE COURT: Yes. Oh, you were right behind the
16 gentleman in front of you, and I couldn't see you. All
17 right. I just want to make sure that we're -- we didn't pick
18 up someone extra from another case or -- Mr. Crane, I can't
19 see through you.

20 MR. CRANE: Sorry.

21 THE COURT: If you'll just -- I'm just sort of
22 checking to make sure that we have -- let's see.

23 BAILIFF BOEDEKER: That should be it, ma'am.
24 There's none on the floor.

25 THE COURT: Okay. We have -- I think we do. Okay.

1 Good enough.

2 Mr. Crane, you may inquire.

3 Yes, sir.

4 VENIREPERSON HEADRICK: I really hate to slow this
5 thing down, but I just realized, I have a court date Monday
6 night.

7 THE COURT: Okay. Would you stand up, sir, and tell
8 us your number, or your name, whichever you feel comfort --

9 VENIREPERSON HEADRICK: John Headrick.

10 THE COURT: All right. You're Number 34.

11 VENIREPERSON HEADRICK: Yes, ma'am.

12 THE COURT: And is your court date in a traffic
13 court?

14 VENIREPERSON HEADRICK: Yes, ma'am.

15 THE COURT: And that's here in Troy?

16 VENIREPERSON HEADRICK: No. That's in Ellisville,
17 Missouri.

18 THE COURT: Is it like a first appearance or is it
19 for a trial?

20 VENIREPERSON HEADRICK: No. It's a first
21 appearance. I had got a ticket for not having --

22 THE COURT: Okay. You don't have to tell me why you
23 have to --

24 VENIREPERSON HEADRICK: Well, I have to be there in
25 order to prove my innocence, because, of course, I'm

1 innocent.

2 THE COURT: I assure you everyone is presumed
3 innocent until they're proven guilty. That's the way our
4 system works, sir. Thank you very much.

5 Mr. Crane, you may now inquire.

6 MR. CRANE: I -- I got in your way again, Judge. I
7 apologize.

8 - - -

9 RESUMED VOIR DIRE EXAMINATION

10 BY MR. CRANE:

11 Okay. Is everybody squared away?

12 I wanted to just follow up real quick on a couple of
13 the hardship questions.

14 Let's see. Miss Brininger? Number 11 down here?

15 VENIREPERSON BRININGER: Yes.

16 MR. CRANE: You sounded like you're really in a jam
17 with the kids being home alone; correct?

18 VENIREPERSON BRININGER: Right.

19 MR. CRANE: And that situation's not something you
20 can address. You don't really have any other options?

21 VENIREPERSON BRININGER: Correct.

22 MR. CRANE: Okay.

23 Mr. Declue?

24 VENIREPERSON DECLUE: Yes, sir.

25 MR. CRANE: You've indicated that you've got kind of

1 the same thing. Is -- your wife's leaving town, and then you
2 got to be there to take care of the child who has some
3 issues?

4 VENIREPERSON DECLUE: Give him med -- make sure he
5 gets his medications also.

6 MR. CRANE: Okay. So if you were gone, he would be
7 in a real jam there, without any options.

8 VENIREPERSON DECLUE: Yes.

9 MR. CRANE: And let's see. Miss Caviness? Number
10 16; is that right?

11 VENIREPERSON CAVINESS: Yes.

12 MR. CRANE: You've got -- you're gone until Monday,
13 after today; is that right?

14 VENIREPERSON CAVINESS: That's correct.

15 MR. CRANE: And that was something you were going
16 with your husband?

17 VENIREPERSON CAVINESS: Yes.

18 MR. CRANE: On a -- is it business?

19 VENIREPERSON CAVINESS: Yes.

20 MR. CRANE: Okay. And you would not be back until
21 Monday. That's a done deal; correct?

22 VENIREPERSON CAVINESS: Correct.

23 MR. CRANE: Okay. Let's see here. Mr. Harris. You
24 indicated you got -- I want to make sure I had this straight.
25 You got court the week after the trial?

1 VENIREPERSON HARRIS: It's the 24th of October.

2 MR. CRANE: Okay. You indicated you got problems

3 with work.

4 VENIREPERSON HARRIS: I'm self-employed.

5 MR. CRANE: Yeah. Being off. No work, no pay type

6 thing. But your trial is the next -- the week after next.

7 VENIREPERSON HARRIS: Yes.

8 MR. CRANE: Okay. Or case, was the week after next.

9 Okay.

10 Mr. Gibbs? That nursing thing's a big, big deal;

11 right? That exam you got to take?

12 VENIREPERSON GIBBS: Yes.

13 MR. CRANE: That's next week, Thursday.

14 VENIREPERSON GIBBS: Yeah.

15 MR. CRANE: Okay. Doesn't look like we'd -- you'd

16 be able to do that if you were on this jury, and that would

17 present a major problem to your furthering your career; is

18 that accurate?

19 VENIREPERSON GIBBS: Yeah.

20 MR. CRANE: Okay. Can't get out of it. It's

21 Thursday.

22 VENIREPERSON GIBBS: Yeah.

23 MR. CRANE: There's no other options.

24 VENIREPERSON GIBBS: Not that I know of.

25 MR. CRANE: Okay. Thank you, Mr. Gibbs.

1 Let me see here. Who else? I know I'm skipping
2 some people. Let's see.

3 Mr. Black?

4 VENIREPERSON BLACK: Yes.

5 MR. CRANE: Number 31 is your number; is that right?

6 VENIREPERSON BLACK: Yes.

7 MR. CRANE: Sounded like you had some significant
8 child care problems. Got little kids.

9 VENIREPERSON BLACK: Yeah.

10 MR. CRANE: And you're the only one during periods
11 of the day that takes care of them; is that right?

12 VENIREPERSON BLACK: Yes. My wife works --

13 MR. CRANE: So as much as you'd like to be gone at
14 times, you're unable to; is that correct?

15 VENIREPERSON BLACK: Correct.

16 MR. CRANE: Okay. No other options to take care of
17 those little children?

18 VENIREPERSON BLACK: No.

19 MR. CRANE: Okay.

20 Let's see here. Miss McCullough, I wanted to get
21 straight what you said. Yours wasn't a kid problem, was it?

22 VENIREPERSON McCULLOUGH: No.

23 MR. CRANE: You just got work?

24 VENIREPERSON McCULLOUGH: It's a money problem.

25 MR. CRANE: Pardon me?

1 VENIREPERSON McCULLOUGH: It's just a money problem.

2 MR. CRANE: The no work, no pay situation?

3 VENIREPERSON McCULLOUGH: Yeah.

4 MR. CRANE: Okay.

5 Let's see. And Miss Bennett. You indicated you got
6 kid problems. And did you say you would -- you didn't think
7 you could get any help?

8 VENIREPERSON BENNETT: No, because there's nobody --
9 everybody works. And the ones that I would leave her with,
10 they work too. In the neighborhood. I -- you know.

11 MR. CRANE: Okay. I appreciate that, ma'am.

12 And Mr., is it Straughter? Number 50. You sound
13 like you're doing it all. You got the kids, cleaning,
14 cooking. Whole nine yards.

15 VENIREPERSON STRAUGHTER: Off to school at 6 in the
16 morning, pick them up at the bus in the evening.

17 MR. CRANE: And I'm not trying to get in any depth
18 on this, but you indicated the kids kind of had some issues;
19 it's --

20 VENIREPERSON STRAUGHTER: Right.

21 MR. CRANE: -- difficult to be away from them for
22 particular reasons; is that right?

23 VENIREPERSON STRAUGHTER: Yeah. They would run my
24 wife ragged if she kept them home by herself.

25 MR. CRANE: So that would work an extreme hardship

1 on you and your family to be gone.

2 VENIREPERSON STRAUGHTER: Yes, it would.

3 MR. CRANE: Correct?

4 VENIREPERSON STRAUGHTER: That's correct.

5 MR. CRANE: Okay. Thank you, sir.

6 All right. Let me go over some basic concepts in
7 the law with you, ladies and gentlemen. First of all, I want
8 to talk to you about the presumption of innocence.

9 Under the United States and the Missouri
10 Constitutions, a criminal defendant is presumed to be
11 innocent until 12 jurors, 12 of you, are convinced beyond a
12 reasonable doubt that he's guilty.

13 Is there anybody on the panel today who would not be
14 able to give this defendant, Mr. Ferguson, the benefit of his
15 presumption of innocence, the same as any other criminal
16 defendant is entitled? Okay. I take it by your silence --
17 remember how we were doing this? If you don't raise your
18 hand and let me know, I'm assuming that you can give the
19 defendant in this case his presumption of innocence. As you
20 sit there right now.

21 Yes, ma'am. Miss Schupmann?

22 VENIREPERSON SCHUPMANN: Yes.

23 MR. CRANE: Yes, ma'am.

24 VENIREPERSON SCHUPMANN: I've always had a big
25 problem of judging people.

1 MR. CRANE: Okay.

2 VENIREPERSON SCHUPMANN: When my kids were growing
3 up, my husband would do the judging. You know, decide who
4 was lying to him and who wasn't.

5 MR. CRANE: Well, let me -- I was going to ask a
6 question along those lines later. Miss Schupmann, you've
7 indicated that you have -- anticipate and feel like, even
8 now, uncomfortable with the idea that you'd have to judge
9 another human being.

10 VENIREPERSON SCHUPMANN: Exactly.

11 MR. CRANE: You don't want to be in that position.

12 VENIREPERSON SCHUPMANN: No.

13 MR. CRANE: And do you think that feeling that you
14 have would cause you to be fair -- not able to be fair and
15 impartial if you were selected as a juror in this case?

16 VENIREPERSON SCHUPMANN: It could.

17 MR. CRANE: Okay.

18 Is there anybody else who feels like that they just
19 could not sit in judgment of a fellow human being?

20 Let's see. Don't let me -- Number 3, Mr. -- how do
21 you pronounce that?

22 VENIREPERSON PHILIPAK: Philipak.

23 MR. CRANE: Yes, sir.

24 VENIREPERSON PHILIPAK: That's my name.

25 MR. CRANE: Right. Go ahead.

1 VENIREPERSON PHILIPAK: No, I just don't feel like
2 it's just -- making a call. I don't know. I just don't.

3 MR. CRANE: I mean, you know, right now nobody knows
4 anything about the facts.

5 VENIREPERSON PHILIPAK: I understand this. But I
6 mean, even the facts and stuff and everything put together, I
7 always got a -- I don't know. I guess I don't -- negative
8 about it. I just -- this is my first time, so I really don't
9 know.

10 MR. CRANE: Yeah. You just feel negative kind of
11 about the process?

12 VENIREPERSON PHILIPAK: Well, I don't know about the
13 process itself. It's just --

14 MR. CRANE: About you --

15 VENIREPERSON PHILIPAK: -- making sure if I know the
16 facts or -- you know, I understand facts, but -- you know, if
17 they're -- I guess if they're mostly explained to me. I
18 don't know.

19 MR. CRANE: Well, and you know, I can't get into the
20 facts a whole heck of a lot right now.

21 VENIREPERSON PHILIPAK: Oh, I understand that.
22 That's what I am saying. I don't know if I can deal with
23 that.

24 MR. CRANE: So as you sit there right now, you're
25 thinking you would not be able to sit in judgment of the

1 defendant in this case?

2 VENIREPERSON PHILIPAK: No, sir.

3 MR. CRANE: You don't think you could do that?

4 VENIREPERSON PHILIPAK: No, sir. Innocent or
5 guilty.

6 MR. CRANE: Okay. Thank you, sir. Mr. Philipak?

7 VENIREPERSON PHILIPAK: Uh-huh. That's correct.

8 MR. CRANE: And Miss Schupmann. Appreciate that.

9 Anybody else -- you know, there is no right or wrong
10 answer here. Okay? We're just trying to be fair and
11 impartial.

12 Yes, ma'am.

13 VENIREPERSON BRININGER: (Inaudible.)

14 MR. CRANE: Don't want to be a part of it?

15 THE COURT REPORTER: I'm sorry. I didn't hear what
16 she said.

17 MR. CRANE: Brininger.

18 What did you say?

19 THE COURT: And also, we can't both talk at the same
20 time, Mr. Crane, and whoever else might be talking. I know
21 that in normal conversation you do that, and I do that, but
22 our court reporter can only write down one person at a time.
23 So if the prosecutor is asking a question, or defense
24 counsel, if you'll wait until the question is asked before
25 answering. And with counsel, if you'll wait until the answer

1 is given before moving on to the next, please.

2 Now if you would, Number 11, if you would repeat
3 your answer, because I don't think I got it all.

4 VENIREPERSON BRININGER: I just don't think I could
5 judge somebody.

6 THE COURT: I'm sorry?

7 VENIREPERSON BRININGER: I don't think I could do
8 it.

9 MR. CRANE: Can I proceed, Judge?

10 THE COURT: You may.

11 MR. CRANE: So you're in the same category as
12 Miss Schupmann and Mr. Philipak?

13 VENIREPERSON BRININGER: Right.

14 MR. CRANE: Okay.

15 Anybody else? I take it by -- yes, ma'am. Back
16 there in the back. Are you Miss Fields?

17 VENIREPERSON FIELDS: Yes.

18 MR. CRANE: Yes, ma'am.

19 THE COURT: You'll need to stand up, Miss Fields,
20 please.

21 VENIREPERSON FIELDS: I'm sorry. I just feel
22 uneasy. Feel like I'm judging. It makes me feel uneasy
23 about it.

24 MR. CRANE: Well, you will be. Uneasy, uneasy --

25 VENIREPERSON FIELDS: I know.

1 MR. CRANE: -- is one thing. Do you feel like, as
2 you sit there right now, knowing no more than you do, that
3 you could not fairly and impartially listen to both sides in
4 this case, because of your uneasiness about sitting in
5 judgment of a fellow human being?

6 VENIREPERSON FIELDS: I'm just not sure. I just --
7 I've never done it before, like this gentleman.

8 MR. CRANE: Right.

9 VENIREPERSON FIELDS: And I just -- it's something
10 different. I've just never done it before.

11 MR. CRANE: Okay. Well, I mean, only you know in
12 your heart what the answer is. And I know I'm asking you to
13 look forward into the future, but do you think could you sit
14 in judgment of a fellow person?

15 VENIREPERSON FIELDS: It's hard.

16 MR. CRANE: Nobody's saying it's easy. Nobody's
17 saying it's easy. Miss Schupmann, Mr. Philipak, you know,
18 I'm not saying it's supposed to be easy.

19 VENIREPERSON PHILIPAK: I understand.

20 MR. CRANE: Okay?

21 VENIREPERSON FIELDS: I could do it; I would just
22 feel uneasy (inaudible).

23 MR. CRANE: Understood.

24 THE COURT REPORTER: I'm sorry. I didn't hear what
25 she said.

1 THE COURT: Would you repeat your answer, please,
2 Miss Fields?

3 VENIREPERSON FIELDS: I'm sorry. I said I could do
4 it; I would just feel very uneasy about it.

5 THE COURT: Thank you.

6 MR. CRANE: Thank you, ma'am.

7 I don't see any other hands on that issue.

8 Some other basic concepts.

9 It is the state's burden to prove beyond a
10 reasonable doubt the elements of the offenses for which the
11 defendant is charged. The defense has no burden of proving
12 anything. Okay? It's the state's burden to prove the
13 elements of the offenses. And remember what the Judge said?
14 She said the defendant in this case is charged with murder in
15 the first degree. And it has elements of that offense. And
16 robbery in the first degree. And it has certain elements
17 that the state has to prove beyond a reasonable doubt. Okay?

18 At this point, first of all, everybody understand
19 that just because the defendant is charged with a crime, just
20 because a filing has been made of a charge, does not mean
21 that he's guilty. Right? Just the filing of a charge
22 doesn't make him guilty. Okay? A jury, remember we talked
23 about this earlier, decides that issue. All right? That's
24 kind of back to the presumption of innocence thing.

25 So, at this point in the trial, if we took a vote

1 right now, would everybody vote not guilty? All that's been
2 done is he's been charged; right? There's -- we haven't put
3 on any evidence to see whether or not a jury decides if we've
4 met our burden. Right? Everybody agree with that? Not
5 guilty at this point, because he's just been charged.
6 Correct? Until such time as you hear evidence, and then
7 determine if it's been proven beyond a reasonable doubt. No
8 verdict. Correct?

9 Has everybody got an open mind at this point then?
10 I take it by your silence that you agree with that concept.

11 Reasonable doubt. It's the state's burden to prove
12 the elements of this -- these offenses beyond a reasonable
13 doubt. And the Judge has or will read you the definition --
14 there's a legal definition of reasonable doubt. That's the
15 standard. Beyond a reasonable doubt.

16 Let me ask this. Could each of you, as far as you
17 know, sitting there right now, use your reason and common
18 sense to determine whether or not a reasonable doubt exists,
19 after hearing all the evidence and the law as it's given to
20 you by the Court in this case? Anybody think they could --
21 everybody think they could use their reason and common sense
22 to decide whether or not the state's met its burden beyond a
23 reasonable doubt? Okay. I take it by your silence that you
24 could follow the law on that.

25 After all the evidence is in, the jury will be

1 instructed by the Court as to what the elements I keep
2 talking about are for these particular offenses. And those
3 elements are what you apply this reasonable doubt standard
4 to. Okay?

5 Is there anybody who feels like they would hold the
6 state, the prosecution, to a higher standard than beyond a
7 reasonable doubt? Proof beyond all doubt? Or you hear on TV
8 sometimes, proof beyond a shadow of a doubt. Those aren't
9 the legal standards. It's proof beyond a reasonable doubt.

10 Is there anybody here who feels like the state
11 should be held to a higher burden than the one I'm telling
12 you that is the law?

13 Yes, sir. Mr. -- your thing flipped up there.
14 Number 14. You're Mr. Norton?

15 VENIREPERSON NORTON: Yes, sir.

16 MR. CRANE: Yes, sir.

17 VENIREPERSON NORTON: I just -- I have to be quite
18 honest. And I -- I own my own business. I'm the only one
19 that takes care of that business. I do have a partner, but
20 I'm still -- I take care of the finance. But I do a lot of
21 -- I have a farm. I do have a sick father. I've got a dog
22 that got run over. But I'm not trying to get out of this in
23 any way. I'll do my duty.

24 In applying for this jury, I had -- I have a very
25 rigorous schedule. I had called down here for jury duty and

1 missed it. In my business. And when I did, I called, said,
2 "Hey, I'm sorry. I'm going to get there again." Well, I was
3 picked up the next day and brought down here and was treated
4 by some of the folks that I'm looking around here, as far as
5 security goes, like I was a criminal. I was brought in here,
6 in front of the judge. I talked to some of the folks here,
7 and they were extremely rude to me. And so I went -- they
8 picked me up at my office. They told me that they couldn't
9 get a hold of me before, but yet they knew my place of
10 business and where to pick me up and bring me down here. I
11 sat in front of the judge. I tried to explain, this could
12 happen to anybody. I have to pay a bunch of bills and do
13 these things.

14 MR. CRANE: You mean forgetting the other time?

15 VENIREPERSON NORTON: No. I'm saying that this was
16 in a period of two days. I came down here. But what I'm
17 saying is: That at this point, even sitting here right now,
18 and again, I am probably as open-minded as anybody, but I do
19 hold some prejudice, because also I was brought down here,
20 treated like a criminal, they knew how to get a hold of me,
21 did not call me or anything like that --

22 MR. CRANE: Well --

23 VENIREPERSON NORTON: -- said they couldn't read my
24 number, yet they picked me up. But what I am getting at is:
25 After that, they said, "Well, you got to get a ride home."

1 And then --

2 MR. CRANE: Well, let me run this -- can I run this
3 by you real quick?

4 VENIREPERSON NORTON: Sure.

5 MR. CRANE: And I didn't mean to cut you off.

6 VENIREPERSON NORTON: I just -- I'm sorry. I'm just
7 saying, you asked me that question, and I --

8 MR. CRANE: Hey, man, I'm all for you. Let me run
9 this by you. You know, I had another question. You can just
10 go ahead and sit down. Unless you feel better standing up.

11 VENIREPERSON NORTON: No. That's fine.

12 MR. CRANE: You know, I had another question I was
13 going to ask. I kind of want to stay on that reasonable
14 doubt deal while I'm on it, but I had another question,
15 about: Has anybody ever had a particularly unpleasant
16 experience with the judicial system? I think you might fall
17 in that category.

18 VENIREPERSON NORTON: Well, it's a little fresh.
19 That's all I'm saying.

20 MR. CRANE: No, I'm cool.

21 VENIREPERSON NORTON: They also made me walk back to
22 my office. They gave me a ride up here --

23 MR. CRANE: Bad experience.

24 VENIREPERSON NORTON: Very bad.

25 MR. CRANE: Okay.

1 VENIREPERSON NORTON: So I'm a little --

2 MR. CRANE: And I'm glad you brought that up. And I
3 appreciate that. Now, one thing: I -- I haven't been here
4 in Lincoln County too long, and I haven't been hassled by any
5 of them. But now remember, if you get on the jury, we're
6 going back to the people in Boone County, and everybody is so
7 nice back there. I'm kidding. You understand that that's an
8 experience you've had, and we're going to head back to Boone
9 County if we get a jury selected.

10 VENIREPERSON NORTON: I understand that.

11 MR. CRANE: I mean, Mr. Richards -- well, see, he's
12 gone already. He was going to help me out a little bit on
13 jury selection, but he's not going to be there for the trial.

14 VENIREPERSON NORTON: I'm just being honest with
15 you. I'm not trying to get out of anything --

16 MR. CRANE: I understand.

17 VENIREPERSON NORTON: -- but for that gentleman's
18 sake and the brevity of this situation, I thought would I
19 bring that forward.

20 MR. CRANE: Understood. And I appreciate that. I
21 appreciate that. Very much. And I understand you've -- it's
22 been an unpleasant experience to you. And you don't feel
23 like that, given that experience, and all the other things
24 that are going on in your life, your job, a lot of -- a lot
25 of stressors --

1 VENIREPERSON NORTON: I mean, that has nothing to do
2 with it. I'm just saying that -- that doesn't have anything
3 to do with that.

4 MR. CRANE: Right. You don't think you could be
5 fair and impartial if you were selected as a juror in this
6 case; is that correct?

7 VENIREPERSON NORTON: If you would ask: Does anyone
8 hold any prejudices in this case, there's a little tender
9 wound, and I just thought I would say that.

10 MR. CRANE: Right. No. And my -- but I'm following
11 up with you. Do you think that that experience would make it
12 difficult for you to be fair and impartial in this case?

13 VENIREPERSON NORTON: Not outside of this area.

14 MR. CRANE: Okay.

15 VENIREPERSON NORTON: So if we're in Boone County,
16 no.

17 MR. CRANE: So if you -- well, now, they could be a
18 bunch of mean -- you never know. But you're saying you think
19 right now it's contained to this courthouse.

20 VENIREPERSON NORTON: Yes.

21 MR. CRANE: Okay. All right. Thank you, sir.

22 Talking about reasonable doubt. And I wanted to ask
23 you -- remember, I asked you the questions about the burden
24 of proof and the standard being beyond a reasonable doubt,
25 not proof beyond all doubt, not proof beyond a shadow of a

1 doubt. Remember all that? Okay? Everybody agreed with me
2 that they understand that that is not the burden, shadow of a
3 doubt or all doubt. It is beyond a reasonable doubt. Right?
4 Is everybody okay with that concept? You'd be able to follow
5 the law on that?

6 Let me ask it another way. In every case there may
7 be some unanswered questions in a juror's mind. Okay? About
8 something. What the weather was. What the time of day was
9 when the crime occurred. Is everybody okay with the idea
10 that what the state is -- has to prove beyond a reasonable
11 doubt is the elements of the charge. Okay? You follow me?
12 So if the elements don't include what the weather was,
13 because they don't, that may be an unanswered question. Was
14 it 30 degrees? Was it 40 degrees? And I'm not saying it's
15 going to be an issue necessarily in this case. You see what
16 I mean? There will be some unanswered questions in any case.
17 The state doesn't have to answer every single question that
18 comes into your mind --

19 MR. ROGERS: Your Honor, I'm going to object.

20 MR. CRANE: -- does everybody understand that?

21 MR. ROGERS: Excuse me. I'm objecting, Your Honor,
22 to any further definition of proof beyond a reasonable doubt,
23 beyond what the Court's already given in the instructions.

24 THE COURT: Mr. Crane.

25 MR. CRANE: I wasn't doing any defining. I was

1 asking the jury if they could follow the law.

2 THE COURT: The objection's overruled.

3 MR. CRANE: To be fair to the defense, is there
4 anybody who would hold the state to a lesser burden than
5 what's required by law? Beyond a reasonable doubt. See?
6 Follow me? More likely than not he did it. Okay. I take it
7 by your silence that you're not going to hold the state to a
8 higher burden or a lesser burden than what's required by law.
9 Everybody okay with that? I take it by your silence that you
10 are.

11 Has anybody on the panel, and again, I'm not trying
12 to embarrass you or anything, has anybody on the panel had a
13 particularly unpleasant experience with a police officer?
14 Sheriff's deputy, highway patrol. And I'm not saying you
15 ran -- you know, you rolled through a stop sign and, you
16 know, you got a ticket. I mean -- unless it was particularly
17 unpleasant, you know. A police officer was -- or a sheriff's
18 deputy, somebody like that, was -- was -- it was an
19 unpleasant experience such that it really stands out in your
20 mind. You were at Woodstock back in the '60s and was minding
21 your own business and the police were -- yes, ma'am.
22 Miss Schupmann?

23 VENIREPERSON SCHUPMANN: Yes. We -- we have
24 exclusive hunting and fishing rights to a piece of property
25 here in Lincoln County. And my son, whose name is also on

1 the deed, was down there hunting and got arrested and beat up
2 by a city -- or a county cop.

3 MR. CRANE: Okay.

4 VENIREPERSON SCHUPMANN: For hunting.

5 MR. CRANE: All right. And that -- I'm sorry about
6 this, John, but I got -- that happened in Lincoln County.

7 VENIREPERSON SCHUPMANN: Yes.

8 MR. CRANE: Okay.

9 VENIREPERSON SCHUPMANN: Yes.

10 MR. CRANE: All right. Not in Boone County.

11 VENIREPERSON SCHUPMANN: No.

12 MR. CRANE: Okay. Would that experience, though,
13 cause you to have problems fairly and impartially gauging the
14 credibility of a police officer if they may testify in this
15 case?

16 VENIREPERSON SCHUPMANN: Yes.

17 MR. CRANE: Okay. Thank you, Miss Schupmann.
18 Appreciate your candor.

19 Anybody else have a particularly unpleasant
20 experience with a law enforcement officer, such that you
21 couldn't be fair and impartial?

22 Yes, sir. Mr. Harris.

23 VENIREPERSON HARRIS: It's been a while back, but
24 one night we were living here in town, and we got a knock on
25 the door, and about five police officers come rushing through

1 the door, pinned us -- me and my fiancée against the wall,
2 with guns drawn. And we didn't know what was going on. And
3 come to find out, they had the right address, but the wrong
4 town. And they left the house and did not apologize. Didn't
5 say nothing to us.

6 MR. CRANE: Okay. Would -- that doesn't sound good.

7 VENIREPERSON HARRIS: It wasn't good.

8 MR. CRANE: Would that experience --

9 VENIREPERSON HARRIS: I don't know --

10 MR. CRANE: -- give you difficulty with being fair
11 and impartial, should police officers testify in this case?
12 And, you know, you've been real candid earlier, that you've
13 been -- you've got some issues going, what is it, next --
14 week after next.

15 VENIREPERSON HARRIS: Yeah.

16 MR. CRANE: Would those experiences make it
17 difficult for you to be fair and impartial as a juror in this
18 case?

19 VENIREPERSON HARRIS: Well, you know, I don't know,
20 but I'd hate to have that possibility come up.

21 MR. CRANE: You think --

22 VENIREPERSON HARRIS: It's been a long time ago.

23 MR. CRANE: Right. But it still stands out in your
24 mind.

25 VENIREPERSON HARRIS: It's still there, yes.

1 MR. CRANE: And there is a possibility that you
2 would not be fair and impartial.

3 VENIREPERSON HARRIS: Could be. I'll be honest with
4 you. Could be.

5 MR. CRANE: Well, that's all I'm asking for. Thank
6 you, Mr. Harris. Appreciate that.

7 Anybody else?

8 Yes, ma'am. Is it McCullough?

9 VENIREPERSON McCULLOUGH: Yes.

10 MR. CRANE: Yes, ma'am. Number 33.

11 VENIREPERSON McCULLOUGH: Yeah. My house got raided
12 like, I don't know, about a year ago. Maybe a little bit
13 more. They didn't find anything, but the cops like
14 repeatedly lied, trying to get me to help them.

15 MR. CRANE: You mean they were -- they didn't -- was
16 it a search warrant at your residence?

17 VENIREPERSON McCULLOUGH: No.

18 MR. CRANE: "Raided."

19 VENIREPERSON McCULLOUGH: Okay. They came to the
20 door. And my boyfriend's mother let them in. And then they
21 proceeded to go through the house and tear stuff out of
22 drawers and all kinds of stuff.

23 MR. CRANE: And they were telling you stuff that
24 wasn't right?

25 VENIREPERSON McCULLOUGH: Right.

1 MR. CRANE: And where did that occur?

2 VENIREPERSON McCULLOUGH: At my house.

3 MR. CRANE: Which is where?

4 VENIREPERSON McCULLOUGH: Oh. In Tropicana Village.

5 MR. CRANE: Which is in what county?

6 VENIREPERSON McCULLOUGH: Lincoln County. Sorry.

7 MR. CRANE: Okay. All right. Would that -- thank

8 you, ma'am. Would that experience be something that stands

9 out in your mind and has tainted your impression or your

10 perception of police officers such that you think you could

11 not be fair and impartial as you gauge the testimony of a law

12 enforcement officer?

13 VENIREPERSON McCULLOUGH: It would be a possibility,

14 yes.

15 MR. CRANE: Okay. And you know, you got -- you're

16 the one that knows.

17 VENIREPERSON McCULLOUGH: Right.

18 MR. CRANE: You know. I mean, do you think -- not

19 knowing any more than you do, not knowing who's going to

20 testify in this case, do you think that that would present a

21 problem, that experience, kind of like Mr. Harris,

22 Miss Schupmann indicated, "Golly, I didn't like that, and I'm

23 going to remember that" kind of flashes through your mind

24 whenever you see the police.

25 VENIREPERSON McCULLOUGH: I don't know. I don't

1 have a very strong trust for cops, so.

2 MR. CRANE: And so you think it would make it
3 difficult for you to be fair and impartial if you sat as a
4 juror in this case.

5 VENIREPERSON McCULLOUGH: Probably.

6 MR. CRANE: Thank you, ma'am. Appreciate it.
7 Anybody else?

8 VENIREPERSON HARRIS: Excuse me.

9 MR. CRANE: Yes, sir.

10 VENIREPERSON HARRIS: I just wanted to add that I
11 don't have anything against police officers. I don't
12 disrespect them at all. I have been in trouble a time or
13 two, but that hasn't caused me to be hateful towards police
14 officers or anything.

15 MR. CRANE: Okay. Well, I didn't mean to suggest
16 that.

17 VENIREPERSON HARRIS: And if someone was to testify,
18 I couldn't tell if he was lying or not. He's under oath. I
19 guess he would have to -- he would tell the truth. I would
20 have to assume he's telling the truth. That's all I have to
21 say about that.

22 MR. CRANE: Okay. And I'm going to talk about that
23 here in a minute too. But I appreciate that, Mr. Harris.

24 Other than Mr., oh, Norton, who's already indicated
25 he's had some difficulties with the judicial system, is there

1 anybody -- did I cut anybody off on that police question?

2 Did I get everybody? Okay.

3 Is there anybody who's had a particularly unpleasant
4 experience with the judicial system generally? Like the --
5 being called in for jury duty type situation, or, you know,
6 you had a civil suit, and I don't need to know the details,
7 or a divorce, and you felt like you got wooled around, or you
8 were called into jury duty here a couple years ago and the
9 prosecutor droned on and on while you sat in agonizing seats.
10 Anything that really stands out in your mind about an
11 unpleasant experience with the judicial system that makes you
12 go, "I don't want to be part of that." Anybody?

13 We've noted Mr. Norton. Anybody else? Okay. I
14 take it by your silence nobody's had that experience.

15 Now, can I -- this is just a show of hands. Could I
16 see a show of hands of those of you who are, now listen to
17 me, relatives or close personal friends of somebody in law
18 enforcement. Police officers, et cetera.

19 (Show of hands.)

20 MR. CRANE: Okay. That's several hands up here.
21 All right.

22 Now collectively, let me ask you all, is there any
23 one of you that has something about that relationship with
24 that close personal friend or relative that's in law
25 enforcement that would prevent you from being fair and

1 impartial to the defense in this case? I mean, could you all
2 set that relationship aside and be fair to the defense in
3 this case? Can everybody do that? Raise their hand now.
4 You with me? Okay.

5 So, if you found the defendant not guilty, you could
6 face that close personal friend or relative, in the event
7 that's what happened. Okay. I take it by your silence that
8 that would not present a problem for any of you that raised
9 your hand.

10 Is there anybody -- well, strike that. Let me make
11 sure. And you kind of talked about this a little bit,
12 Mr. Harris.

13 Nobody here would give a police officer a head start
14 in credibility just because they're a police officer, would
15 they? I mean, you'd want to gauge their testimony,
16 understanding they may be expert in various things in their
17 job, but wouldn't you all want to gauge the testimony of a
18 police officer the same as you would any other witness?

19 I don't know what to think about that reaction here.

20 Okay. First of all, Mr. Harris, you kind of -- you
21 said, "Now wait a minute, yeah, I've had some things go down.
22 And I didn't like that about the police. But, you know,
23 gosh, I wouldn't necessarily write off their testimony
24 because of it." Although you did think that you'd have
25 trouble being fair and impartial. That experience you talked

1 about did stand out in your mind; right?

2 VENIREPERSON HARRIS: Yes.

3 MR. CRANE: Okay. Now I'm going kind of with the
4 second thing you said. Am I making myself clear? The police
5 officer, he or she may have expertise in law enforcement, but
6 would you be able to gauge their testimony the same as you
7 would any other witness in this case? See what I'm saying?
8 I think everybody understands where I'm coming from. I take
9 it by your silence that you wouldn't give a police officer a
10 head start just 'cause they're a cop. You'd listen to them,
11 hear their testimony, gauge it fairly and impartially. I
12 take it -- is that okay with you, Mr. Harris, that concept?
13 I take it by your silence everybody's okay with that.

14 Just a show of hands again, has anybody, yourself,
15 close personal friends, or relatives been a victim of a
16 significant criminal offense? Yourself, close personal
17 friends, relatives. And I'm just looking for a show of hands
18 here.

19 (Show of hands.)

20 MR. CRANE: Okay. Looks like about three of you.
21 Okay. Yourself, close personal friend, relative.

22 Would -- let's see. Mr. -- is that Mr. Betts?

23 VENIREPERSON OHMERT: Ohmert.

24 MR. CRANE: Ohmert.

25 And you've been quiet back there, Mr., is it Runge?

1 VENIREPERSON RUNGE: Runge.

2 MR. CRANE: Runge. Number 44. And Miss Schupmann.
3 Whatever that incident was, would you be able to set that
4 incident aside and be fair to both the state and the defense
5 in this case?

6 Mr. Ohmert?

7 VENIREPERSON OHMERT: Yes.

8 MR. CRANE: Mr. Runge?

9 VENIREPERSON RUNGE: Yes.

10 MR. CRANE: Miss Schupmann.

11 VENIREPERSON SCHUPMANN: Yes.

12 MR. CRANE: You'd all be able to do that. Okay.

13 The -- how the police may have worked that -- and
14 you know, when I say "police," let's include that being
15 sheriff's department, highway patrol, FBI, whatever -- what
16 have you. Were you satisfied with the way they handled the
17 matter? If they were involved. You don't have any, "Golly,
18 they didn't do X, Y, and Z"? You're okay -- you don't have
19 any heartburn over that.

20 VENIREPERSON OHMERT: No.

21 VENIREPERSON RUNGE: No.

22 MR. CRANE: Okay.

23 I know you got the thing about the hunter.

24 VENIREPERSON SCHUPMANN: To a certain extent. Well,
25 there's another case too.

1 MR. CRANE: Okay. Okay. You two guys, though? You
2 told me about the hunting thing; right?

3 VENIREPERSON SCHUPMANN: Right.

4 MR. CRANE: Okay.

5 So I take it that you all could, other than
6 Miss Schupmann, is -- a little bit qualified there, could set
7 that experience aside and give the defendant a fair trial.
8 Am I correct on that?

9 VENIREPERSON OHMERT: Yes.

10 VENIREPERSON RUNGE: Yes.

11 VENIREPERSON SCHUPMANN: Yes.

12 MR. CRANE: Let me tell you a little bit about the
13 victim in this case. His name was Kent Heitholt.
14 H-e-i-t-h-o-l-t. Mr. Heitholt was a sports editor at the
15 Columbia Daily Tribune in the City of Columbia. And that's
16 our big paper in the City of Columbia. He was the sports
17 editor there. He was 48 years old on November 1st, 2001,
18 when he was murdered. He lived in Columbia with his wife
19 Deborah. And they have two kids, Kali Heitholt and Vince
20 Heitholt.

21 Now just telling you that much, does anybody go,
22 "Golly, I think I know that guy"? I take it by your silence
23 that doesn't ring a bell with anybody. Okay. And nor do
24 you -- does the family members that I've mentioned ring a
25 bell. Am I correct? Nobody says so? I take it by your

1 silence nobody knows.

2 Does anybody ever recall reading anything
3 Mr. Heitholt might have written about sports? I take it by
4 your silence nobody did.

5 Anybody here who is close personal friends or
6 relatives of someone who works or used to work at the
7 Columbia Daily Tribune in Columbia, Missouri? You were just
8 scratching. Okay. All right. Kind of like an auction. You
9 raise your hand, you might buy something. I take it by your
10 silence nobody does.

11 Anybody used to work at the Tribune yourself? No?

12 Media. The Judge talked to you a little bit about
13 that. I think Miss Schupmann, you're the only one that said
14 you heard anything; right?

15 VENIREPERSON SCHUPMANN: Yes.

16 MR. CRANE: Okay. Now, you all thought about this
17 for a little bit. Has anybody recalled, maybe on radio, TV,
18 newspaper, hearing anything about this case? Okay.

19 Just let me ask you: Doesn't everybody agree that
20 the decision as to whether or not the defendant is guilty or
21 innocent should be made pursuant to the rules, the law, the
22 evidence of a court trial. Doesn't everybody agree with
23 that? And that the decision should not be made by what we
24 read in the newspaper or hear on television or radio. I
25 mean, that's fundamental to the United States of America, is

1 it not? Decisions about whether somebody is guilty should be
2 made in the courtroom, after the evidence is all in. Does
3 everybody agree with that? I take it by your silence that
4 you do.

5 Another legal concept that might come up in this
6 case. Under Missouri law, this is what -- what we're talking
7 about here is acting in concert, or the concept of accomplice
8 liability. Under Missouri law, a person is responsible for
9 his own conduct, and he is also responsible for the conduct
10 of others, another person, in committing a crime, stay with
11 me on this, if he acts with them for the common purpose of
12 committing that crime or if, for the purpose of committing
13 that crime, he aids or encourages the other person in
14 committing it. You can tell that law was written by
15 attorneys. Does everybody -- did everybody get -- stay with
16 me on that one? The conduct of one person can be attributed
17 to another person if this person is aiding or encouraging and
18 acting in furtherance of the commission of the crime. Is
19 anybody not staying with me? And if you're not, that's okay.
20 Let me know. Okay.

21 For instance, here's kind of a classic hypothetical
22 or an example. You got a -- two guys go to do a bank
23 robbery. And they both know that there's going to be a
24 robbery going down. And one guy's the wheelman. And -- you
25 know, the get-away driver. And the other guy is going to go

1 in and stick 'em up and rob the bank; okay?

2 Under the concept of in concert or accomplice
3 liability, the guy pulls him up to the bank, and Bad Guy
4 Number 1 goes in and sticks him up and takes the money. And
5 then Bad Guy Number 1 runs back out, and Bad Guy Number 2,
6 the wheelman, drives off. Okay? They're both guilty of
7 robbery. You follow me? Now punishment may be a different
8 issue. Maybe the guy with the gun gets more punishment than
9 the guy that was in the car. That's not what we're talking
10 about. We're talking about get-away driver aided and
11 encouraged and acted in furtherance of the robbery. So he's
12 acting in concert with the one that actually went in and
13 stuck him up. You got it? You with me on that? Everybody
14 agree with that legal concept? Okay.

15 Take it a step further. There's also an offense
16 called felony murder. Felony murder is another form of
17 murder in the second degree. Felony murder -- let's take
18 that hypothetical about the bank. Get-away driver drives his
19 buddy to the bank; the buddy goes in, robs the bank, and
20 shoots one of the employees at the bank. Now maybe the
21 shooter could be charged and found guilty of murder in the
22 first degree or murder in the second degree, all right,
23 depending on the facts. But what about my get-away driver?
24 Now we've already said he's guilty of robbery; right? Acting
25 in concert? This crime of felony murder is -- states that

1 if, in the course of the commission of a felony, we got a
2 robbery, right, somebody dies as a result thereof, then they
3 can be charged with felony murder and the underlying offense
4 of robbery.

5 So the wheelman stayed outside. Maybe he knew or
6 maybe he didn't know that his buddy was going to go shoot the
7 bank teller. Doesn't matter. He was acting in concert to
8 commit robbery. Waiting for him to come back out. Be the
9 get-away driver. Right? And in the course of the commission
10 of that felony, somebody died. Get-away driver, guilty
11 felony murder. Murder second degree.

12 What do you think about that? Anybody going,
13 "Golly, that don't sound right"? Everybody okay with that
14 concept? You okay? You're thinking awful hard.

15 Does everybody think -- I mean, that's the law in
16 the State of Missouri as to that offense. Anybody have a
17 problem with that? Doesn't think they could follow that
18 concept?

19 What do you think? You okay with it? I don't think
20 I've -- Miss Moretto?

21 VENIREPERSON MORETTO: Yes.

22 MR. CRANE: How -- you're thinking hard.

23 VENIREPERSON MORETTO: I agree.

24 MR. CRANE: You agree you're thinking hard or you're
25 okay with that legal concept?

1 VENIREPERSON MORETTO: No, I agree with the legal
2 concept.

3 MR. CRANE: All right. All right. Let me move on
4 then.

5 Ladies and gentlemen, one of the state's witnesses
6 in this case is Charles Erickson. He goes by Chuck. Chuck
7 Erickson. He was also charged in this crime, along with the
8 defendant, Ryan Ferguson. And I'm going to tell you now, in
9 exchange for his testimony in this case, Mr. Erickson will
10 receive 25 years in prison. He has pled guilty, but will not
11 be sentenced until after this trial. Assuming that
12 Mr. Erickson honors his side of the plea agreement and
13 provides truthful testimony, he will receive a 25-year
14 sentence.

15 MR. ROGERS: Your Honor, I'm going to have to object
16 to the prosecutor endorsing the truthfulness of Erickson's
17 testimony. That's not for him to decide.

18 THE COURT: I -- would you repeat your question
19 again? Or are you making a statement, Mr. Crane?

20 MR. CRANE: I'm -- I was mirroring the terms of the
21 agreement. We can approach on this matter if you wish. I
22 don't think at this point you want me to repeat that
23 question, do you, Mr. Rogers?

24 MR. ROGERS: That's correct. I think you're right.

25 THE COURT: All right.

1

- - -

2

Counsel approached the bench and the following

3

proceedings were held:

4

MR. CRANE: Judge, we had an understanding that --

5

the defense had filed a motion in limine, and we agreed, as I

6

understand it, that the state could not repeatedly talk about

7

the truthful nature of his testimony. I take it Mr. Rogers

8

would object. I think this is the juncture at which that

9

word is going to be used. The law, as we took up in our

10

motion, says that the state can't just say it over and over

11

and over.

12

MR. ROGERS: The problem here, Your Honor, is that

13

he is conditioning his question on the truthfulness of

14

Mr. Erickson's testimony. And there's no way that that's

15

appropriate. And it's not being given any context, other

16

than the prosecutor vouching for the truthfulness of the

17

testimony. He's talking about if his -- if he -- I believe

18

the question was: If he lives up to his part of the plea

19

agreement and gives truthful testimony, then he's going to

20

get a sentence of 25 years, I think is what you were next

21

going to say.

22

MR. CRANE: That's true. I'm talking to them about

23

their feelings on plea agreements.

24

MR. ROGERS: I think you can do that without -- I

25

think the state can talk to them about feelings on plea

1 agreements without vouching for the truthfulness of the
2 witness's testimony.

3 MR. CRANE: That's not vouching.

4 THE COURT: Just wait a minute. Let Mr. Rogers
5 finish.

6 MR. CRANE: Oh, I thought you were done.

7 MR. ROGERS: That's -- basically that's my
8 objection. I don't think there's any need or use or anything
9 except prejudice resulting from going into the purported
10 truthfulness of the testimony at this stage, where it's not
11 subject to any type of cross-examination and it has not been
12 subject to any cross-examination. So that's my objection.

13 THE COURT: The way it was -- the way the statement
14 was phrased, I believe that term was used once.

15 MR. ROGERS: Yes. I objected the first time it was
16 used.

17 THE COURT: Yes. You did object to it. And at this
18 point I'm going to overrule that objection, but will caution
19 the state not to repeat it and go on into it, other than --

20 MR. CRANE: Understood, Judge. Very good.

21 THE COURT: All right.

22 - - -

23 The following proceedings were held in open court:

24 MR. CRANE: Proceed, Your Honor?

25 THE COURT: You may proceed.

1 MR. CRANE: Okay.

2 In exchange for his testimony in this case,
3 Mr. Erickson will receive 25 years in prison. He's pled
4 guilty already, but he's not been sentenced. And that's not
5 going to happen until after this trial is over. Okay?

6 Assuming that Mr. Erickson honors his end of the
7 agreement and provides truthful testimony, he would receive a
8 25-year sentence in prison. And he'd get those 25 years,
9 whether you find the defendant in this case guilty or not.

10 Now at this stage I can't tell you a whole lot more
11 about the facts. But having heard just that much, is there
12 anybody who would refuse to listen to and weigh the
13 credibility of this witness I'm referring to because you feel
14 the state should not make plea bargains with the
15 understanding it will be in return for testimony? You see
16 what I'm saying? Is there anybody uncomfortable with that
17 notion? You know, "I don't like that idea. It doesn't
18 matter what they got. I don't want to hear that guy."

19 Yes, sir. Mr. --

20 VENIREPERSON MOORE: Moore.

21 MR. CRANE: -- Moore. Yeah.

22 VENIREPERSON MOORE: I have an objection with that.
23 If the law states that a sentence for a specific crime should
24 carry whatever the sentence may be, whether there's one, two,
25 three, or four defendants in it, I think they should all be

1 dealt the very same sentence. Because they all equally
2 committed the crime. Just because it makes the state's case
3 a little easier doesn't mean he's not just as guilty.

4 MR. CRANE: Well, now, that's true. I understand
5 your concept. And you know, we can take that back to the
6 get-away driver thing. I was really only talking about guilt
7 in that scenario, and really not punishment. Because they --
8 well, really, their actions differ. The get-away driver
9 drove the car. He's a bad guy. He shouldn't have been
10 involved in the robbery. Remember, I'm not saying that's
11 like the facts of this case necessarily. I'm just talking
12 about the law. But maybe the shooter ought to get more time.
13 Right?

14 VENIREPERSON MOORE: I would agree with that.

15 MR. CRANE: See, so those two guys did things that
16 are different factually, and maybe one ought to get this and
17 one ought to get that. In punishment. Right?

18 VENIREPERSON MOORE: Oh, without knowing any further
19 facts --

20 MR. CRANE: That's the thing. I can't give you an
21 opening statement. Can't put on any evidence.

22 VENIREPERSON MOORE: That's my feeling.

23 MR. CRANE: Well, I know. And I want to get real --
24 you also said you were concerned about your wife being by
25 herself too, didn't you?

1 VENIREPERSON MOORE: Yes.

2 MR. CRANE: But you're thinking that you don't like
3 the idea of a plea agreement, because everybody ought to get
4 the same thing if they did the same thing?

5 VENIREPERSON MOORE: Yes.

6 MR. CRANE: What if they didn't?

7 VENIREPERSON MOORE: What if they didn't what?

8 MR. CRANE: Do the same thing.

9 VENIREPERSON MOORE: Well, I'm not sure --

10 MR. CRANE: It's a snowflake; right?

11 VENIREPERSON MOORE: -- what the same thing is.

12 MR. CRANE: Exactly.

13 VENIREPERSON MOORE: That comes in degrees.

14 MR. CRANE: Okay. So you'd have to hear the facts.

15 VENIREPERSON MOORE: Yes.

16 MR. CRANE: Okay. Because somebody had an
17 agreement, the witness now is what I'm talking about, with
18 the state, would you not gauge them the same? Would you not
19 lend them credibility because of that agreement? See, that's
20 really what I'm asking.

21 VENIREPERSON MOORE: Somewhere I'd have to read it
22 in that he might be trying to save his own neck.

23 MR. CRANE: Okay. 25 years --

24 VENIREPERSON MOORE: Still involved in the same
25 crime.

1 MR. CRANE: Understood. Would that cause you to
2 have trouble fairly and impartially gauging the testimony of
3 that witness?

4 VENIREPERSON MOORE: I don't know.

5 MR. CRANE: Okay.

6 Miss Schupmann, would it be a problem?

7 THE COURT: Mr. Moore, I did not hear your answer,
8 sir.

9 VENIREPERSON MOORE: I said at this point I really
10 don't know --

11 THE COURT: All right.

12 VENIREPERSON MOORE: -- if it would or not.

13 THE COURT: Thank you.

14 MR. CRANE: Miss Schupmann, it would be a problem
15 for you?

16 VENIREPERSON SCHUPMANN: Yes.

17 MR. CRANE: You wouldn't be able to fairly and
18 impartially gauge the testimony of a witness who had -- was
19 testifying and had already pled guilty under an agreement
20 with the state.

21 VENIREPERSON SCHUPMANN: That's correct.

22 MR. CRANE: Okay.

23 Did you hear that, Judge?

24 THE COURT: Yes, I heard it, Mr. Crane.

25 MR. CRANE: Anybody else?

1 Yes, ma'am.

2 VENIREPERSON BRININGER: I think so too. Because
3 you don't know if the other guy's lying.

4 THE COURT: I'm sorry, Miss Brininger. You'll just
5 have to speak up a bit, all the way over to here and the
6 reporter -- if you can stand, it might -- you might project
7 your voice a little louder.

8 VENIREPERSON BRININGER: Well, you don't know if the
9 other guy's lying about, what, saving his butt, where he
10 would get shorter time.

11 MR. CRANE: So the question is then: Would you have
12 trouble fairly evaluating or listening to the testimony of
13 the guy who may be trying to save his butt --

14 VENIREPERSON BRININGER: Yeah.

15 MR. CRANE: -- as you call it.

16 VENIREPERSON BRININGER: Yes.

17 MR. CRANE: Okay. I'm not suggesting that's
18 necessarily what's going on, but that concept gives you
19 problems.

20 VENIREPERSON BRININGER: Yeah.

21 MR. CRANE: Okay. Thank you, ma'am.

22 Somebody else. Yeah. Mr. Straught -- I thought I
23 pronounced it right the first time, and then I can't get it
24 out. Straughter?

25 VENIREPERSON STRAUGHTER: That's close.

1 MR. CRANE: Yes, sir.

2 VENIREPERSON STRAUGHTER: Yeah, I have a problem.

3 MR. CRANE: I guess you better stand up.

4 VENIREPERSON STRAUGHTER: I guess so.

5 I would have a problem with that. Prior to you
6 making that statement that you had a witness that had --
7 going to get 25 years of his life, prior to that I had no
8 problem with trying to judge that young man there. But since
9 you made that statement, I do now.

10 MR. CRANE: Okay.

11 VENIREPERSON STRAUGHTER: Because I find it hard for
12 a person to give up 25 years of his life, lying, in behalf of
13 that young man. So I --

14 MR. CRANE: Oh, you're going the other way.

15 VENIREPERSON STRAUGHTER: Yeah. I would have a
16 problem with trying to make --

17 MR. CRANE: Okay. Well, wait a minute. Let me
18 ask -- let's stick with -- and you got an interesting concept
19 going.

20 First of all, the concept of the state entering into
21 an agreement with somebody that's committed a crime, a
22 murder, and then using them as a witness in exchange for
23 their testimony, and they're going for 25 years, we just
24 talked about that, well, first of all, would that cause
25 difficulty for you in terms of believing the witness?

1 VENIREPERSON STRAUGHTER: Yes.

2 MR. CRANE: Okay. It would. Such that you could
3 not be fair and impartial to that witness.

4 VENIREPERSON STRAUGHTER: To the witness --

5 MR. CRANE: The witness --

6 VENIREPERSON STRAUGHTER: -- who got the 25 years.

7 MR. CRANE: Yeah. Or are you talking about the
8 defendant?

9 VENIREPERSON STRAUGHTER: I'm talking about the
10 defendant.

11 MR. CRANE: Okay. All right. So, the fact that he
12 had that sentence, and, you know, we were talking about that
13 a minute ago, it's within the range, would make you have --
14 give him a head start, even though you don't know anything
15 about the case at this point.

16 VENIREPERSON STRAUGHTER: I know enough about the
17 case that that young man gave up 25 years of his life, to let
18 him get off.

19 MR. CRANE: We haven't even talked about the range
20 of punishment.

21 VENIREPERSON STRAUGHTER: You told me 25 years.

22 MR. CRANE: No, no, no. I just said that's what his
23 sentence would be. That's not the range. Maybe he could
24 have got more.

25 VENIREPERSON STRAUGHTER: But you told me that he

1 was going to get 25 years after this trial was over.

2 MR. CRANE: Correct. As part of the plea. Correct.
3 That's true. I see what you're saying. I see what you're
4 saying. That's a long time.

5 VENIREPERSON STRAUGHTER: That would prejudice me in
6 giving that man a fair chance.

7 MR. CRANE: Okay.

8 VENIREPERSON NORTON: So he pled guilty.

9 MR. CRANE: Let's see. That's Number 14,
10 Mr. Norton.

11 VENIREPERSON NORTON: He pled guilty. He was not
12 tried. He took a plea, is what you're saying. The other
13 person.

14 MR. CRANE: Correct.

15 VENIREPERSON NORTON: I just wanted to make that
16 clear.

17 MR. CRANE: Yeah. Everybody understood that; right?
18 Charles, Chuck, he goes by Chuck Erickson, took a plea.
19 Okay. And entered into this agreement. Okay.

20 Okay. Let me ask you all this collectively, because
21 I know we're -- this is just getting old. Everybody that
22 hasn't otherwise indicated, are you all going to be able to
23 gauge the testimony of this witness fairly and impartially,
24 other than those of you who have spoken up? You would be
25 able to gauge him fairly and impartially on -- for both

1 sides. Okay?

2 What Mr. -- we just talked about here with Mr. --
3 you know, I keep wanting you to call Slaughter, and it's
4 Straughter.

5 VENIREPERSON STRAUGHTER: Just call it Oscar. It's
6 easier.

7 MR. CRANE: Okay.

8 VENIREPERSON STRAUGHTER: Juror 50.

9 MR. CRANE: Is everybody going to be able to be fair
10 and impartial on both sides of this equation? The issue that
11 there's a plea bargain isn't going to cause, other than those
12 who have spoken up, isn't going to cause you problems in
13 fairly and impartially gauging his credibility. And the
14 issue of the sentence that we're talking about would also not
15 change your mind about his credibility. As you sit there
16 right now, you're going to gauge his credibility when he hits
17 the stand just like any other witness. Other than those of
18 you who have spoken up. Have I got that right? I take it by
19 your silence I have.

20 Yes, ma'am.

21 VENIREPERSON SUSAN GALLOWAY: I'm kind -- I'm kind
22 of feeling like --

23 THE COURT: Excuse me. Would you stand up, please,
24 so that I can see who you are.

25 MR. CRANE: And you are Miss --

1 VENIREPERSON SUSAN GALLOWAY: 28.

2 MR. CRANE: -- Galloway.

3 THE COURT: Juror 28. Thank you.

4 MR. CRANE: Yes, ma'am.

5 VENIREPERSON SUSAN GALLOWAY: I kind of got to agree
6 with that guy back there. That if this witness is taking 25
7 years of his life, I am assuming he's certainly guilty. And
8 if he's trying to say this other guy's guilty, I'm -- I'm
9 buying his story.

10 MR. CRANE: Okay. You raise an interesting point.
11 I can't get into that with you at this juncture, specifically
12 about the facts of this case and what the defense may be --

13 VENIREPERSON SUSAN GALLOWAY: So in other words --

14 MR. CRANE: -- but let me -- let me ask you this.
15 The idea -- you don't know -- I mean, I was going to talk in
16 a minute about the ranges of punishment. Every crime's got a
17 range of punishment. There's ranges of punishment on the
18 crimes that Mr. Erickson pled guilty to. He pled guilty, I
19 told you, to murder second, robbery first, and armed criminal
20 action. Each one of those offenses has a range. Okay? Do
21 you understand that he could have potentially received more
22 time than what he pled guilty to, or he could have received
23 less time. You agree with that concept?

24 VENIREPERSON SUSAN GALLOWAY: Yes.

25 MR. CRANE: Okay. And you don't know the facts of

1 the case right now, do you?

2 VENIREPERSON SUSAN GALLOWAY: No.

3 MR. CRANE: Okay. So have you already decided
4 whether or not Mr. Erickson is credible at this point? How
5 could you? You haven't heard the facts. Correct?

6 VENIREPERSON SUSAN GALLOWAY: Correct.

7 MR. CRANE: Okay. So not knowing any more than what
8 I told you about the agreement, would you be able to give
9 such a witness, as Mr. Erickson, a fair and impartial
10 evaluation as you would any other witness? Not knowing any
11 more than you do right now. I'm not saying 25 years isn't a
12 long time. I'm not saying that. But you don't know anything
13 about the facts; right?

14 VENIREPERSON SUSAN GALLOWAY: Right.

15 MR. CRANE: Would you be able to sit as a fair and
16 impartial juror and gauge his testimony just like you would
17 anybody else's? That's the question.

18 VENIREPERSON SUSAN GALLOWAY: I hope so.

19 THE COURT: I'm sorry?

20 VENIREPERSON SUSAN GALLOWAY: I hope so.

21 MR. CRANE: All right.

22 Everybody else okay with that? What I just asked

23 Miss --

24 THE COURT: Galloway.

25 MR. CRANE: -- Galloway? Anybody else?

1 You see, we talked about both sides of the equation?

2 Okay. All right.

3 I take it by your silence that everybody else can
4 give Charles Erickson, Chuck Erickson, a fair, other than
5 those of you who have spoken up, a fair and impartial
6 evaluation of his testimony. Not going to be in favor of the
7 defense or in favor of the state, as you sit here right now.

8 Correct?

9 There may be evidence of underage drinking in this
10 case. Is there anybody on the panel who, if you heard that
11 the defendant or anybody, any witness in this case, had been
12 drinking alcohol, you'd go, "Whoa, that's it, by golly.
13 That's enough for me. If he's drinking, under age, he's got
14 to be guilty." Anybody feel so strongly about that issue
15 that may arise that they'd go, "All right, hey, that's it for
16 me. That's all I got to hear"?

17 I mean, remember, this is a murder case. There'll
18 be a lot of issues to evaluate. Is anybody going to take
19 that and go, "Well, that's a big problem there"? I'm not
20 saying it's a great thing, to even encourage it, but you see
21 what I mean. I take it by your silence nobody would have
22 that attitude.

23 If the defendant was in a bar, an adult
24 establishment, drinking, same response. That's something
25 that you would take as part of the case and listen to it, but

1 not immediately make a decision. Based on that type of
2 conduct. I take it by your silence that you could be fair on
3 that issue.

4 Is there anyone who could not consider the testimony
5 of a witness who was to some degree intoxicated during the
6 events they describe? When they're on the stand. You see
7 what I'm saying? "Well, if they had been drinking, forget
8 it. You can't believe nothing." Anybody have that attitude?
9 Okay?

10 What are you guys laughing about? Did I say --

11 VENIREPERSON KELLY: It depends on how much they'd
12 been drinking.

13 MR. CRANE: Huh?

14 VENIREPERSON KELLY: It depends on how much they'd
15 been drinking.

16 MR. CRANE: It does. It depends on a lot of
17 factors, doesn't it? Right. Right. Okay. But you'd want
18 to know the facts.

19 VENIREPERSON KELLY: That's right.

20 MR. CRANE: Okay. So you'd -- is there anybody that
21 would just discount the testimony of somebody when they're
22 testifying they had been intoxicated to some degree? Did you
23 scratch? Did you scratch? I thought I saw your hand go up.

24 VENIREPERSON WILLIAM THOMAS: Me?

25 MR. CRANE: Yeah.

1 VENIREPERSON WILLIAM THOMAS: Scratch. Sorry.

2 MR. CRANE: Okay. That's all right. You can
3 scratch.

4 As the Court's told you and I told you, this case is
5 a murder case. During the trial there's going to be
6 photographs and items of evidence presented to the jury to
7 assist the jury in understanding the facts of this case.
8 Jurors will be asked to look closely at the photos of the
9 wounds of the victim. Is there anybody on the panel who does
10 not think that they could look at and evaluate those photos
11 and things? I take it by your silence everybody can do that.

12 Am I going too fast? Going too slow; right?

13 Anybody think they can't do that? Okay.

14 Is there anyone on the panel who, because of moral
15 or religious or personal feelings, just could not evaluate
16 that type of admittedly unpleasant evidence?

17 Miss Schupmann?

18 VENIREPERSON SCHUPMANN: Uh-huh.

19 MR. CRANE: You couldn't?

20 VENIREPERSON SCHUPMANN: That's correct.

21 MR. CRANE: That's noted, ma'am. Thank you.

22 Miss Schupmann said she could not.

23 Let me talk to you about what's referred to in some
24 circles as the CSI effect. It's Crime Scene Investigation or
25 Crime Scene Investigator. How many of you all have seen that

1 show?

2 (Show of hands.)

3 MR. CRANE: A lot of you? A lot of you? Okay.

4 There's a lot of TV shows that tell stories about solving
5 crimes by connecting forensic or physical evidence to the bad
6 guy. Some great looking detective or some voluptuous coroner
7 uses all the investigative equipment known to man, and some
8 that's not known to man. And the background music gets
9 louder and faster, and you know that that detective, actor,
10 is about to find some good stuff. And they always find the
11 bad guy's DNA or hair or the victim's cat fur or fingerprints
12 or whatever, and they solve that crime in an hour, with
13 commercials, don't they?

14 Does everybody agree that shows like CSI, and even
15 some news programs or movies, does anybody feel like that
16 those are accurate depictions of criminal investigations in
17 real life? And you know, don't let me -- I'm not trying to
18 make fun of you if you do. Don't get me wrong. Does anybody
19 feel like that, you know, "I know how to work a crime scene
20 because I watch TV"? Now come on now. I'm not trying to
21 make fun of you. Tell me what you think. You think you've
22 learned something from CSI? You think that's the way it is?
23 Let me know. Now, I really thought I'd get somebody saying,
24 "Yeah." Nobody. Okay.

25 Does everybody agree that shows like that are made

1 to get people to tune in and watch it for entertainment?
2 Does everybody agree with that? Anybody who think they're
3 kind of an expert in crime scene investigations because of
4 what they've seen on TV? Let me know. Okay.

5 Does anybody think that discovering forensic
6 evidence, and when I say "forensic evidence," you know,
7 blood, hair, DNA, what have you, is a relatively fast and
8 easy process? Anybody think that? Relatively fast -- I
9 mean, you know, we just talked about it on TV. I mean, wham,
10 bam, they get that thing run through the machine and there
11 are the guys -- you know, evidence is, and we go on down the
12 road. Okay. Does everybody recognize that's just on TV?

13 Does anybody here think -- now listen to me. Don't
14 give up on me. This is important. Does anybody here think
15 that, in this day and age, science, forensic science, will
16 solve every crime? You know, does anybody think, "Gosh, you
17 know, I sit around -- I watch TV, and, you know, really they
18 always solve this thing there at the crime scene or whatever.
19 Why waste gas and time driving around trying to interview
20 witnesses? Just wait around the scene, wait long enough,
21 you're going to find something. Throw it in the hopper and
22 it will come out telling you who the bad guy is." I take it
23 none of you feel that way about the realities of criminal
24 investigations.

25 Now don't let me browbeat you. You know, if you do

1 feel like that should be the case or is the case, please say
2 so. Because I'm going to tell you right now, I'm going to be
3 straight up, there is no physical evidence in this case that
4 the state will present that connects Ryan Ferguson to the
5 crime scene. We don't have physical evidence, hair, DNA,
6 fingerprints that connects Chuck Erickson to the crime scene.

7 Is there anyone who believes that if such evidence
8 is not presented by the prosecution, then you could not find
9 the defendant guilty? Everybody listening to me? I know
10 you're getting wore out. Does anybody believe that the state
11 is required to provide physical evidence under the law in
12 order for you to find the defendant guilty? Anybody think
13 that's a requirement?

14 Yes, sir. You are Mr. Headrick. Yes, sir,
15 Mr. Headrick.

16 VENIREPERSON HEADRICK: I think so.

17 MR. CRANE: So -- and I appreciate your candor. You
18 believe that regardless of what the other evidence in the
19 case may be, the state -- you would want and require the
20 state to provide some physical evidence, fingerprint, at the
21 scene.

22 VENIREPERSON HEADRICK: If by "evidence" you mean
23 somebody else's testimony? Then --

24 MR. CRANE: Yeah. That would not be physical
25 evidence. See, what -- I'm going back to crime scene -- you

1 know, crime scene --

2 VENIREPERSON HEADRICK: To me, there would have to
3 be evidence. I'm not going to say --

4 MR. CRANE: Well, no, now wait a minute. Now let's
5 make sure --

6 THE COURT: Mr. Headrick, would you mind standing up
7 so that we --

8 VENIREPERSON HEADRICK: Yes, ma'am.

9 THE COURT: -- can hear you and the court reporter.

10 VENIREPERSON HEADRICK: There would have -- there
11 would definitely have to be physical evidence for me --

12 MR. CRANE: All right. So --

13 VENIREPERSON HEADRICK: -- that they're guilty of
14 the crime.

15 MR. CRANE: -- if the state doesn't provide evidence
16 of fingerprints or DNA or hair or something along -- I won't
17 go back through all those, you know what I'm saying, you
18 wouldn't be able to find the defendant guilty.

19 VENIREPERSON HEADRICK: No. Hard proof. I need
20 evidence, yeah.

21 MR. CRANE: Okay. All right. Well, you need
22 evidence. You're saying --

23 VENIREPERSON HEADRICK: I need --

24 MR. CRANE: -- physical evidence.

25 VENIREPERSON HEADRICK: -- something that you can

1 see, something you can show me that says --

2 MR. CRANE: So a witness --

3 VENIREPERSON HEADRICK: -- that man did it. A
4 witness, I can't go off somebody's word, no.

5 MR. CRANE: Okay. Very good. Thank you, sir.
6 Anybody else feel the same -- what was it?
7 Headrick?

8 VENIREPERSON HEADRICK: Yes, sir.

9 MR. CRANE: -- Number 34? Anybody else on that same
10 line of questioning feels the same as Mr. Headrick? And I
11 appreciate your candor, sir. Thank you.
12 Miss Schupmann?

13 VENIREPERSON SCHUPMANN: Yes, I do.

14 MR. CRANE: That's noted. You would not be able --
15 VENIREPERSON SCHUPMANN: That's correct.

16 MR. CRANE: -- to convict, unless there was some
17 physical evidence.

18 VENIREPERSON SCHUPMANN: That's correct.

19 MR. CRANE: Everybody understands between "evidence"
20 and "physical evidence." Okay.

21 VENIREPERSON NORTON: Is a body considered physical
22 evidence?

23 MR. CRANE: Well, what we were talking about was
24 physical evidence that, for instance, the defendant was at
25 the scene type of thing.

1 VENIREPERSON NORTON: Okay.

2 MR. CRANE: Did you need me to follow up?

3 VENIREPERSON NORTON: No. That's fine.

4 MR. CRANE: Okay.

5 VENIREPERSON DECLUE: Yeah, I would have a problem
6 with that.

7 MR. CRANE: Mr. Declue?

8 VENIREPERSON DECLUE: Yes, sir. You're just going
9 on someone's hearsay. That's like someone saying, like, all
10 right, for instance, someone in the room would say something
11 bad about you. That don't make it true.

12 MR. CRANE: Well, goll, I'm glad of that.

13 VENIREPERSON DECLUE: You know what I'm saying?

14 MR. CRANE: Yeah, I know. You know, I'm really not
15 able to get into the facts much of this case at this stage.
16 It's not an issue of hearsay here. It -- there may be other
17 things. I hear the defense back there a little bit. There
18 may be other arguments about the state's case, but it would
19 not be hearsay. And remember what I told you about the
20 Charles Erickson agreement? He also pled guilty. He pled
21 guilty to the murder. You follow me? That's not hearsay.
22 See what I mean?

23 VENIREPERSON DECLUE: I understand. I'm sorry. I
24 didn't relate the two of them together.

25 MR. CRANE: Yeah. And I can't really give you a

1 whole lot. You see, I'm tiptoeing around. I can't give you
2 a whole lot, see? Okay.

3 Yeah.

4 VENIREPERSON PUND: Can you put it back into the
5 bank robber scenario?

6 THE COURT: Excuse me. Would you stand. I can't
7 see your number from here.

8 VENIREPERSON PUND: I just thought maybe he could
9 put it back into the bank robbery example.

10 MR. CRANE: Well, on the physical evidence thing?

11 VENIREPERSON PUND: Right. Your -- the driver
12 wasn't -- there's no physical evidence that the driver was
13 there, but we should go on other evidence.

14 MR. CRANE: You could. Yeah. If it's there.
15 Right. The question was: Would you require physical
16 evidence? Juror Number 34 said yes. Would you require
17 physical evidence before you could find him guilty? What do
18 you think? And I know -- you were trying to help me, weren't
19 you?

20 VENIREPERSON PUND: Right. I was.

21 MR. CRANE: I appreciate that. Is there -- is there
22 anybody -- do you -- but you're okay -- you could do that?

23 VENIREPERSON PUND: Right.

24 MR. CRANE: You would not -- okay. You understand
25 that's not an element of the charge.

1 VENIREPERSON PUND: Right.

2 MR. CRANE: Okay.

3 VENIREPERSON HEADRICK: I might -- I might have to
4 retract that then, because, I mean, if you consider maybe
5 there's ten people that actually saw him do it, I would
6 consider that physical evidence. If you didn't find a hair
7 or something --

8 MR. CRANE: Well, okay. I mean, it's not a numbers
9 game, as to how many people saw --

10 VENIREPERSON HEADRICK: So I guess I'm going to have
11 to retract that then, because I don't know -- you know what
12 I'm saying?

13 THE COURT: Mr. Headrick, would you stand up so that
14 everyone will be able to hear you?

15 VENIREPERSON HEADRICK: Yes, ma'am. I'm sorry. I'm
16 sorry.

17 THE COURT: I'm sorry that we don't have a mic for
18 you.

19 VENIREPERSON HEADRICK: Did you understand what I'm
20 saying?

21 MR. CRANE: Yeah. Would you require ten witnesses?

22 VENIREPERSON HEADRICK: No. What I'm saying is:
23 You know, since -- if it's -- if it's him and one other guy,
24 and there's another guy or maybe two guys -- you know, I
25 don't know all the details about those two guys. I don't

1 know what those guys, whether they like him, whether they're
2 just trying to get off because they did it, or whatever.

3 There's no physical evidence telling me that he did it. Now
4 if there's a crowd of people, that's a different --

5 MR. CRANE: What if there's not?

6 VENIREPERSON HEADRICK: -- that's a different story.

7 MR. CRANE: What if there's not?

8 VENIREPERSON HEADRICK: In that instance --

9 MR. ROGERS: Your Honor, I'd like to object. I
10 think we're --

11 THE COURT: Excuse me just a minute.

12 MR. ROGERS: I'm making an objection. I think
13 we're --

14 THE COURT: Hold on just a second.

15 MR. ROGERS: I think we're getting to the point
16 where we're seeking commitments from the juror, and I don't
17 think that's proper.

18 MR. CRANE: Yeah. All right. I'll back off of
19 that. Yeah.

20 THE COURT: You may withdraw that question.

21 MR. CRANE: Yeah. I'll withdraw that question.

22 Forget about that. Would you -- would your
23 feelings, as you sit there right now, obviously you would
24 really like to have some physical evidence at the scene.

25 VENIREPERSON HEADRICK: Yes.

1 MR. CRANE: Okay. And that would be something that
2 you would have grave concerns about if you didn't have it.

3 VENIREPERSON HEADRICK: What I'm saying: I don't
4 know the details. I don't know how many people were there.
5 I cannot say that at this point I have to have physical
6 evidence, no.

7 MR. CRANE: Okay. All right. Thanks. Appreciate
8 it.

9 Okay. Deliberation. In a murder one, in the
10 event -- we go through this case, and you're assessing the
11 elements of murder in the first degree. There's a particular
12 element in that called deliberation. The principal
13 difference between murder in the first degree and murder
14 second degree is that element of deliberation. And I expect
15 that you'll be instructed that deliberation means -- is
16 defined as cool reflection on the matter, the matter of
17 killing someone, for any period of time, no matter how brief.
18 That's the legal definition. Cool reflection on the matter,
19 for any period of time, no matter how brief. Okay?

20 Now, did some of you think, Well, gosh, I thought
21 murder in the first degree required planning. Go get gun,
22 buy ammo, get gas to burn up get-away car. You know.
23 Anybody think that? Planning seems to be something that
24 people can think of. But under the law, it's cool reflection
25 on the matter of killing somebody for any period of time no

1 matter how brief. Regardless of what you thought it might
2 be, is everybody okay with that as the legal definition?
3 Okay. I take it by your silence that you are.

4 Does anybody have any special training or interest
5 in the fields of psychology, psychiatry, or human behavior?
6 Nobody?

7 Yes. Okay. You're doing the nursing thing.

8 VENIREPERSON GIBBS: Yeah. I -- well, I took high
9 school classes in psychology and sociology.

10 MR. CRANE: Okay.

11 VENIREPERSON GIBBS: I don't know if that counts.

12 MR. CRANE: Sure. Could you set aside that -- not
13 completely. You know, nobody's saying you got to shut the
14 door on your past experiences, but would anything about that
15 keep you from being fair and impartial in this case?

16 VENIREPERSON GIBBS: Not that I can think of.

17 MR. CRANE: Okay. Are you willing, all of you,
18 willing to accept that psychologists may be mistaken in their
19 diagnosis or may differ in their opinions? Everybody okay
20 with that idea? That two psychologists may have a different
21 view on the same person. Okay?

22 Has anybody ever read any books by Dr. Elizabeth
23 Loftus? The defense has indicated they may call Dr. Loftus
24 in this case. Anybody read any books by her? Anybody ever
25 heard of Dr. Elizabeth Loftus? L-o-f-t-u-s.

1 A witness the state may call is Dr. Delaney Dean.
2 Has anybody heard of Dr. Dean? I take it by your silence
3 nobody's ever heard of those two psychologists.

4 If there are psychologists who testify during this
5 trial, will you all be willing to decide for yourself if
6 their opinions are correct or incorrect? You'd be able to do
7 that? Okay.

8 Would you be able to reject an opinion if you didn't
9 think it was right? Or are you going to go, "Well, a
10 psychologist said it; I got to go with that"? Okay.

11 Would you also be able to consider the testimony of
12 a psychologist as you would any other witness? Gauge their
13 testimony, listen to what they had to say, decide whether or
14 not you wanted to adopt it? I take it by your silence you
15 could all do that.

16 I want to talk to you about memory. A little bit
17 about memory. Stupid questions coming at you here now. It's
18 going to make me sound stupid, not you. Okay?

19 Could I see a show of hands of anybody who's ever
20 forgotten anything.

21 (Show of hands.)

22 MR. CRANE: Looks like about everybody's hand. You
23 forgot where you put your glasses. You forgot where you put
24 your purse. Do you -- most of you, that everyday stuff,
25 watch, glass, purse, try to put it in the same place when you

1 go to bed? And you do that so that the next morning it's
2 right there and you don't have to forget where it is and go
3 hunting it down. Okay? And sometimes you lose them.
4 Sometimes you can't find your glasses. And they're right
5 there on your face. Some of you don't wear glasses, but I'll
6 bet the people with glasses have maybe had that happen
7 before. Okay?

8 And when you find the thing you lost -- you forgot
9 where it was, and when you find it, you remember you put it
10 right there. Anybody had that experience? "Oh, man, that's
11 where I left the glasses, right there." Or "I had them on my
12 head. And I remembered when I found them." Everybody had
13 that experience? Again, I'm not going to make you raise your
14 hand. If you didn't raise your hand, if everybody's had that
15 type of experience... I take it by your silence you have.

16 Has anyone ever forgotten someone or something from
17 your past, and then something triggered your memory and you
18 remembered it again? Umm, you went to grade school with
19 Billy Bob. And you forgot about Billy Bob. And somebody
20 says, "You remember Billy Bob?" And you don't remember. And
21 then you get shown your yearbook. Or a photo. And there you
22 are, standing by Billy Bob. And you go, "Golly, that's the
23 guy. I remember him now." Anybody had that type of
24 experience? I take it by your silence that you have. You've
25 had that type of experience. In other words, you forgot

1 about Bill, but when you saw him again, you remembered. And
2 it was a true fact, that you and Billy Bob went to school. I
3 told you it was going to be kind of weird questions.
4 Everybody had that type of experience? Okay.

5 Is anyone unable to accept the idea that some people
6 can experience a terrible, traumatic event and consciously
7 put it out of their mind, and then later on remember it
8 again? It comes back to them. That bad thing.

9 Now I'm not necessarily asking, on that one, that
10 things -- the other ones, where it happens to everybody type
11 questions, this one I'm not asking, has it ever happened to
12 you, you understand, but -- and listen to the way I'm asking
13 that. Is anybody unable to accept the concept that somebody
14 can have something bad, traumatic, happen to them, and
15 consciously put it out of their memory, and then have it come
16 back to them? Nobody is unable to accept that type of
17 concept; correct? I mean, if you are, let me know. "Oh,
18 heck, that don't happen." Let me know.

19 Yes, sir.

20 VENIREPERSON WAECHTER: Yes, it does. It happened
21 to me.

22 MR. CRANE: Well, it does happen. I'm trying -- it
23 did happen to you.

24 VENIREPERSON WAECHTER: Yes.

25 MR. CRANE: And I'm -- again, I'm trying -- you

1 know, I don't know what bad experiences, maybe you were in
2 the army and, you know, something bad happened, something
3 like that. But something you didn't want to remember, and
4 then something made you think about it again.

5 You're saying --

6 VENIREPERSON WAECHTER: You want me to tell you?

7 MR. CRANE: No. No, I don't. Here's what I'm
8 saying. My question is: You accept that that can happen.

9 VENIREPERSON WAECHTER: Yes.

10 MR. CRANE: Okay.

11 And everybody else is okay with that concept as
12 well? Okay.

13 And I wasn't trying to cut you off.

14 VENIREPERSON WAECHTER: No. That's fine.

15 MR. CRANE: Okay. I appreciate that.

16 All right. I take it by your silence that everybody
17 is able to accept that.

18 Has anybody had a dream where you dreamed something
19 bad happened, or embarrassing, and you woke up and you went,
20 "Golly, I can't believe I said that to her," or "I can't
21 believe that I didn't get to that class and get that test
22 taken. How could I have blown off that class all last
23 semester?" Or "Why would I go to work naked? How come I did
24 that?" For a while you wake up and you think, "This is
25 terrible." And then you start to kind of wake up and you

1 realize, "Well, wait a minute. I must have gotten through
2 that class, because I've got this home and these kids, and
3 I've got to go to work. And I'm not even in school any
4 more." Or, you know, "Wait a minute. There's the clothes.
5 I got clothes. I didn't go in to work naked." Everybody had
6 that kind of experience? Think their dream for a little bit
7 was reality?

8 Let me ask it this way. Is there anybody in the
9 room who's ever had such a dream, that you thought was real,
10 but when you woke up, you went the rest of your life thinking
11 that what you dreamed was real? I take it by your silence
12 that no one, no one's had that experience. Did you
13 understand my question?

14 Ladies and gentlemen, is there anybody who has ever
15 told your friends, relatives, the police, that you murdered
16 somebody? I take it by your silence nobody's done that. Not
17 a murder necessarily, but told your friends, your parents,
18 and the police, "I murdered somebody." I take it by your
19 silence nobody's done that.

20 I also take it by your silence now that nobody has
21 murdered anybody. Am I safe at that? I take it by your
22 silence I am.

23 Ladies and gentlemen, after being selected as a
24 juror, you'll take an oath to follow the Court's
25 instructions. They'll give you -- they're given to you by

1 the Judge at the close of all the evidence. Again, they'll
2 tell you what the law is, applicable to this case in the
3 State of Missouri.

4 General question: Is there anybody here who's going
5 to be unable to follow the law, the Court's instructions,
6 because of personal beliefs that the law is misguided or
7 wrong or just shouldn't be written that way and "I'm not
8 going to use that law; I'm going to use my own." Is
9 everybody going to be able to follow the law? Accept what
10 the Court tells you the law is and follow it. I take it by
11 your silence you can all do that.

12 Motive. Still on this theme of following the law.
13 Does everybody understand that the law does not require the
14 prosecution to prove why the defendant committed the offense
15 for which he's charged. We talked about the physical
16 evidence thing a minute ago. And you hear about motive all
17 the time. "What was his motive?" Okay. Does everybody
18 understand that motive, why someone did it, may be an issue
19 that's discussed in a case, but it's not required on the
20 issue of proof beyond a reasonable doubt. Does anybody
21 think, "Well, gosh, it should be? I want to know why. And
22 if I don't know why, I can't fairly consider whether or not
23 he did it." Are you with me on that? Everybody okay with
24 that question? I take it by your silence you can follow the
25 law that motive is not required.

1 Is any member on the panel bothered by the fact that
2 jurors decide facts in a case? Even though both sides
3 disagree. That's going to happen in this case. Both sides
4 will disagree as to what those facts are. It's jurors who
5 make the decisions. Anybody bothered by that fact? "I just
6 don't want" -- we talked about that a little bit. "I don't
7 want to be having to decide that." In other words, if one
8 witness gets up and says, "The light was red at the time of
9 the crash," and that's not in this case, just giving you an
10 example, and another witness says, "No, at the time of the
11 crash the light was green," the jury decides what color that
12 light was. If it's an issue in the case. You follow me?
13 Anybody uncomfortable with that idea?

14 Anybody who thought of or discovered a pressing
15 physical or personal problem as I've droned on here with you
16 this morning that you want to tell us about that's going to
17 cause you problems being fair and impartial in this case?
18 Something you haven't thought of. Okay.

19 I asked you that last question so that we can be
20 assured, so that both sides can be assured that if you're a
21 juror on this case, your attention will be focussed fully on
22 the facts of this case. Because after it's over, if you're a
23 juror, and you go back into that deliberation room to decide
24 this case, you will be equipped only with what you've heard
25 and seen and the exhibits in the case. So it's very

1 important that you're all able to give your full, fair, and
2 impartial attention. Other than those that have mentioned
3 various things earlier, can the rest of you do that?

4 Ladies and gentlemen, I sure do appreciate you
5 bearing with me.

6 Let me ask my assistant if I've got any more
7 questions.

8 (Discussion off the record between Mr. Crane and
9 Mr. Knight.)

10 MR. CRANE: I did have another one, but I'm going to
11 quit.

12 Thank you.

13 THE COURT: Would counsel approach the bench just
14 briefly?

15 - - -

16 Counsel approached the bench and the following
17 proceedings were held:

18 THE COURT: I'm assuming you have quite a few
19 questions you want to ask this panel.

20 MR. ROGERS: Yes.

21 THE COURT: It is five minutes to 12. Would you
22 rather ask those questions all at one time? Or would you
23 want to start and maybe go 15, 20 minutes now, or half an
24 hour now, and then pick up after lunch?

25 MR. ROGERS: I wanted a break about an hour ago, but

1 whatever the Court --

2 THE COURT: Well, no, I'm --

3 MR. ROGERS: -- prefers.

4 THE COURT: -- I'm asking you.

5 MR. ROGERS: I would anticipate it will take at

6 least an hour, hour and a half. So we're not going to be

7 able to start at 12:30 with the second panel if we need them

8 anyway.

9 THE COURT: Well, no, we wouldn't be able to start

10 with that panel.

11 MR. ROGERS: But I would just as soon we get started

12 before we break.

13 THE COURT: Pardon?

14 MR. ROGERS: I would just as soon we get started

15 before we go on break.

16 THE COURT: Okay.

17 MR. ROGERS: We did have an earlier --

18 THE COURT: We did have an earlier break.

19 MR. CRANE: The earlier you break, the quicker they

20 can get back. What difference does it make?

21 MR. ROGERS: Let's break now.

22 THE COURT: That would be my inclination.

23 MR. ROGERS: I'm with you. I'm persuaded.

24 THE COURT: All right.

25 MR. ROGERS: Thank you.

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The following proceedings were held in open court:

THE COURT: Ladies and gentlemen, defense counsel has more than just a few questions to ask, as you might imagine. It's five minutes to 12. And what we were discussing is whether we should take a lunch break now, have you come back, say, in an hour, and conclude the questioning, or proceed at least through part of it. We've decided to take a lunch break, but not a very long one now.

The Court again reminds you of what you were told at the first recess of the Court. Until you retire to consider your verdict, you must not discuss this case among yourselves or with others, or permit anyone to discuss it in your hearing. You should not form or express any opinion about the case until it is finally given to you to decide. Do not read, view, or listen to any newspaper, radio, or television report of the trial.

I'm going to allow our bailiff here to instruct you about where you need to go when you come back. I will give you -- if you would come back about ten minutes to one, we'll take up at that time.

You may eat with whomever you choose or wherever you choose, but you may not discuss this case when you're in recess. And follow the Court's instructions.

So we will be in recess, but our bailiff here will

1 give you instructions about where to appear.

2 BAILIFF BOEDEKER: Just come back up to that room
3 when you come back in.

4 - - -

5 The following proceedings were held out of the presence
6 of the jury:

7 (Mr. Crane not present in the courtroom.)

8 THE COURT: If we could close the door when the
9 jurors leave. I want to just, before counsel -- did
10 Mr. Crane leave?

11 MR. ROGERS: Yeah. The state's gone.

12 MS. MARSDEN: I'll get him.

13 THE COURT: Would you get him?

14 I just wanted to give you some idea of people that
15 I'm going to excuse, that I think either have a hardship or
16 some other reason. Just so that, in tailoring your
17 questions, if you felt they should be excused for cause or
18 otherwise excused, you needn't go into that in such great
19 details. But we'll wait for Mr. Crane to come.

20 (Mr. Crane present in the courtroom.)

21 MR. CRANE: Sorry, Judge. I didn't know you --

22 THE COURT: I was just going to go over some
23 individuals that I intended to excuse for either hardship or
24 reasons that they'd stated. And I certainly will hear from
25 anyone who disagrees with that. And I thought it might

1 expedite things, particularly --

2 MR. CRANE: I wish I could get my peeps in here.

3 THE COURT: Your peeps?

4 MR. CRANE: Yeah.

5 THE COURT: Do you have your --

6 MR. CRANE: Hey, would you -- no, I'm kidding.

7 She's wanting to look at some strikes.

8 THE COURT: Well, I mean, they're not strikes. They

9 would be excuses. Although I probably won't excuse them

10 until the end of the jury.

11 Number 11 and 12. 15. Let's see. I put their

12 names.

13 MR. CRANE: Yeah. Bringer. What do you want?

14 Were you looking for their names?

15 THE COURT: No. I'm going on to furtherers. I -- the

16 last I said was Declue, which was 15.

17 MR. CRANE: Yeah.

18 THE COURT: Thomas, who is Number --

19 MR. ROGERS: 29?

20 THE COURT: -- 29. Number 31, Mr. Black. Number

21 33, Miss McCullough.

22 MR. CRANE: Okay. Wait a minute. Black.

23 MR. ROGERS: I think we need to talk to her some

24 more.

25 THE COURT: Okay. That's fine.

1 MR. CRANE: Now wait a minute. Now wait a minute.
2 31 and 33?

3 THE COURT: 31 -- let's see. 31 -- let's see.
4 There was 29, 31. And then Mr. Rogers wanted to speak with
5 Miss McCullough more. I'm not saying they are excused.
6 Those are the ones I'm inclined to excuse. And I can tell
7 you --

8 MR. CRANE: I think she's going to ask if we agree
9 with any of these. If you don't, she's not going to kick
10 them.

11 MR. ROGERS: Basically what she's I think going to
12 tell us is: Don't waste time on these people if you can
13 avoid it.

14 THE COURT: Well, that was my basis. For example --
15 and I'll tell you, Miss McCullough was someone who said she
16 can't afford to work because she didn't get paid.

17 MR. ROGERS: Well, what she said was: She didn't
18 know whether or not she got paid.

19 MR. CRANE: Yeah, you know, Judge, I tell you,
20 there's several of them that --

21 THE COURT: Okay.

22 MR. CRANE: I'm with you. I'm with you.

23 THE COURT: I'm just telling the ones I'm inclined
24 to.

25 MR. CRANE: Yeah.

1 THE COURT: I'm not excusing them now. They will
2 all come back.

3 MR. ROGERS: Fair enough.

4 THE COURT: Let's see if there was some on the last
5 page of this that I thought I would be inclined to excuse.

6 Joan Bennett, who is Number --

7 MR. ROGERS: 43.

8 THE COURT: -- 43. She's the one that takes care of
9 the grandkid. Mr. Riney is gone. And Mr. Straughter,
10 S-t-r-a-u-g-h-t-e-r --

11 MR. CRANE: He's in a jam. You're talking hardship
12 with him.

13 THE COURT: With him with hardship. I'm just
14 telling you the ones I'm inclined to excuse.

15 MR. ROGERS: Your Honor, I'm not --

16 THE COURT: I'm not excusing --

17 MR. CRANE: Do you -- also, do you want, if there's
18 any of them that you want to let go now, do you want --

19 THE COURT: I don't -- I don't want to let them go
20 now.

21 MR. CRANE: Okay.

22 MR. ROGERS: And that tips the others off, so.

23 THE COURT: That's right. And there's no one whose
24 situation is critical. It's not like "My mother-in-law is
25 dying in the hospital, and I want to be there when she

1 breathes her last." There's no one that said something like
2 that.

3 MR. CRANE: I don't know. I might be able to push
4 that far on some of them.

5 THE COURT: Well, anyway. I just wanted to give you
6 that heads up. And we'll see you -- did I say ten to 1?

7 MR. CRANE: Very good, Judge.

8 THE COURT: All right.

9 MR. ROGERS: Thank you, Your Honor.

10 THE COURT: We'll see you at that time then.

11 We'll be in recess.

12 (Recess taken.)

13 - - -

14 The following proceedings were held out of the presence
15 of the jury:

16 THE COURT: State ready to proceed?

17 MR. CRANE: I'm sorry?

18 THE COURT: Did I wake you from your afternoon nap?

19 MR. CRANE: I was dreaming. Yeah, I'm ready, Judge.

20 THE COURT: Hopefully you don't think it's reality.

21 Is the defense ready to proceed?

22 MR. ROGERS: As long as I'm not naked. We're ready,
23 Your Honor.

24 THE COURT: You may return the jurors to the
25 courtroom, please.

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The following proceedings were held in the presence of
the jury:

THE COURT: Do we have everyone back?

BAILIFF BOEDEKER: I hope so.

THE COURT: Well, perhaps we should call their names
to make sure that we have them all.

Does the circuit clerk have the names of the jurors
that should be here?

CIRCUIT CLERK HOUSTON: I do.

THE COURT: Okay.

CIRCUIT CLERK HOUSTON: If I can find my list here.

(Roll call by Melba Houston, Circuit Clerk.)

THE COURT: Miss Schisler, you had indicated you
might call to see if there might be someone that your
daughter could stay with if you happened to be selected. Are
there some friends that she could stay with?

VENIREPERSON SCHISLER: Yes.

THE COURT: Thank you so much.

VENIREPERSON SCHISLER: Could I also add, though,
that -- I know you said this is supposed to only last a week.

THE COURT: Yes.

VENIREPERSON SCHISLER: But like on the 25th I have
to run my daughter to Louisville, Kentucky, for FFA.

THE COURT: You have to run her to where?

1 VENIREPERSON SCHISLER: To Kentucky, for FFA
2 national convention.

3 THE COURT: You will be able to do that.

4 VENIREPERSON SCHISLER: Okay.

5 THE COURT: Thank you.

6 Defense counsel may have questions for you.

7 MR. ROGERS: Thank you, Your Honor.

8 - - -

9 VOIR DIRE EXAMINATION

10 BY MR. ROGERS:

11 Good afternoon. It's been a while. Let me
12 reintroduce myself. My name is Charlie Rogers. And Jeremy
13 Weis, has the matching hairstyle, he and I practice law in
14 Kansas City with a firm called Wyrsh, Hobbs, and Mirakian.
15 Also representing Mr. Ferguson in this case is Kathryn
16 Benson, who practices law in Columbia with a firm called
17 Batek and Benson. And our client is Ryan Ferguson. Okay.
18 Also assisting us during this trial is Michelle Dorrance.
19 She is a paralegal with our law firm.

20 Now that you've seen us for it seems like a long
21 time, is there anybody here who thinks you know any of
22 Mr. Ferguson's defense team? I don't see any hands, so I'm
23 assuming that the answer is no.

24 Ryan Ferguson lives in Columbia, Missouri, with his
25 parents, who are also present in the courtroom. His father,

1 Bill Ferguson.

2 Would you stand, please.

3 And his mother, Leslie Ferguson. Bill is a real
4 estate agent; Leslie is a teacher, a reading specialist with
5 the Columbia school system.

6 Is there anybody who thinks you might know Ryan
7 Ferguson or any of his family? Okay. I don't see any hands,
8 so I assume once again the answer is no.

9 I'm going to ask a lot of questions. Some of them
10 may sound like questions you've heard from the Judge or from
11 the prosecutor. I'm not intending to be repetitious. And I
12 certainly don't intend to waste any time. But they are
13 questions that I think I need answers to, the way I'm going
14 to ask them, that I may not have heard when they were asked a
15 different way.

16 The other thing that I need to tell you is that in
17 many cases questions that I ask are things that would
18 normally be none of my business. And that you would have no
19 reason to tell me. But in this situation, we are picking 12
20 people who will decide whether or not Ryan Ferguson ever sees
21 the unfettered light of day again. And therefore, we have to
22 know as much as we can, to get the 12 people who are best for
23 this particular case. And so, therefore, I'm going to
24 apologize in advance if you think I'm being unduly intrusive.
25 I don't intend to be. But it's a serious job and it's a

1 serious matter, and we need the information to make the
2 choices that we have to make.

3 So basically I will assure you at that if you give
4 me good, accurate answers to my questions, I will not in any
5 way attempt to deceive or mislead or trick anybody.

6 And I also want to stress that there are no right
7 and wrong answers to these questions. A right answer is a
8 truthful answer. An answer that tells us information that we
9 can use. A wrong answer is an answer that does not tell us
10 what we need to know when it's there to be known. Okay?

11 Now, I said I wasn't going to be tricky or
12 deceitful, but I will start out the questioning with a quiz,
13 if you will. I used to have a teacher in high school who
14 used to come in on Monday morning and give a little pop quiz
15 to see if you were paying attention Friday -- in Friday
16 morning's class. And so this is a pop quiz to see if you
17 were paying attention, listening, and thinking about things
18 that you were told earlier today here in this courtroom.

19 And the question is: First of all, I'd like to see
20 a show of hands, how many people have a presumption right now
21 as to whether Ryan Ferguson is guilty or not guilty of the
22 murder of Kent Heitholt? How many have a presumption?

23 (One hand.)

24 MR. ROGERS: Mr. Straughter. You have a
25 presumption. What is your presumption?

1 VENIREPERSON STRAUGHTER: You asked me. I stood up.
2 Yes, I do.

3 MR. ROGERS: Yes. What is your presumption?

4 VENIREPERSON STRAUGHTER: That he's guilty.

5 MR. ROGERS: Okay. And that's because based on what
6 Mr. Crane told you about the plea bargain --

7 VENIREPERSON STRAUGHTER: Right.

8 MR. ROGERS: -- of the codefendant. Okay. So --
9 and you have already told us about that. And nothing that
10 you were told before that question was asked -- or after that
11 question has been asked has changed that in your mind. Is
12 that a fair statement?

13 VENIREPERSON STRAUGHTER: That's fair.

14 MR. ROGERS: Okay. Thank you.

15 Anybody else have a presumption? Okay. See, if I
16 were grading the pop quiz, I would be wondering whether you
17 were thinking about what Judge Roper told you or about what
18 Mr. Crane talked about, because they both told you that
19 Mr. Ferguson is presumed to be innocent. Okay? Everybody
20 remember that, now that I say it? See hands of people who
21 now remember hearing that.

22 (Show of hands.)

23 MR. ROGERS: Okay. All right. So when you heard
24 that, then it appears to me that maybe you weren't
25 internalizing that. You weren't thinking, Well, wait a

1 minute, if he's presumed to be innocent, and I'm here seeing
2 whether or not I'm going to be on the jury, maybe I should be
3 presuming him to be innocent. Okay? How many people, now
4 that I've said that, think that it is your job as jurors at
5 this stage of the trial to presume that Mr. Ferguson is
6 innocent?

7 (Show of hands.)

8 MR. ROGERS: Okay. And now I'm going to pick on
9 somebody who didn't raise his hand.

10 And since you are close, sir, Juror Number 4,
11 Mr. Clark, why not?

12 VENIREPERSON CLARK: I haven't heard all the facts
13 yet.

14 MR. ROGERS: Okay. And let me then go back to my
15 pop quiz and remind you of something that Mr. Crane stressed,
16 which is: You haven't heard, not only all the evidence, but
17 you haven't heard anything; correct?

18 VENIREPERSON CLARK: Yes.

19 MR. ROGERS: Okay. Mr. Ferguson is presumed to be
20 innocent throughout the jury. And it is the job of the jury
21 to -- as a juror, as an individual, and a jury as a group, to
22 keep that presumption and to take that presumption with them
23 into the jury room after they've heard all the facts and then
24 talk about the facts and see whether or not there has been
25 enough shown by the other side to overcome that presumption.

1 Do you understand that, sir? Are you agreeing with me on
2 that?

3 VENIREPERSON CLARK: Yes.

4 MR. ROGERS: Okay. So, given that, since you
5 haven't heard all the facts, in fact you haven't heard any of
6 the facts, would you now agree that it is your job to presume
7 that Mr. Ferguson is innocent?

8 VENIREPERSON CLARK: Yes.

9 MR. ROGERS: Okay. And are -- now that I've
10 explained it, are you doing it?

11 VENIREPERSON CLARK: To my knowledge, yes.

12 MR. ROGERS: Okay. Good enough. That's all you can
13 answer, is what you know. So, given that, you are now able
14 to give Mr. Ferguson the full benefit of the presumption of
15 innocence.

16 VENIREPERSON CLARK: Yes.

17 MR. ROGERS: Okay. Now that I have had my
18 conversation with Mr. Clark --

19 THE COURT: There is a hand.

20 MR. ROGERS: Oh, another hand.

21 VENIREPERSON KELLY: Could I have you scoot over
22 just a little bit? Thank you so much.

23 MR. ROGERS: Thank you. I've never been a preacher,
24 but this must be what it feels like.

25 All right. And just for the record, you're

1 Miss Kelly; is that correct?

2 VENIREPERSON KELLY: Yes.

3 MR. ROGERS: Number 42.

4 VENIREPERSON KELLY: Yes.

5 MR. ROGERS: Now that I've had my conversation with
6 Mr. Clark, I would again like to see a show of hands of those
7 people who are right now actively giving Mr. Ferguson the
8 benefit of the presumption of innocence.

9 (Show of hands.)

10 MR. ROGERS: Mr. Robinson, you didn't have your hand
11 up.

12 VENIREPERSON ROBINSON: I don't presume anything
13 until I find out something. I don't say he's guilty or not
14 guilty.

15 MR. ROGERS: And that's -- my whole point here is
16 that that sounds like a fair way to be. That is, in a sense,
17 impartial. And you heard the "words fair and impartial" a
18 lot. But in the context of this case and the criminal law
19 and the Constitution of the United States and the way it's
20 been developed in our justice system, when somebody is
21 accused of a crime, for a juror to be fair to that person,
22 that juror has to give them the benefit of the presumption of
23 innocence. And that means that juror has to presume that
24 they're innocent throughout the course of the trial. Before
25 they hear any evidence, while they're hearing the

1 prosecutor's evidence, while they're hearing the defense
2 evidence, while they're hearing the instructions of law from
3 the Judge, while the lawyers are making their closing
4 arguments. And then they go in the jury room and then they
5 decide whether the prosecution has overcome the presumption.
6 But the presumption has to be there from start to -- almost
7 to finish. Okay? Do you understand that?

8 VENIREPERSON ROBINSON: (Nodding head up and down.)

9 MR. ROGERS: You have to answer out loud. I'm
10 sorry.

11 VENIREPERSON ROBINSON: Yes.

12 MR. ROGERS: Because she can't take down a nod of
13 the head. And understanding that, are you having trouble
14 doing that?

15 VENIREPERSON ROBINSON: Yes.

16 MR. ROGERS: Okay. And why?

17 VENIREPERSON ROBINSON: I don't know. I just -- I
18 don't know the facts and I don't want to try to create
19 something in my head that shouldn't be there.

20 MR. ROGERS: Okay.

21 VENIREPERSON ROBINSON: So, until I know something
22 that's going on, I'm not going to presume anything.

23 MR. ROGERS: Okay.

24 VENIREPERSON ROBINSON: Or assume anything, I should
25 say.

1 MR. ROGERS: There's a difference between assuming
2 and presuming. Okay? Maybe that's the problem here.
3 Because I don't want you to assume anything. But I not only
4 want, but need and require you to presume that Mr. Ferguson
5 is innocent. And that is something in your head that should
6 be there. And must be there if you're going to do your duty
7 as a juror, in terms of the instruction Judge Roper has
8 already read to you, which you'll hear again at the end of
9 the case. And I'm kind of floundering here, wondering what I
10 can say to communicate that to you in a way that you will
11 accept it and internalize it and agree to do it. Answer me,
12 if you can.

13 VENIREPERSON ROBINSON: I guess I can accept it. I
14 mean --

15 MR. ROGERS: Okay. Would -- knowing that the Judge
16 has said that you have to do that, are you willing to do
17 that?

18 VENIREPERSON ROBINSON: Yes.

19 MR. ROGERS: Okay. So you understand it's not
20 something that shouldn't be in your head. It's not something
21 that makes you unfair. It's something that should be in your
22 head to make you fair.

23 VENIREPERSON ROBINSON: Okay.

24 MR. ROGERS: Okay. Fair enough.

25 And Mr. Brown. You didn't raise your hand either.

1 VENIREPERSON BROWN: Correct.

2 MR. ROGERS: Why was that?

3 VENIREPERSON BROWN: Well, I feel there's got to be
4 some reason why the young man was brought here. They just
5 don't pick a person off of a street, just an innocent person,
6 and just bring them in, say, "Well, I think we're going to
7 try you for this or that." So I got to believe there could
8 be just a smidgeon of guilt. I can listen to both sides of
9 the story and give an unbiased opinion about my feelings
10 toward that, but to give -- to say he is 100 percent
11 innocent, or guilty, either one, I could not say that at this
12 period of time.

13 MR. ROGERS: And once again, we may just be talking
14 about semantics, but... You're not required to conclude that
15 he is 100 percent guilty, but you are required to presume
16 that he is. And in fact, the Judge has told you, and
17 Mr. Crane I think said in almost the same words, that the
18 charge of an offense is not evidence. And it creates no
19 inference or presumption that any offense was even committed,
20 or that this defendant committed any offense.

21 Now, knowing that, and knowing that that's the law
22 that you would be sworn to follow as a juror, could you
23 follow that law?

24 VENIREPERSON BROWN: I could -- I could honestly say
25 that I think this man is 98 percent innocent right at this

1 moment, but there's got to be a reason that he was brought
2 here.

3 MR. ROGERS: Okay. But what I'm saying is: Having
4 been told that you cannot use that belief that you have as
5 any type of evidence, or to infer any guilt, can you set it
6 aside and give him the benefit of the presumption of
7 innocence in terms of what they have to prove to prove that
8 he's guilty?

9 VENIREPERSON BROWN: As far as to infer that there's
10 any guilt there, yeah, I could set that aside.

11 MR. ROGERS: Okay. Even the 2 percent.

12 VENIREPERSON BROWN: Uh-huh.

13 MR. ROGERS: So you can -- even though you're not
14 concluding that he's a hundred percent innocent, if you had
15 to vote right now, that's the way you'd have to vote, is not
16 guilty; right?

17 VENIREPERSON BROWN: Right now.

18 MR. ROGERS: Okay. And if you were not persuaded
19 beyond a reasonable doubt by evidence in court that he had
20 been proven guilty, that's the way you'd vote at the end of
21 the case too.

22 VENIREPERSON BROWN: After I heard both sides of the
23 story, I could give an honest opinion about it.

24 MR. ROGERS: Okay. Let me -- but the answer you
25 gave maybe didn't reflect the question I asked, so let me

1 clarify more. I'm not trying to pick on you, but this is
2 important stuff, as you know.

3 At the conclusion of the case, would the opinion
4 that you rendered, in the form of a verdict, be an opinion as
5 to whether or not you believed Mr. Ferguson was guilty or not
6 guilty, or would it be an opinion as to whether or not you
7 believed the state had proven its case beyond a reasonable
8 doubt?

9 VENIREPERSON BROWN: I would say that I could base
10 my opinion upon that there was no reason of doubt there
11 whatsoever. That he was guilty or innocent.

12 MR. ROGERS: But you understand that if there is a
13 reasonable doubt, what would your verdict be?

14 VENIREPERSON BROWN: If there was a doubt, he'd have
15 to be innocent.

16 MR. ROGERS: Okay. We're tracking finally. Okay.
17 And with that explanation, and having -- and I appreciate the
18 fact that you shared with me your concerns about he wasn't
19 picked at random to be here, but with that understanding, can
20 you, if selected on this jury, give Mr. Ferguson the benefit
21 of the presumption of innocence?

22 VENIREPERSON BROWN: Uh-huh.

23 MR. ROGERS: And are you doing that now, at this
24 stage, now that we've talked so much about it?

25 VENIREPERSON BROWN: I'm telling just like I told

1 you a while ago. Right now I feel 98 percent. I mean, I
2 can't say a hundred percent he's innocent right now. I'm
3 sorry. I just can't do that.

4 MR. ROGERS: All right.

5 VENIREPERSON BROWN: It's just like if you got a cop
6 gets a guy speeding down the highway, or there's just an
7 individual that's driving down the highway, and he picked him
8 just because "I want to pick him." Well, to me, if he got
9 the guy speeding down the highway, he's guilty of speeding.
10 You just don't pick a guy off the highway and say he's
11 innocent or guilty.

12 MR. ROGERS: We'll talk about credibility after a
13 while. Okay? But yeah. What I'm saying is -- what I'm
14 asking is: Are you now --

15 VENIREPERSON BROWN: I can set that aside.

16 MR. ROGERS: You can set that aside and use that
17 legal principle of the presumption of innocence to set that
18 aside and give Mr. Ferguson the presumption of innocence
19 right now and throughout the trial.

20 VENIREPERSON BROWN: Based upon what I hear, yes.

21 MR. ROGERS: Okay. Thank you.

22 All right. Now, let me see one more time a show of
23 hands on everybody who is right now, in this courtroom today,
24 giving Ryan Ferguson the full benefit of the presumption of
25 innocence.

1 (Show of hands.)

2 MR. ROGERS: Thank you.

3 Now, I'm having trouble seeing the entire courtroom.
4 Is there anybody other than Mr. Straughter who did not raise
5 their hand? Miss Delk? Did you raise your hand the last
6 time?

7 VENIREPERSON DELK: (Nodding head up and down.)

8 MR. ROGERS: Okay. I couldn't see it. Thank you.

9 THE COURT: Was that a yes?

10 VENIREPERSON DELK: Yes.

11 THE COURT: Thank you. She shook her head up and
12 down. I assume she meant yes.

13 MR. ROGERS: Thank you.

14 Okay. Now, talking about presumption of innocence,
15 we also necessarily talk about the burden of proof. And in
16 this case, the burden of proof is the highest burden known to
17 our justice system. And that is proof beyond a reasonable
18 doubt.

19 Is there anybody here who thinks that's too high a
20 burden to place on the prosecution, on the government, on the
21 State of Missouri, in a case like this? Where somebody's
22 dead. Don't you think we ought to cut it back a little? You
23 want to think about that? Okay. I see no hands. So I'm
24 assuming from that that everybody here not only is presuming
25 Mr. Ferguson to be innocent, but will also hold the state to

1 their burden of proof, beyond a reasonable doubt.

2 Now when Mr. Crane was talking about that, he talked
3 about elements of the offense. And I want to make something
4 clear. The state has the burden of proof, beyond a
5 reasonable doubt, of each and every element of the offense.
6 That's exactly correct. But that just proves that the
7 offense occurred. They also have the burden of proving
8 beyond a reasonable doubt that this kid right here committed
9 the offense.

10 And in that regard, if you have a reasonable doubt
11 as to something that bears on whether or not he committed the
12 offense, even though it may not be an element of the offense,
13 and even though they showed that the offense occurred, that
14 still would be a reasonable doubt touching upon the guilt of
15 the defendant, and you'd have a burden -- have the
16 responsibility of finding the defendant not guilty. Is there
17 anybody who doesn't understand that?

18 Let me shift gears a little bit here and ask an easy
19 question. How many of you know other people on the jury
20 panel from before you came to court today?

21 (Show of hands.)

22 MR. ROGERS: Okay. What I'm going to do is
23 basically ask who you know and where you know them from. And
24 if they've already said they know you, and where from, and
25 there's nothing more to add that you know somebody else, then

1 you can put your hands down.

2 We'll start with you, Mr. Brown. You're in the
3 first row here. Who do you know?

4 VENIREPERSON BROWN: Let's see. I know Roy Waechter
5 sitting on the end over here.

6 MR. ROGERS: Okay.

7 VENIREPERSON BROWN: That's the only one in the
8 first row that I know.

9 MR. ROGERS: Okay. Who else?

10 VENIREPERSON BROWN: Second row, I know Chris
11 Kaimann, setting over here.

12 MR. ROGERS: How do you know Mr. Waechter, first of
13 all?

14 VENIREPERSON BROWN: Well, he's been in business in
15 Troy for a long time and I've bought things from him in the
16 past.

17 MR. ROGERS: Okay. And how about Mr. Kaimann?

18 VENIREPERSON BROWN: Mr. Kaimann lives about two
19 miles from me.

20 MR. ROGERS: Okay. Who else?

21 VENIREPERSON BROWN: Mel Burkemper.

22 MR. ROGERS: How do you know Mr. Burkemper?

23 VENIREPERSON BROWN: Grew up with him. He lived
24 just -- in my same neighborhood.

25 MR. ROGERS: Okay.

1 VENIREPERSON BROWN: This next lady here was a
2 business acquaintance years ago. I dealt with her husband
3 and knew her through her husband.

4 MR. ROGERS: And for the record, the next lady is
5 Deborah Caviness; is that correct?

6 VENIREPERSON BROWN: That is correct.

7 MR. ROGERS: Okay.

8 VENIREPERSON BROWN: As a business person, I know
9 Mr. Norton. I haven't dealt with him, but I do know him. I
10 know Mr. Runge back there.

11 MR. ROGERS: And how do you know him?

12 VENIREPERSON BROWN: He lives in the same
13 neighborhood as I do.

14 MR. ROGERS: Okay.

15 VENIREPERSON BROWN: Back here in the back, I grew
16 up with her and their family, living in the same
17 neighborhood.

18 MR. ROGERS: Is that Mrs. Delk?

19 VENIREPERSON BROWN: Yes.

20 MR. ROGERS: All right.

21 VENIREPERSON BROWN: Who else knows me back here?

22 MR. ROGERS: All right.

23 VENIREPERSON BROWN: This lady over here, I've dealt
24 with her. Mark Krieg, sitting back here, I know him.

25 MR. ROGERS: When you say "this lady," you're

1 meaning Mrs. Fields?

2 THE COURT: I'm sorry? I can't hear whom you're
3 talking about. Pardon me. We can't hear the juror that
4 you're referring to. So we wouldn't know which one he knows.

5 MR. ROGERS: Okay. Mrs. Donna Fields? Is that who
6 you --

7 THE COURT: That was the one we missed. Juror
8 Number 52. Thank you.

9 VENIREPERSON BROWN: And Mr. Craig. I know him.
10 I've known him for many years. Lives in the same
11 neighborhood as I do also.

12 MR. ROGERS: All right. And I will now tell
13 everybody who Mr. Brown has identified, and it was convenient
14 to start with him, because he's in the business of knowing
15 people, you being an insurance agent and all; right? So, if
16 he's already talked about knowing you, you don't have to
17 raise your hand any more about that, unless there's something
18 you want -- think that needs to be clarified. Okay.

19 Anybody else on this front row over here who knows
20 somebody else here in the courtroom?

21 Yes, sir. Mr. Robinson.

22 VENIREPERSON ROBINSON: I know Tony Runge. Played
23 basketball against him in high school. I know Eldora Day. I
24 played ball with her son and that. We live in the same town.

25 MR. ROGERS: Okay. And does that pretty much sum it

1 up?

2 VENIREPERSON ROBINSON: (Nodding head up and down.)

3 MR. ROGERS: Anybody else in the front row?

4 Yes, sir.

5 VENIREPERSON GALES: Courtroom or jury?

6 MR. ROGERS: No. Let me get back to you in a little

7 bit, Mr. Gales. Mr. Clark had his hand up first.

8 VENIREPERSON GALES: I'm sorry.

9 MR. ROGERS: I -- the question was the jury panel.

10 VENIREPERSON GALES: That's what I thought.

11 MR. ROGERS: Okay.

12 VENIREPERSON CLARK: I know Mike Gaines. I think

13 he's Juror 51.

14 MR. ROGERS: Yes, he is. Mr. Gaines. And how do

15 you know each other?

16 VENIREPERSON CLARK: We went to church together.

17 MR. ROGERS: And what church is that?

18 VENIREPERSON CLARK: Baptist church.

19 MR. ROGERS: Okay. Now, Mr. Gales, you don't any of

20 the other prospective jurors?

21 VENIREPERSON GALES: No.

22 MR. ROGERS: But you do know other court personnel?

23 VENIREPERSON GALES: One.

24 MR. ROGERS: Okay. Fair enough.

25 Okay. Now front row on this side.

1 Yes. Miss Pund?

2 VENIREPERSON PUND: I know Chris Kaimann. We went
3 to school together. And Linda in the back.

4 MR. ROGERS: Linda Delk?

5 VENIREPERSON PUND: Just friends.

6 MR. ROGERS: Okay.

7 Yes, ma'am.

8 VENIREPERSON SCHUPMANN: I know Roy Waechter.

9 MR. ROGERS: Okay. And you -- other than the two
10 people, Mr. Waechter, who already mentioned knowing you --

11 VENIREPERSON WAECHTER: I really don't know.
12 They're talking about me, and I don't know them.

13 MR. ROGERS: Because you see people come in and out.
14 All right. Fair enough.

15 Okay. Second row over here. Anybody who has not
16 already been talked about as knowing somebody who knows
17 somebody?

18 Mr. Norton?

19 VENIREPERSON NORTON: I worked with Juror 41.

20 MR. ROGERS: Juror 41 is Mr. --

21 VENIREPERSON NORTON: Skirvin.

22 MR. ROGERS: -- Skirvin? Okay. And you don't work
23 together any more?

24 VENIREPERSON NORTON: No. No, sir.

25 MR. ROGERS: Thank you.

1 And Mr. Declue?

2 VENIREPERSON DECLUE: I know Juror 31. Just

3 friends.

4 MR. ROGERS: And that is the -- Mr. Black? Is that

5 correct?

6 VENIREPERSON DECLUE: Yes, sir.

7 MR. ROGERS: Okay. Thank you.

8 And Miss Caviness?

9 VENIREPERSON CAVINESS: Mark Krieg. Personal

10 friend.

11 MR. ROGERS: And that's Juror 40 behind you.

12 Yes, sir.

13 VENIREPERSON BURKEMPER: I know pretty well all the

14 people that Ron Brown mentioned, just because they're all in

15 the same community.

16 MR. ROGERS: Okay. You're Mr. Burkemper; correct?

17 VENIREPERSON BURKEMPER: (Nodding head up and down.)

18 MR. ROGERS: So the people who live in the same

19 neighborhood or community, you also know.

20 VENIREPERSON BURKEMPER: Right.

21 MR. ROGERS: Okay.

22 Anybody else on the second row over here? Second

23 row on this side?

24 Start here. Mr. Kaimann?

25 VENIREPERSON KAIMANN: Pretty well everybody that

1 Ron Brown mentioned.

2 MR. ROGERS: Okay. And Mr. Burkemper too; right?

3 VENIREPERSON KAIMANN: Yes.

4 MR. ROGERS: Fair enough.

5 Anybody else?

6 Yes, ma'am.

7 VENIREPERSON IEPPERT: Roy Waechter.

8 MR. ROGERS: And for the record, you're Carol
9 Ieppert?

10 VENIREPERSON IEPPERT: Ieppert.

11 MR. ROGERS: And you know Mr. Waechter.

12 VENIREPERSON IEPPERT: Yes.

13 MR. ROGERS: All right.

14 Mr. Gibbs?

15 VENIREPERSON GIBBS: I know John Skirvin and Doran
16 Black. We went to the same school.

17 MR. ROGERS: Miss Thomas?

18 VENIREPERSON LAURA THOMAS: I know William Daniel
19 Thomas. He's my son. And I go to church with Mr. Gaines.

20 MR. ROGERS: So mother and son team here? All
21 right. What church is that?

22 VENIREPERSON LAURA THOMAS: First Baptist Church.

23 MR. ROGERS: Okay. Thank you.

24 Third row here?

25 VENIREPERSON OHMERT: I know Charlie. We work

1 together.

2 MR. ROGERS: Mr. Ohmert?

3 VENIREPERSON OHMERT: Yes. I know Charlie.

4 MR. ROGERS: And when you say "Charlie," you mean

5 Mr. Stief sitting right next to you?

6 VENIREPERSON OHMERT: (Nodding head up and down.)

7 MR. ROGERS: Is that how you say your name, sir?

8 VENIREPERSON STIEF: Stief.

9 MR. ROGERS: Stief. I'm sorry.

10 Anybody else?

11 And Mr. Stief, do you know anybody else other than

12 Mr. --

13 VENIREPERSON STIEF: No.

14 MR. ROGERS: And yes, ma'am. Miss Galloway?

15 VENIREPERSON SUSAN GALLOWAY: I know Dale Galloway.

16 He's my husband.

17 MR. ROGERS: All right.

18 THE COURT: I'm going to have to ask you all to

19 stand up when you speak. It's real hard to hear you. Hard

20 for the court reporter. So if you're answering whom you

21 know, if you'll just stand and give your answers from a

22 standing position.

23 VENIREPERSON SUSAN GALLOWAY: I know Dale Galloway.

24 He's my husband.

25 MR. ROGERS: All right. We have a mother and a son

1 and we have husband and wife on the same panel.

2 Anybody else on that row?

3 Yes, sir.

4 VENIREPERSON WILLIAM THOMAS: I'm the son.

5 MR. ROGERS: You're the son. You're William Thomas.

6 You do know your mother. That's good to know.

7 The third row on this side.

8 Yes, sir. Mr. Moore.

9 VENIREPERSON MOORE: I've known Roy Waechter for

10 dealings with him 30 years ago, and my brother-in-law used to

11 work for him.

12 MR. ROGERS: Okay.

13 Now, back on the -- my left, your right, on the

14 fourth row. Anybody who hasn't already been talked about?

15 No hands. On my right side, anybody?

16 Yes, ma'am.

17 VENIREPERSON BENNETT: I know Roy Waechter.

18 MR. ROGERS: And you are Joan Bennett; correct?

19 VENIREPERSON BENNETT: Uh-huh.

20 MR. ROGERS: And how do you know Mr. Waechter?

21 VENIREPERSON BENNETT: Through his business.

22 MR. ROGERS: Okay. Once again, you're one of the

23 people -- you know him, but he doesn't know you.

24 VENIREPERSON BENNETT: Right.

25 MR. ROGERS: Fair enough.

1 And the back row. Anybody who hasn't already been
2 talked about? And I see no hands.

3 Now, here's the question. And it might be a little
4 bit different for those of you who know each other from going
5 to school together or working together and just being in the
6 same neighborhood, and people who go to the same church might
7 have a somewhat different twist on this question, and
8 certainly husband and wife or mother and son might have a
9 different twist on the same question, but the question is:
10 If you're on the jury with the person or people that you
11 know, is there anything about your relationship with those
12 people that may make you want to give more weight to their
13 views and opinions or less weight to their views and opinions
14 than you would to the views and opinions of a juror who's a
15 stranger to you?

16 First of all, I want to see a show of hands of
17 people who understand the question.

18 (Show of hands.)

19 MR. ROGERS: Okay.

20 That's a question Mr. Philipak doesn't understand.

21 VENIREPERSON PHILIPAK: Yeah. Just say it again. I
22 don't --

23 MR. ROGERS: Okay. That's why I asked, because it
24 gets convoluted.

25 If you were on the jury with somebody who you knew,

1 is there anything about that relationship which would make
2 you give more weight to their opinions, when you're talking
3 about having to decide a case, or less weight to their --

4 VENIREPERSON PHILIPAK: No.

5 MR. ROGERS: -- opinions than you would a stranger?

6 VENIREPERSON PHILIPAK: Would make no difference.

7 MR. ROGERS: Okay. Good enough. That's --

8 VENIREPERSON PHILIPAK: That's the answer you want;
9 right?

10 MR. ROGERS: That's -- well, I want a true answer,
11 and that sounds like it is. Okay. How's that?

12 Now, everybody else I assume understands the
13 question; right? Anybody not clear on that? Okay.

14 Is there anybody here who might think, Well, hey, if
15 I'm on the jury with my wife, I'm going to have to listen to
16 what she has to say or else I'm going to have to live with
17 this woman when I get home. And I'm looking at Mr. Galloway,
18 and he's shaking his head no. Is that a fair statement?
19 Okay.

20 Now, Mrs. Galloway, let me ask the converse to you.
21 Are you thinking that if you're on the jury with your
22 husband, that you might have to give a little more attention
23 to his opinions than you would somebody who's a stranger to
24 you, because of the fact that you're married and have been
25 married for a while?

1 VENIREPERSON SUSAN GALLOWAY: No, sir.

2 MR. ROGERS: You have to stand up. I'm sorry.

3 VENIREPERSON SUSAN GALLOWAY: I don't feel that way.

4 However, I would like to say that I don't feel like we can

5 both be on the jury because we have foster kids at home, and

6 the state has not approved anybody to watch them for us if we

7 were gone. And they have to stay in our town so they can go

8 to school.

9 MR. ROGERS: So what you're saying is one of you can

10 serve, but not both.

11 VENIREPERSON SUSAN GALLOWAY: Right.

12 MR. ROGERS: Okay. Thank you. I appreciate that.

13 And that's a question that had not occurred to me until you

14 stood up and said it. Thank you.

15 VENIREPERSON SUSAN GALLOWAY: We can both do it, but

16 the children need looking after.

17 MR. ROGERS: Okay. Fair enough. So we won't have

18 to worry about getting each other angry.

19 VENIREPERSON SUSAN GALLOWAY: Right.

20 MR. ROGERS: Okay.

21 Mr. Thomas, let me ask you the same question. If

22 you're on the jury with your mother, do you think you'd have

23 to give her opinion more weight than you would that of a

24 stranger? Or do you think you would give it more weight?

25 VENIREPERSON WILLIAM THOMAS: Yeah, I probably

1 would. I mean --

2 MR. ROGERS: And -- I mean, we've all been brought
3 up to listen to our mothers; right?

4 VENIREPERSON WILLIAM THOMAS: Right.

5 MR. ROGERS: And do you think that you would have
6 trouble arguing a position contrary to hers if you had a
7 different position and you were both on the jury?

8 VENIREPERSON WILLIAM THOMAS: No, I wouldn't have
9 trouble arguing. I would -- you always have that mother
10 voice stuff.

11 THE COURT: Could you stand up, Mr. Thomas?

12 MR. ROGERS: I'm sorry.

13 VENIREPERSON WILLIAM THOMAS: I wouldn't have
14 trouble arguing the point. I guess the voice would be in my
15 mind, as it's been all my life.

16 MR. ROGERS: But it would be, whether she was on the
17 jury or not.

18 VENIREPERSON WILLIAM THOMAS: Yeah, it would be
19 there.

20 MR. ROGERS: All right. Thank you.

21 How about you, Mrs. Thomas?

22 VENIREPERSON LAURA THOMAS: He's never shared an
23 opinion with me so far, so. When we do argue, and we --
24 about 50/50 with the wins. So I don't think it would --

25 MR. ROGERS: So you have some give and take going on

1 in the nonjury situation; is that what you're telling us?

2 VENIREPERSON LAURA THOMAS: Yes.

3 MR. ROGERS: Okay. But, of course, you're the one
4 that's always right, because you're his mom; right?

5 VENIREPERSON LAURA THOMAS: Yes.

6 MR. ROGERS: Is there anybody here who has such a
7 relationship with somebody else on the jury panel that it
8 might make it difficult for you to, in the give and take of
9 jury deliberations, treat their opinion the same way you
10 would treat the opinion of a juror who's a stranger? I see
11 no hands. I take it the answer is no.

12 Does anybody here belong to any group or
13 organization which has as its goal or reason for existing or
14 one of the things it does: Fighting crime? In other words,
15 a neighborhood watch group, a sheriff's auxiliary group,
16 anything like that? I don't see any hands.

17 Does anybody here belong to a group or organization
18 which is designed to help out people who are in trouble with
19 the law? Like a prison ministry kind of group or a -- I'll
20 just use that as an example. I'm having trouble thinking of
21 another one. Anybody belong to any organization like that?
22 Okay. I see no hands once again.

23 Has anybody on the jury panel had a college level
24 course or higher in psychology?

25 (Show of hands.)

1 MR. ROGERS: Okay. I see some hands.

2 Let me start in the front row with Miss Pund. You

3 -- if you're in the front row, you don't have to stand up. I

4 think that's the rule.

5 First of all, how long ago was that?

6 VENIREPERSON PUND: Five years ago.

7 MR. ROGERS: And where was it?

8 VENIREPERSON PUND: Webster University.

9 MR. ROGERS: And what was the name of the course?

10 VENIREPERSON PUND: Psychology 101 and child

11 psychology.

12 MR. ROGERS: Okay. During the class, did you study

13 how memories are formed and stored and retrieved?

14 VENIREPERSON PUND: I'm sure I did, but -- a little,

15 but I can't remember.

16 MR. ROGERS: Let me ask you this.

17 VENIREPERSON PUND: I got an A in the class.

18 MR. ROGERS: I'm sure you earned it. You didn't

19 make a conscious decision to forget everything you learned,

20 did you?

21 VENIREPERSON PUND: No.

22 MR. ROGERS: Okay. Fair enough. I know it was a

23 smart-aleck comment, but we still had to have an answer for

24 the record. And do you recall the name of Dr. Elizabeth

25 Loftus coming up during your studies?

1 VENIREPERSON PUND: No.

2 MR. ROGERS: Okay. All right.

3 Second row, anybody who had a college level?

4 Mr. Norton.

5 VENIREPERSON NORTON: Yeah. Psych 101. Basically

6 it was a general psych in college. The only thing I remember

7 about that was testing, and your mind during tests and

8 whatnot. I mean, it was a long time ago. I'm 40 years old.

9 I was 21, something like that. The only thing I remember was

10 results on how your mind would be for study. If you study

11 this way, you should test this way. Things of that nature.

12 But that wasn't my major or anything like that.

13 MR. ROGERS: So basically you took what you could

14 for practical use in other areas of academic endeavor.

15 VENIREPERSON NORTON: If you study drinking, take

16 your test drinking.

17 MR. ROGERS: I'm not going there.

18 VENIREPERSON NORTON: I just remembered that. I'm

19 sorry.

20 MR. ROGERS: And I'm not going to ask if that

21 applied during your student days either. But having said

22 that, is that the extent of what you remember? Correct?

23 VENIREPERSON NORTON: I don't remember much. No,

24 I'm kidding.

25 MR. ROGERS: Anybody else on the second row who's

1 had a college level or higher course of psychology? Okay.

2 This second row.

3 Yes, ma'am.

4 VENIREPERSON CARTER: Juror 20.

5 MR. ROGERS: There you are. Miss Carter; correct?

6 VENIREPERSON CARTER: Uh-huh.

7 MR. ROGERS: How long ago was that?

8 VENIREPERSON CARTER: It's been within the last five
9 years.

10 MR. ROGERS: And where was that?

11 VENIREPERSON CARTER: St. Charles Community College.

12 MR. ROGERS: And what was the course?

13 VENIREPERSON CARTER: It was introduction.

14 MR. ROGERS: Okay. Did you also have anything
15 dealing with memories and how they're encoded, stored,
16 retrieved?

17 VENIREPERSON CARTER: I don't remember either.

18 MR. ROGERS: Okay. Fair enough. Thank you.

19 Mr. Gibbs.

20 VENIREPERSON GIBBS: Well, the high school classes I
21 mentioned before were college credited. So I don't know if
22 that counts or not. And we did discuss the topics of memory
23 and stuff. I don't recall most of it, though.

24 MR. ROGERS: Do you recall the name of Dr. Loftus?

25 VENIREPERSON GIBBS: No.

1 MR. ROGERS: Okay. Thank you.

2 All right. Anybody else in the second row on either
3 side? Third row?

4 Yes, sir.

5 VENIREPERSON SEABAUGH: I took psychology 101, child
6 psychology, and probably abnormal psychology. That's about
7 all I remember.

8 MR. ROGERS: And you are Mr. Seabaugh?

9 VENIREPERSON SEABAUGH: Yes.

10 MR. ROGERS: Is that how you pronounce it?

11 VENIREPERSON SEABAUGH: Seabaugh.

12 MR. ROGERS: Seabaugh.

13 VENIREPERSON SEABAUGH: Yes.

14 MR. ROGERS: Thank you. And where was this? I'm
15 sorry. I'm not done. Thank you for telling me how to say
16 your name.

17 VENIREPERSON SEABAUGH: Montgomery, Alabama, at
18 Southern Christian University.

19 MR. ROGERS: All right. And did you study memory
20 and some of those things?

21 VENIREPERSON SEABAUGH: Probably, but I don't
22 remember a lot of it, so.

23 MR. ROGERS: Okay. Fair enough. Thank you.

24 Anybody else on the second row?

25 Yes, ma'am. Mrs. Galloway.

1 VENIREPERSON SUSAN GALLOWAY: I am in the process of
2 getting my Master's, so -- in counseling, so I have taken --

3 THE COURT: Miss Galloway, would you raise your
4 voice just a little bit. I know you're getting a Master's
5 degree. I heard that much.

6 VENIREPERSON SUSAN GALLOWAY: In counseling, at the
7 moment, so I have taken several classes.

8 MR. ROGERS: All right. And where are you getting
9 your Master's degree?

10 VENIREPERSON SUSAN GALLOWAY: Missouri Baptist
11 University.

12 MR. ROGERS: Where's that?

13 VENIREPERSON SUSAN GALLOWAY: I go to the extension
14 in Moscow Mills.

15 MR. ROGERS: Okay. I didn't know they had one.
16 Where's -- where's the main campus?

17 VENIREPERSON SUSAN GALLOWAY: Down off of Ballas.

18 MR. ROGERS: Okay. Thank you. In terms of the
19 memory, for the classes that you had that touched on memory,
20 how extensive has that been?

21 VENIREPERSON SUSAN GALLOWAY: Not very.

22 MR. ROGERS: And once again, have you -- do you
23 recall the name of Dr. Loftus coming up in any of these
24 classes?

25 VENIREPERSON SUSAN GALLOWAY: No.

1 MR. ROGERS: Thank you.

2 Anybody else on the third row over here? Third row

3 over here. No? Fourth row. My left. Your right.

4 Yes, ma'am.

5 VENIREPERSON KELLY: Took child -- or college

6 psychology.

7 MR. ROGERS: And you're Miss Kelly?

8 VENIREPERSON KELLY: Yes.

9 MR. ROGERS: And where was that?

10 VENIREPERSON KELLY: It was in Washington State.

11 MR. ROGERS: And do you recall -- at what

12 university?

13 VENIREPERSON KELLY: It was at a community college.

14 Green River Community College.

15 MR. ROGERS: Okay. Do you recall studying memory

16 and how it's --

17 VENIREPERSON KELLY: (Shaking head from side to

18 side.)

19 MR. ROGERS: -- encoded or retrieved or --

20 VENIREPERSON KELLY: No, sir.

21 MR. ROGERS: And do you recall the name Dr. Loftus?

22 VENIREPERSON KELLY: No, sir.

23 MR. ROGERS: Thank you.

24 All right. Right-hand side, fourth row.

25 Yes, sir. Mr. Runge?

1 VENIREPERSON RUNGE: Runge, yes, sir.

2 MR. ROGERS: Runge. I'm sorry.

3 VENIREPERSON RUNGE: I had two courses at Moberly
4 Area Junior College. That was back in '74 and '75.

5 MR. ROGERS: Okay.

6 VENIREPERSON RUNGE: So I don't remember much about
7 it.

8 MR. ROGERS: Does that -- do they have a campus
9 here?

10 VENIREPERSON RUNGE: No. That was in Moberly,
11 Missouri.

12 MR. ROGERS: In Moberly?

13 VENIREPERSON RUNGE: Yes.

14 MR. ROGERS: Okay. And once again, you don't recall
15 any of the details about what they may have taught about
16 then.

17 VENIREPERSON RUNGE: No.

18 MR. ROGERS: Thank you.

19 Anybody else on the fourth row over here? And the
20 back row on my left, your right.

21 Yes, sir. Mr. Gaines.

22 VENIREPERSON GAINES: I had several psychology,
23 social psychology, statistics, child behavior, 20 years ago,
24 Mid-America Nazarene College. I remembered enough to pass a
25 test and get a grade.

1 MR. ROGERS: That's over in my part of the country,
2 right, over in Olathe, Kansas?

3 VENIREPERSON GAINES: Right.

4 MR. ROGERS: And do you recall anything about the
5 subject of memory, as it was taught back then?

6 VENIREPERSON GAINES: Just enough to remember what
7 was going to be on the test.

8 MR. ROGERS: And once you took the test, you didn't
9 care to remember it any further?

10 VENIREPERSON GAINES: (Nodding head up and down.)

11 MR. ROGERS: All right. Thank you.

12 Okay. Is that everybody?

13 While we're sort of talking about memory, is there
14 anybody here who's ever been someplace and seen somebody you
15 thought you knew, and it turned out it wasn't that person?
16 In other words, mistaken a stranger for someone you knew?

17 I see a hand. Mr. Ohmert?

18 VENIREPERSON OHMERT: Yes.

19 MR. ROGERS: Tell me a little bit about that.

20 VENIREPERSON OHMERT: I guess I was -- about five or
21 six years ago I thought I was in a place, and I never had
22 been there before, and I thought I knew somebody. Turned out
23 that I just didn't know them.

24 MR. ROGERS: Just somebody who looked like somebody
25 you knew?

1 VENIREPERSON OHMERT: Yeah.

2 MR. ROGERS: Okay.

3 And I saw some other hands. I'm not going to detail
4 them, but let me ask the reverse of that question then. Has
5 anybody ever been someplace, and some stranger came up to you
6 and said, "Aren't you so and so?" And you're not so and so.

7 I see a nod of the head here from Mr. Gales.

8 VENIREPERSON GALES: Yes.

9 MR. ROGERS: And tell me about that.

10 VENIREPERSON GALES: You want to know the
11 particulars.

12 MR. ROGERS: Yeah, or just -- a particular incident.

13 VENIREPERSON GALES: They just asked me if I was
14 so-and-so, and I said no. And they said, "You look like
15 so-and-so." I said I wasn't.

16 MR. ROGERS: Fair enough.

17 Does anybody here have any quarrel with the
18 proposition that a witness who thinks they are being honest
19 and maybe being honest may be mistaken about identifying
20 somebody who they say as somebody who they saw some other
21 time? Anybody have any proposition -- any quarrel with the
22 notion that even though somebody may be telling the truth as
23 they perceive it, they could be wrong about whether or not
24 that's the person they saw? Does everybody agree that it is
25 something that is part of our common experience, that people

1 see people that they think are somebody else and they are
2 proven not?

3 (Show of hands.)

4 MR. ROGERS: Okay.

5 VENIREPERSON GAINES: I don't know that I completely
6 agree with that statement.

7 MR. ROGERS: Okay. And once again, you are
8 Mr. Gaines?

9 VENIREPERSON GAINES: Yes.

10 MR. ROGERS: You don't agree with the statement that
11 that's part of our common experience?

12 VENIREPERSON GAINES: I think that it can be part of
13 our common experience, but you haven't given us enough
14 information. If I know somebody very well, I'm not going to
15 mistake somebody else for them. But if I casually know
16 somebody, I may.

17 MR. ROGERS: Okay. Or how about strangers and
18 strangers?

19 VENIREPERSON GAINES: I don't know them, so it's
20 very easy to make that mistake.

21 MR. ROGERS: Okay. So you are basically agreeing
22 that mistaken identity happens, but as the familiarity with
23 the person is greater, the person that you know is greater,
24 the possibility of mistaking somebody for them might become
25 less.

1 VENIREPERSON GAINES: Yes.

2 MR. ROGERS: Okay. Thank you. That's based on your
3 common experience more than your studies at Mid-America
4 Nazarene University; correct?

5 VENIREPERSON GAINES: Yes.

6 MR. ROGERS: All right.

7 Mr. Waechter, you were telling us about a situation,
8 telling Mr. Crane about a situation where you had experienced
9 something unpleasant and had decided to put it out of your
10 mind, and then didn't remember it for a while?

11 VENIREPERSON WAECHTER: Yeah. I work construction.
12 We had a truck. And I picked it up at our location. Went
13 out to get the gas cap. It was off. On the truck. First
14 thing I thought: Somebody stole the gas.

15 MR. ROGERS: Uh-huh.

16 VENIREPERSON WAECHTER: A month later -- I had put
17 it out of mind. Somebody got the gas. A month later, the
18 truck did get stolen. Then I went back to the month before,
19 when I went out and the gas cap was gone. And I know, if the
20 truck was out of gas -- I always charge gas up about two
21 miles from where this truck was parked. I couldn't remember
22 stopping and putting gas in it. But if the truck was empty,
23 and somebody stole the gas, how did I get another 30 miles
24 closer to home without any gas? Trick was: Nobody stole the
25 gas. Somebody took the gas cap off and put gas in it, so

1 they presumably could get away with the truck.

2 But I took for granted that somebody stole the gas,
3 so put it out of my mind for at least three weeks. Two
4 weeks. When the truck got stolen, it reentered my mind,
5 "Hey, they didn't steel that gas. Somebody had to put gas in
6 it." Because I checked the records. I never put gas in the
7 truck.

8 MR. ROGERS: So --

9 VENIREPERSON WAECHTER: I do hope I'm not out of
10 line, if you follow what I'm saying.

11 MR. ROGERS: I think --

12 VENIREPERSON WAECHTER: The gas cap's gone.
13 Somebody took the gas. But two weeks later the truck
14 disappears. You stop and think, Well, if they stole the gas,
15 how did I drive 30 miles?

16 MR. ROGERS: And one assumes, when you got in the
17 truck to drive it back to your place of business, that you
18 looked at the gas gauge, it had gas in it.

19 VENIREPERSON WAECHTER: And it left my mind. I
20 never thought about it.

21 MR. ROGERS: And the fact that the gas cap had been
22 missing left your mind.

23 VENIREPERSON WAECHTER: Right.

24 MR. ROGERS: Okay. But it's not a matter of
25 later -- it's not a matter of you consciously deciding to

1 forget that the gas cap had been missing; correct?

2 VENIREPERSON WAECHTER: I think I forgot the
3 incident when it happened, because it really was a minor
4 incident. Some kid or somebody stole the gas.

5 MR. ROGERS: Not a matter of you deciding: "Well,
6 the gas cap's gone. I'm going to -- that's too horrible for
7 me to contemplate. I'm not going to think about it."

8 VENIREPERSON WAECHTER: Uh-huh.

9 MR. ROGERS: Right? Okay. And did you, I assume,
10 replace the gas cap at some time?

11 VENIREPERSON WAECHTER: I found the gas cap. It was
12 maybe 50 feet away from the truck.

13 MR. ROGERS: Okay.

14 VENIREPERSON WAECHTER: Somebody took the gas cap
15 and...

16 MR. ROGERS: All right. I see.

17 VENIREPERSON WAECHTER: Or they got spooked when
18 they was putting gas in it and they...

19 MR. ROGERS: Okay. Thank you. I was wondering what
20 that was about.

21 VENIREPERSON WAECHTER: That was it.

22 MR. ROGERS: Wasn't making a whole lot of sense to
23 me, but now that you've explained it.

24 Has anybody here ever been evaluated or treated by a
25 psychologist or a psychiatrist or some other person who is

1 like a mental health professional, a counselor, or something
2 like that? I'm not talking about going to a marriage
3 counselor. Something more than that.

4 You can put your hand down. You've been to a
5 counselor?

6 VENIREPERSON McCULLOUGH: Yes.

7 MR. ROGERS: Number 33?

8 VENIREPERSON McCULLOUGH: Yes.

9 MR. ROGERS: And you're Miss McCullough; is that
10 correct?

11 VENIREPERSON McCULLOUGH: Yeah. Mary McCullough.

12 THE COURT: Could you stand?

13 VENIREPERSON McCULLOUGH: Yes.

14 I don't really remember it. I was kind of young. I
15 was like 16. And I OD'd on Aleve. And I spent like --

16 MR. CRANE: You know, I'm sorry. I didn't --

17 THE COURT: You're going to have to --

18 MR. CRANE: You OD'd on what?

19 VENIREPERSON McCULLOUGH: Aleve.

20 MR. CRANE: Okay.

21 VENIREPERSON McCULLOUGH: And I spent a weekend in
22 the psych ward downtown St. -- no, at St. John's.
23 St. John's. And I was released. That was it.

24 MR. ROGERS: So you were basically treated for the,
25 I guess overdose is the way to put it, but the toxicant, too

1 much toxin, too much ibuprofen? Is that what the reason was?
2 VENIREPERSON McCULLOUGH: More or less.
3 MR. ROGERS: Okay. Thank you.
4 Anybody else?
5 Mr. Philipak?
6 VENIREPERSON PHILIPAK: Yeah. I just seen one one
7 time. That was it.
8 MR. ROGERS: And --
9 VENIREPERSON PHILIPAK: A psychiatrist.
10 MR. ROGERS: How old were you at the time?
11 VENIREPERSON PHILIPAK: About 38, 39, I guess.
12 MR. ROGERS: Okay. Thank you.
13 Anybody else?
14 Ma'am. I'll get your name in a minute. Janet
15 Brininger?
16 VENIREPERSON BRININGER: Yes.
17 MR. ROGERS: Yes.
18 VENIREPERSON BRININGER: I seen one for depression.
19 MR. CRANE: I'm sorry?
20 MR. ROGERS: She saw a mental health professional
21 for depression?
22 VENIREPERSON BRININGER: Yeah.
23 MR. CRANE: Thank you.
24 MR. ROGERS: And how long ago was that, ma'am?
25 VENIREPERSON BRININGER: About ten years.

1 MR. ROGERS: Okay. Thank you.

2 Anyone else?

3 Miss Delk?

4 VENIREPERSON DELK: Same here. I saw a counselor.

5 THE COURT: I'm sorry. You're going to have to
6 speak up. It's hard to hear you, ma'am.

7 VENIREPERSON DELK: I saw a psychologist and a
8 psychiatrist for depression after going through a divorce.

9 MR. ROGERS: And how long ago --

10 VENIREPERSON DELK: About ten years ago. Thirteen
11 years ago.

12 MR. ROGERS: Okay. Thank you.

13 Anybody else?

14 Yes, sir.

15 VENIREPERSON BLACK: I went to a counselor for
16 depression. Four -- four years ago.

17 MR. ROGERS: Thank you, sir.

18 Mr. Crane talked at some length about Charles
19 Erickson and his plea bargain and plea agreement. Is there
20 anybody here, other than Mr. Straughter, who's already made
21 it perfectly clear how he feels about this situation, is
22 there anybody here who would automatically believe a witness
23 who came in and said, "I did this crime, I've pled guilty to
24 it, I'm going to be sent to prison for it, and that's the guy
25 that did it with me"? Is there anybody, other than

1 Mr. Straughter, anybody who says, "Okay, this guy is going to
2 prison, and he says he did it; I'm going to believe who he
3 says he did it with"? I don't see any other hands. Okay.

4 Does that accurately describe your beliefs,
5 Mr. Straughter?

6 VENIREPERSON STRAUGHTER: You're pretty much on it.

7 MR. ROGERS: Okay. Thank you.

8 Yes. Mr. Norton.

9 VENIREPERSON NORTON: I just want to say that, I
10 don't know -- that doesn't help. I'm saying I could keep an
11 open mind. By using that little bit -- and I don't think
12 there's probably anyone sitting here that that did not
13 prejudice this man, when they used that in the preliminary of
14 talking about that. I think we're all saying, "Okay, we can
15 understand what you're saying as far as presuming innocence,"
16 but by stating that, from the git-go, that there's a
17 gentleman that testified to this, he's taking a plea, he --
18 you know, we've all heard he's copped a plea to save his own
19 skin. That does not -- I mean, it does not lend well.
20 That's all I am saying. And can we assume? Yes, we can --
21 not assume. Can we presume innocence? Yes. But in the
22 backs of several folks' minds, you feel that -- and that's
23 not a -- I don't even know if that should have been fair as
24 far as the opening statements, to be able to use that part.
25 It doesn't seem -- that's a prejudice with me against this

1 gentleman.

2 MR. ROGERS: And I appreciate that. I will tell you
3 that, quite frankly, I would rather find that out from
4 Mr. Straughter, for example, now, than find it out in what
5 are really the opening statements or during when the first
6 witness is called, down the line, when it's too late to do
7 anything about it. I agree. Certainly not a helpful fact to
8 the defense. But my -- my question really is: Is that --
9 the fact that you now have been given reason to believe that
10 that will be the testimony coming in from Charles Erickson,
11 does that mean we're wasting our time having the rest of the
12 trial? And you don't feel that way, I take it.

13 VENIREPERSON NORTON: No.

14 MR. ROGERS: Okay. Thank you, Mr. Norton. I do
15 appreciate your comments. And the situation had not escaped
16 me.

17 Let's talk about that a little bit.

18 First of all, is there anybody who hasn't already
19 said so who could never believe somebody who is testifying
20 for the prosecution in return for a plea agreement? Somebody
21 who says, "I did this crime, and here's what I'm getting, and
22 this person did it with me, and so you should find him
23 guilty." Anybody who would never believe such a witness?
24 Okay.

25 Now, while I've got you here, Mr. Norton, let me ask

1 you what kinds of evidence would you want to hear to be able
2 to decide whether or not to believe a witness who says, "I
3 did the crime, and Ryan Ferguson did it with me"?

4 MR. CRANE: Judge, I'm going to object to the form
5 of that question.

6 THE COURT: The objection is sustained to the form.
7 You may rephrase your question, Counsel.

8 MR. ROGERS: Let me ask it a different way then.

9 What would you look at in deciding the credibility
10 or the believability or the weight to be given to such
11 testimony?

12 MR. CRANE: Judge, I'm going to make the same
13 objection. The juror is being asked to speculate on facts
14 that he doesn't know about, at this stage of the trial.
15 Object to the form of the question.

16 MR. ROGERS: I thought it was responsive to the
17 speculation about facts that was introduced during the
18 state's voir dire, Your Honor.

19 THE COURT: You may ask how he judges credibility of
20 a witness.

21 MR. ROGERS: Okay.

22 THE COURT: Without getting into specifics that
23 maybe has not gone into -- or asking him for matters that
24 haven't been gone into.

25 MR. ROGERS: Let me do it that way.

1 In judging the testimony of any witness, I'll still
2 pick on you, Mr. Norton, because you've obviously given this
3 some thought, would you want to know the witness's ability to
4 observe things?

5 VENIREPERSON NORTON: Since we've all been given
6 some, I don't -- I would -- I don't want to say facts,
7 specific facts, but we've been given part of a puzzle here.
8 We've been told that there's part of the puzzle that is not
9 here. This is what we're going to have to use to make a
10 decision. If there is no hard evidence, as far as what we --
11 you discussed: Hair, nail, whatever, blood, blah, blah,
12 blah, that DNA, and that we are going specifically on another
13 human's testimony to decide the fate of another human, then
14 the scrutiny of that testimony of that witness, their
15 personality, their personality profile, their credibility as
16 far as other folks, folks that know them, is of paramount.
17 So, yes. It's humongous. I mean, to take that step, without
18 the other parts of the play, to take someone else's testimony
19 that possibly, someone mentioned earlier, to save their own
20 butt or whatever, their credibility as a person would be of
21 paramount.

22 MR. ROGERS: Okay. Thank you. I appreciate that.

23 Let me ask you, in that regard -- let me actually --
24 yeah, let me ask you while I got you here, Mr. Norton, in
25 terms of physical evidence, would you be interested in seeing

1 whether or not that person's testimony goes along with the
2 physical evidence that there is, or detracts from the
3 physical evidence? In other words, is it consistent or
4 inconsistent with physical evidence? Would that be important
5 to you?

6 VENIREPERSON NORTON: Yes.

7 MR. ROGERS: And if there were physical evidence
8 that was recovered, that did not match Charles Erickson or
9 Ryan Ferguson, would that be important to you?

10 VENIREPERSON NORTON: Yes, it would.

11 MR. ROGERS: Thank you.

12 And now that gets me to Mr. Headrick, because you're
13 the one who talked twice about physical evidence. And once
14 you said, "You need physical evidence," and then you seemed
15 to say, "But it really depends on what the other evidence
16 is." Is that a fair statement?

17 VENIREPERSON HEADRICK: Yes, sir.

18 MR. ROGERS: And let me ask you that. Would you be
19 able to use whatever physical evidence was presented in
20 assessing the believability and the weight and value to be
21 given to the testimonial evidence?

22 MR. CRANE: Judge, I'm going to object. I think
23 that seeks a commitment from the prospective juror. So I'll
24 make -- that's my objection. "Would he" --

25 MR. ROGERS: "Be able." The "be able" is what makes

1 it not a commitment. To use physical evidence in assessing
2 the believability of the testimonial evidence.

3 THE COURT: I'm going to overrule the objection.

4 You may answer the question, if you understand it,
5 sir.

6 VENIREPERSON HEADRICK: One more time.

7 MR. ROGERS: Would you be able to use whatever
8 physical evidence is presented in assessing the believability
9 or the weight or value of the testimonial evidence? You know
10 what testimonial evidence is? Things people say --

11 VENIREPERSON HEADRICK: Along with it or solely?

12 MR. ROGERS: No, not solely. Along with it.

13 VENIREPERSON HEADRICK: Yes.

14 MR. ROGERS: Okay. Thank you. And that's a very
15 good question.

16 Yes, sir. Mr. Harris?

17 VENIREPERSON HARRIS: I understand your questions
18 you're asking. By us being able to -- we were given a
19 statement by the prosecutor about having a witness who turned
20 state's witness -- or state's evidence, whatever. And that
21 in itself we could seem to believe. This man, he's pleaded
22 guilty. If he was there with the defendant, whatever. It
23 seems like that would be a cut-and-dried thing. But right
24 after that the prosecutor mentioned something about alcohol.
25 And whether or not this witness was drunk or what, I don't

1 know. But that's kind of confusing me on this.

2 MR. ROGERS: And I can't really talk about that.

3 VENIREPERSON HARRIS: I know you can't, and we can't
4 -- we haven't been given those facts. But for you to ask us,
5 "Can we believe this witness" --

6 MR. ROGERS: And I'm not asking you that. What I'm
7 asking you is: Can you weigh and judge --

8 VENIREPERSON HARRIS: Oh, sure.

9 MR. ROGERS: -- the testimony of this witness,
10 without automatically believing him or automatically
11 disbelieving him, but looking at it as evidence that has to
12 be looked at as part of the big picture. And there are
13 things that might tend to support --

14 VENIREPERSON HARRIS: Right. That's what I was
15 getting at. We didn't have any -- any -- anything at all.
16 We knew that he turned state's evidence, or whatever you want
17 to call it.

18 MR. ROGERS: That's what I'm trying to get to. I
19 think you and I seem to be on the same page, Mr. Harris.

20 Okay. Is there anybody here who could not consider
21 and weigh the testimony of a -- what do I want to call it? --
22 a codefendant, guilty pleading, cooperating with the
23 government, testifying witness, consider and evaluate their
24 testimony in light of all of the evidence in the case,
25 physical evidence, the testimonial evidence from other

1 witnesses, and in terms of your own life experiences and
2 common sense? Anybody who would automatically either accept
3 or reject the testimony of somebody who is -- has pleaded
4 guilty and is admitting their own involvement as conclusive
5 or anybody who would automatically reject such testimony?
6 Other than Mr. Straughter, who's already told us.

7 Mr. Straughter?

8 VENIREPERSON STRAUGHTER: The reason I was
9 prejudiced was because of the amount of years. If it had
10 been like two years, I could have maybe had a chance for him.
11 But he said 25 years. That's a life sentence.

12 MR. ROGERS: Well, let me, since you're there, talk
13 to you about -- don't you think it's compared to what? What
14 was he looking at if he didn't enter into the plea agreement?

15 VENIREPERSON STRAUGHTER: If he had two years or
16 maybe four or five years or something of that nature.

17 MR. ROGERS: I mean, if you're looking at a maximum
18 of five years, and you plead guilty for two years, that's an
19 incentive; right?

20 VENIREPERSON STRAUGHTER: Yeah.

21 MR. ROGERS: But if you're looking at a maximum of
22 life imprisonment, and you plead guilty for 25 years, that
23 might be an incentive too, don't you think?

24 VENIREPERSON STRAUGHTER: No.

25 MR. ROGERS: Okay.

1 VENIREPERSON STRAUGHTER: No.

2 MR. ROGERS: Fair enough.

3 VENIREPERSON HEADRICK: That, I think, what he's
4 talking about, is --

5 MR. ROGERS: Okay. Mr. Headrick.

6 VENIREPERSON HEADRICK: Yes, sir. That, I think, is
7 having a lot of bearing on people's opinions, just about the
8 questions that you're asking, because, you know, he's saying
9 that since -- and nobody's even said whether the witness
10 you're talking about is an accomplice or whether he's just
11 a -- you know, he was the guy that did it, and he's the
12 accomplice. You know, because it's -- it's causing -- it's
13 causing some interference there. And you can't give, you
14 know, you can't give details, so --

15 MR. ROGERS: Right.

16 VENIREPERSON HEADRICK: -- when he says that there's
17 a witness that is going to have a testimony against him,
18 well, if he was there and he saw it, or if he was an
19 accomplice and he's just trying to get in less trouble, or
20 maybe he's the one that did it and to get into less trouble
21 he's going to try to put the blame on somebody else. There's
22 too many -- you know. And he's already developed an opinion
23 because of that. So, I mean, you can't -- those questions
24 are too indirect, you know.

25 MR. ROGERS: Well, I go second, so I don't get -- or

1 third, actually, if you count the Judge. But I understand
2 what you're saying. And I don't know that there's anything I
3 can really do about it, except, like I say, make sure that
4 nobody here is just automatically saying, "Okay, the case is
5 over as far as I'm concerned," one way or the other. You're
6 not doing that, are you?

7 VENIREPERSON HEADRICK: No, I'm not.

8 MR. ROGERS: Okay. I appreciate it.

9 Let me follow up a little bit on what I was talking
10 about with Mr. Straughter, in terms of punishment. And the
11 reason I'm doing this is because Mr. Ferguson is charged with
12 more than one offense in this case. Just one dead guy, but
13 he's charged with first degree murder. And if the jury finds
14 him guilty of first degree murder, the jury will have to
15 assess the punishment, but they only have one choice. And
16 that choice is life in prison, with no possibility of parole.

17 But Mr. Crane also mentioned a second degree felony
18 murder. And if the jury were to find Mr. Ferguson guilty of
19 second degree felony murder, they would have to assess the
20 punishment there. And the range of punishment for second
21 degree felony murder is not less than 10 years and not more
22 than life in prison.

23 So, now my question is: Is there anybody here who,
24 if --

25 MR. CRANE: Can I just interrupt? Did you say 10 to

1 life?

2 MR. ROGERS: Yeah.

3 MR. CRANE: It's actually 10 to 30.

4 MR. ROGERS: That's true.

5 MR. CRANE: Or life.

6 MR. ROGERS: Exactly.

7 Let me clarify that. Not less than 10 years and not
8 more than 30 years, or life in prison. Okay?

9 And there's also a charge of robbery in the first
10 degree, which has a range of punishment like second degree
11 murder of not less than 10 years, nor more than 30 years, or
12 life in prison.

13 Now, the question is a hypothetical question,
14 because it's a question that hopefully will never really
15 happen. But if, hypothetically, you were on the jury and you
16 found Mr. Ferguson guilty of one or both of those offenses,
17 is there anybody here who could not consider the full range
18 of punishment?

19 Mr. Philipak?

20 VENIREPERSON PHILIPAK: I just don't -- I just can't
21 see giving him life -- I just -- that's hard for me to judge.
22 I don't -- to be truthful, this whole situation, I just don't
23 care much for it anyway. I just --

24 MR. ROGERS: You shared that with us earlier.

25 VENIREPERSON PHILIPAK: Well, I just want to make

1 sure. I mean, I just don't care for this kind of stuff, and
2 I just want to make sure. But anyway, just for me to give a
3 call on somebody's life, to be honestly reassured that I know
4 he did it or did not do it, I don't know. Benefit of the
5 doubt, but I --

6 MR. ROGERS: Okay. And let me follow that up,
7 because that's exactly why we have the burden of proof,
8 beyond a reasonable doubt, is so that jurors like you are not
9 put in the position of having to make these decisions and
10 live with a wrong decision if you don't hold the state to
11 their burden of proof. Right?

12 VENIREPERSON PHILIPAK: Okay.

13 MR. ROGERS: So knowing that that's the burden of
14 proof, beyond a reasonable doubt, you could follow those
15 instructions, couldn't you? I mean, it's not going --

16 VENIREPERSON PHILIPAK: Yes.

17 MR. ROGERS: -- to be easy.

18 VENIREPERSON PHILIPAK: Huh?

19 MR. ROGERS: Not that it would be easy.

20 VENIREPERSON PHILIPAK: No, not that it would be
21 easy; just...

22 MR. ROGERS: Let me ask you this.

23 VENIREPERSON PHILIPAK: Okay.

24 MR. ROGERS: If you were on trial, would you want a
25 jury of 12 people who thought it was easy to send somebody to

1 prison forever?

2 VENIREPERSON PHILIPAK: Well, no.

3 MR. ROGERS: Okay.

4 VENIREPERSON PHILIPAK: I guess I just hit the easy
5 button.

6 MR. ROGERS: Yeah. Right. Exactly.

7 VENIREPERSON PHILIPAK: What I'm just trying to get
8 across is: That I don't like this confrontation stuff. I
9 just don't, you know. I'm being totally clear.

10 MR. ROGERS: And quite frankly, I've chosen my
11 career, and you have not chosen a career as a juror.

12 VENIREPERSON PHILIPAK: That's true.

13 MR. ROGERS: Correct?

14 VENIREPERSON PHILIPAK: Uh-huh.

15 MR. ROGERS: And I understand that and I appreciate
16 you doing it.

17 VENIREPERSON PHILIPAK: Thank you.

18 MR. ROGERS: Let's go back to a memory kind of
19 question. Is there anybody here who's seen anything on
20 television or heard on the radio or read anything in
21 newspapers or magazines or wherever about so-called recovered
22 memories? Nobody?

23 VENIREPERSON LAURA THOMAS: Excuse me.

24 MR. ROGERS: Yes, ma'am. I'm sorry. Miss Thomas.

25 VENIREPERSON LAURA THOMAS: Do you mean that, under

1 hypnotism, someone remembers something that they couldn't
2 remember when they were not hypnotized? Is that what you're
3 referring to?

4 MR. ROGERS: That is an example that has been cited
5 by some people --

6 VENIREPERSON LAURA THOMAS: Okay.

7 MR. ROGERS: -- but that's not --

8 VENIREPERSON LAURA THOMAS: Yes, I have then.

9 MR. ROGERS: -- the only thing that I'm talking
10 about. You've heard of that.

11 VENIREPERSON LAURA THOMAS: Yes. Uh-huh.

12 MR. ROGERS: Okay. And how long ago was that, that
13 you read or heard or whatever?

14 VENIREPERSON LAURA THOMAS: Within the past year.

15 MR. ROGERS: Okay. Did you have an opinion as to
16 whether those memories were accurate or not, after you read
17 or heard whatever you read or heard?

18 VENIREPERSON LAURA THOMAS: No.

19 MR. ROGERS: Did the thing that you were listening
20 to or reading say that those were accurate or inaccurate?

21 VENIREPERSON LAURA THOMAS: They implied that they
22 were, yes.

23 MR. ROGERS: Were accurate?

24 VENIREPERSON LAURA THOMAS: (Nodding head up and
25 down.)

1 MR. ROGERS: Was it -- you didn't know whether to
2 accept that or not?

3 VENIREPERSON LAURA THOMAS: (Shaking head from side
4 to side.)

5 MR. ROGERS: Is that a fair statement?

6 VENIREPERSON LAURA THOMAS: Yes. Yes.

7 MR. ROGERS: Okay. And did you do any other reading
8 or research to follow up on that?

9 VENIREPERSON LAURA THOMAS: No.

10 MR. ROGERS: Thank you.

11 Anybody else who's had exposure to that notion of
12 so-called recovered memories?

13 Yes, sir.

14 VENIREPERSON STIEF: I think I seen a program on TV
15 about something like that, but I never thought much about it.

16 MR. ROGERS: And you're Mr. Stief.

17 VENIREPERSON STIEF: Correct.

18 MR. ROGERS: And did you form an opinion or do you
19 have an opinion as to whether such memories are accurate or
20 not?

21 VENIREPERSON STIEF: No. I never thought much about
22 it.

23 MR. ROGERS: Okay. Thank you.

24 VENIREPERSON STIEF: Just one of those programs,
25 watch it and turn it off.

1 MR. ROGERS: Okay. Fine.

2 Is there anyone here who believes that somebody can
3 deliberately choose not to remember something that they have
4 done while conscious and aware, and then will actually not
5 have a memory of it for years? I don't see any hands.

6 THE COURT: There is a hand, sir.

7 MR. ROGERS: I'm sorry.

8 THE COURT: In fact, two.

9 MR. ROGERS: Miss McCullough?

10 VENIREPERSON McCULLOUGH: I guess maybe.

11 THE COURT: You need to speak up, please.

12 VENIREPERSON McCULLOUGH: Maybe.

13 MR. ROGERS: Maybe? You believe that's at least a
14 possibility?

15 VENIREPERSON McCULLOUGH: Yeah. It could be.
16 Depending on what happened or whatever.

17 MR. ROGERS: Okay. That you can -- stand. I'm not
18 done with you yet. I'm sorry. In terms of actually saying,
19 "Well, I choose not to remember this," and then you really
20 don't remember it?

21 VENIREPERSON McCULLOUGH: Oh. You don't mean
22 like --

23 MR. ROGERS: I mean consciously choose.

24 VENIREPERSON McCULLOUGH: You don't mean like
25 blocking it out or something.

1 MR. ROGERS: Well, it's like by blocking it out by
2 choice. By an exercise of will.

3 VENIREPERSON McCULLOUGH: I don't know. I think if
4 it's traumatic enough maybe, but --

5 THE COURT: I'm sorry. I can't hear you. You
6 need --

7 VENIREPERSON McCULLOUGH: Maybe if it's traumatic
8 enough.

9 MR. ROGERS: Maybe you could?

10 VENIREPERSON McCULLOUGH: I guess, yeah.

11 MR. ROGERS: All right.

12 And I saw another hand. Miss Carter?

13 VENIREPERSON CARTER: Yes. I think it's possible.
14 We studied that in my psychiatric nursing class.

15 MR. ROGERS: Okay.

16 VENIREPERSON CARTER: That people can block those
17 memories out.

18 MR. ROGERS: Consciously choose to block a memory
19 out.

20 VENIREPERSON CARTER: Yes.

21 MR. ROGERS: And then would they be aware the next
22 day of having done that?

23 VENIREPERSON CARTER: Well, they might remember it
24 later on in time, you know.

25 MR. ROGERS: Well, I'm not --

1 (Counsel and venireperson talking at the same time.)

2 MR. CRANE: Well, no, let's let her finish her
3 answer.

4 MR. ROGERS: Thank you.

5 I'm sorry. Go ahead.

6 VENIREPERSON CARTER: Well, they might remember it
7 later on in life. Something might trigger it to where it
8 comes back to them.

9 MR. ROGERS: All right. Now, my question I guess is
10 focussed not about when they remember it, but when they
11 forget it. In other words, does it take time to successfully
12 block a memory, or can you do it with a single act of will,
13 or did you study that part of it?

14 VENIREPERSON CARTER: We studied it, but -- I think
15 it is possible.

16 MR. ROGERS: And how long ago was that class taught?

17 VENIREPERSON CARTER: Just a couple of years ago.

18 MR. ROGERS: Thank you.

19 Anybody else?

20 Yes.

21 VENIREPERSON GIBBS: Are you referring to repressed
22 memories or --

23 MR. ROGERS: I'm not referring to repressed memories
24 as I understand it. I don't claim to be an expert.

25 VENIREPERSON GIBBS: Okay.

1 MR. ROGERS: But a repressed memory, in my
2 understanding, is something that someone doesn't remember,
3 not because they consciously choose to disregard it, but
4 because of the trauma of the event itself, or the recurrence
5 of events. Something like that.

6 VENIREPERSON GIBBS: Okay.

7 MR. ROGERS: Is that what you're talking about?

8 VENIREPERSON GIBBS: Well, I was going to mention
9 that I've heard of repressed memories, if that's what
10 you're --

11 MR. ROGERS: Okay. And certainly that is the kind
12 of thing that Mrs. Thomas was talking about. A repressed
13 memory which was recovered under hypnosis or something.

14 Is that correct, Mrs. Thomas?

15 VENIREPERSON LAURA THOMAS: Yes.

16 MR. ROGERS: But now I'm talking about something
17 different, in terms of a memory which is consciously
18 repressed. If there is such a thing. And that doesn't make
19 -- even make sense, I don't think.

20 MR. CRANE: Well, Judge, I'm going to object to
21 whether or not he thinks that makes sense and also his
22 definition of repressed memory.

23 MR. ROGERS: A little late for the repressed memory
24 definition stuff.

25 MR. CRANE: Well, there's no question on the table.

1 He's going, "Well, it doesn't make sense to me and" --

2 THE COURT: Are you objecting?

3 MR. CRANE: There's no question.

4 THE COURT: Are you objecting to the answer that is

5 not responsive to a question? Is that --

6 MR. CRANE: If -- if -- I don't think that was --

7 with all due respect, I don't think Mr. Rogers' last series

8 of comments was a question. If it was, I'll object to the

9 form. I think it was a commentary.

10 THE COURT: All right. If you would just -- you may

11 rephrase your question, Counsel.

12 MR. ROGERS: That will be easier.

13 I'm still with you, Mr. Gibbs, a little bit. If

14 there is a distinction between repressed memories and

15 memories which are consciously put aside, okay, can you see

16 that kind of a distinction?

17 VENIREPERSON GIBBS: So you cannot -- are you saying

18 that you can or cannot consciously repress memories?

19 MR. ROGERS: I'm not saying; I'm asking, what you

20 think about that.

21 VENIREPERSON GIBBS: Well, I'm not sure. I'm not

22 a --

23 MR. ROGERS: Okay.

24 VENIREPERSON GIBBS: -- I'm not an expert, so.

25 MR. ROGERS: All right. Thank --

1 VENIREPERSON GIBBS: I don't know if you can or not.

2 MR. ROGERS: All right. Thanks.

3 Yes, sir. Mr. Ohmert?

4 VENIREPERSON OHMERT: I know if you happen to have a
5 little bit too much to drink, you can surely forget that.
6 And somebody tells you what you did, and you have no idea
7 that you did that.

8 MR. ROGERS: Okay.

9 VENIREPERSON OHMERT: That has happened to me.

10 MR. ROGERS: And that's --

11 (Laughter.)

12 VENIREPERSON OHMERT: It's happened to me.

13 MR. ROGERS: Okay. And that kind of thing, you
14 know, what's --

15 VENIREPERSON OHMERT: So is that -- is that
16 depressed or is that -- I mean, it's gone.

17 MR. ROGERS: But let me ask you this. Have you ever
18 had a situation where you were so drunk that you don't
19 remember what you did, and that when somebody tells you about
20 it later, you then can remember? Or is it just a memory
21 that's not --

22 VENIREPERSON OHMERT: It's gone. It's gone.

23 MR. ROGERS: All right. Thank you.

24 Okay. Easy question. Is there anybody here, other
25 than the people who have already said so, who themselves or a

1 close friend or family member works or have worked in the
2 field of law enforcement? I want to define the field of law
3 enforcement broadly to include ATF agents, FBI agents,
4 highway patrol officers, deputy sheriffs, sheriffs, local
5 police officers, and even security guards. Is that
6 everybody?

7 Okay. Mr. Philipak?

8 VENIREPERSON PHILIPAK: You asked who have and
9 has --

10 MR. ROGERS: You've already talked about --

11 VENIREPERSON PHILIPAK: No, I don't think I did.

12 MR. ROGERS: Okay. Go ahead. It's on your
13 questionnaire I guess, yeah.

14 VENIREPERSON PHILIPAK: I mean, he's retired now.

15 MR. ROGERS: Okay. And who is that?

16 VENIREPERSON PHILIPAK: His name was -- he was a
17 state patrolman. Don Bizelli.

18 MR. ROGERS: Okay.

19 VENIREPERSON PHILIPAK: He's my brother-in-law.

20 MR. ROGERS: Okay.

21 Others?

22 VENIREPERSON GIBBS: Does that include Coast Guard?

23 MR. ROGERS: No. Coast Guard is more like a
24 military service.

25 VENIREPERSON GIBBS: Okay.

1 MR. ROGERS: I'll get there. Although they do do
2 law enforcement.

3 VENIREPERSON GIBBS: Yeah.

4 (Counsel and venireperson talking at the same time.)

5 THE COURT: You can't both talk at the same time.

6 MR. ROGERS: Sorry, Your Honor.

7 THE COURT: Or we won't be able to get both of what
8 you're saying.

9 MR. ROGERS: Go ahead.

10 VENIREPERSON GIBBS: I was going to say, they do do
11 law enforcement.

12 MR. ROGERS: All right. And you have a close friend
13 who is in there or --

14 VENIREPERSON GIBBS: My father was, years ago.

15 MR. ROGERS: Okay. Thank you.

16 Yes, sir.

17 VENIREPERSON RUNGE: Tony Runge.

18 MR. ROGERS: Thank you.

19 VENIREPERSON RUNGE: I had a brother-in-law that was
20 a state patrolman. He's died a few years back with leukemia.
21 He's no longer alive. I've also got a nephew that's on the
22 St. Louis County police squad. And that's about it.

23 MR. ROGERS: Thank you.

24 VENIREPERSON RUNGE: Okay.

25 MR. ROGERS: Yes, sir.

1 VENIREPERSON MILLER: My brother's a detective down
2 in St. Charles city.

3 MR. ROGERS: And you're Kevin Miller?

4 VENIREPERSON MILLER: Yes.

5 MR. ROGERS: Thank you.

6 And Mr. Brown?

7 VENIREPERSON BROWN: I have a first cousin that's on
8 the St. Charles County police force. And I also know Don
9 Bizelli, who used to be a highway patrolman. And I've got
10 another cousin through marriage that is a law enforcement
11 officer right now with the City of Florissant.

12 MR. ROGERS: Okay. Thank you.

13 And Mr. Ohmert?

14 VENIREPERSON OHMERT: I have a son-in-law that's a
15 St. Louis policeman.

16 MR. ROGERS: Thank you.

17 Miss Moretto?

18 VENIREPERSON MORETTO: Yes. I have a nephew by
19 marriage that's a police officer over in Swansea, Illinois.
20 He's in Iraq right now.

21 MR. ROGERS: Okay. I assume he was also in the
22 national guard, or some type of military police?

23 VENIREPERSON MORETTO: Yeah. Army National Guard.

24 MR. ROGERS: Okay. Thank you.

25 THE COURT: You're Juror 38, are you, ma'am?

1 VENIREPERSON MORETTO: Yes.

2 THE COURT: Thank you.

3 MR. ROGERS: Yes, ma'am. Miss --

4 VENIREPERSON FIELDS: I have a cousin who's a police
5 officer in Jefferson County and a cousin by marriage who's a
6 lawyer in Arkansas.

7 MR. ROGERS: Okay. I don't think lawyers qualify as
8 law enforcement.

9 VENIREPERSON FIELDS: Oh, sorry.

10 MR. ROGERS: Even prosecutors. I don't know.

11 All right. Yes.

12 VENIREPERSON SCHUPMANN: I have a brother-in-law who
13 works for the Lincoln County Sheriff's Department.

14 MR. ROGERS: Despite your view of the Lincoln County
15 Sheriff's Department.

16 VENIREPERSON SCHUPMANN: Right.

17 MR. ROGERS: Okay.

18 Let me --

19 THE COURT: Mr. Rogers, there's a hand.

20 MR. ROGERS: I'm sorry. I missed a hand.

21 VENIREPERSON BETTS: I have a sister-in-law that
22 works down here, downstairs.

23 MR. ROGERS: And you're Debra --

24 VENIREPERSON BETTS: Helen Ellis-Mershon.

25 MR. ROGERS: I'm sorry? Her name?

1 VENIREPERSON BETTS: Helen Mershon. She works
2 downstairs.

3 MR. ROGERS: And you are Debra Betts; is that
4 correct?

5 VENIREPERSON BETTS: Yes.

6 MR. ROGERS: Thank you.

7 Okay. Let me address this question, first of all,
8 to those of you who have friends or relatives in law
9 enforcement. Is there anything about that relationship which
10 would lead you to give more weight or more believability to a
11 police officer's testimony than you would to the testimony of
12 another officer -- another witness, excuse me, who is not a
13 police officer?

14 Mr. Philipak?

15 VENIREPERSON PHILIPAK: I think it would. I mean,
16 I -- I would assume I -- I would believe a patrolman I guess
17 more, say, than -- you said the witness?

18 MR. ROGERS: Right.

19 VENIREPERSON PHILIPAK: Or witness. Yes.

20 MR. ROGERS: A lay witness? A civilian?

21 VENIREPERSON PHILIPAK: Yeah. A civilian compared
22 to, you know.

23 MR. ROGERS: Why's that?

24 VENIREPERSON PHILIPAK: I don't know. Just the way
25 I was brought up. You know, I always respected them. I

1 mean, I've never been in any trouble. I mean, nobody's
2 given -- you know what I mean. Nobody's given me any reason
3 to dislike them.

4 MR. ROGERS: Let me ask you this.

5 VENIREPERSON PHILIPAK: Okay.

6 MR. ROGERS: If one witness came in and said, in
7 Mr. Crane's example, the light was red, and that was a
8 civilian witness, and a police officer witness came in and
9 said the light was green, the police officer was just there,
10 was not involved in the accident, just happened to be there,
11 would you automatically believe the police officer?

12 VENIREPERSON PHILIPAK: Well, I guess not if you put
13 it that way. I mean -- I mean, that's -- then there you go.
14 I guess you got to weigh out the facts.

15 MR. ROGERS: Is what you're trying --

16 VENIREPERSON PHILIPAK: But that's -- I'm just --
17 yeah.

18 MR. ROGERS: Is what you're trying to say, that
19 police are trained, and they write reports and stuff, and so
20 you can use that training in --

21 VENIREPERSON PHILIPAK: I would hope so. I mean,
22 that's why we got them in there. I mean --

23 MR. ROGERS: Okay.

24 VENIREPERSON PHILIPAK: -- you'd hope they'd tell
25 the truth. I mean, I would assume.

1 MR. ROGERS: Okay. But you're not saying cops never
2 lie.

3 VENIREPERSON PHILIPAK: I never said they'd never
4 lie. I'm not saying that --

5 MR. ROGERS: And you're not saying --

6 VENIREPERSON PHILIPAK: I'm not saying I never lie
7 neither, but I --

8 MR. ROGERS: Exactly.

9 VENIREPERSON PHILIPAK: -- I mean --

10 MR. ROGERS: Fair enough.

11 VENIREPERSON PHILIPAK: -- I'd be lying.

12 MR. ROGERS: Exactly. That reminds me of a logic
13 problem I once heard, and we won't go there.

14 Anyone else who would tend to give more weight or
15 believability to a law enforcement officer's testimony than
16 to that of a lay witness, a civilian witness, just because
17 it's a law enforcement officer?

18 And Mr. Waechter?

19 VENIREPERSON WAECHTER: I think I would. They're
20 trained more. They're used to facing a problem and question
21 every day.

22 MR. ROGERS: Okay. Now, do you think they are more
23 honest, just because of their job?

24 VENIREPERSON WAECHTER: I'd trust them first.

25 MR. ROGERS: So you think --

1 VENIREPERSON WAECHTER: I'd lean towards them, I'd
2 say, yes.

3 MR. ROGERS: Okay. Just because they're police
4 officers?

5 VENIREPERSON WAECHTER: They got to like the job.

6 MR. ROGERS: Yeah, but that doesn't necessarily lead
7 to honesty. They might like the opportunities (inaudible).
8 I come from Kansas City, you know.

9 All right. Anybody else?

10 Yes, sir. Mr. Runge.

11 VENIREPERSON RUNGE: I might have to put more weight
12 on a police officer's testimony, especially if someone was,
13 say, admitting guilt to a murder, like you're saying this
14 witness may be, and they bring in a highway patrolman or
15 whomever, I think I would have a tendency to believe that
16 officer over that witness.

17 MR. ROGERS: Okay.

18 VENIREPERSON RUNGE: Because I trust and I hope that
19 that officer or -- would carry more honesty and clout. And
20 I'm not saying that they may be lying or not, but I
21 personally would take the officer's standpoint probably over
22 a witness that's already admitted guilt.

23 MR. ROGERS: Okay. Let's leave the "already
24 admitted guilt" out, and let's make them both sort of neutral
25 witnesses, just for sake of this question. Okay? Would you

1 then tend to, if all else was equal, tend to just believe the
2 police officer because it was a police officer?

3 VENIREPERSON RUNGE: If all was equal?

4 MR. ROGERS: Yeah. If all else was equal.

5 VENIREPERSON RUNGE: I would say probably I
6 wouldn't outweigh the officer's testimony over that other
7 person, no.

8 MR. ROGERS: Okay. Thank you.

9 MR. CRANE: Now wait a minute. What did you say?
10 You wouldn't outweigh it?

11 VENIREPERSON RUNGE: Well, I'm -- he was saying, if
12 they were equal, if you had a person here and an officer
13 setting there, testimony was the same thing, and I didn't
14 know -- how do I put this? If I didn't know that person was
15 not guilty, I think I could be very fair in judgment on that.

16 MR. ROGERS: Okay. In other words, you think -- let
17 me -- I don't want to put words in your mouth, but I want to
18 understand what I think you're saying. You're saying that if
19 all else is equal, and neither one of them is gaining
20 anything from whatever they're saying, that you would not
21 make a distinction as to whether it was a police officer or
22 not a police officer --

23 VENIREPERSON RUNGE: No.

24 MR. ROGERS: -- giving the testimony. Is that what
25 you're saying?

1 VENIREPERSON RUNGE: That is correct, yes.

2 MR. ROGERS: Okay. Thank you. That's what I
3 thought I heard. I wanted to make sure.

4 Let me ask this of everybody. Is there anybody here
5 who, in a situation where everything else was equal, talking
6 about testimony under oath, would give more believability to
7 a police officer than to somebody who wasn't a police
8 officer, just because it's a police officer talking?
9 Anybody? Okay.

10 Has anybody here ever testified and been
11 cross-examined, questioned by lawyer from the other side?

12 Okay. Start with Mr. Waechter. What kind of case
13 was that?

14 VENIREPERSON WAECHTER: Individuals were suing a
15 contractor for improper construction. I was subpoenaed as a
16 witness to testify my opinion.

17 MR. ROGERS: Okay. What? An expert --

18 VENIREPERSON WAECHTER: In other words, I was a
19 contractor.

20 MR. ROGERS: Okay.

21 VENIREPERSON WAECHTER: Whether the work was
22 satisfactory or not.

23 MR. ROGERS: Did you feel like the lawyer who
24 cross-examined you, the lawyer for the other side, treated
25 you fairly?

1 VENIREPERSON WAECHTER: There was a couple tricks,
2 but basically it was pretty fair.

3 MR. ROGERS: Okay. You say, "a couple of tricks."
4 Did you --

5 VENIREPERSON WAECHTER: Well --

6 MR. ROGERS: Did he tell you anything, I mean, that
7 wasn't true?

8 VENIREPERSON WAECHTER: No. The only thing I could
9 do -- the only thing I could do -- I was told the only thing
10 I could do is answer the question yes or no.

11 MR. ROGERS: Right.

12 VENIREPERSON WAECHTER: And he asked me -- the
13 defense attorney asked me if there was a crack in the man's
14 basement floor. The basement floor was cracked. I say yes.
15 But I couldn't repeat that everybody else's floor's got a
16 crack in it too. You know.

17 MR. ROGERS: Did the lawyer who called you as a
18 witness also --

19 VENIREPERSON WAECHTER: See. In fact, I asked him,
20 I said, "Do you have a crack in your basement floor?" And he
21 said, "Your Honor, the wrong one's asking questions."

22 MR. ROGERS: Okay. Fair enough. All right.

23 VENIREPERSON WAECHTER: Sorry about that, but
24 that --

25 MR. ROGERS: That's all right.

1 VENIREPERSON WAECHTER: -- that's what happened.

2 MR. ROGERS: Now let me ask a follow-up question
3 here, which is: If you're on this jury, and I'm
4 cross-examining some witness called by the prosecutor, and
5 you think I'm being unfair or tricky to that witness, are you
6 going to somehow hold that against Mr. Ferguson?

7 VENIREPERSON WAECHTER: No. To be honest, I'd
8 probably be in contempt of court, because if this -- I'd like
9 to repeat, if you block me in a corner, and I can't -- I got
10 to say yes or no, that's awful hard for me to do if there's
11 another part to it.

12 MR. ROGERS: All right.

13 VENIREPERSON WAECHTER: Sometimes there's an "if."

14 MR. ROGERS: Sometimes there's an if. Okay. Thank
15 you.

16 I saw another hand here.

17 VENIREPERSON IEPPERT: Carol Ieppert.

18 MR. ROGERS: Yes.

19 VENIREPERSON IEPPERT: Yes. It was a civil court.
20 Civil case.

21 MR. ROGERS: And you think you were treated fairly?

22 VENIREPERSON IEPPERT: Yes.

23 MR. ROGERS: And is there anything about that
24 experience which might make you hold it against Mr. Ferguson
25 if you don't like the way we cross-examine their witnesses?

1 VENIREPERSON IEPPERT: No.

2 MR. ROGERS: Okay. Thank you.

3 THE COURT: Was your answer no?

4 VENIREPERSON IEPPERT: No.

5 THE COURT: Okay. Thank you.

6 MR. ROGERS: I'm sorry. I am standing in your way
7 probably, Judge.

8 THE COURT: Well, no, I can see her; I just couldn't
9 hear her.

10 Mrs. Thomas, did you have your hand up?

11 VENIREPERSON LAURA THOMAS: Yes. Years ago I was a
12 vault teller in California, and we were robbed several times.
13 And I was a witness for each of those different -- different
14 times. And two out of three were good experiences; the other
15 one was a poor experience. But I don't use -- I wouldn't use
16 that in my life now.

17 MR. ROGERS: And you wouldn't hold it against
18 Mr. Ferguson.

19 VENIREPERSON LAURA THOMAS: No.

20 MR. ROGERS: Thank you.

21 Mr. Ohmert.

22 VENIREPERSON OHMERT: Yes. I was a witness called
23 in by the FBI on a murder trial.

24 THE COURT: Did you -- what kind of trial did you
25 say, sir?

1 VENIREPERSON OHMERT: Murder trial.

2 THE COURT: That's what I --

3 MR. ROGERS: In federal court?

4 VENIREPERSON OHMERT: Yes.

5 MR. ROGERS: And where was that?

6 VENIREPERSON OHMERT: It was actually held in

7 Columbia.

8 MR. CRANE: What's that?

9 VENIREPERSON OHMERT: Part of it was in Columbia,

10 and then another part was in Jeff City.

11 MR. ROGERS: Okay. And were you treated fairly by

12 the lawyers who cross-examined you?

13 VENIREPERSON OHMERT: Yes, I was.

14 MR. ROGERS: Is there anything about that experience

15 which you might somehow hold against Mr. Ferguson if you

16 don't like the way we cross-examine their witnesses?

17 VENIREPERSON OHMERT: No, I wouldn't hold it against

18 him, but I would hold it against you.

19 MR. ROGERS: Okay.

20 Okay. Mrs. Galloway.

21 VENIREPERSON SUSAN GALLOWAY: I worked for our

22 children's division for four years, and so at times I got

23 subpoenaed for my testimony.

24 MR. ROGERS: Okay. And were you ever cross-examined

25 in a way that you thought was unfair?

1 VENIREPERSON SUSAN GALLOWAY: No.

2 MR. ROGERS: Is there anything about having
3 testified during your work for the children's division that
4 would affect the way you would view Mr. Ferguson if you
5 didn't like the way we were treating the prosecutor's
6 witnesses?

7 VENIREPERSON SUSAN GALLOWAY: No.

8 MR. ROGERS: Thank you.

9 And Mr. Runge.

10 VENIREPERSON RUNGE: When I was 18 years old, I was
11 in an establishment that was selling liquor to minors. And
12 they were -- there was an undercover agent in that
13 establishment, and I had to come for state's witness against
14 that lady that owned the bar.

15 MR. ROGERS: Okay. And were you cross-examined by
16 her or --

17 VENIREPERSON RUNGE: I was cross-examined by both
18 the state lawyer and the -- her attorney.

19 MR. ROGERS: Okay. And did her attorney treat you
20 fairly?

21 VENIREPERSON RUNGE: I think so, yes.

22 MR. ROGERS: Is there anything about that that you
23 would hold against Mr. Ferguson if you don't like the way we
24 treat the state's witnesses in this case?

25 VENIREPERSON RUNGE: I don't believe so, no.

1 MR. ROGERS: Okay.

2 Anybody I've missed over here? Anybody over here?

3 Okay.

4 Now, is there anybody here who would expect Ryan
5 Ferguson to testify on his own defense and would somehow hold
6 it against him if he didn't? I don't see any hands.

7 Okay. Now I see one. Or was that just a stretch?

8 VENIREPERSON SKIRVIN: Yeah, because if he's
9 innocent, he ought to get up there and say something.

10 THE COURT: Excuse me. Are you Number 41?

11 VENIREPERSON SKIRVIN: Yeah.

12 THE COURT: Thank you, sir.

13 VENIREPERSON SKIRVIN: He needs to talk for himself.

14 MR. ROGERS: And I'm not now talking about as a bit
15 of tactical advice for his defense team, but as a matter of
16 law and the United States Constitution that we all live
17 under, even though you might want to hear from him, would
18 you, if he didn't testify, tend to believe that he must be
19 hiding something? Must be hiding his guilt with regard to
20 this case?

21 VENIREPERSON SKIRVIN: No. I would just think that
22 he would want to talk, you know.

23 THE COURT: You would just think that he was what?

24 VENIREPERSON SKIRVIN: He would just want to get up
25 there and get it off his chest.

1 THE COURT: All right.

2 MR. ROGERS: Okay. And can you think of any reason
3 why somebody who was accused of a serious crime like this,
4 who was not guilty, might still choose not to testify?

5 VENIREPERSON SKIRVIN: Nope.

6 MR. CRANE: Well, Judge, I'm going to object to that
7 question. That opens up some issues that -- can we approach
8 on that?

9 THE COURT: You may. I will tell you that the
10 juror's already answered the question.

11 MR. CRANE: Oh. I couldn't hear him. Well, sorry.

12 MR. ROGERS: He said no.

13 MR. CRANE: Oh, you said no? Well, okay. Forget
14 it. I guess I'll wait until you -- sorry. I couldn't hear
15 you there. Sorry.

16 MR. ROGERS: Mr. Skirvin, have you had any
17 experience speaking in front of groups?

18 VENIREPERSON SKIRVIN: No.

19 THE COURT: Would you stand, sir? Thank you.

20 VENIREPERSON SKIRVIN: No, I haven't.

21 MR. ROGERS: Okay. Other than right now, today.

22 VENIREPERSON SKIRVIN: Yes.

23 MR. ROGERS: So you couldn't tell me how somebody
24 would -- who didn't speak in front of groups might feel about
25 getting up and talking in front of a bunch of strangers?

1 VENIREPERSON SKIRVIN: Well, if my life was on the
2 line I would.

3 MR. ROGERS: No matter what?

4 VENIREPERSON SKIRVIN: Yeah. I believe so.

5 MR. ROGERS: You think everybody else is like that?

6 VENIREPERSON SKIRVIN: No, sir.

7 MR. ROGERS: Anybody else who shares

8 Mr. Skirvin's -- Mr. Robinson?

9 VENIREPERSON ROBINSON: I feel the same way. If you
10 have nothing to hide, why not speak?

11 MR. ROGERS: Okay.

12 VENIREPERSON ROBINSON: You're hiding something if
13 you don't want to talk.

14 MR. ROGERS: Let me ask you this. Do you have any
15 experience speaking in front of groups?

16 VENIREPERSON ROBINSON: No.

17 MR. ROGERS: Okay. I do it for a living. I -- this
18 is not an uncommon situation for me. But studies have shown
19 that fear of speaking in public is second of the fears that
20 people in the United States have. After snakes, I think.
21 And so people are sometimes really nervous about that.

22 Let me ask you another one. If Mr. Ferguson does
23 not testify, and if you were given an instruction from the
24 Judge that no inference of guilt or any inference of any kind
25 can be raised from the fact that he didn't testify, would you

1 be able to follow that instruction?

2 VENIREPERSON ROBINSON: Yes.

3 MR. ROGERS: Even though you think there must be
4 something being hid? You could still follow that
5 instruction.

6 VENIREPERSON ROBINSON: Yes.

7 MR. ROGERS: How about you, Mr. Skirvin? Could you
8 follow that instruction?

9 VENIREPERSON SKIRVIN: Yes.

10 MR. ROGERS: Okay.

11 And let's look at the other side of that coin. If
12 Mr. Ferguson decides to testify, how many people here would
13 tend to discount what he has to say because he's the person
14 who's on trial? He's got the most to lose of anybody in the
15 courtroom. He's got the only thing to win or lose of anybody
16 in the courtroom, personally. Anybody here who would tend to
17 discount Mr. Ferguson's testimony because he's the defendant?

18 Mr. Skirvin, that's a wiping of the brow; that's not
19 a hand? Okay. Is that correct?

20 VENIREPERSON SKIRVIN: Yeah.

21 MR. ROGERS: Okay.

22 How about you, Mr. Robinson? Would you tend to
23 disbelieve anything he said since he's the guy who's on
24 trial; he's the accused?

25 VENIREPERSON ROBINSON: No.

1 MR. ROGERS: Okay.

2 THE COURT: There's a hand over here, Mr. Rogers.

3 MR. ROGERS: Yes, sir. Mr. Moore.

4 VENIREPERSON MOORE: Yes. Just as I said earlier, I
5 think I would have -- I think the testimony would be suspect
6 if they had something to gain by it.

7 MR. ROGERS: That includes not only Mr. Ferguson, if
8 he chose to testify, but any other witness who's getting some
9 kind of deal? Is that a fair statement?

10 VENIREPERSON MOORE: Well, I don't know about
11 Mr. Ferguson's. I was thinking about the other codefendant.

12 MR. ROGERS: Okay. Let's talk about Mr. Ferguson
13 now, because, like I say, he is the person who is on trial.
14 The outcome of this trial determines whether he goes home to
15 his family or whether he goes to prison forever. Right?

16 VENIREPERSON MOORE: Sure.

17 MR. ROGERS: So if he were to testify, would you
18 think, Well, hey, I can't really give much believability to
19 what he says because he's the guy who's got it all riding on
20 the line.

21 VENIREPERSON MOORE: I understand your question. I
22 don't think I would be as suspect of his testimony as of the
23 other gentleman.

24 MR. ROGERS: I appreciate that. And my next -- I
25 got one more for you. Would you be able to judge his

1 testimony and weigh it and evaluate the truthfulness or
2 untruthfulness like you would that of other witnesses?

3 VENIREPERSON MOORE: Yes.

4 MR. ROGERS: Okay. Thank you.

5 Anybody else who has a response to that question?

6 Now let's talk about another kind of witness. And
7 that is a witness who may have been convicted of a crime
8 unrelated to those crimes charged against Mr. Ferguson. Is
9 there anybody here who could not consider the witness's
10 convictions of crimes in judging the believability of that
11 witness?

12 VENIREPERSON KELLY: I'm not sure --

13 MR. ROGERS: Okay.

14 VENIREPERSON KELLY: I'm not sure I understand the
15 question.

16 MR. ROGERS: Okay. And for the record, you are
17 Number 42, Miss Kelly; correct?

18 VENIREPERSON KELLY: Yes.

19 THE COURT: Would you stand, please, Miss Kelly.
20 Thank you.

21 MR. ROGERS: And you don't understand the question.

22 VENIREPERSON KELLY: No.

23 MR. ROGERS: Okay. If a witness were to testify,
24 and the witness were to tell you that he had been convicted
25 of various crimes, not related to the death of Kent Heitholt,

1 other crimes, could you consider his convictions in terms of
2 judging whether or not he's a believable person?

3 VENIREPERSON KELLY: Well, why would that person be
4 testifying if it's unrelated to this crime?

5 MR. ROGERS: Testifying about -- his convictions are
6 unrelated to his crime. Testifying about whatever he's
7 testifying about.

8 VENIREPERSON KELLY: If he's -- he was convicted of
9 another crime --

10 MR. ROGERS: Right.

11 VENIREPERSON KELLY: -- and he's testifying on
12 Mr. Ferguson's behalf, or --

13 MR. ROGERS: Or against. Either one.

14 VENIREPERSON KELLY: Either one? I would --

15 MR. ROGERS: And the question is: Could you
16 consider the fact that he had been convicted in determining
17 his believability?

18 VENIREPERSON KELLY: Yes.

19 MR. ROGERS: Okay. Would you necessarily disbelieve
20 him just because he's been convicted?

21 VENIREPERSON KELLY: No.

22 MR. ROGERS: Okay. But you wouldn't necessarily
23 believe him, just because he'd been --

24 VENIREPERSON KELLY: Well, I mean, it would depend
25 on what he's saying. But I wouldn't discount him just

1 because he was convicted of another crime.

2 MR. ROGERS: All right. And you wouldn't --
3 although you would not automatically believe him either.

4 VENIREPERSON KELLY: Right.

5 MR. ROGERS: Like anybody else.

6 VENIREPERSON KELLY: Right.

7 MR. ROGERS: Okay. Thank you.

8 All right. I have used way too much time. But I
9 have one more sort of easy question. Many of you marked on
10 your questionnaires that you had been on jury service before,
11 in other cases. And this is addressed to those people, or to
12 anybody who has been on jury service, but has not marked it
13 on their questionnaire. The question is: Were you the
14 foreman of the jury? Anybody here who has ever been a
15 foreman of a jury before? I see no hands.

16 Now, you've listened to me for a couple of hours
17 now. You listened to Mr. Crane a couple hours. You listened
18 to the Court for a while. Sometimes somebody's sitting there
19 saying, "Well, you know, there's something that these people
20 should probably know in deciding whether or not I want to be
21 on the -- whether or not I am going to be on this jury, but
22 they haven't asked me yet." Well, now I'm asking. Is there
23 anything that you think that we should know in deciding
24 whether or not you're on this particular jury? Speak now, or
25 forever hold your peace. Okay.

1 Miss McCullough?

2 VENIREPERSON McCULLOUGH: Yes.

3 MR. ROGERS: Did you indicate that you had -- did
4 not know whether or not your job would reimburse you for jury
5 duty?

6 VENIREPERSON McCULLOUGH: Yes.

7 MR. ROGERS: Do you have a union?

8 VENIREPERSON McCULLOUGH: No.

9 MR. ROGERS: Okay.

10 VENIREPERSON McCULLOUGH: I work at a temp agency.

11 THE COURT: I'm sorry. You need to stand.

12 VENIREPERSON McCULLOUGH: I work at a temp agency.

13 MR. ROGERS: Okay.

14 VENIREPERSON McCULLOUGH: So I don't know.

15 MR. ROGERS: All right. Thank you.

16 VENIREPERSON PHILIPAK: Right here. I mean, I
17 know -- I know where I work, they won't reimburse me for
18 being off.

19 MR. ROGERS: Right. And again, you mentioned that I
20 think earlier; is that correct?

21 VENIREPERSON PHILIPAK: I don't -- no. I think I
22 mentioned it in my questionnaire when they sent it to me. I
23 think. Heck, I don't know.

24 MR. ROGERS: I think --

25 VENIREPERSON PHILIPAK: I don't know what -- I don't

1 know what it said. No, I was kidding.

2 MR. ROGERS: And your wife is disabled and you're
3 the sole provider?

4 VENIREPERSON PHILIPAK: Yes. So you did read it,
5 huh? I didn't do it for nothing, did I?

6 MR. ROGERS: You're right.

7 Thank you.

8 VENIREPERSON PHILIPAK: You're welcome.

9 THE COURT: Ladies and gentlemen, thank you so much
10 for your attention. We are going to take a recess at this
11 time.

12 The Court again reminds you of what you were told at
13 the first recess of the Court. Until you retire to consider
14 your verdict, you must not discuss this case among yourselves
15 or with others, or permit anyone to discuss it in your
16 hearing. You should not form or express any opinion about
17 the case until it is finally given to you to decide. Do not
18 read, view, or listen to any newspaper, radio, or television
19 report of the trial.

20 We will take a recess. We will consider those
21 individuals who asked to be excused, as well as other
22 matters, and we will let you know just as soon as we can
23 whether you are finally excused or whether you are not
24 finally excused.

25 The jury may be in recess.

1 If you'd keep them together, please.

2 - - -

3 The following proceedings were held out of the presence
4 of the jury:

5 THE COURT: Now, Mr. Crane has run in and out of
6 this courtroom. I don't know if anyone else needs to take a
7 short break before we do excuses.

8 MR. CRANE: You're making an assumption on what I
9 was doing out there.

10 THE COURT: I have no idea what you were doing.

11 MR. CRANE: But you're correct. You're correct.

12 THE COURT: Are we having troubles downstairs still?

13 DEPUTY COURT MARSHAL WERNER: We're okay. I'll talk
14 to you about that here in just a minute.

15 THE COURT: All right.

16 I will tell the attorneys that we have someone
17 downstairs that was creating somewhat of a disturbance
18 because he didn't think he ought to come. And we finally I
19 think confiscated his cell phone.

20 DEPUTY COURT MARSHAL WERNER: Yes.

21 THE COURT: No doubt he's called the governor, the
22 U. S. Senators, and everyone else about this.

23 MR. ROGERS: As long as he didn't call Jim Wyrsh,
24 I'm okay.

25 THE COURT: He probably doesn't know to call him.

1 He knows I'm not a judge here.

2 Anyway, why don't we take up excuse -- people that
3 should be excused before we take up challenges for cause.
4 And I -- let me read out the ones that I now remember that I
5 should -- that I made notes to excuse. And you can let me
6 know -- did someone say something to me?

7 MR. ROGERS: No.

8 THE COURT: Okay. Number 3, Mr. Philipak, who
9 didn't get paid if he did not work.

10 MR. CRANE: No objection.

11 MR. ROGERS: No objection on him.

12 THE COURT: All right. He's Number 3.

13 MR. CRANE: Now wait a minute. Before I start
14 marking people off, Judge, if we're all -- does that mean --
15 he doesn't object, I don't object, does that mean he's gone?

16 THE COURT: Then he's excused.

17 MR. CRANE: Okay.

18 THE COURT: He's to be marked off. All right? Then
19 Number 5 has already been excused, with consent of counsel.
20 Mr. Orr, Number 8, is already excused, by agreement. And 9
21 has already been excused, before we took up court. I would
22 then tend excuse 11 and 12. Let me go one by one. Is there
23 an objection to Number 11?

24 MR. CRANE: No objection.

25 MR. ROGERS: No, Your Honor.

1 THE COURT: 11 is excused. What about 12?

2 MR. CRANE: No objection.

3 MR. ROGERS: No objection.

4 THE COURT: 12 is then excused. Then coming back to
5 the other side of the room, Mr. Declue, he is the one with
6 the 15-year-old son who has ADHD and bipolar disease and his
7 wife's out of town.

8 MR. CRANE: No objection.

9 MR. ROGERS: No objection.

10 THE COURT: All right. 15 is excused. Mr. Thomas
11 is the one that has an 8 and 9-year-old that he has to take
12 care of.

13 MR. CRANE: What's the number?

14 THE COURT: 29.

15 MR. ROGERS: No objection there, Your Honor, from
16 the defense. He's the guy whose mother's on the jury. And
17 he has --

18 MR. CRANE: Yeah. I remember him. I don't remember
19 him being in as bad a shape as --

20 THE COURT: His problem was is that his wife I think
21 left for work at 6 or 6:30 in the morning, and he had to take
22 the kids at 7:15 or something to the bus stop, and there was
23 no one --

24 MR. CRANE: Yeah, but he didn't -- I didn't remember
25 him indicating that there were no other options.

1 THE COURT: I think he did. I asked him that
2 specifically.

3 MR. CRANE: Okay. Well, that's -- neither -- I'm
4 not going to go against you, Judge, but I -- we would not
5 agree to Number 24 being -- 29, sorry --

6 THE COURT: 29 is the number.

7 MR. CRANE: -- being stricken for cause.

8 THE COURT: I'm going to -- I'm not going to strike
9 him for cause. I'm going to excuse 29. Number 30 has
10 already been excused because of his felony convictions.

11 Mr. Black, who is Number 31, is an individual who takes care
12 of a three-month-old baby Monday, Wednesday, and Friday, and
13 doesn't have anyone else to look after that child.

14 MR. CRANE: I would agree there.

15 MR. ROGERS: Would agree there too, Your Honor.

16 THE COURT: 31 then is excused. My next excuse was
17 Mary McCullough, who's not going to be paid if she doesn't
18 work. At least that's what she thought.

19 MR. ROGERS: And I asked her, Your Honor, and she
20 said she worked for a temp agency, so I know she won't. So I
21 do not object to that.

22 THE COURT: What about the state? 33,
23 Miss McCullough?

24 MR. CRANE: Okay. Yeah. We'll agree to that.

25 THE COURT: All right. 33 is excused. Let's see.

1 One that I didn't mention before, but I did look in my notes,
2 Miss Betts, is Number 37. She has a 14-year-old child, and
3 her husband travels, and he is to be in I guess Mount Vernon.
4 She mentioned he would not be here. If she were gone, there
5 would be no one to look -- not that a 14-year-old needs the
6 same kind of looking after that a three-month-old, but I sure
7 wouldn't want to leave a kid like that at home alone for a
8 week.

9 MR. ROGERS: It would be party central.

10 THE COURT: Yeah, it might be, or worse. And see --
11 she's Number 37. Does state have any objections to excusing
12 her?

13 MR. CRANE: I think she said she didn't have any
14 help with her 14-year-old boy.

15 THE COURT: Does the defense object?

16 MR. ROGERS: No, Your Honor.

17 THE COURT: 37 then is excused. Miss Bennett, who
18 takes care of the granddaughter. And everyone else in the
19 family works. She's Number 43.

20 MR. CRANE: I don't have -- let me -- I don't have
21 any problem with 43 being stricken.

22 THE COURT: The defense?

23 MR. ROGERS: No objection, Your Honor.

24 THE COURT: 43 is excused. And -- let's see.
25 Mr. Riney has already been excused. He is 46. He is one of

1 the bailiffs. And finally, but not -- was Mr. Straughter,
2 who might be, in fact, stricken for cause, but has also
3 talked about taking care of his disabled wife and being a
4 good househusband at home taking care of all the chores.
5 Does the state object?

6 MR. ROGERS: And the grandchildren.

7 MR. CRANE: Well, I liked -- I liked Mr. Straughter,
8 but. By God, he's my kind of guy. But I understand he did
9 say he didn't have any options. That was under my inquiry,
10 so.

11 THE COURT: All right. He will be excused.

12 MR. ROGERS: I have no objection, by the way, Your
13 Honor.

14 THE COURT: Okay. I suspected that you wouldn't.

15 Now let me tell the bailiff, marshals, which ones
16 can actually be excused now. And they can go home and not
17 have to come back, with thank-yous to those people. And some
18 of them may already be gone.

19 DEPUTY COURT MARSHAL WERNER: Okay.

20 THE COURT: 3, 5, 8, 9, 11, 12, 15, 29, 30, 31, 33,
21 37, 43, 46, and 50.

22 MR. CRANE: And now 36 is already gone.

23 THE COURT: Let's see. Did I --

24 MR. ROGERS: 36 was the one who didn't show up this
25 morning.

1 MR. CRANE: Yeah, just for the record, make sure she
2 mentioned --

3 THE COURT: 36 is absent. I'm not excusing 36. 36
4 may have the sheriff come after him.

5 MR. CRANE: There is no 36.

6 MR. ROGERS: 36 is downstairs now. That's my guess.

7 THE COURT: 36 came in?

8 MR. ROGERS: I don't know.

9 MR. CRANE: Is that the one that came in before the
10 other group? Anyway, there isn't a 36.

11 THE COURT: 36 is not in our group. She was the
12 only absent one that we showed in our group.

13 MR. ROGERS: I think it's a he. I think Jody's a
14 he.

15 THE COURT: Jody is a he? It is? Someone told me
16 it was a she. But -- whoever Jody is -- Jody may --

17 MR. ROGERS: Jody is Jody. You can see why Jody
18 didn't come. Jody has social anxiety disorder.

19 THE COURT: All right. So I'm going to permit our
20 bailiff to release these jurors finally. They don't have to
21 come back for anything.

22 Is the state ready to make any challenges for cause?

23 MR. CRANE: Yeah.

24 THE COURT: All right.

25 MR. CRANE: Go ahead with that, Judge?

1 THE COURT: Yes.

2 MR. CRANE: And just name them and not state my
3 basis?

4 THE COURT: State's challenges for cause should be
5 named by number, hopefully in numeric order, so I can follow
6 them.

7 MR. CRANE: All right.

8 THE COURT: And then we will come back to the
9 defense. And if the defense agrees with it, you needn't make
10 an argument. If the defense does not agree with it, then you
11 will have to make an argument.

12 So let me hear what the state's challenges for cause
13 are.

14 MR. CRANE: Okay. Number 2, Robinson.

15 THE COURT: All right.

16 MR. CRANE: He was emphatic --

17 THE COURT: You don't need to tell me why.

18 MR. CRANE: All right.

19 THE COURT: Just give me the number.

20 MR. CRANE: Number 2, Robinson.

21 THE COURT: All right.

22 MR. ROGERS: Agreed.

23 THE COURT: Okay.

24 MR. CRANE: So can we mark them off?

25 THE COURT: I will go through -- anyone that the

1 defense agrees to, you may assume that he is struck for
2 cause.

3 MR. CRANE: Okay.

4 THE COURT: Next one.

5 MR. CRANE: Number 14, Norton.

6 THE COURT: Robert Norton.

7 MR. ROGERS: I object to that, Your Honor.

8 THE COURT: Okay. We'll come back to Mr. Norton.
9 Go ahead.

10 MR. CRANE: Number -- oh. Number 16, Caviness.

11 THE COURT: All right.

12 MR. CRANE: That's a hardship. She indicated --

13 THE COURT: Yes. I realize that she said she needed
14 to go someplace this weekend. I didn't consider that as much
15 a hardship as leaving a 14-year-old alone for five days or
16 six days. But I'll -- if you want --

17 MR. CRANE: She said she wouldn't be back 'til
18 Monday on a business trip.

19 THE COURT: Yeah, I understand that.

20 MR. ROGERS: I'm going to take the Fifth on that
21 one, Judge.

22 THE COURT: All right. We can come back to that
23 one. Keep going.

24 MR. CRANE: Okay. Let me find that one again.
25 Let's see.

1 Number 22, Harris.

2 THE COURT: Yes. Keep going. Oh, well. Harris?

3 MR. ROGERS: I'm -- I would object to that, Your

4 Honor.

5 THE COURT: Okay. Keep going then.

6 MR. CRANE: What did you say?

7 THE COURT: He objects.

8 MR. ROGERS: I object to that.

9 MR. CRANE: Okay. 23, Gibbs.

10 THE COURT: Okay.

11 MR. ROGERS: We need to consult on that, Your Honor.

12 We'd object to that, Your Honor.

13 THE COURT: All right. There's an objection to 23.

14 Keep going.

15 MR. ROGERS: It's a group objection.

16 MR. CRANE: So we're going to come back to 23 too?

17 THE COURT: Yeah. You have to come back to 23.

18 MR. CRANE: Okay.

19 Okay. Let's see here. 34, Headrick.

20 MR. ROGERS: We object to that, Your Honor.

21 THE COURT: All right.

22 MR. CRANE: 35, Moore.

23 MR. ROGERS: We'd object to that also.

24 THE COURT: All right.

25 MR. CRANE: 52 --

1 THE COURT: Donna Fields?
2 MR. CRANE: -- Fields.
3 Wait, wait, wait a minute. Hang on a minute, Judge.
4 We're trying here. Hang on just a second.
5 Just --
6 (Pause.)
7 THE COURT: All right. Are you looking, Mr. Crane,
8 to see --
9 MR. CRANE: Yeah. I -- I think that -- okay. 52.
10 THE COURT: Donna Fields?
11 MR. CRANE: The last one, yeah.
12 THE COURT: Yes. And what is the defense position
13 on Donna Fields?
14 MR. ROGERS: I think we object to that too, Your
15 Honor.
16 THE COURT: All right.
17 I will mention that in the Galloways, evidently they
18 take care of kids that are placed with them from the state.
19 And they've tried to get someone to come in and give respite
20 care, and only one of them can go. I'm happy to excuse -- I
21 mean, if there's a challenge for cause to one or the other, I
22 don't know if the defense has one, I'll take it up. But I
23 wanted to make you aware that after it's said and done,
24 probably one of them is going to be released by the Court,
25 either Mr. or Mrs. Galloway. But that has nothing to do now.

1 And I understand the defendant may have a challenge for cause
2 to one of the two.

3 So, let me hear -- so as I understand it, the
4 defense does not object to 2 being stricken. Has no position
5 on 16.

6 MR. ROGERS: We'll agree to that, Your Honor.

7 THE COURT: You're agreeing to 16? 16 then would be
8 stricken. And you object to striking 14, 22, 23, 34, 35, and
9 52.

10 MR. CRANE: I thought -- oh, okay. I'm sorry. I'm
11 sorry.

12 THE COURT: So, you may have your say on those
13 jurors.

14 Number 14. Why is it that you wish to strike 14?

15 MR. CRANE: Okay.

16 THE COURT: That's Mr. Norton.

17 MR. CRANE: Yeah. Mr. Norton demonstrated severe
18 problems with the experience that he had today. He went on
19 for an extended period about how he was mistreated. And I'm
20 sure not saying that happened, but he was very upset. And it
21 was -- actually, I don't think it was responsive to a
22 question that I had asked. So, based on that, I think he
23 demonstrated an inability to be fair and impartial with
24 respect to his being involved with the judicial system. And,
25 you know, I mean, if we need to go back and look at the

1 record on that, he went on probably for several minutes about
2 his unpleasant experience.

3 THE COURT: You may be heard.

4 MR. ROGERS: None of that translates into him being
5 unfair to the state in this case. He was able to point out
6 that that was, in fact, the state -- the local authorities
7 and had nothing to do with Boone County. And Mr. Crane told
8 them what good guys the people in Boone County were. And
9 he -- I don't think he gave a single answer which
10 disqualifies him as a witness. I don't think the state is
11 entitled to a jury of people who think that all law
12 enforcement officers are always perfect.

13 THE COURT: I'm going to look at my notes. How's
14 that?

15 MR. ROGERS: Sounds great.

16 THE COURT: I note that he indicated he had failed
17 to appear for jury service. He was picked up by the sheriff.
18 He feels that he was treated like a criminal. Those were his
19 words, not mine. By that system. He had things to say in
20 other areas, but this is the point that the state is making,
21 that he --

22 MR. CRANE: Well, yeah, he did have things to say in
23 other areas. Obviously we think this was the most dramatic.
24 And I think that the Court, the trial judge in this case, has
25 the discretion to evaluate the demeanor and responsiveness of

1 that venireperson and assess their ability to be fair and
2 impartial.

3 THE COURT: I'm going to sustain the challenge for
4 cause to 14.

5 22.

6 MR. CRANE: Okay. Yeah. Just a minute. Let me
7 make -- 15 and 16 are gone, I believe you indicated, Judge.

8 THE COURT: Well --

9 MR. CRANE: Declue just -- or Caviness just went;
10 right, Charlie?

11 MR. ROGERS: Right. I just agreed to that.

12 MR. CRANE: Okay. 22.

13 THE COURT: Is Terry Harris.

14 MR. CRANE: Okay. He -- no work, no pay. He
15 indicated a -- and I recognize that there were times when
16 Mr. Harris went back and forth, but initially, in the
17 question about his experience with law enforcement, he said
18 he had a particularly bad experience when the police showed
19 up I think at his house, and it was the wrong place. He said
20 that that would, and I'm paraphrasing, that would -- is
21 something that he would have trouble setting aside and being
22 fair and impartial.

23 Now, just to be fair to the defense, I think he did
24 maybe get back up later and said something about, "Well, you
25 know, maybe that -- maybe I wouldn't have a problem with

1 that." He also, though, got into --

2 (Pause.)

3 Judge, it's my recollection he said something about
4 having problems with the plea agreement with the witness. He
5 indicated also that he has a court date, but that's -- that's
6 a week after this one.

7 THE COURT: He has one on the 24th.

8 MR. CRANE: That's not next week; right?

9 So I -- you know, I don't know. I could have
10 sworn -- I wasn't taking notes up there. I could have sworn
11 he said something about the plea agreement, is what's the
12 problem. But I guess if I can't document it, I'm out of luck
13 on that. He did talk about the police problem, and said he
14 couldn't be fair and impartial due to that experience. And
15 he also said no work, no pay.

16 MR. ROGERS: With regard to the no work, no pay,
17 Judge, if we're going to grant that one, I don't think we're
18 going to have a panel qualified out of both groups. But
19 having said that, with regard to the police experience, he
20 did say that the police came in and pinned him and his
21 fiancée to the wall, and they had the right address, but the
22 wrong town, I believe was his words.

23 THE COURT: True.

24 MR. ROGERS: But then he said, "I don't have
25 anything bad about the cops. I don't hate the cops." And he

1 said, if they were under oath, he would assume they were
2 telling the truth, which I thought made a bit of
3 disqualifying answer, until I was able to ask questions about
4 whether he would treat cops different from anybody else, and
5 I don't think he would. And so I think he is certainly a
6 qualified witness.

7 THE COURT: You mean a juror.

8 MR. ROGERS: Juror. Yes. Exactly what I mean.

9 THE COURT: You know, I've excused other people that
10 either said they were self -- and reported that they were
11 self-employed, and if they didn't work, they didn't get paid.
12 And for that reason, I feel I probably -- I missed that on
13 his -- I had notes that he did say he was self-employed and
14 didn't earn money. And if I excused some on that basis, I
15 feel that I need to at least excuse him on that basis. I
16 don't think I would strike him for cause, but I would excuse
17 him, as Number 22, to be excused. And I missed him.

18 23, who is Dustin Gibbs.

19 MR. CRANE: 23, Gibbs, on the Court's inquiry and on
20 mine, indicated that he had to take an exam I believe on
21 Thursday -- a week from -- next week, Thursday. Said that
22 this was some kind of a qualification for being an RN. That
23 it would be an extensive period before he could sit for the
24 exam again. That it was a major problem. If he missed it,
25 he had no other options. He generally demonstrated being

1 preoccupied with the need to take that examination.

2 THE COURT: And it was for a CNA, which is a
3 certified nursing assistant.

4 MR. CRANE: Yeah, it's a nurse thing, yeah.

5 THE COURT: Yeah.

6 MR. ROGERS: Your Honor, I don't think he said that
7 he had no options. I think what he said was that he was
8 scheduled to take it next Thursday. That he was required to
9 take it within 180 days of having become employed there. I
10 would note that on his questionnaire, he wasn't working
11 there. He listed his employment as being an Imo's delivery
12 driver.

13 THE COURT: He obviously has a new job.

14 MR. ROGERS: But what I'm trying to say is that he's
15 got some time to get the test. I'm sure they don't just give
16 it once every blue moon.

17 MR. CRANE: Our notes indicate that he said no other
18 options that he knows of. With respect to this exam and the
19 need to take it on Thursday.

20 THE COURT: All right. I'm overruling the challenge
21 to 23.

22 34. Mr. Headrick.

23 MR. CRANE: Headrick stated that he would require
24 the state to present physical evidence, you know, that was
25 the forensic evidence, for him to find the defendant guilty.

1 MR. ROGERS: I think he was pretty thoroughly
2 rehabilitated before I got up there. And I think once I
3 discussed with him and talked to him about using physical
4 evidence and all the evidence and weighing the testimony of
5 evidence, that he was certainly able to follow the law.

6 THE COURT: Challenge to 34 is sustained. I think
7 he was equivocal in his -- if you want to call it
8 rehabilitation.

9 35, Jack Moore.

10 MR. CRANE: He did not -- I mean, generally
11 speaking, without belaboring it, he didn't like the idea of a
12 plea bargain with the codefendant at all. He stated that on
13 the state's voir dire and the defense voir dire. Even though
14 I don't think Mr. Rogers was questioning him on that, he
15 stated that on his own. He also had great difficulty with
16 the idea of leaving his wife, who is somewhat of an invalid.
17 I remember hearing something about knees and she stove up
18 some kind of way or another, and that that would be a problem
19 to leave her for a week. But the main thing was, he -- he
20 repeatedly said he didn't like the idea of a deal with the
21 codefendant.

22 MR. ROGERS: Your Honor, he never said that he would
23 automatically reject the testimony just because there was a
24 deal given, or that he could not weigh and evaluate it. I
25 think it's certainly proper to have some questions about why

1 somebody who agrees to testify on behalf of the state and
2 admits their own guilt is doing so.

3 With regard to the wife situation, it's just -- I
4 think he sort of jokingly, in response to the Court's
5 question about whether his wife was disabled, he sort of
6 said, "Oh, she's just got some bad knees," or words to that
7 effect. He didn't claim that she was an invalid. And he
8 just would not feel comfortable leaving her alone, due to the
9 length of the time they've been married, and they've
10 apparently never been apart.

11 MR. CRANE: Judge, our records indicate, and, you
12 know, I don't have the Court's record in front of me, but
13 that he was asked by -- I asked him if his problem with a
14 plea agreement with the defendant would impair his ability to
15 be fair and impartial. And he said yes, he would have a
16 problem being fair and impartial, given that concept is in
17 this case.

18 THE COURT: 35 is struck for cause.

19 52. Donna Fields.

20 MR. CRANE: Okay. She said that she would have
21 problems sitting in judgment of a fellow person, human being.
22 I can't remember the exact type of creature, but it was a
23 person.

24 THE COURT: You're through, Mr. Crane?

25 MR. CRANE: Oh, I didn't hear what you said.

1 MR. ROGERS: Oh, I didn't know --

2 THE COURT: He didn't say anything.

3 MR. ROGERS: -- you were done.

4 MR. CRANE: Yeah, I'm done.

5 MR. ROGERS: Okay. She did specifically say that
6 she could do it. She said it would be difficult. I think
7 that describes maybe the ideal juror.

8 THE COURT: The word she used was "feels uneasy."

9 MR. CRANE: That's true. And what I did was
10 collectively, I think it was Number 3 and Number 12 and
11 Number 52, I believe I had a follow-up question: "All of you
12 feel like you wouldn't be able to sit in front of your fellow
13 human being. Anybody else feel that way?" Now if I didn't
14 go right at her again, I'll -- I won't argue that any more.

15 THE COURT: The challenge to 52 is overruled.

16 Does the defendant have any challenges for cause?

17 Well, let me -- let me look at my -- I have that 21
18 have either been excused, stricken, or absent. Is that what
19 you get?

20 MR. KNIGHT: I got 30 left.

21 THE COURT: You have 31?

22 MR. KNIGHT: 30 left.

23 MR. CRANE: Yeah. Yeah.

24 MR. ROGERS: That's what we get.

25 THE COURT: Is that --

1 MR. CRANE: Yeah.

2 THE COURT: So that's -- okay.

3 MR. ROGERS: There's the --

4 THE COURT: Well --

5 MR. CRANE: Gives us two alternates, if -- you know,
6 go ahead and do what you're going to do.

7 THE COURT: Well, I think you have to represent the
8 defendant in the way you feel you need to.

9 MR. CRANE: Absolutely.

10 THE COURT: And I would not in any way encourage you
11 to forego a challenge for cause because you want to get
12 everything out of this panel. I'm -- I want you to do what's
13 best for your client.

14 MR. ROGERS: Yeah. And I'll tell you, Your Honor,
15 there is a situation that you already brought to our
16 attention, which was with regard to the Galloways.

17 THE COURT: There is the Galloways.

18 MR. ROGERS: And there is a possible challenge for
19 cause with regard to Mrs. Galloway, Number 28.

20 THE COURT: Well --

21 MR. ROGERS: But --

22 MR. CRANE: Hey. What were you all saying on the
23 Galloways? They can't -- they said they couldn't take care
24 of the kids if they're both gone?

25 THE COURT: Evidently they --

1 MR. ROGERS: They have foster kids.

2 MR. CRANE: Okay.

3 MR. ROGERS: And they can't get anybody who's
4 certified to take the foster kids.

5 MR. CRANE: Okay. We'll go ahead and -- go ahead
6 make your strikes for cause, and we'll see what we got on
7 alternates. Go ahead and make your strikes for cause. I
8 mean, are you going to make any?

9 MR. ROGERS: Yeah. I'm going to make Mrs. Galloway,
10 Number 28.

11 THE COURT: Is that the only one?

12 MR. ROGERS: Yes.

13 THE COURT: All right.

14 MR. CRANE: Okay. Well, I -- can you just state --
15 okay. I'll object. What's your reason? Go ahead.

16 MR. ROGERS: Oh. First of all, I'd ask she be
17 excused for hardship, because neither -- either she or
18 Mr. Galloway has to be home to take care of the foster kids.
19 And she's the logical person, being the former children's
20 division worker.

21 MR. CRANE: All right. Okay. All right. And so
22 you're not going to strike Mr. Galloway for cause.

23 MR. ROGERS: Right. We're not going to strike
24 Mr. Galloway for cause.

25 MR. CRANE: Okay. We have no objection to

1 Miss Galloway, Number 28.

2 THE COURT: Susan Galloway is struck for cause. And
3 it really is hardship. It's more an excuse.

4 MR. ROGERS: It is more of a hardship. Exactly.
5 There was a cause, but we didn't need to state it.

6 MR. CRANE: It's going to be a hardship on
7 Miss Galloway. She's got to go home by herself.

8 THE COURT: I don't know how many kids she has. She
9 probably has to take care of them.

10 Is that -- does that conclude the --

11 MR. ROGERS: Let me --

12 THE COURT: And I want to make sure that we still
13 have the ones we had.

14 Do you have a yellow highlighter there that I
15 might --

16 CIRCUIT CLERK HOUSTON: I have a pink one.

17 THE COURT: I don't care what color, just as long as
18 I can -- I don't care if it's pink for breast cancer week or
19 whatever.

20 Let me tell you which ones I now have. Just so that
21 we'll all be on the same page. I show that Brown is still in
22 the group. Clark is still in the -- these are their last
23 names. Gales is still in the group. Waechter is still in
24 the group. Pund is still in the group. Stonebarger is still
25 in the group. Caviness --

1 MR. ROGERS: No. She's gone.

2 THE COURT: -- is struck. Burkemper is in the
3 group. Davenport. Kaimann. Carter. Ieppert. Gibbs was
4 one that had been a challenge for cause, I believe.

5 MR. ROGERS: Overruled.

6 THE COURT: And was overruled. Thomas. Laura
7 Thomas. Ohmert. Stief. Did he pronounce it Seabaugh?

8 MR. ROGERS: Seabaugh.

9 THE COURT: Seabaugh. Wubker. I don't remember him
10 saying anything.

11 MR. ROGERS: Very little.

12 THE COURT: Moretto. Dale Galloway. Krieg.

13 MR. CRANE: Oh, I just got lost. Wait a minute
14 here.

15 Headrick?

16 THE COURT: We're talking --

17 MR. CRANE: I didn't get them marked off.

18 THE COURT: No. These are people that are still on.

19 MR. CRANE: Yeah. No, I screwed up. I didn't have
20 34 and 35 marked off. Sorry to hold you up. I got -- I'm
21 with you. Sorry.

22 MR. ROGERS: You were making the correct rulings on
23 your own challenges? Is that what you're saying?

24 THE COURT: All right. So we're down -- have you
25 gotten Moretto, Galloway, and Krieg as still being on the

1 list?

2 MR. CRANE: Yeah.

3 THE COURT: Skirvin, Kelly, Runge, Schisler, Day,
4 Miller, Delk, Gaines, and Fields are the ones that I have
5 still in the running. Is that -- does counsel agree?

6 MR. ROGERS: That's the ones I have, Your Honor.

7 THE COURT: Okay. And that gives us a total of --

8 MR. ROGERS: 29.

9 THE COURT: How many?

10 MR. ROGERS: 29.

11 THE COURT: 29? Well, I must be mistaken then.

12 MR. CRANE: What did you have, Judge?

13 THE COURT: Well, I have more.

14 MR. KNIGHT: I've got 29.

15 THE COURT: You have 29. Maybe I -- let's see. You
16 have -- if we have -- if we have 28 people -- if we have 28,
17 we can get two alternates out of 28. Because we get six and
18 six. And the rule, the statute, reads that you get -- each
19 one get a challenge for every two alternates. It has always
20 been my policy, when trying cases, to give each attorney a
21 strike. You know, to take three and give each attorney a
22 strike. However, that's not what the statute says. The
23 statute, in 494, I believe it's 485, 495, gives you -- each
24 one one strike for every two alternates. And if we play by
25 those rules, which are the rules that everyone -- I mean, you

1 get two alternates out of 28 jurors.

2 MR. CRANE: Okay. And -- well, wait a minute. We
3 talked about this this morning. You're saying that you're
4 okay with going with two alternates instead of three.

5 THE COURT: I would go with two alternates. The
6 Court would. I would not go with one alternate.

7 MR. CRANE: Okay.

8 MR. ROGERS: I'm happy with two alternates.

9 MR. CRANE: And we can do that with this bunch.

10 THE COURT: We can do that with this bunch. Praise
11 the Lord. All right.

12 MR. CRANE: So all we need to know now is for sure
13 who the alternates are.

14 MR. KNIGHT: Yeah. We're striking through where?

15 THE COURT: Fields actually would be excess. So let
16 us -- gentlemen, the -- you will make your six strikes each
17 out of Jurors 1, 4, 6, 7, 10, 13, 14, 15 --

18 MR. KNIGHT: Wait. Whoops. No, no, no.

19 THE COURT: I'm sorry.

20 MR. ROGERS: Over my objection.

21 THE COURT: Oh, wait a minute. Let's see.

22 MR. KNIGHT: 10, 13, and 17.

23 THE COURT: Let me look and see. Mr. Norton is off.
24 I'm -- I'm having problems here. Just a second.

25 MR. CRANE: You're -- I did that a minute ago too.

1 Just because you didn't get anybody marked off, is what
2 throws you.

3 THE COURT: Well, no. I show him as off for cause.
4 I know what I did. 13, he's 14, 15, 16. So it would be 17,
5 and then 18, 19, 20, and 21. And that gives us 11 jurors
6 there; correct? And then we would go to 23, 24, 25, 26, 27,
7 28.

8 MR. CRANE: No. I had 28 gone.

9 THE COURT: I'm sorry. You did. I'm numbering them
10 consecutive.

11 All right. 28, 29, 30, 31. It would be 32.

12 MR. CRANE: Is in.

13 THE COURT: Is in.

14 MR. CRANE: Yeah.

15 THE COURT: Then to 38, 39, 40, and 41. That gives
16 us 21. 42, 44, and 45 would make up the original panel.
17 Miss Schisler is the last one on the regular panel. And then
18 47, 48, 49, and 50 would be the alternate panel. And each of
19 you may make --

20 MR. CRANE: No. 50's gone, Judge.

21 THE COURT: I'm sorry. 51.

22 MR. CRANE: Okay.

23 THE COURT: Okay.

24 MR. CRANE: So wait a minute. What are you going to
25 do with 52? Just officially.

1 THE COURT: 52 will be excused as excess, as long as
2 I know that no one has passed out and is sick by the time we
3 get all the jurors back in here. I'm not -- I'm not going to
4 release the excess.

5 MR. ROGERS: Your Honor, Mr. Gaines is the one
6 that's doing the online presentation.

7 MS. BENSON: For 80 people. They just went online.

8 MR. ROGERS: Tuesday morning or whenever it was.

9 THE COURT: I think it was Monday morning.

10 MR. ROGERS: Monday morning. Sometime inconsistent
11 with our --

12 THE COURT: With our trial.

13 MR. CRANE: Well, yeah, but, you know, Mr. Harris --
14 oh, he's gone?

15 MR. ROGERS: Yes.

16 MR. CRANE: I guess I'll shut up on that. Well,
17 wait a minute. No, hold it. Hold it. Here's an analogy.
18 Mr. Gibbs, he's not going to be able to be a nurse for
19 longer.

20 MR. ROGERS: Sure, he can. He's a nurse right now.

21 MR. CRANE: And the other guy, the other guy, other
22 people aren't going to hear some PowerPoint deal that he's
23 going to do, with all due respect to him. But, I mean, I
24 don't necessarily feel like there's any great difference
25 between Mr. Gibbs and Mr. Gaines, other than the idea that

1 Mr. Gibbs is in worse shape.

2 So to be consistent -- I mean, golly. The guy's not
3 going to be able to go on about his business. Got to take a
4 test. What did he say? Another 120 days to sit for it.

5 THE COURT: Well, he didn't know how long it would
6 be, but. I did not -- I really think that business issues
7 are things that people should have to deal with, unless
8 they're the sole provider of a family and they don't get --
9 they get zip if they don't work. I excuse those kind of
10 people. And I'm not going to --

11 MR. CRANE: Mr. Gaines is still going to get paid.

12 THE COURT: I'm not going to excuse Mr. Gaines. If
13 someone feels he ought to be taken off, you can take him off.
14 But I'm going to over -- you're officially moving to strike
15 him?

16 MR. ROGERS: I'm officially moving to excuse him.

17 MR. CRANE: Hey, what was his number again?
18 Kathryn?

19 MR. ROGERS: Number 51.

20 MR. CRANE: 51? Okay.

21 THE COURT: And I will show that defendant moves to
22 excuse Juror 51 for hardship. Motion is overruled.

23 I mean, he would be an alternate, if he were
24 serving. So if someone were really a nice person and didn't
25 care, they might agree, since he's an alternate, it would be

1 pretty annoying to have to set through the whole trial.

2 MR. ROGERS: Second alternate.

3 THE COURT: Yes, he would be a second alternate if
4 he serves. So, anyway --

5 MR. ROGERS: And you still got a strike to use on
6 Mrs. Fields anyway.

7 THE COURT: Well, Mrs. Fields is off.

8 MR. ROGERS: Well, not if we excuse him.

9 THE COURT: Oh. Okay.

10 MR. ROGERS: I'm still -- I'm making my pick with
11 you, Judge.

12 THE COURT: All I'm saying is: I will give the
13 state --

14 MR. CRANE: The opportunity to be benevolent? Is
15 that what you're saying?

16 MR. ROGERS: That's exactly --

17 THE COURT: A kinder, more gentle person. I'm not
18 suggesting you have to do that, Mr. Crane. I'm just saying,
19 he is --

20 MR. CRANE: Well, I tell you what. Can you -- can
21 you let me talk with my people about that? And we'll -- can
22 I just have a minute on that?

23 THE COURT: Sure. You can have five minutes. We'll
24 take a break.

25 MR. CRANE: It takes me a while to work up that

1 kinder, gentler -- all right.

2 THE COURT: Gentlemen. Just a second. We do have a
3 number of people waiting downstairs, some of whom are really
4 angry at having to be here and be here over three hours --

5 MR. CRANE: Okay. We'll get on it, Judge.

6 THE COURT: -- and wasting their time. Is it
7 agreeable that we tell them to be released and thank them for
8 coming?

9 MR. CRANE: I thought you were going to make sure
10 nobody fell out.

11 THE COURT: Well, I'm talking in this case. I'm not
12 releasing an -- an excess in this case. In this group.

13 MR. CRANE: I thought you weren't going to release
14 anybody, even in the next group, until --

15 THE COURT: Well, I'll be happy to keep them here.

16 MR. CRANE: Well, I -- whatever -- if you think
17 we're okay, we won't have to roll the dice.

18 MR. ROGERS: I just -- I don't see any reason to
19 keep them here.

20 MR. CRANE: Okay. That's fine.

21 THE COURT: You may release the second group.

22 DEPUTY COURT MARSHAL WERNER: Okay.

23 THE COURT: All right. And you'll get back in five
24 minutes, Mr. Crane?

25 MR. CRANE: Oh, golly. I sure --

1 THE COURT: No. On this one that you might be
2 kinder --

3 MR. CRANE: Oh, on the one. Yeah. Yeah. Yeah,
4 I'll run back in here.

5 THE COURT: Otherwise, no, I'll give you 20 minutes
6 to make your strikes.

7 MR. CRANE: Oh, okay. Yeah. I thought you were
8 saying I had five minutes for all --

9 THE COURT: No. You can have 20 minutes on each
10 side to make your strikes.

11 MR. CRANE: We'll be right back, Judge.

12 (Recess taken.)

13 - - -

14 The following proceedings were held out of the presence
15 of the jury:

16 MR. CRANE: I got a question for you. Charlie,
17 there you are. I thought that was you.

18 I've got a question, Judge. You're indicating that
19 two alternates, would be 47, 48, and one side gets to strike
20 one of them.

21 THE COURT: Wait a minute. Here we go. 47, 48, 49,
22 and 51, would be the panel.

23 MR. CRANE: Yeah.

24 THE COURT: And there's a strike -- each side gets
25 one strike, leaving two alternates. You want to look at the

1 statute?

2 MR. CRANE: So it's not like he gets to strike one
3 of either 47 or 48 and I get to strike one of 49 or 51. It
4 doesn't work that way.

5 THE COURT: No. But you make -- you make your first
6 strikes. And you can strike 47 or you can strike 49 and --
7 you can strike any one of the four. But the state goes
8 first. In other words, you could strike any one of 47, 48,
9 49, or 51. The state would make its strike. And then the
10 defendant --

11 MR. CRANE: Okay.

12 THE COURT: -- would come back and make his strike.

13 MR. CRANE: Okay.

14 THE COURT: Any one of the three that are left.

15 MR. CRANE: Okay.

16 THE COURT: He may make one strike.

17 MR. CRANE: All right. So, if we go up to 51 --

18 THE COURT: Yes.

19 MR. CRANE: -- I get a strike and the defense gets a
20 strike.

21 THE COURT: Yes.

22 MR. CRANE: From 47, 48, 49, or 51.

23 THE COURT: Correct.

24 MR. CRANE: Okay. I think I'm -- give me 30
25 seconds.

1 MR. ROGERS: Wait. Wait.

2 MR. CRANE: Give me 30 seconds. What? I'm right on
3 that; right?

4 MR. ROGERS: You're right on that, but you're coming
5 back with the answer about whether you're going to soften
6 your heart on Mr. Gaines?

7 MR. CRANE: That's what I'm doing right now. That's
8 what I'm doing right now.

9 (Mr. Crane left the courtroom and then returned.)

10 MR. CRANE: Got it.

11 THE COURT: Are you going to be a kind person?

12 MR. CRANE: No.

13 THE COURT: All right. You have 20 minutes from now
14 to make your strikes on our clerk's --

15 MR. CRANE: We can mark off Fields?

16 MR. ROGERS: Well, we'll wait until they survive --

17 MR. CRANE: Well, unless you tell me different,
18 Fields is gone.

19 THE COURT: Fields is not a part of the group unless
20 someone else falls over or calls and says, you know, someone
21 in the family --

22 MR. CRANE: How much time do I have?

23 THE COURT: You have until 10 minutes past 4.

24 MR. CRANE: 10 minutes past 4.

25 THE COURT: You have 20 minutes.

1 MR. CRANE: Very good, Judge.

2 (Attorneys left the courtroom.)

3 (Discussion between the Court and Venireperson James
4 Burlison omitted from Transcript.)

5 THE COURT: We'll be in recess.

6 (Recess taken.)

7 - - -

8 The following proceedings were held out of the presence
9 of the jury:

10 THE COURT: I want to make a record, gentlemen,
11 about who has struck whom, just so that I know. I show that
12 the state strikes Jurors 13, 18, 23, 27, 39, and 42 from the
13 main panel and Number 51 from the alternate panel. Is that
14 correct?

15 MR. CRANE: Yes.

16 THE COURT: All right. And the defense strikes
17 Jurors 6, 7, 10, 20, 38, and 45 from the main panel and
18 Number 49 from the alternate? Is that correct?

19 MR. ROGERS: That's correct, Your Honor.

20 THE COURT: All right.

21 MR. CRANE: So 47 and 48 are the alternates.

22 THE COURT: 47 is the first alternate, 48 is the
23 second alternate.

24 MR. CRANE: I just note, Judge, there's no line
25 through Fields. Was she not excused?

1 THE COURT: She is shown as excess.

2 MR. CRANE: Excess. Okay.

3 THE COURT: Excused. And so our jurors are 1, 4,
4 17, 19 and 21 on the first page, 24, 25 and 26, 32, 40 and 41
5 and 44 are on the main panel.

6 Is that -- does the state concur with that?

7 MR. CRANE: Yes.

8 THE COURT: And the defendant?

9 MR. ROGERS: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. ROGERS: And the alternates are --

12 THE COURT: Day.

13 MR. ROGERS: -- Day, 47, and Miller, 48?

14 THE COURT: Correct. In that order.

15 MR. ROGERS: In that order.

16 THE COURT: All right.

17 MR. CRANE: All right.

18 Judge, Mr. Rogers and I were talking. On their
19 admonishment reference reading anything, do you think that
20 covers like getting on the Internet?

21 THE COURT: I am going to be rather specific, if you
22 don't have an objection. I'm going to read -- I'm going to
23 do this as 300.04, paragraph 2, which is one of the recesses
24 that we take. And I'm going to tell them about: Do not
25 read, view, listen to any radio, television, or report of the

1 trial, or make any other inquiry or investigation into the
2 facts of this case, in any manner whatsoever, including, but
3 not limited to, Internet.

4 Now, I -- you know, it's a double-edged sword.
5 Because they might well say, "Well, goodness, this may well
6 be on the Internet. I never thought of that." I mean, if
7 they Google it, I can assure you it will be right there for
8 them to see. So I -- you know, I -- I mean, I will admonish
9 them in every strong way that I can. If you don't want me to
10 say "Internet," I won't say that.

11 MR. ROGERS: We do want you to say it, because
12 anybody who's going do it, it would occur to them anyway.
13 That's my view of the deal.

14 THE COURT: And they'll say, "Well, she didn't say
15 the Internet. I'm not reading a newspaper."

16 MR. CRANE: I agree with Mr. Rogers.

17 THE COURT: But, you know, I can tell you, you put
18 the name in, and it immediately will come up.

19 MR. CRANE: I'm in agreement with Mr. Rogers and the
20 Court.

21 THE COURT: Okay. If you're all in agreement, I
22 will add that little admonishment to that normal instruction
23 I give when we recess.

24 Are we ready to bring them in?

25 DEPUTY COURT MARSHAL WERNER: Yeah.

1 BAILIFF BOEDEKER: Yes, ma'am.

2 THE COURT: You may bring them in.

3 - - -

4 The following proceedings were held in the presence of
5 the jury:

6 (Roll call by Melba Houston, Circuit Clerk.)

7 THE COURT: Ladies and gentlemen, you are the lucky
8 ones. And we certainly appreciate the time you've spent
9 today and the time you will be spending next week.

10 Our marshal will give you instructions on
11 information that you need to know prior to reporting back to
12 the courthouse. And that will be on Sunday. But I want to
13 thank you again for your willingness to do this. And to do
14 it particularly in an area where you will be in another
15 county, away from your family and friends and work. And we
16 all appreciate it, both the state and the defense, as well as
17 the Court.

18 Hopefully we can return the favor. Although we've
19 never had anyone from your county come to Boone County, we
20 certainly have had other counties come to pick juries and
21 take them elsewhere.

22 The Court will remind you again of what you were
23 told at the first recess of this Court. Until you retire to
24 consider your verdict, you must not discuss this case among
25 yourselves or with others, or permit anyone to discuss it in

1 your hearing. You should not form or express any opinion
2 about the case until it is finally given to you to decide.
3 Do not read, view, or listen to any newspaper, radio, or
4 television report of the trial, or make any kind of
5 investigation on your own regarding the facts of this case,
6 by any means whatsoever, including, but not limited, to the
7 Internet.

8 Our marshal will indicate to you and has some
9 written materials for you, what you may and may not bring
10 when you report back to the courthouse.

11 In the unlikely event that something should happen
12 that none of us anticipate -- for example, we had a juror
13 whose wife had a blood clot and had to go to the hospital
14 this morning. And we had to excuse that juror. We don't
15 plan on things like -- happening like that, but sometimes
16 they do. And we will give you a number that immediately you
17 should contact as soon as you know if there's any kind of
18 problem at all, so that we can deal with that situation.

19 But again, I hope you have a good weekend. And we
20 will see you Monday morning.

21 I'm wondering, since they will come up on Sunday
22 evening, whether we will be able to start promptly at 8:30 on
23 Monday morning or whether we should wait until 9. Is there
24 any problem with having, first of all, having witnesses there
25 or having counsel there for opening statement at that time?

1 MR. CRANE: Start off opening statement at 8:30 as
2 far as I know would be fine with the state, Judge.

3 THE COURT: Well, we'll have instructions that the
4 jury would receive at that time, but -- you know, and we'd
5 swear the jury. But you'd be able to start at that time.

6 MR. CRANE: Yes, ma'am.

7 MR. ROGERS: Yes, Your Honor.

8 JUROR SKIRVIN: Can we drive up?

9 THE COURT: Sir?

10 JUROR SKIRVIN: Can we drive up?

11 THE COURT: No, you would not be able to drive up.
12 There will be transportation provided for you.

13 JUROR SKIRVIN: So in other words, we're limited to
14 a hotel.

15 THE COURT: Our marshal will explain all those
16 things for you.

17 VENIREPERSON SKIRVIN: I just -- I got one question.

18 THE COURT: And would you identify yourself, sir?

19 VENIREPERSON SKIRVIN: Oscar -- or John Skirvin.

20 THE COURT: Yes.

21 VENIREPERSON SKIRVIN: You know, I'm a single-income
22 family and ain't got enough money to live week from week
23 hardly. How am I supposed to pay my bills, going a hundred
24 miles away?

25 THE COURT: Sir.

1 VENIREPERSON SKIRVIN: I stated that earlier. If it
2 was here, I'd have no issue, because I could work after --

3 MR. CRANE: Judge, maybe we could take a few
4 minutes?

5 THE COURT: We may do that.

6 VENIREPERSON SKIRVIN: I'd be glad if it around
7 here, but.

8 THE COURT: Have you released everyone?

9 BAILIFF BOEDEKER: Yes.

10 THE COURT: You have released everyone?

11 I do not -- I'll be glad to talk to counsel about
12 this matter.

13 Is there a place where we can have the jury where --
14 maybe the assembly room?

15 BAILIFF BOEDEKER: Yes, ma'am. We're going to take
16 them in and put them in the jury room.

17 THE COURT: All right. If you'll take them into the
18 assembly room, please.

19 - - -

20 The following proceedings were held out of the presence
21 of the jury:

22 THE COURT: I do not have any notes that this juror
23 made that statement during this voir dire. He made some
24 comment about expecting the defendant to talk for himself.

25 MS. BENSON: I have a note that he said he's a

1 single-income family.

2 MR. ROGERS: That's on his questionnaire.

3 THE COURT: That may have been on his questionnaire.

4 MS. BENSON: No, he said it as well.

5 THE COURT: I didn't -- I usually make a note of
6 those things. I'm glad you did. I could have the reporter
7 go back and look at it, just to make sure what he disclosed.
8 Let me see -- do you want to talk to defense counsel
9 privately?

10 MR. ROGERS: I do have that note also, Your Honor.

11 THE COURT: Pardon?

12 MR. CRANE: Well, yeah, I mean, it doesn't matter.
13 I'll give you, he might have said that. I mean, now he's
14 raising Cain. I mean, the question is: What are we going to
15 do?

16 MS. BENSON: Right.

17 MR. CRANE: I mean, first off, I'd just throw this
18 out there. You want to go with one alternate?

19 MR. ROGERS: I -- I think the Court is very
20 reluctant to do that.

21 THE COURT: I am very reluctant to go with one
22 alternate. Of course we've let the second panel to go. And
23 we've also let -- although perhaps we could --

24 MR. ROGERS: Let's --

25 THE COURT: -- we could get --

1 MR. CRANE: Why don't we just go back and get Gaines
2 or what's her name?
3 MR. ROGERS: Fields.
4 MR. CRANE: Fields? Can't run them down? They
5 might have read --
6 MR. ROGERS: That's what I would suggest.
7 MR. CRANE: -- viewed, listened to some news
8 broadcast of the thing.
9 MR. ROGERS: In the meantime?
10 MR. CRANE: I don't know. What about that?
11 THE COURT: Well, that might be an alternative, is
12 to find, if we can locate -- Miss Fields was excess. She was
13 an extra person.
14 MS. BENSON: Right.
15 THE COURT: And she's left the courthouse for sure?
16 BAILIFF BRISCOE: They're all gone.
17 MR. CRANE: Now let's just say we got those two back
18 here, though.
19 THE COURT: If you got those two back here, then --
20 MR. CRANE: You got to restrike alternates; right?
21 MR. ROGERS: Right. Well --
22 THE COURT: Yes.
23 MR. ROGERS: We would basically -- that would put
24 Miss Day on the regular jury, which would be okay with us.
25 We didn't choose to strike her from the alternate. And then,

1 if you wanted to strike Fields instead of Gaines, we could
2 get Gaines back.

3 MR. CRANE: Well, no, what I'm -- you got to get --
4 you got to get four of them -- you got to get two back and
5 then restrike; correct?

6 MR. ROGERS: You don't have to get -- I'm saying, we
7 would not want to restrike. If you wanted to strike one of
8 these -- this one instead of this one --

9 MR. CRANE: Oh. All right. Well, you'll let me do
10 that? Can we get away with that, Judge, you think, if he
11 lets me do it?

12 THE COURT: If the defendant is agreeable to
13 allowing the state to strike between Gaines and Fields --
14 that assumes that we can get both of these jurors back. And
15 I'm willing to wait here to see if we can locate them. And I
16 certainly -- is the bailiff going to see if we can find them?

17 BAILIFF BRISCOE: We'll see if we can get the
18 address where they're at.

19 MR. ROGERS: I've got the questionnaires here with
20 the --

21 MR. CRANE: All right. Can you give me a couple
22 minutes to think on it? I've put all my stuff up. I got my
23 notes here. I can --

24 MR. ROGERS: It seems better than having somebody as
25 angry as Mr. Skirvin appears to be.

1 MR. CRANE: I really -- I mean, I don't doubt he
2 said something, but he wasn't that adamant in -- during voir
3 dire.

4 MR. ROGERS: No, he wasn't.

5 THE COURT: I don't --

6 MR. CRANE: But let me --

7 THE COURT: -- know if Diana -- you know, I was
8 surprised that you didn't strike him, from what he said about
9 the defendant.

10 (Mr. Crane left the courtroom.)

11 MR. ROGERS: We thought they were going to.

12 THE COURT: Well, I was surprised to see him on
13 there, myself. For that reason. But I'm not the lawyer. I
14 don't try the lawsuit. I learned almost 30 years ago we
15 don't do that. You have to give it up.

16 MR. ROGERS: Exactly.

17 THE COURT: Well, I sort of --

18 CIRCUIT CLERK HOUSTON: They left so quickly. I
19 didn't --

20 THE COURT: -- thought they were going to -- well,
21 they were so happy to go. I sort of --

22 CIRCUIT CLERK HOUSTON: I didn't realize they were
23 gone already.

24 THE COURT: Well, I would have left the ones that
25 had been struck for cause and excused off -- right off, and

1 then kept the others, but...

2 Do we know where Miss Fields is and Mr. Gaines?

3 BAILIFF BRISCOE: They live in Moscow. That's about
4 four miles down the road. The other one lives in Troy.

5 THE COURT: All right.

6 BAILIFF BRISCOE: Nickel Holler.

7 THE COURT: And --

8 MR. ROGERS: You got their phone numbers?

9 BAILIFF BRISCOE: Yeah, I got them, but I don't know
10 whether they've got home yet or not.

11 THE COURT: Who lives in Troy?

12 BAILIFF BRISCOE: Gaines. Michael Gaines.

13 MS. BENSON: I have my cell phone right here. You
14 want to call them?

15 THE COURT: Who knows. They may go out and
16 celebrate that they're not on this jury and we may have to
17 find them in a local tavern.

18 BAILIFF BRISCOE: Gaines -- was Gaines the right
19 one?

20 MR. ROGERS: Gaines and Fields. And Moscow Mills
21 isn't --

22 BAILIFF BRISCOE: Four miles down the road.

23 MR. ROGERS: Probably time wise --

24 BAILIFF BRISCOE: Getting them back here --

25 MR. ROGERS: -- depending on where he lives in Troy

1 really.

2 THE COURT: Would it be possible to -- well,

3 Mr. Crane was going to go see --

4 MR. ROGERS: Which one he wanted to strike.

5 THE COURT: Well, I mean, maybe he could agree that

6 he would strike one and not the other, and we could get the

7 one back that he didn't want to strike.

8 MR. ROGERS: That's right.

9 THE COURT: And so we'd only have one coming back.

10 MR. ROGERS: That's -- that's what we agreed.

11 THE COURT: In which case I don't want you to call

12 both.

13 BAILIFF BRISCOE: Okay.

14 THE COURT: Let's see if he can come to an

15 agreement. And I understand it's the state's -- I mean, the

16 defense position that he can strike either one.

17 MR. ROGERS: Either.

18 (Mr. Crane present in the courtroom.)

19 MR. CRANE: Well, if you find Gaines, we'll take

20 him.

21 MR. ROGERS: You'll keep him and strike --

22 THE COURT: And leave Miss Fields off.

23 MR. CRANE: Yeah.

24 MR. ROGERS: Okay.

25 BAILIFF BRISCOE: Do you want me to try to

1 contact --

2 THE COURT: Would you try to contact Mr. Gaines? He
3 may have a few words for you.

4 MR. CRANE: You know, we tried to let him go once.

5 MR. ROGERS: Yeah, you did. You even used your
6 preemptory for him, after you refused to be a nice guy and
7 let him go.

8 MR. CRANE: I don't think I can tell him that now,
9 but.

10 CIRCUIT CLERK HOUSTON: Are we going to need a clean
11 sheet? Or can we work on your original?

12 THE COURT: We can work on the original.

13 MR. CRANE: And I'd like to just, for the record,
14 make sure that this is what we're doing here. There's no
15 objection, in fact was suggested by the defense, that the
16 state select between the last two jurors on the panel --

17 MR. ROGERS: Right.

18 MR. CRANE: -- would basically be what it is.
19 Correct?

20 MR. ROGERS: That is correct. And it seems to me
21 the only fair thing to do, since you would have had the
22 opportunity to make the strike, had we excused Mr. Skirvin
23 earlier.

24 THE COURT: Well, I'm looking for him on the list,
25 and he's disappeared. I probably have looked at it so

1 long --

2 MR. CRANE: I think he's Number 51.

3 MS. BENSON: 41.

4 THE COURT: 41?

5 MR. CRANE: Who? Skirvin?

6 THE COURT: Yeah.

7 MR. ROGERS: Skirvin is 41.

8 THE COURT: So it is agreeable then we would excuse

9 Mr. Skirvin, assuming that we can get -- we can get

10 Mr. Gaines back. And then we would move Eldora Day up to the

11 main panel. And she would be one of the 12.

12 MR. ROGERS: Right.

13 THE COURT: And the state is in agreement with that.

14 MR. CRANE: Wait a minute. Let me -- I forgot

15 about -- oh, yeah. Okay. That's the one --

16 THE COURT: She would move up. And then the two

17 alternates would be Kevin Miller and Michael Gaines.

18 MR. CRANE: Yeah. I mean, if we don't do that, we

19 either keep Skirvin or choose another panel.

20 MR. ROGERS: Yeah.

21 THE COURT: I think that would be the alternative,

22 is to have a panel come in tomorrow morning.

23 MR. ROGERS: I'd rather find Gaines, knowing that he

24 will be upset. He can afford to be upset.

25 (Recess taken.)

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The following proceedings were held out of the presence of the jury:

(Juror Gaines present in the courtroom.)

THE COURT: Mr. Gaines?

JUROR GAINES: Yes.

THE COURT: I bring you glad tidings. Probably not to you. Because of a circumstance that has arisen in the panel, we are going to have to ask you to serve in this case. And I realize that it is a hardship and a problem for you, but -- I wish that there was something else that I could do, but I can't.

Our marshal will give you instructions about where to appear and what you may or may not bring with you.

And I need to tell you that and remind you what we first discussed when we had a recess to begin with. Until you retire to consider your verdict, you must not discuss this case among yourselves, with others, or permit anyone to discuss it in your hearing. You should not form or express any opinion about the case until it is finally given to you to decide. Do not read, view, or listen to any newspaper, radio, or television report of the trial, or make any independent investigation of the facts of this case by any means whatsoever, including, but not limited to, anything on the Internet.

1 Again, I regret that we have to have you serve, and
2 I can't finally release you, but circumstances have arisen
3 that we just -- we need you to serve in this case.

4 And if you will go with our marshal, he'll give you
5 some information that he's giving the other jurors in the
6 assembly room. And we will see you in Columbia 8:30 on
7 Monday morning. But if you will retire with that.

8 JUROR GAINES: Is there anything that can change
9 that? This -- there's literally 80 people that I'm training.
10 We shut down a complete system last night. We're changing
11 over the complete system this weekend and starting up Monday
12 morning. And I've got 80 people across the country that are
13 waiting on me to train them Monday. This has been planned
14 for a month. I mean, this is not just a little thing. It's
15 major. It's a major company and it's a major deal. And I'm
16 the only one that can do it.

17 THE COURT: There is not anything that I can do.
18 I -- certainly you will have time between now and when you
19 report on Sunday, if there's some -- something that you can
20 do on your end, either to delay it a week, for example.

21 JUROR GAINES: Well, if I had done that, you know,
22 four hours ago, that was possible, but it's not possible now.

23 THE COURT: Well, I cannot excuse you.

24 JUROR GAINES: Okay.

25 (Juror Gaines excused from the courtroom.)

1 THE COURT: So the record is clear, we have excused
2 41, have allowed Miss Day to be on the main panel, and have
3 had Mr. Gaines as the second alternate. And I truly regret
4 it. I wish he had said something earlier about being able to
5 reschedule it, if he could. I mean, if he had even said
6 that, I certainly -- we would have given him time to go do
7 that. But he was as adamant as he was. And I feel
8 particularly badly since he's an alternate. There may be a
9 fight, in which case someone else will be off this panel. I
10 don't know. I wish I could do something else, but absent
11 calling in a whole new panel and starting tomorrow morning,
12 there's not a thing we can do.

13 Anything further for the state?

14 MR. CRANE: No, Your Honor.

15 THE COURT: Anything further for the defendant?

16 MR. ROGERS: No, Your Honor.

17 THE COURT: All right. We will then be in recess.
18 And we'll see you then bright and early. We'll be in the
19 courthouse early. I expect the state will have its
20 instructions. The defendant will have any instructions that
21 you may give. You're not required to give any at all, of
22 course, but if you have them that you're thinking about, let
23 us know.

24 MR. ROGERS: Okay. You want them Monday morning?

25 THE COURT: Monday morning would be good. I assume

1 you have them prepared.

2 MR. ROGERS: We will by then.

3 THE COURT: Okay. And the state will exchange any
4 instructions that it might have.

5 All right.

6 MR. ROGERS: We're in the big courtroom?

7 THE COURT: The ceremonial courtroom. And there
8 will be one camera in that courtroom.

9 MR. CRANE: There's one still, one video? Is that
10 the way it works?

11 THE COURT: I don't remember if there's a still
12 camera. There is a video camera.

13 MR. CRANE: But there can't be more than one still.
14 Isn't that the way it works?

15 THE COURT: Yes.

16 MR. ROGERS: All right. Fair enough.

17 THE COURT: With that understanding, we'll be in
18 recess.

19 MR. ROGERS: Thank you, Your Honor.

20 (Adjourned for the evening.)

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P R O C E E D I N G S

October 17, 2005

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The following proceedings were held in Boone County, out of the presence of the jury:

THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Your Honor.

THE COURT: And what says the defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: I don't know if you're aware, there is a mic that's live on that table. If you push the button on the side and it flashes -- no. On the table. Just look underneath. No, no. On the table. Sit down and look in front of you. Right in front of you on the ledge there.

MR. WEIS: Oh, okay.

THE COURT: If it's flashing -- if it's flashing, the mic 's off. And if it is -- if there's no color to it, the mic is on. Just so that you would know that, for confidential matters.

Are there preliminary matters for the state?

MR. CRANE: We gave you and the defense our draft of instructions.

THE COURT: Are they on the bench here? I do see one.

1 And does the defense have a draft instruction at --
2 any draft instructions at this time?

3 MR. ROGERS: We have prepared them, Your Honor, but
4 we don't have them here in hard copy format. Or at least we
5 can't find them in our boxes. But we --

6 THE COURT: Well, you don't have to do it this
7 moment, but if we can do that sometime this morning, that
8 would be fine.

9 MR. WEIS: I've got them on the computer. We can --

10 MR. ROGERS: Print them off during the recess.

11 THE COURT: All right. That would be fine.

12 Other than that, does the state have any matter to
13 take up?

14 MR. CRANE: None that I can think of, Judge.

15 THE COURT: The defense? Is there any --

16 MR. ROGERS: Your Honor, I would ask the Court's
17 leave for Miss Dorrance, our paralegal, to sit over here at
18 this table during the trial, so she can help us with some
19 audiovisual.

20 MR. CRANE: That's all right with me.

21 THE COURT: If that would assist, you may do that.
22 It looks like there -- are all those boxes your boxes?

23 MR. ROGERS: Yes, Your Honor.

24 THE COURT: All right.

25 MR. ROGERS: That's why we can't find our

1 instructions. Too many boxes.

2 THE COURT: All right. Are there any other matters
3 then for the defense?

4 MR. ROGERS: No, Your Honor.

5 THE COURT: I would tell anyone here, if you have a
6 cell phone in any form, whether it's a normal looking cell
7 phone or if it's a PDA, a BlackBerry, turn it off. If your
8 telephone goes off, it will be checked for the rest of the
9 day by our court security staff. And certainly we wouldn't
10 want you to be without it. And that goes for the attorneys
11 too. Because sometimes it happens that attorneys have
12 their's on as well.

13 Where is our -- are you handling court today? The
14 jury is ready to come in?

15 DEPUTY COURT MARSHAL LANE: Yes, Judge.

16 THE COURT: All right. If you would have them come
17 in, please.

18 - - -

19 The following proceedings were held in the presence of
20 the jury:

21 THE COURT: Good morning, ladies and gentlemen.

22 (Court reporter experienced technical difficulties
23 with equipment.)

24 THE COURT: Why don't we start over again.

25 If, ladies and gentlemen, you would answer "here" or

1 "present" as the clerk calls your name. We appreciate your
2 being here and bearing with us with this technical problem.
3 Hopefully it won't happen again.

4 You may start.

5 (Roll call by Sheri Vanderhoof, Deputy Clerk.)

6 THE COURT: Would you stand, ladies and gentlemen,
7 and be sworn.

8 DEPUTY CLERK VANDERHOOF: Please raise your right
9 hands.

10 (Jury panel of 12 jurors and 2 alternates sworn by
11 Sheri Vanderhoof, Deputy Clerk.)

12 THE COURT: Be seated, ladies and gentlemen.

13 MR. ROGERS: Your Honor, at this time defendant
14 would request the rule with regard to exclusion of witnesses
15 be invoked.

16 THE COURT: All right.

17 (Discussion off the record between counsel.)

18 MR. CRANE: Yeah. The defense -- this is something
19 we talked about Friday. The defense doesn't have any
20 objection to investigator -- or prosecutor's investigator
21 Bill Hawes being in the courtroom, although he will testify.

22 Also, Judge, I would ask that the record reflect
23 that the wife of Kent Heitholt is in the courtroom. Pursuant
24 to the victims' rights statute and Missouri Constitution, the
25 state requests that she be allowed to remain in the

1 courtroom, even though she'd be a witness in the case.

2 THE COURT: Are there any other family members that
3 might be called as witnesses?

4 MR. CRANE: There are other family members that are
5 present --

6 THE COURT: But that --

7 MR. CRANE: -- of the Heitholt family, but I do not
8 anticipate any of those would be called as a witness by the
9 state. At least at this juncture.

10 THE COURT: Do you have --

11 MR. ROGERS: We do not anticipate calling any, Your
12 Honor.

13 THE COURT: Do you have an objection?

14 MR. ROGERS: No, Your Honor.

15 THE COURT: All right. Any individual who is in
16 this courtroom who is to be called as a witness, would you
17 please approach the clerk, if you're here. Because I --
18 gentlemen, you know your witnesses. I don't know who they
19 might be. And I'm talking to both sides.

20 MR. ROGERS: We don't have any who are present in
21 the courtroom, Your Honor.

22 THE COURT: All right.

23 I'd ask our marshal then to put a sign outside the
24 door that indicates witnesses are excluded.

25 And you did swear the jury in. Yes. All right.

1 You may be excused then at this time.

2 (Clerk excused.)

3 THE COURT: Ladies and gentlemen, this case will
4 proceed in the following order.

5 First, the Court will read to you two instructions
6 concerning the law applicable to this case and its trial.
7 Next, the attorney for the state must make an opening
8 statement outlining what the attorney expects the state's
9 evidence will be. The attorney for the defendant is not
10 required to make an opening statement then or at any other
11 time. However, if the attorney chooses to do so, he may make
12 an opening statement after that of the state, or the attorney
13 may reserve his opening statement until the conclusion of the
14 state's evidence.

15 Evidence will then be introduced.

16 At the conclusion of all the evidence, further
17 instructions in writing concerning the law will be read to
18 you by the Court, after which the attorneys may make their
19 arguments. You will then be given the written instructions
20 of the Court to take with you to your jury room. You will go
21 to that room, select a foreperson, deliberate, and arrive at
22 your verdict.

23 Sometimes there are delays or conferences out of
24 your hearing with the attorneys about matters of law. There
25 are good reasons for these delays and conferences. The Court

1 is confident that you will be patient and understanding. We
2 will have recesses from time to time.

3 The following two instructions of law are for your
4 guidance in this case. The two of them, along with the other
5 instructions in writing read to you at the close of all the
6 evidence, will be handed to you at that time to take to your
7 jury room.

8 (Instructions 1 and 2 read to the jury.)

9 THE COURT: Mr. Crane.

10 MR. CRANE: Please the Court.

11 THE COURT: You may address the jury.

12 MR. CRANE: Counsel.

13 - - -

14 OPENING STATEMENT

15 BY MR. CRANE:

16 Ladies and gentlemen of the jury, welcome to Boone
17 County.

18 The evidence in this case will be that on October
19 31st, 2001, that's Halloween 2001, Charles, he goes by Chuck,
20 Erickson and the defendant, Ryan Ferguson, both 17-year-old
21 high school students, had been drinking inside a bar called
22 By George here in town. By the early morning hours of
23 November 1, 2001, the two left the bar and walked down the
24 street where the defendant had parked his Mercedes. From the
25 car, the teenagers walked a short distance, when they saw a

1 man on the parking lot of the Columbia Daily Tribune
2 newspaper building. Without warning, they attacked this man,
3 as he stood by the door of his car. The evidence will be
4 that Erickson walked up and struck the victim in the head
5 with a tire tool. Thereafter, the defendant strangled the
6 victim to death. And then both of them left the scene.

7 Now ladies and gentlemen, back in November of last
8 year, 2004, Chuck Erickson pled guilty to murder in the
9 second degree, robbery, acting in concert with Ryan Ferguson
10 to commit that robbery, and a crime called armed criminal
11 action. He pled guilty to those offenses for his part in
12 this crime.

13 Let's go back to the fall of 2001. Chuck Erickson
14 and the defendant had been friends since junior high. They
15 went to the same schools, had some of the same friends, lived
16 in the same part of town, hung out together, ran around
17 together.

18 On the night of Halloween 2001, the defendant and
19 Erickson met out -- met up outside a house party where a lot
20 of other kids their age had gathered. Shortly after the
21 police showed up and broke up this house party, the boys got
22 together and left in the defendant's vehicle. But the night
23 was still young. The defendant drove to Erickson's
24 residence, where Erickson changed clothes and snuck back out,
25 meeting the waiting defendant.

1 They were headed for a bar called, as I mentioned,
2 By George. The 17-year-olds were under age, but the
3 defendant's sister had said that she could get them in. The
4 nightclub was a popular place that night. A lot of people
5 inside; a lot of cars parked outside. So the defendant
6 parked on past the bar, down the street.

7 The two buddies walked to the parking lot and met up
8 with the defendant's older sister and her friend. And this
9 friend was an Asian female. The bar doorman, bouncer,
10 whatever you want to call it, let them right on in, with
11 these two females. And while the defendant and Erickson were
12 in By George bar, they each had several cocktails. They
13 eventually left the bar that night and went back to the
14 defendant's Mercedes.

15 The evidence will be that during this period the
16 defendant made some cell phone calls. Evidence will be that
17 the last cell phone call the defendant made was at 2:09 a.m.,
18 and it was one minute in duration. 2:09 a.m. on November 1,
19 2001. And the evidence will be that these cell phone calls
20 were made right there in the area of the bar.

21 They got to the car, but these two young men still
22 weren't ready to go home. Instead, on a spontaneous whim,
23 they decided to go rob someone.

24 The defendant got a tire tool from his trunk and he
25 gave it to Erickson. Evidence will be they then left the

1 vehicle on foot and walked a short distance to Providence
2 Road. Providence Road. From there, Erickson and the
3 defendant spotted the victim, Kent Heitholt, a sports editor
4 for the Tribune newspaper. And Mr. Heitholt was now the
5 target.

6 Erickson and the defendant walked up to the parking
7 lot.

8 By the way, the bar and the defendant's car are a
9 short distance, a block and a half, from the parking lot at
10 the Tribune building. The evidence will be that, walking at
11 a normal pace, it takes 3 minutes and 20 seconds to get from
12 the area of the car down to this parking lot where
13 Mr. Heitholt was.

14 Evidence will be that Kent Heitholt logged off his
15 computer at work at 2:08 a.m., and he said his goodbyes to
16 the other employees inside, left the building, and walked to
17 his car on the parking lot.

18 He normally worked in the early morning hours,
19 reporting sports news of the day. He was a big man. 315
20 pounds, six foot three inches tall. And he was 48 years old.
21 His work day was over. And now Kent stood at the driver's
22 side of his car, getting ready to leave. He was alone on the
23 parking lot. And ladies and gentlemen, the evidence will be
24 that Chuck Erickson simply walked up and began striking the
25 victim on the head with this tire tool. Heitholt staggered.

1 He moaned. His head began bleeding. And finally he went
2 down on the pavement. Erickson stopped hitting him and sat
3 on a wall at the front end of the vehicle, of Mr. Heitholt's
4 vehicle, and he felt sick. The victim was hurt bad, but he
5 was still alive. After Kent was down, the evidence will be
6 the defendant then pulled off the victim's own belt and used
7 it to strangle him to death.

8 While Chuck Erickson and the defendant were still at
9 the scene, beside the driver's side of the victim's car, a
10 cleaning lady, a night cleaning lady at the Tribune, stepped
11 out onto the lot to smoke a cigarette. And she saw two
12 people ducking behind the driver's side of Kent's car. This
13 scared her. And the cleaning lady went back inside and
14 hollered at another janitor.

15 And then both janitors, one was the cleaning lady
16 and one was a male janitor, looked outside from this dock
17 area out onto the parking lot, and they saw two young white
18 males, not one, but two young white males on the opposite
19 side of Kent Heitholt's car from them.

20 The male janitor yelled out there, "Who's there?"
21 Trying to figure out what's going on. He couldn't see Kent.
22 He was down. And from his location behind the victim's car,
23 the evidence will be that one of these young white males
24 yelled back at him, "Somebody's hurt. Get help." Words to
25 that effect.

1 Ladies and gentlemen, the evidence will be that that
2 young white male that yelled back at those janitors, evidence
3 will be that was Chuck Erickson.

4 When last seen by either of the janitors, the
5 defendant and Erickson were headed out of the parking lot.
6 The evidence will be they made it back to the Mercedes up by
7 the bar, and they got away. The defendant drove Erickson to
8 his residence and drove away himself.

9 The evidence will be that the janitors contacted 911
10 at 2:26 a.m. on November 1, 2001. So the victim, the
11 evidence will be, logs off his computer, finishes his job,
12 leaves, 2:08. The janitors are calling 911 at 2:26 a.m.

13 Other sports writers that were still in the building
14 that night heard that something had happened to their
15 co-worker, Kent. He was their boss. And they ran out onto
16 the lot. And when they got to Kent, he was face down in a
17 pool of his own blood.

18 The two coworkers, of course they were hoping he was
19 still alive, rolled him over from his original position.
20 They rolled him over onto his back. They checked for a
21 pulse. Checked his neck; checked his wrist. Didn't get
22 anything.

23 The first police officers, now responding to the
24 janitor's 911 call, arrive at 2:30 a.m. And soon thereafter
25 numerous other uniform police officers arrive and emergency

1 personnel. Paramedics. The paramedics tore open
2 Mr. Heitholt's sweater that he was wearing, checked his
3 vitals, but he was already dead.

4 After the uniform police arrived and paramedics
5 determined the victim was deceased, evidence detectives were
6 called in from the Columbia Police Department to process the
7 crime scene.

8 It was determined that Kent Heitholt's wrist watch
9 was missing. It was also determined that the keys to Kent
10 Heitholt's vehicle had been stolen. His wallet was in the
11 car, in the center console, under the thing you can raise up
12 and down. Its contents were intact.

13 There was blood spatter on the inside and on the
14 outside of the victim's car. The driver's side of the
15 vehicle was where this spatter was located. The driver's
16 side. And also there was a particularly large amount of
17 blood spatter and blood transfer, we'll talk about what those
18 terms means as the case proceeds, on the rear driver's side
19 wheel of the victim's vehicle. The multiple blows to the
20 victim had produced a large amount of blood pooling on the
21 pavement. Those multiple blows to the victim's head.

22 Loose change lay near the body. The strap, the
23 strap part of the victim's belt, was missing. It wasn't at
24 the scene. But the buckle of Kent Heitholt's belt lay near
25 his head. Two belt loops on the pants of the victim were

1 ripped loose.

2 At the autopsy performed on the body of Kent
3 Heitholt later that same day, we're still on November 1,
4 2001, the medical examiner determined that the victim
5 received multiple blows to the head with a blunt object. He
6 also had wounds inflicted on his arms and hands. The blunt
7 trauma on the head, however, was not what killed Kent
8 Heitholt. On his neck there was visible bruising. In
9 addition, there is an imprint on the right side of Kent
10 Heitholt's neck. And that imprint matches the buckle that
11 was found at the scene.

12 The victim's watch, car keys, belt strap have never
13 been found. The tire tool used to deliver the blows to the
14 victim's head has never been found.

15 I'll tell you right now, ladies and gentlemen, over
16 the course of this investigation, no fingerprints, blood,
17 DNA, or hair at the scene have been identified as the
18 defendant's or Chuck Erickson's.

19 Since this murder on November 1, 2001, the Columbia
20 Police Department worked the case, for the rest of that year,
21 and then they worked the case through 2002, and then they
22 worked the case through 2003. And it remained unsolved.

23 Let's go back now to 2001. That same morning, the
24 Thursday morning -- Wednesday was a school night. It's time
25 for school. Time to go to high school. It's Thursday

1 morning. And ladies and gentlemen, hung over, Chuck Erickson
2 got up and went to school. The evidence will be the
3 defendant did not attend school that day.

4 The evidence will be that Chuck Erickson would not
5 consciously think about what he and Ryan Ferguson had done
6 for two years. He put the horrible things they'd done on the
7 Tribune parking lot out of his conscious memory.

8 He graduated from high school; got a job; was
9 attending junior college classes.

10 But now in October of 2003, coming up on the
11 two-year anniversary of this murder, October of 2003, his
12 memory, Chuck Erickson's memory of these events was
13 triggered. He saw a newspaper article talking about the
14 homicide. He kept it to himself at first, but from then on
15 his memory, his guilt for this crime, began to bother him and
16 to eat at him more and more.

17 Finally at a New Year's Eve party, it was 2003,
18 going into 2004, Erickson confronted Ferguson about these
19 memories that he had. It became confrontational. Ferguson,
20 the defendant, angrily denied it. And Chuck left the party
21 saying, "That's not something you forget."

22 Then in late February, early March, of 2004,
23 Erickson confided in two different friends --

24 MR. ROGERS: Object to this as hearsay, Your Honor.
25 This is not going to be admissible testimony.

1 THE COURT: Do you want to approach the bench?

2 MR. CRANE: I -- yeah, we probably ought to
3 approach.

4 THE COURT: Or do you want to respond? Do you care
5 to respond there, or you want to approach the bench?

6 MR. CRANE: You want to approach on this?

7 - - -

8 Counsel approached the bench and the following
9 proceedings were held:

10 MR. CRANE: Well, first of all, Judge, when we call
11 Mr. Erickson, he'll testify about what he told the two
12 friends. So that's not -- he'll testify about a
13 conversation. So that's not hearsay.

14 MR. ROGERS: Sure, it is. It's the witness
15 testifying about an out-of-court statement he made. It's not
16 only hearsay, it's self-serving hearsay.

17 MR. CRANE: The defendant can testify to things he
18 said.

19 THE COURT: I'm going to overrule your objection.

20 MR. CRANE: And also, now, we do have a motion in
21 limine regarding the testimony of these two individuals,
22 which we I guess we'll approach on that.

23 THE COURT: Yes.

24 MR. CRANE: Okay. Yeah.

25 - - -

1 The following proceedings were held in open court:

2 THE COURT: You may proceed.

3 MR. CRANE: Thank you, Judge.

4 Okay. Then in late February, March, 2004 -- I know
5 I'm skipping around a little bit on dates, but you with me?
6 2004. The -- Chuck Erickson confided in two different
7 friends. Two different buddies. He was hesitant, and he was
8 uncertain, and he said maybe he dreamed it. But he told both
9 of these friends that -- now these were two different
10 conversations with two different guys at different times --
11 that he and Ryan Ferguson, back on Halloween of 2001, had
12 been at George's. Said they had run out of money and they
13 decided to rob somebody. Erickson told these buddies that
14 they attacked the man, and that he then saw Ferguson strangle
15 the reporter.

16 Erickson said he'd seen a cleaning lady, when he was
17 talking to these buddies, at the back of the Tribune
18 building. And Erickson told his buddies he yelled at her and
19 told her they needed help. "Somebody's hurt." Words to that
20 effect. But that the lady had taken off.

21 Now those statements were before Erickson talked to
22 the police. But word about these statements got to the
23 police. There was an anonymous call about that New Year's
24 Eve conversation. Got to the police. And one of the two
25 buddies, that I mentioned a minute ago, he told the police.

1 He told buddies, and then the police found out about it, and
2 they talked to them about what Erickson was saying.

3 On March 10, 2004, the police made contact with
4 Chuck Erickson, here in Columbia. At the station the police
5 told Erickson they'd been hearing he was saying things about
6 the murder to his friends. And with the police, ladies and
7 gentlemen, Chuck Erickson still couldn't remember many
8 details. He was hesitant about what he could remember. And
9 he even said a time or two he wasn't sure that it had
10 happened. But during the very first interview with the
11 detective, Chuck Erickson said he was the one who had beaten
12 the victim and that Ryan Ferguson was the one who strangled
13 him.

14 He said he and Ferguson were at By George, when he
15 talked to the police. He said they'd run out of money.
16 Decided to go rob somebody. He said Ferguson got a tire tool
17 out of his car. And that the car was parked down the street
18 from the bar. That they walked from the car to the Tribune
19 building. Erickson said he, talking about himself, the
20 evidence will be, without warning, hit the victim in the head
21 with this tire tool. He said the victim moaned in pain and
22 was bleeding. Erickson said he felt sick. Thought maybe
23 he'd thrown up after hitting the victim. And he sat down.
24 Said when he looked up, he saw Ferguson, over the victim,
25 strangling him.

1 Erickson said to the police he saw a cleaning lady
2 at the back of the Tribune building. He said he yelled at
3 the cleaning lady: "Somebody's hurt. Go get help." Words
4 to that effect.

5 He said that when they crossed back over
6 Providence -- you got to go across Providence to get to and
7 from the parking lot from George's -- that they saw an
8 acquaintance named Dallas Mallory pulling up to a traffic
9 light.

10 Erickson told the police that he and Ferguson went
11 back inside the bar, after this murder occurred, and that
12 then they left again, and that Ferguson drove Mr. Erickson
13 home to his house, and then the defendant left.

14 After his initial statements to the police, the
15 detectives drove Erickson to the scene and the surrounding
16 area. Erickson continued to be unsure about all that had
17 happened. He'd back off and he'd say maybe he read it in the
18 newspaper.

19 At these interviews there were details, there were
20 details that he couldn't remember. But the essence -- the
21 evidence will be, ladies and gentlemen, that the essence of
22 this homicide was there: He was always with the defendant;
23 he was always the one, Erickson was always the one that
24 started hitting him, hitting the victim; and the defendant
25 was always the one that was strangling him, when he told

1 about that memory.

2 That same day the defendant was located by police in
3 Kansas City. He was transported back here by officers. He
4 was extensively interviewed by the police. And he denied any
5 involvement with the murder.

6 We expect the evidence will be: Mr. Ferguson, the
7 defendant, agreed he was with Erickson that night, and they
8 were at By George bar, and that they left together. Said he
9 dropped Erickson off and went home and got home sometime
10 around 2 to 2:15 a.m.

11 After his arrest on March 10, 2004, Chuck Erickson
12 was taken to jail. His parents hired a criminal defense
13 attorney to represent him.

14 For the next eight months, Erickson talked on the
15 phone to his mom and his dad and his sister. He consulted
16 with his lawyer. He did read the police reports in the case,
17 given to him by his lawyer, that his lawyer had gotten from
18 the prosecutor's office. And he talked to a psychologist
19 that was hired by his attorney.

20 During that time, during that time after his arrest,
21 and up until October 2004, law enforcement didn't have any
22 contact with Chuck Erickson. Nobody from the prosecutor's
23 office, nobody from the Columbia Police Department had access
24 to him. He was represented by counsel. No contact.

25 On October 1st of 2004, Chuck Erickson, through his

1 attorney, entered into what is called a proffer. A proffer.
2 He was taken, with his consent, along with his attorney, his
3 attorney went too, to the police department, where he made a
4 statement outlining what he could remember. And this was
5 done with the potential for an agreement that he testify in
6 this case.

7 At this meeting he did provide more information.
8 Some of the things he talked about he had never been asked
9 before by the police back in March. Some of the information
10 was details about the night of the murder that he'd forgotten
11 and remembered again. And as to some details, he still
12 couldn't remember. But the evidence will be, ladies and
13 gentlemen, that Chuck Erickson had no uncertainty about the
14 essence of this murder. That he beat the victim and the
15 defendant strangled him.

16 After that proffer, after consulting with his
17 attorney, Chuck Erickson and his attorney signed a written
18 agreement to plead guilty to murder in the second degree,
19 robbery, and armed criminal action. As a part of this
20 agreement, Erickson agreed to testify truthfully --

21 MR. ROGERS: Objection, Your Honor.

22 MR. CRANE: -- in this --

23 MR. ROGERS: Argumentative.

24 THE COURT: The objection's overruled.

25 MR. CRANE: As part of the agreement, the evidence

1 will be that Chuck Erickson agreed to testify truthfully at
2 this trial in which you're jurors on today.

3 On November 4, 2004, right in this courtroom, in
4 that witness chair, Chuck Erickson entered his pleas of
5 guilty. After this trial is over, Erickson will be sentenced
6 to 25 years in prison for the murder and robbery of Kent
7 Heitholt.

8 At the close of all the evidence in this case, I'll
9 ask you to find that the defendant is also guilty of the
10 murder and robbery of Kent Heitholt.

11 I appreciate your patience. Thank you.

12 THE COURT: Does defense counsel wish to make an
13 opening statement at this time or reserve your opening
14 statement?

15 MR. ROGERS: We wish to make one, Your Honor.

16 May it please the Court.

17 THE COURT: You may.

18 - - -

19 OPENING STATEMENT

20 BY MR. ROGERS:

21 Good morning.

22 This case is about three different stories. The
23 first two follow one on the other. The third story is
24 connected to the first two only in the imagination of Chuck
25 Erickson.

1 The first story is the tragic, brutal beating and
2 strangulation of Kent Heitholt. There is no question that
3 sometime around a quarter after 2 in the morning, November
4 1st, 2001, Kent Heitholt was attacked in the parking lot
5 behind the building where he worked, the Columbia Daily
6 Tribune building.

7 This will be -- to defy convention, north is at the
8 right end of the picture.

9 This is the Columbia Daily Tribune building. This
10 is the parking lot behind it, where Heitholt was parked.
11 This is By George's, by the way.

12 Here's what we know from credible evidence happened
13 in that parking lot.

14 Kent Heitholt had left the building. There was a
15 stray cat who frequented that area, and Mr. Heitholt was in
16 the habit of feeding that cat. And when the police later
17 processed the scene, they saw that cat food had, in fact,
18 been put on top of a little retaining wall for the cat.

19 Mr. Crane has mentioned the two cleaning people. A
20 woman named Shawna Ornt came outside to smoke a cigarette;
21 stood on the loading dock behind the building, overlooking
22 the parking lot; saw two young men. She described one man,
23 the man who was at the back of the car, the man who said
24 something to her to the effect of, "Somebody needs help
25 here," as a white male, 20 to 21 years of age, six feet tall,

1 with a medium or muscular build, having blond hair, later
2 described as extremely blond hair, spiked in the front. The
3 other man she didn't get a look at at all, but said that he
4 was about the same age, with a much fatter build.

5 The other janitor, Jerry Trump, described those men:
6 The man at the back of the car as a white male, with a stocky
7 build, dark hair, wearing a ball cap, six feet tall, 20 to 21
8 years of age; the other man, by the driver's door, Trump
9 described as a white male, with blond hair, also six feet
10 tall, with a thin build, 19 to 20 years old.

11 Now, keep in mind, they're not looking at the same
12 time necessarily. Ornt is there first; she goes and gets
13 Trump; Trump comes out. So the people could have switched
14 positions.

15 Those are the men that were seen. And what do they
16 do? What are they seen to do by Jerry Trump? They are seen
17 to go east in this alley that leads through the parking lot
18 and to turn right and head south on Fourth Street.

19 Police come. Start processing the scene. And
20 latent fingerprints of value, which are fingerprints which
21 have sufficient detail to be identified, are found on the car
22 of Mr. Heitholt. Those fingerprints are not Ryan Ferguson's,
23 those fingerprints are not Charles Erickson's, and those
24 fingerprints are not Kent Heitholt's, or anybody else's the
25 police have compared them to in connection with this case.

1 A canine unit, police dog, handled by an officer
2 named Todd Alber, comes to the scene. Is brought to the
3 scene. And Officer Alber and the dog -- the dog, under the
4 guidance and control of Officer Alber, follows a scent trail
5 from the Tribune parking lot, east, up the alley, to Fourth
6 Street, south on Fourth Street, across Walnut Street, and
7 across Broadway, which is a main east-west street here in
8 Columbia, down past Cherry and Locust, and it ends up over
9 here roughly on Fifth Street, where the dog loses the trail
10 in front of a building which is student housing for the
11 University of Missouri.

12 Other police come to the scene. They used a
13 substance called luminol. And luminol is a chemical which
14 they can spray and which fluoresces in the presence of blood.
15 And they, with the use of luminol, find some pretty complete
16 bloody footprints there at the scene, and they find a trail
17 of blood -- of -- that -- of this luminescence from the
18 luminol, that goes up the alley, right on Fourth Street,
19 going south down towards Broadway, before the trail
20 decreases, and they basically lose it roughly at Fourth and
21 Broadway.

22 The body of Kent Heitholt is prepared for
23 transportation to the medical examiner's -- or to the morgue,
24 where the medical examiner does the autopsy. And one of the
25 things they do in preparing the body for transportation is

1 they put sterile bags over the hands, so that any items of
2 evidence on the hands of Mr. Heitholt can be maintained and
3 won't be lost during the transportation.

4 At the medical examiner's -- at the autopsy, those
5 bags are removed, and trace evidence is recovered. There are
6 several hairs on the hands of Kent Heitholt. Several hairs
7 and hair fragments, and one what they call limb hair or body
8 hair; not a head hair. Most of those hairs turn out to be
9 those of Mr. Heitholt. There is, however, one hair in the
10 bloody hand of Kent Heitholt which is not his. It has been
11 tested by the FBI laboratory using a process called
12 mitochondrial DNA analysis. And that's a process where the
13 DNA from the mitochondria of the cell are tested.

14 Basically if you think of a cell like a fried egg,
15 you have the yolk, which is the nucleus, and then you have
16 the cytoplasm, which is the white of the egg. And in the
17 cytoplasm are little bodies called mitochondria. And they
18 contain DNA which is different from the nuclear DNA, because
19 it's only derived from the mother. The nuclear DNA is
20 derived from the father's DNA, combines with the mother's
21 DNA, to create life. And so mitochondrial DNA is different
22 than nuclear DNA.

23 But this mitochondrial DNA was tested in the hair.
24 And you'll have that in the hair cells that do not have
25 nuclear materials, so it cannot be tested for nuclear DNA.

1 You can test them for mitochondrial DNA.

2 That hair is not Kent Heitholt's. That hair in the
3 bloody hand of the decedent is not Chuck Erickson's. That
4 hair in the bloody hand of the decedent is not Ryan
5 Ferguson's.

6 The autopsy shows that Mr. Heitholt suffered
7 multiple blunt trauma force injuries to the head. He had
8 what appeared to be defensive wounds on his hands and arms.
9 He had a ligature mark around his neck. He had a very
10 unusual finding: He had a fractured hyoid bone in his neck,
11 which is certainly consistent with and the result of
12 strangulation, but it shows a lot more force than is normally
13 seen. I believe the medical examiner will testify that that
14 is a finding that you might find in somebody who has been
15 hanged as a manner of execution, with a long drop, but you
16 very rarely find in somebody who has committed suicide by
17 hanging themselves, on somebody who is hoisted up to be
18 hanged. Shows a very significant amount of force. And
19 you'll also see the torn belt buckle, which shows a very
20 significant amount of force.

21 That is the story of what happened to Kent Heitholt.

22 The next story, the story that follows from that, is
23 the story of the police investigation. And we've talked
24 about the investigation early that morning.

25 For the next two and a half years the police are

1 following some leads, talking to people, talking to suspects,
2 clearing people, clearing suspects. There are a lot of
3 people that they talk to, there are a lot of reasons to
4 suspect various people, but nobody is ever arrested, nobody
5 is ever charged. There are a lot of people who are asked to
6 give fingerprints; there are a lot of people who are asked to
7 give DNA samples. Nothing.

8 And even though this investigation is not closed,
9 it's definitely on the back burner. But remember who we're
10 talking about here. Kent Heitholt was the sports editor of
11 the Columbia Daily Tribune. Big paper here in town. This is
12 not a story that goes away. This is a story that the local
13 media, including the Tribune, but also the broadcast media,
14 keep on. It's a story that is revived in October of 2002,
15 Halloween of 2002, November of 2002, the one-year anniversary
16 of Mr. Heitholt's death. And it's a story which is revived
17 again on October -- in October and November of 2003. It is
18 at that time that the third story comes into play.

19 And there's really no question that on Halloween
20 night of 2001, Ryan Ferguson and Chuck Erickson ended up at
21 this bar, By George's. They had been -- Chuck had been at a
22 party. The police had come and closed down the party. The
23 guys that Chuck had gone there with had left without him.
24 Ryan had been at that party briefly earlier, but was now
25 coming back. Saw Chuck walking away from the place. Offered

1 him a ride.

2 Ryan had, before -- earlier that evening had talked
3 with his sister Kelly. Ryan had just turned 17 October 19th.
4 And he was an occasional drinker. And he was planning to
5 drink at the party. And he was planning -- he had talked
6 with Kelly about getting into a bar. Getting into By
7 George's.

8 Kelly was 21, 22 years old. She was of legal age.
9 Her roommate, Christine Lo, was of legal age. Her roommate,
10 Christine Lo, was friends with the doorman or bouncer,
11 whatever you call them, at By George's. And she would
12 usually take advantage of that friendship to get in there for
13 free, if they were charging a cover, or to get free drinks.

14 And Kelly knew that if Ryan came with her and
15 Christine, he could get in without having any ID, without
16 being of age or having to prove that he was of age, because
17 the doorman was a friend of Christine's and would let a
18 friend of hers in the bar.

19 So they got -- they had talked earlier that evening
20 at the home where Ryan lived with his parents. Christine did
21 not live there. She lived in an apartment with -- I don't
22 mean Christine. I mean Kelly. Christine didn't live there
23 either. Kelly and Christine and another girl lived in an
24 apartment. They were all students at the University of
25 Missouri. But Kelly had been over there using her parents'

1 computer to work on a paper from school. And she had talked
2 with Ryan and talked about getting together later in the
3 evening and getting into By George's. So they met up, and
4 they got together by phone, and Kelly and Christine got Ryan
5 and Chuck into By George's. And they went there and they
6 drank.

7 You know, By George's is a bar in Columbia. By
8 George's closes, like all bars are supposed to, at 1:30 in
9 the morning. They have what's called "last call," where they
10 turn on the lights; they try to get everybody out of there.
11 The evidence will be that there are almost always police
12 officers out in the parking lot or in front of By George's
13 when it closes, because sometimes there are fights and things
14 when the bar's getting out. It's a, or it used to be, I
15 guess it's closed now, kind of a happening night spot for
16 young people, and they don't want any trouble, so there are
17 usually police officers there watching at closing.

18 You know, earlier at the party Ryan had been talking
19 to a girl named Holly Admire. And Holly was having troubles
20 with her boyfriend. And Ryan thought he was going to take
21 advantage of that situation. Or he'd like to at least. So
22 after By George's closed, Ryan took Chuck home to his house,
23 to Chuck's house, and then Ryan went to his house. And there
24 is a series of telephone calls between Ryan on his cell phone
25 and Holly Admire on her cell phone, Holly Admire at the house

1 of a friend where Holly was staying, and other cell phone
2 calls. Those calls start at about 1:40 and keep going up
3 until after 2:00 in the morning.

4 MR. CRANE: Up until what time?

5 MR. ROGERS: After 2:00 in the morning.

6 MR. CRANE: Okay.

7 MR. ROGERS: So far there's nothing connecting the
8 story of Halloween 2001, from Ryan Ferguson's point of view,
9 with the other two stories.

10 And yet here's Ryan talking on the cell phone after
11 2:00 in the morning, and he skipped school the next day. I'm
12 afraid that the record will show it wasn't all that unusual
13 for Ryan to miss school.

14 There's nothing that connects Ryan's story with the
15 other stories: The death of Kent Heitholt, the investigation
16 of the murder of Kent Heitholt, during 2001, during 2002,
17 most of the way through 2003. But around Halloween of 2003,
18 when the media once again honor the anniversary of
19 Mr. Heitholt's death, Chuck Erickson has a dream. And like
20 dreams are want to do, it combines different elements from
21 waking reality. And one of the elements in waking reality is
22 the fact that Chuck and Ryan were together on Halloween.
23 Another of the element in waking reality is the news media
24 and everything that Chuck has been reading and hearing about
25 Mr. Heitholt's death.

1 Now, keep in mind, Ryan is not reading and hearing
2 these things, because Ryan has gotten out of high school,
3 taken some time off and done some work, and now is going to
4 college in Kansas City. And he and Chuck really don't see
5 each other, because he's in Kansas City and Chuck's here in
6 Columbia.

7 But Chuck has this dream. And the evidence will be
8 that Chuck has symptoms consistent with -- it's called
9 obsessive-compulsive disorder. And Chuck starts obsessing
10 about this dream. And the dream itself is a dream, and he
11 knows it's a dream, and he tells his buddies it's a dream,
12 but he thinks it might be real. He keeps wondering about the
13 dream, he keeps thinking about the dream, and he keeps
14 worrying and obsessing about the dream.

15 And so Chuck and Ryan see each other at a New Year's
16 Eve party, or a party around New Year's Eve, it's not real
17 clear it was actually New Year's Eve, but during the holidays
18 at the end of 2003, beginning of 2004. And they're at a
19 party. And Chuck is drinking; Ryan's drinking. They --
20 Chuck says, "I want to talk to you about something." They go
21 outside, away from the bulk of the party-goers. And Chuck
22 confronts Ryan with this, as Mr. Crane says, and says, "You
23 know, I think we did something really bad, you know, with
24 that Tribune guy." Ryan doesn't know what he's talking
25 about. Denies in no uncertain terms that he ever did

1 anything like that. Chuck kind of drops the subject then.

2 Ryan goes back to school.

3 Chuck, it seems like every time he'd get drunk,
4 would be telling people about this funny dream he's had. And
5 he begins to get more sure that there's something behind it.
6 And he finally tells somebody who tells somebody who calls
7 the police.

8 Now in the meantime, somebody at the party has, in
9 fact, overheard the conversation between Chuck and Ryan,
10 because the police receive an anonymous tip. And as a result
11 of that -- coincidentally, Ryan's car was broken into; some
12 things were taken; he calls the police and reports that.
13 They say, "Okay. We need to get your fingerprints so that we
14 can investigate the theft from your car." Actually, they
15 want fingerprints to compare in this case. They get them.
16 They compare them. Like they've done with so many other
17 leads. Not Ryan's prints on the Heitholt car. So that's the
18 end of that.

19 But a couple of months later, when they hear about
20 Chuck Erickson telling people he might have been involved, or
21 he and Ryan might have been involved, then they go out and
22 they pick up Chuck Erickson. And they interview him on March
23 the 10th a total of four times.

24 The first time he is interviewed by Detective Short.
25 And Detective Short wrote a report of that interview. It's

1 really hard to tell what went on during that interview from
2 the report, but you will hear a lot of details that Chuck
3 supposedly said that are not accurate with regard to what
4 really happened.

5 But then the next three interviews are on videotape.
6 And you will watch, on videotape, right here, on that big
7 screen back there, which I'll move this in a minute, and see
8 how Charles Erickson's memory, so-called, of these events is
9 formed and shaped and given what detail it has by the police.
10 You will see over and over again, both with Detective Short
11 and later with Detective Nichols, Erickson try to say, "Look,
12 I may just be making this up. I may have fantasized this.
13 After all, it's only a dream. I don't really remember doing
14 it." And you'll see their reaction to that.

15 Significantly, Charles Erickson throughout that day,
16 March 10th, all four interviews, says that they assault
17 Mr. Heitholt and that they then leave, going north and west
18 across Providence. It is at this intersection, the
19 intersection of Providence and Ash, that Erickson says on
20 March 10th he encountered Dallas Mallory. That intersection
21 is known as the Break Time, because there's a convenience
22 store and gas station called Break Time right there, that is
23 sort of visible from miles around.

24 Consider that. Consider it. Erickson says, "We go
25 this way." Trump, Ornt, Officer Alber's dog, and the luminol

1 trail all say they went thataway. Opposite directions.

2 First interviews with Detective Short, not recorded.

3 The first videotaped interview is with Detective Short. The
4 second videotaped interview is done in a police car. And
5 they're driving around with -- Detective Nichols is the one
6 who's doing the questioning, and there's another police
7 officer running the videotape, showing the scenery, and
8 they're trying to get Chuck to point out various things. And
9 once again he points out the Break Time. Once again he
10 points out a retaining wall. A wooden retaining wall in this
11 area here that he says he remembers climbing. In fact, over
12 and over again he points out the retaining wall.

13 It's interesting, because when they approach the
14 alley that leads to the parking lot of the Tribune, Chuck
15 asked them, he doesn't tell them, he asks them, "Show me
16 where this actually happened. Show me where it actually
17 happened." Not "I remember doing it and here it was." "Show
18 me where it happened." And Detective Short -- or Detective
19 Nichols, excuse me, obligedly says, "Well, it's right up
20 there where that white Jeep's parked."

21 They drive the route taken by the dog. The trail of
22 blood. And Chuck says, "No, that doesn't look familiar to me
23 at all. Not at all." They try to transform the wooden
24 embankment he claims to remember climbing. And by "wooden
25 embankment," it's a retaining wall made of beams, like

1 railroad ties. They try to say that that must have been this
2 creek here. Flat Branch I believe is its name. And when he
3 keeps saying the Break Time, they tried to say that he must
4 be talking about this Phillips 66 station down here at
5 Providence and Locust. But he says no. "Doesn't look
6 familiar. That's not what I'm talking about."

7 By the way, he says that he saw Dallas Mallory
8 stopped -- or at a stoplight. And he described Dallas
9 Mallory as wearing a Halloween costume of a police officer's
10 uniform. Well, Dallas Mallory had, in fact, been at the
11 party earlier, the one that was closed down by the police,
12 wearing the police officer costume. And he had been with
13 Chuck at that party. But at 2:00 in the morning, this
14 stoplight is flashing yellow. Nobody stops for the flashing
15 yellow. Even this stoplight (indicating) is flashing yellow
16 at 2:00 in the morning.

17 Then you'll see the interview between Chuck and
18 Detective Nichols, after Ryan has been arrested, after Ryan
19 has repeatedly denied having been involved in any type of
20 homicide, after Ryan has told him, "Look, we left By George's
21 when it closed, and I took him home." Once again Chuck tells
22 Nichols, "Well, if Ryan says it didn't happen, I could be
23 making it up." And you'll see Nichols' reaction to that.

24 Chuck's arrested. Nichols is arrested. Chuck gets
25 a lawyer. Chuck's lawyer gets all of the police reports. He

1 gets the videotapes. He gets everything. And shares them
2 with Chuck.

3 And then in October of 2004, six months later, Chuck
4 comes to the police department with his lawyer to give his
5 proffer. And lo and behold, he now remembers, supposedly,
6 going up this way, going down this way, coming across here.
7 It's down here that he says Dallas Mallory. But they still
8 come back here to By George's to drink. Because remember the
9 motive? The motive for this is to get more money --
10 according to Chuck, they're out of money -- for drinking. So
11 we have to get more money so that we can go back to By
12 George's and drink more. But By George's has been closed for
13 an hour by the time Heitholt is dead and the time the people
14 would have had a chance to get away from the scene and back
15 there.

16 So why? Why would Chuck Erickson, having gone to
17 the police with something that he didn't even know was real,
18 now be coming in here and telling you, "Oh, yeah, I remember
19 it plain as day"?

20 Let's see what happened when he tried to tell
21 Detective Nichols in that last interview that he was not
22 sure, that he could have been making it up.

23 MR. CRANE: Judge, I'm going to object at this point
24 to --

25 THE COURT: If you'd turn that off, please.

1 MR. WEIS: Sure.

2 MR. ROGERS: Stop. Thanks.

3 MR. CRANE: We -- we expect that the videotapes may
4 come in. I mean, we were the ones that tendered them to the
5 defense. I don't think that playing a videotape -- I didn't
6 have any objection to the still photograph, but a videotape
7 isn't appropriate for opening statement. The photograph is a
8 static exhibit. The videotape, which I'm confident the jury
9 will see during the trial, is not. And I would object
10 generally to that being -- I may have something else here on
11 top of that.

12 (Discussion off the record between Mr. Crane and
13 Mr. Knight.)

14 MR. CRANE: If -- the exhibits that are used to
15 assist the jury in understanding locations, et cetera, are
16 one thing. But this is evidence that's going to come in as
17 to statements and is not suitable for opening.

18 MR. ROGERS: Your Honor, I believe that any exhibit
19 that I have a good faith basis will be admitted in evidence
20 is proper for opening statement if I want to use it. And
21 that's all I want to do.

22 THE COURT: I'm going to sustain the objection.

23 MR. ROGERS: Watch the tape when you hear it. And
24 you'll hear it more than once. You will see Charles Erickson
25 tell Nichols: "I don't know. I don't remember. It's not

1 something I remember. It's something I might have read in
2 the paper." You'll hear him repeatedly try and say, "Look,
3 I'm not sure." And you'll see Nichols move his chair up, get
4 right in Erickson's face and yell at him, and tell him, "I
5 don't want to hear any of this gibberish. Ryan Ferguson is
6 saying that he didn't do it, and you're out here hanging out.
7 You're the one hanging out. Unless you tell us all the
8 details you can about Ryan Ferguson, you're going down alone.
9 I don't want to hear any of this 'I might have dreamed it.'
10 I don't want to hear it. I don't want to hear it. I don't
11 want to hear it."

12 You know, if the police had done their job --

13 MR. CRANE: Well, Judge, this sounds like argument
14 to me.

15 THE COURT: The objection to the form is sustained.
16 If you'd just tell the jury what the evidence is going to be.

17 MR. ROGERS: You will see from the evidence that
18 Chuck Erickson, when he was questioned by the police on March
19 10, wanted to be reassured that it was just a dream and that
20 he really didn't do anything. But, instead, you will see him
21 be berated, coerced, cajoled, and taught what the police
22 wanted him to say. And then you'll see the differences
23 between what he claimed to remember then and what he claims
24 to remember now. It is not the truth. Ryan Ferguson had
25 nothing to do with the death of Kent Heitholt.

1 At the close of this case I will stand before you
2 again and show you how it is your duty under the law and the
3 evidence in this case to return a verdict of not guilty as to
4 each and every charge.

5 Thank you.

6 THE COURT: Counsel, just a second before you get --
7 are you -- is your witness that you're intending to call
8 now --

9 MR. CRANE: Can we --

10 THE COURT: -- one that is --

11 MR. CRANE: You know, I'm glad you said something.
12 Can we --

13 THE COURT: You can come to the bar.

14 - - -

15 Counsel approached the bench and the following
16 proceedings were held:

17 THE COURT: I'm thinking of taking a break now.
18 They've been here an hour and a half. And I don't want to
19 stop a witness right in the middle of something.

20 MR. CRANE: I was just going to say that. That's
21 fine.

22 THE COURT: And they can order their lunch. And
23 then we'll know a better time on your schedule. That's when
24 I would normally do it if we start at 8:30.

25 MR. ROGERS: That's good for me. I think the

1 defendant needs it worse.

2 THE COURT: Okay. Thank you.

3 - - -

4 The following proceedings were held in open court:

5 THE COURT: Ladies and gentlemen, this seems like it
6 might be a good time to take our mid-morning break, since the
7 next individual called as a witness may be lengthy. And we
8 would take a break anyway around this time.

9 The Court again reminds you of what you were told at
10 the first recess of the Court. Until you retire to consider
11 your verdict, you must not discuss this case among yourselves
12 or with others, or permit anyone to discuss it in your
13 hearing. You should not form or express any opinion about
14 the case until it is finally given to you to decide. Do not
15 read, view, or listen to any newspaper, radio, or television
16 report of the trial.

17 Les, has the jury already ordered their lunch?

18 DEPUTY COURT MARSHAL WERNER: Not yet. We'll
19 probably do that during this break.

20 THE COURT: Maybe you can do that during a break.
21 And then let me know what time it will be delivered so that
22 we can let counsel know about witnesses' scheduling and so
23 forth.

24 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

25 THE COURT: With that understanding, we'll be in

1 recess.

2 (Recess taken.)

3 - - -

4 The following proceedings were held out of the presence
5 of the jury:

6 THE COURT: Is the state ready to proceed?

7 MR. CRANE: Yes, Your Honor.

8 THE COURT: And the defendant ready to proceed?

9 MR. ROGERS: Yes, Your Honor.

10 THE COURT: All right. You may return the jury to
11 the courtroom.

12 - - -

13 The following proceedings were held in the presence of
14 the jury:

15 THE COURT: State may call its witness.

16 MR. CRANE: State calls Deborah Evangelista.

17 THE COURT: Could you come forward and raise your
18 right hand, please.

19 - - -

20

21

22

23

24

25

1 DEBORAH LYNN EVANGELISTA,
2 being first duly sworn by the Court, testified as follows:

3 THE COURT: Would you take the witness stand,
4 please, ma'am.

5 - - -

6 DIRECT EXAMINATION

7 BY MR. CRANE:

8 Q. Good morning.

9 A. Good morning.

10 Q. Ma'am, would you give us your name, please?

11 A. Deborah Lynn Evangelista.

12 Q. And what was your relationship to the victim in this
13 case, Kent Heitholt?

14 A. I was his wife.

15 Q. And you obvious -- obviously you kept your name;
16 right?

17 A. Yes. My maiden name.

18 Q. Okay. Where are you currently living, ma'am?

19 A. I'm living in Texas.

20 Q. I want to direct your attention to what's marked for
21 identification as State's Exhibit 1, 1A and 1B.

22 MR. CRANE: Charlie.

23 MR. WEIS: That's fine.

24 MR. CRANE: Oh, Jeremy? Okay.

25 Q. Do you recognize the individual, and in this second

1 one, the taller of the two individuals in these two
2 photographs?

3 A. I do.

4 Q. And are these fair and accurate depictions of your
5 late husband, close in time to his death?

6 A. They are.

7 MR. CRANE: Judge, I would offer State's Exhibit 1,
8 1A and 1B.

9 MR. WEIS: No objection, Your Honor.

10 THE COURT: State's Exhibit 1, 1A and 1B, are
11 admitted.

12 - - -

13 State's Exhibits 1, 1A and 1B, admitted into
14 evidence.

15 - - -

16 Q. Okay. Just quickly show these to the jury. The top
17 photograph, 1A, is a picture of your husband walking down the
18 street. Actually he's right out here near the courthouse; is
19 that right?

20 A. That's right.

21 Q. And the lower photograph is a picture of your
22 husband, you've already indicated, with another guy; right?

23 A. Right.

24 Q. Do you recognize who that guy is?

25 A. Yes.

1 Q. Who is it?

2 A. That's Jim Robertson, his boss.

3 Q. So this was his boss at the Columbia Daily Tribune?

4 A. Yes.

5 Q. When, ma'am, were you and Kent married?

6 A. December 21st, 1981.

7 Q. Okay. So you'd been married almost 20 years as of

8 October of 2001?

9 A. That's right.

10 Q. What was Kent's age at the time of his death?

11 A. He was 48.

12 Q. And did you and Kent have children?

13 A. Yes.

14 Q. And who were they -- who are they?

15 A. Vince Heitholt and Kali Heitholt.

16 Q. And Vince is how old now?

17 A. He's 22.

18 Q. And what about Kali?

19 A. She's 18.

20 Q. And does Kali also have a middle name?

21 A. Yeah. Rose.

22 Q. So it's Kali Rose Heitholt?

23 A. Yeah. Rose is actually a family name. Uh-huh.

24 Q. Okay. Where was -- we won't go into a whole lot of

25 background at this juncture with respect to Kent, but where

1 was he from?

2 A. Well, he --

3 Q. Where did he grow up? How about that?

4 A. Oh, he grew up in Creve Coeur, Missouri.

5 Q. Okay. And I believe you mentioned to me before that

6 he -- as he grew up, he wanted to play college football?

7 A. Right.

8 Q. That didn't work out.

9 A. (Nodding head up and down.)

10 Q. So what did he go into?

11 A. Sports writing.

12 Q. Okay.

13 A. Journalism.

14 Q. And he worked at various newspapers in the United

15 States; is that right?

16 A. Yes.

17 Q. All right. And eventually when did Kent move up

18 here to work for the Columbia Daily Tribune?

19 A. In 1996.

20 Q. Okay. And then after you got a place up here and

21 everything, the family came on up soon thereafter?

22 A. A couple months later, yeah. He was looking for the

23 perfect house. He didn't find it, but we felt like it was

24 more important to be together, so we went ahead and moved.

25 Q. So he starts on -- in -- do you remember the day he

1 started in 1996? What the date was?

2 A. Well, he just celebrated, that day of his death, his
3 five-year anniversary.

4 Q. And that was Halloween of 2001.

5 A. Uh-huh.

6 Q. Okay.

7 A. That's right.

8 Q. And, in fact, this second photo, 1B, was a
9 photograph taken of Kent at his fifth anniversary.

10 A. That's right.

11 Q. On October 31st, 2001.

12 A. That's right.

13 Q. And it looks like he got some kind of a gift there
14 or something.

15 A. Right. As I -- I remember correctly, it was golf
16 balls, a whole big box of them, because he liked to play
17 golf.

18 Q. Okay. And what was his position throughout his
19 five-year tenure there at the Tribune?

20 A. He was a sports editor. He also wrote --

21 Q. Okay.

22 A. -- for the paper.

23 Q. What were his normal, if he had normal work hours --
24 how about if I ask you this. When would he typically be at
25 the office?

1 A. Well, he'd go in in the morning, after taking Kali
2 to school, and then he'd come back in the afternoon for a
3 little while and he'd eat dinner and -- we'd eat dinner
4 together and watch a little TV, and then he'd go back to
5 work, and he'd work until early the next morning.

6 Q. Okay. And then get up and do it all again the next
7 day.

8 A. Yeah.

9 Q. Okay. By the way, I should ask, how, if you were
10 employed, how were you employed during the time you all lived
11 here in Columbia?

12 A. I was a case manager. I worked for Central Missouri
13 Regional Center, Department of Mental Health. It was the
14 Division of Mental Retardation and Developmental
15 Disabilities.

16 Q. Where was your daughter Kali, who, by the way, Kali
17 is here with us today.

18 A. That's -- she was sitting next to me.

19 Q. Okay. She's seated right back here behind this
20 first guy?

21 A. Yes.

22 Q. Okay. What school was Kali going to back in October
23 of 2001?

24 A. She was going to Hickman High School.

25 Q. Okay. There 's two high schools in Columbia?

1 A. Yes.

2 Q. One of them's Hickman High School and the other one
3 is?

4 A. Rock Bridge.

5 Q. I want to direct your attention to what's marked for
6 identification State's Exhibit 2.

7 MR. CRANE: And Judge, I'm going to just ask the
8 Court, with the defense counsel's permission, to simply take
9 judicial notice of the calendar year 2001, specifically
10 October and November.

11 MR. WEIS: No objection.

12 THE COURT: Court will judicially notice those
13 months.

14 MR. CRANE: Then I'll offer State's Exhibit 2.

15 THE COURT: Any objection?

16 MR. WEIS: No, Your Honor.

17 THE COURT: Exhibit 2 is admitted.

18 - - -

19 State's Exhibit 2 admitted into evidence.

20 - - -

21 Q. Okay. October 2001 shows that the 31st was a
22 Wednesday. That doesn't sound shocking to you, does it?

23 A. No, it doesn't. Uh-uh.

24 Q. Okay. All right. What about that day was -- you
25 talked about normal work hours. You had a job. Anything

1 abnormal about that day, when you got up and went about your
2 business?

3 A. Yeah. It was a pretty typical day. I came home
4 from work. I got home about a quarter 'til 5. I made sure
5 that the jack-o'-lanterns, all the Halloween decorations were
6 out. Made dinner. And Kent came home for dinner. We ate
7 dinner together and watched television. Ate and watched
8 television. And then he went back to work.

9 Q. Okay. And ma'am, when was the last time you saw
10 your husband alive?

11 A. That evening.

12 Q. Okay. Going -- what you've just described. You
13 watched a little bit of TV -- had dinner with you, watched a
14 little bit of TV, and went on into the office.

15 A. That's right.

16 Q. Did your husband wear a watch?

17 A. Yes.

18 Q. What -- describe that watch, if you would.

19 A. It was -- it was just a cheap watch. It was a
20 Timex. A gold flex band. He was hard on watches, so. I had
21 gotten that for him for Christmas the previous year.

22 Q. And you indicated it was a -- well, I don't want to
23 put words. Was a pocket watch or was it a wrist watch?

24 A. No. It was a wrist watch.

25 Q. Okay. And I'm going to direct your attention back

1 to 1B here. Do you see, on his arm, in this photograph taken
2 earlier on October 31st, '01 --

3 A. Yes.

4 Q. -- what you're describing?

5 A. Yes.

6 Q. Could you point it out for us, please?

7 A. There's his watch (indicating).

8 Q. Okay. Pointing out the wrist watch there, in the
9 arm holding the box. Okay?

10 And -- I think we covered -- I was thinking you --
11 oh. You said it was cheap. But you bought it.

12 A. It was a Timex.

13 Q. What was Kent's practice about carrying money?

14 Cash.

15 A. He never carried very much with him.

16 Q. What about a wallet?

17 A. Yeah, he had a wallet, which he, you know, he kept
18 either in his pocket, or he would keep it in his car.

19 Q. Okay. So if he didn't carry his wallet on him, it's
20 your recollection he'd keep it where?

21 A. In his car.

22 Q. Okay. What vehicle did Kent drive? What was his
23 car?

24 A. It was a Neon -- I mean a Nissan Maxima. A black.

25 Q. Okay. Ma'am, who else had access or used or rode in

1 that car that you're aware of?

2 A. Well, Kali would have, because --

3 Q. Okay. Your-all's daughter?

4 A. -- Kent was teaching her to drive.

5 Q. Okay. How did Kali get to and from school?

6 A. Usually Kent took her.

7 Q. Okay. Are you aware whether anybody else rode in
8 the car on those occasions or any others?

9 A. Maybe some of her friends, because Kent would pick
10 up Kali and, you know, take some of her friends home. And
11 then colleagues.

12 Q. What?

13 A. Colleagues. Maybe --

14 Q. Oh, you mean people he worked with?

15 A. Yeah.

16 Q. So he didn't -- when he was going to a game or
17 something here in town, he didn't have a company car?

18 A. Oh, no.

19 Q. Okay. So he'd ride over maybe with another sports
20 guy in a company car to go to a ball game or something.

21 A. Right.

22 Q. And that was -- he had to keep up with all these
23 sporting events going on --

24 A. Oh, yeah.

25 Q. -- around the area; right? Okay.

1 A. Nothing was too small or -- you know, so. He -- he
2 traveled a lot.

3 Q. What about his car keys? Do you remember what those
4 looked like or may have consisted of?

5 A. That would have been a house key, his car key, then
6 the keys to our other cars.

7 Q. Okay. They didn't have any distinctive key ring,
8 you know, like a -- you know, no decorative thing attached to
9 the keys that you recall? Pretty much keys.

10 A. No. Just keys. Yeah.

11 Q. Okay. Strange question: What did your husband use
12 to hold his pants up?

13 A. Always a belt.

14 Q. All right. And do you recall whether he wore a belt
15 on this day, October 31st, 2001?

16 A. Yes. He definitely wore a belt.

17 Q. Okay. He wasn't a suspenders guy?

18 A. Many -- years ago, but not recently, no.

19 Q. Not during this time period?

20 A. No. Uh-uh.

21 Q. Now in State's Exhibit 1B, his sweater goes over his
22 belt area, but directing your attention here to 1A, what do
23 you see around his midsection there?

24 A. That's his belt right there (indicating).

25 Q. And we see his belt in this top photograph. Okay.

1 Q. After Kent -- after you saw Kent for the last time
2 that night, and he went on into the office, did you have any
3 other conversation with him?

4 A. Yes. I called him to let him know that Kali had
5 lunch money and he didn't need to get her any. He would go
6 to the ATM after work sometimes and get her -- get her her
7 lunch money. And I told him he didn't need to do that.

8 Q. Can you tell us about what time that may have been
9 when you made that phone call?

10 A. Yeah. 10. Around 10.

11 Q. And ma'am, that's the last time you spoke to your
12 husband?

13 A. Yes.

14 Q. Prior to when Chuck Erickson and the defendant in
15 this case were arrested in March of 2004, did you know either
16 one of them?

17 A. No.

18 Q. Okay. And I'm going to show you some photographs.
19 The first two are marked for identification as 17 and 18.
20 And just ask if you recognize either of these two
21 individuals.

22 A. No.

23 Q. Okay. You hadn't seen them before this case --
24 their arrests in March of '04.

25 A. No.

1 Q. Okay. And also, just for the record, let me show
2 you what's marked for identification State's Exhibits 19 and
3 20. Do either of those two photographs of the same guys,
4 more recently, ring a bell? I'm not talking about what you
5 may have seen afterwards.

6 A. Right. No.

7 Q. Okay. Ma'am, how did you find out that Kent had
8 been murdered?

9 A. Around 4:00 in the morning, two police officers came
10 to the door. One of them was a detective and one of them had
11 a uniform on. They knocked on the door and rang the
12 doorbell. And Kali got up. She went down the stairs to open
13 the door. I remember telling her, "Look and see who it is
14 first." She opened the door. It was the two police
15 officers. And the first thing I thought of was that it was
16 just some vandalism. You know, I had pumpkins out and
17 ceramic pumpkins and, you know. It's weird, you know, what
18 goes through your mind. I just thought -- you know. And I
19 just woke up. I was (witness making sound). And they came
20 up the stairs. And I asked them to sit down. And the way
21 they looked, I knew something was very wrong. And I thought
22 at first it was my son. I mean, you just -- you know. I
23 thought, Uh, something's happened to Vince. And I sat down.
24 And Detective McGuire bent down and took my hand, and he
25 said, "There's been a horrific crime." He said they found

1 Kent lying beside his car, dead. And I said, "How did it
2 happen?" And they said that he had been beaten to death.

3 Q. Okay. Let me stop you. After the police delivered
4 that news to you -- and that was November -- early morning
5 November 1; correct?

6 A. Yes.

7 Q. Thereafter, after you had a chance to collect
8 yourself, in the days that followed, did the police come and
9 ask you other questions, follow-up questions about this case?

10 A. Yes.

11 Q. Okay. Let me show you what's marked for
12 identification as State's Exhibit 3.

13 I'm going to ask if you recognize the contents of
14 this bag.

15 A. Yes.

16 Q. Okay. What is that?

17 A. That's Kent's hair brush.

18 Q. Okay.

19 A. Yeah.

20 MR. CRANE: Judge, I'm going to -- could you hear
21 her?

22 MR. WEIS: Yes.

23 MR. CRANE: I'm going to offer State's Exhibit 3.

24 MR. WEIS: No objection, Your Honor.

25 THE COURT: State's Exhibit 3 is admitted.

1

- - -

2

State's Exhibit 3 admitted into evidence.

3

- - -

4

Q. Okay. Ma'am, this item was at your residence, and

5

Kent used it?

6

A. Yes.

7

Q. Okay. And after you found out about his murder, who

8

contacted you, reference hair samples of your husband?

9

A. The police did.

10

Q. Okay. And what did you provide them with?

11

A. The hair brush.

12

Q. Okay. And that's the one.

13

A. Yes.

14

Q. Okay.

15

MR. CRANE: Thank you, ma'am.

16

I don't have any other questions of this witness,

17

Judge.

18

THE COURT: You may inquire.

19

MR. WEIS: Thank you, Your Honor.

20

- - -

21

CROSS-EXAMINATION

22

BY MR. WEIS:

23

Q. Miss Evangelista, my name's Jeremy Weis. I'm one of

24

the attorneys that's representing Mr. Ferguson in this

25

matter. You said that you last saw your husband,

1 Mr. Heitholt, on the evening of October 31st of 2001; is that
2 correct?

3 A. That's correct.

4 Q. And what time was -- did he leave for work again
5 that night?

6 A. I would say 8, 9. Around 8 or 9.

7 Q. Okay. And that's --

8 A. In the evening.

9 Q. And that 8 or 9 in the evening, that's the last time
10 you saw him?

11 A. Yes.

12 Q. And then he went to the office?

13 A. Yes.

14 Q. And you said you were contacted by police officers
15 from the Columbia Police Department. What time of the
16 morning was that?

17 A. Around 4:00.

18 Q. And they came to your house in Columbia?

19 A. Yes.

20 Q. And you said -- I believe your testimony was that
21 your daughter is the one who answered the door?

22 A. She was in front of me. I was right behind her.

23 Q. Okay. The police officers, they just -- they
24 informed you at that time that your husband had died;
25 correct?

1 A. Yes.

2 Q. Did they take a statement from you at that time?

3 A. I don't know if they took a statement. I wouldn't
4 really call it a statement.

5 Q. Okay. Did you have to meet with -- you met with
6 police officers after what would be November 1st of 2001.

7 A. Yes.

8 Q. You met with them on a number of occasions; is that
9 correct?

10 A. Uh-huh. That's right.

11 Q. Okay. And during that investigation -- and this
12 investigation, for the record, went on for several years.

13 A. Right.

14 Q. In fact, they -- the police department didn't have
15 anybody arrested in this case until March of 2004; is that
16 correct?

17 A. That's when I got the phone call that they had found
18 them, yes --

19 Q. Okay.

20 A. -- and they had been arrested.

21 Q. So from October 31st of 2001, when Mr. Heitholt
22 passed away, 'til March of 2004, 26, 27 months, somewhere
23 around there?

24 A. Right.

25 Q. Okay. And during that time, you moved out of the

1 Columbia area; is that correct?

2 A. That's right.

3 Q. Okay. And when did you move out of Columbia?

4 A. August of 2003.

5 Q. And there was a period of time where -- let me ask
6 you this. As I said -- or as you said, there was a long
7 period of time where this crime went un -- there were no
8 arrests made in this crime; is that correct?

9 A. That's correct.

10 Q. Did the police ever talk to you about your
11 relationship with your husband?

12 A. Oh. They wanted to know, yeah, if I had a
13 boyfriend.

14 Q. Did they ever search the house? Your house?

15 A. No. They had asked me that night if Kent took any
16 medication. And we said yes, you know, and told them where
17 it was. And I believe they went and got it and -- but they
18 didn't search the house, no.

19 Q. They didn't ask you to -- they didn't ask to search
20 the house?

21 A. No.

22 Q. They didn't ask to search any of the other vehicles?

23 A. No.

24 Q. Okay. And when they got the medications that you
25 indicated, those were down in Kent's room in the basement; is

1 that correct?

2 A. They were in the bathroom downstairs, uh-huh.

3 Q. And that's the bathroom he used in the house?

4 A. One of them, yeah.

5 Q. Okay. But that was his primary bathroom?

6 A. Well --

7 Q. Where he got ready in the morning?

8 A. Well, actually, it didn't even have a shower, so he

9 had to shower upstairs.

10 Q. And State's Exhibit 47 I believe, the hair brush,

11 was that in the bathroom in the basement?

12 A. Yes, it was.

13 Q. And then the state -- or the police department asked

14 you for some hair samples; is that correct?

15 A. Uh-huh.

16 THE COURT: You need to say yes --

17 A. Oh, I'm sorry. Yes.

18 Q. That's okay. She has trouble taking down the nods.

19 A. Oh, sure.

20 Q. And they called you and asked you for a hair sample

21 from Mr. Heitholt -- of Mr. Heitholt; is that correct?

22 A. That's right.

23 Q. Okay. And that was a phone call that the police

24 department made to you or a police officer made to you?

25 A. I believe so.

1 Q. Okay. And you agreed to provide them with a hair
2 sample?

3 A. Yeah. Right.

4 Q. And by doing so, you grabbed what's been marked and
5 admitted as State's Exhibit 47.

6 A. Right. Kent's --

7 Q. The hair brush?

8 A. -- hair brush. Uh-huh.

9 Q. And you didn't give them -- you didn't personally
10 give the hair brush to the officers, did you?

11 A. If I remember correctly, Kali and I were getting
12 ready to go out of town, and I put it in a bag, at -- and
13 left it in our mailbox for them to get.

14 Q. Okay.

15 A. Come by and get. And so --

16 Q. You didn't drop it off at the police station?

17 A. No. I don't think so, no. Uh-uh. No.

18 Q. And somebody picked up the hair brush from you.

19 A. Right.

20 Q. The one that you left.

21 A. Right.

22 Q. Okay. And back to the period of time where this
23 case was unsolved, or there were no arrests made, the police
24 didn't ask you for financial records, did they?

25 A. No.

1 Q. And you never provided any financial records to the
2 police department.

3 A. No.

4 Q. And the police didn't ask you for your phone
5 records.

6 A. No.

7 Q. And you didn't provide any phone records to the
8 police department in this case.

9 A. No.

10 Q. In fact, you didn't have contact with the police
11 department from I believe April 17th of 2002 until like May
12 21st of 2004. Is that correct?

13 A. That sounds correct.

14 Q. Okay. And I know in State's Exhibit -- if I can
15 find it. The -- I'm sorry. I've been referring wrong.
16 State's Exhibit Number 47 is the belt buckle. State's
17 Exhibit 47, I think you refer --

18 MR. WEIS: May I approach the witness? I'm sorry.

19 THE COURT: Sure.

20 Q. In State's Exhibit Number 1, 1A -- and that's a
21 photograph of Mr. Heitholt wearing his belt.

22 A. Right.

23 Q. Okay. And you've now identified to the jury today
24 that that's the belt -- that was definitely his belt, and
25 that's the one he wore.

1 A. Right.

2 Q. Okay. Do you remember talking to police and being
3 shown the belt buckle around the time of the murder?

4 A. It was -- yeah. It probably was weeks, I'm -- I
5 think --

6 Q. Okay.

7 A. -- when they showed it to me.

8 Q. You were certainly shown the belt buckle by the
9 police department.

10 A. Right.

11 Q. All right. And that's the same one that's now been
12 admitted as State's Exhibit 47.

13 A. Yes.

14 Q. Okay. And at that time, you had actually told the
15 police, "I'm not sure if that's his belt buckle or not";
16 isn't that correct? "It looks like it, but I'm not sure"?

17 A. I really don't remember.

18 Q. Okay. But you believe today that it is.

19 A. Yes.

20 Q. Okay. But you're not saying that you definitely
21 recalled it back in 2001 or whenever it was you were shown
22 it. Shortly after.

23 A. I don't remember that.

24 Q. Okay. And one more thing. In -- again, in State's
25 Exhibit 1, and I'm going to refer to 1B, you said that was a

1 picture of Jim Robertson and your husband, Mr. Heitholt?

2 A. The day of his death, yes.

3 Q. The day of his death. And Mr. Heitholt is
4 wearing -- that's what he wore to work that day?

5 A. Yes. That -- that's what -- would have been what he
6 wore to work that day.

7 Q. Okay. And that's, you know, October 31st. He's
8 wearing a short-sleeved shirt?

9 A. Could -- yeah.

10 Q. Okay. And I'm -- I'm just asking you to identify
11 the picture from the day, picture 1B, short-sleeved shirt.

12 A. Right.

13 Q. Okay. Great.

14 MR. WEIS: That's all the questions I have, Your
15 Honor. Thank you.

16 THE COURT: Redirect?

17 - - -

18 REDIRECT EXAMINATION

19 BY MR. CRANE:

20 Q. Well, just one thing. On that outfit he's got on
21 there in the bottom picture, you said he got up and would
22 come in and work in the day.

23 A. Uh-huh.

24 Q. Is that right?

25 A. That's right.

1 Q. And then he'd come home and leave again.

2 A. Right.

3 Q. Okay. I don't -- I mean, were you even there to see
4 what he had on the morning of the 31st? Or did you leave for
5 work first or did he leave?

6 A. I would have left first, yes.

7 Q. Before he got dressed?

8 A. Right.

9 Q. Okay. So -- well, I mean, I guess you also don't
10 know if he had a short-sleeved shirt on inside there and then
11 put on a jacket.

12 A. That's true.

13 Q. Okay.

14 A. I don't know.

15 Q. But you -- do you have -- and I don't think I've
16 ever -- he changed, or could have changed, after he got home,
17 and then left again for work and stayed late at night; right?

18 A. Right.

19 Q. Okay.

20 A. Uh-huh.

21 MR. CRANE: I think that's all I have, Your Honor.

22 THE COURT: Recross?

23 MR. WEIS: Nothing further.

24 THE COURT: Thank you so much. You may step down.

25 You may call your next witness.

1 MR. CRANE: Your Honor, the state calls Charles
2 Erickson.

3 THE COURT: Would you raise your right hand, please.

4 - - -

5 CHARLES TIMOTHY ERICKSON,
6 being first duly sworn by the Court, testified as follows:

7 THE COURT: Would you take the witness stand,
8 please.

9 - - -

10 DIRECT EXAMINATION

11 BY MR. CRANE:

12 Q. Give us your name, sir.

13 A. Charles Timothy Erickson.

14 Q. Make sure you speak up so even this guy on the jury
15 back farthest from you can hear; okay?

16 A. All right. It's Charles Timothy Erickson.

17 Q. And what's your current age?

18 A. I'm 21 years old.

19 Q. How old were you back on October 31st of 2001?

20 A. I was 17 years old.

21 Q. Mr. Erickson, on the early morning of November 1,
22 2001, what did you do to Kent Heitholt?

23 A. I robbed him and I beat him with a tire tool.

24 Q. And what did the defendant in this case, Ryan
25 Ferguson, do to him?

1 A. He robbed him and he strangled him.

2 Q. Do you see Ryan Ferguson in the courtroom here
3 today?

4 A. He's right there (indicating).

5 MR. CRANE: Judge, I'd ask the record reflect that
6 this witness has identified the -- what is it? A tan jacket?
7 Identified -- is it the individual in the tan jacket?

8 A. Yeah. That's correct.

9 MR. CRANE: Judge, I'd ask the record reflect this
10 witness has identified the defendant.

11 THE COURT: The record will so reflect.

12 Q. Where are you originally from?

13 A. I was born in Normal, Illinois, but I'm originally
14 from Bloomington, Illinois.

15 Q. When did you start living here in Columbia?

16 A. It was my 8th grade year. I believe it was 1998.

17 Q. Okay. And that's, the way our schools work here,
18 that's junior high?

19 A. Yeah. That's correct.

20 Q. Back on Halloween of 2001, where were you going to
21 school?

22 A. I was going to Rockbridge High School.

23 Q. And what year were you at Rockbridge High School?

24 A. I was a junior.

25 Q. And where were you living back then?

1 A. I was living in Columbia.

2 Q. With whom?

3 A. With my parents.

4 Q. Your mom and dad?

5 A. Yeah. That's correct.

6 Q. What's your dad do for a living?

7 A. My dad, he works for Columbia Insurance.

8 Q. At some point did he have a law degree, or what's

9 his -- is that what he does for the insurance company?

10 A. Well, yeah, he was a lawyer. He passed his bar in

11 New York and Illinois. But --

12 Q. What's he do with the insurance company?

13 A. He's the vice president for claims.

14 Q. What about your mom? What's she do?

15 A. My mom's a microbiologist at University Hospital.

16 Q. Here in town?

17 A. Yeah. That's correct.

18 Q. What about brothers and sisters? You got any?

19 A. Yeah. I've got a younger sister named Karen. She's

20 18. She's in her senior year at Rockbridge.

21 Q. So when this all happened, she'd have been 14?

22 A. Yeah. That's correct.

23 Q. Okay. She was living there at home with you and

24 your mom and your dad?

25 A. That's correct. Actually she would have been -- she

1 would have been 15.

2 Q. Okay. Did my math wrong there.

3 How is it you first met the defendant?

4 A. We had a class or two together and we ran track
5 together.

6 Q. Okay. Is that in 8th grade, when you first got
7 here?

8 A. Yeah. That's correct.

9 Q. Okay. And then how would you characterize your
10 relationship with him after that?

11 A. We hung out.

12 Q. You first met in 8th grade?

13 A. Yeah. He'd come to my house; I'd go to his house.
14 We'd just, you know, we'd go and hang out at other people's
15 houses.

16 Q. Okay. You had friends of your own, and he had
17 friends of his own?

18 A. Yeah. A lot of them were mutual friends.

19 Q. Okay. Well, was -- was Ryan Ferguson the only
20 friend you had? I guess is what I'm getting at.

21 A. No.

22 Q. Okay. You'd hang out with him, kind of lived --
23 what about where he lived?

24 A. He lived about -- about two miles away from my
25 house.

1 Q. Okay. Roughly the same part of town?

2 A. Yeah. That's correct.

3 Q. Okay. Did -- I mean, did you date females?

4 A. Yeah.

5 Q. Junior high and high school?

6 A. Yeah. Freshman year, I remember he -- he was kind
7 of with this girl named Stephanie Daily.

8 Q. Well, I mean, I don't know how much specifics we
9 need to go into now. The defense may want to go into that,
10 but. What I'm getting at is: He'd date girls and you dated
11 girls and --

12 A. Yeah.

13 Q. -- what have you.

14 A. Yes.

15 Q. Okay. What -- since you met him, when you were in
16 8th grade, and we'll go up to when this happened in the fall
17 of 2001, what conflicts or problems or big falling-outs or
18 anything did you all have?

19 A. None.

20 Q. Okay. Didn't get mad -- you wanted to date his girl
21 or anything like that?

22 A. No.

23 Q. Okay. Got along okay?

24 A. Yeah. That's correct.

25 Q. All right. How well did you know his parents?

1 A. I knew them okay. Not real well. I think -- I had
2 seen his mom around more than his dad.

3 Q. Okay. Sometimes you'd be over at his house and
4 they'd be there, I guess?

5 A. Yeah. That's correct.

6 Q. Do you see either of them in the courtroom here
7 today?

8 A. Yeah. They're right over here.

9 Q. Okay. Right over here in the front row, to my
10 right?

11 A. That's correct. Yes.

12 Q. Okay. Did you have any conflicts or anything with
13 either of them?

14 A. No.

15 Q. Okay. You said you saw his mom more often. How did
16 you get along with her?

17 A. She's very nice. She's a nice lady.

18 Q. Okay. Sir, I want to direct your attention to
19 October 31st of 2001. We've already shown another witness a
20 calendar there. Shows that was a Wednesday. School night.
21 School day. Correct?

22 A. That's correct, yes.

23 Q. Okay. You don't have any argument with that, do
24 you?

25 A. No, I don't.

1 Q. Okay. That day, do you remember what -- anything
2 eventful that happened? I mean, did you go to school that
3 day?

4 A. Yes, I did.

5 Q. Okay. Anything out of the ordinary? I mean other
6 than it being Halloween --

7 A. No. Nothing.

8 Q. -- that day?

9 A. Nothing I can recall, no.

10 Q. Okay. After you got out of school that day, where
11 did you end up going? What was your plans for the night and
12 what did you end up doing?

13 A. Well, we knew of a party at an individual named Ryan
14 Swilling's house. And before that, I went with David
15 Igleheart and Scott Turner and maybe a couple other people,
16 and we went to my friend Jon Cole's house. And the plan was:
17 We were going to -- his folks had a bunch of retro '70s
18 stuff, and we were going to --

19 Q. Some what?

20 A. Some like retro '70s clothes.

21 Q. Okay.

22 A. And that was -- we were just -- we went over there
23 to look for Halloween costumes.

24 Q. Okay. And so that is -- this -- your buddy Jon
25 Cole's mom and dad's house.

1 A. Yeah. That's correct.

2 Q. And they had some old clothes, some '70s stuff --

3 A. Yeah.

4 Q. -- which I probably got some '70s stuff myself, but

5 that's -- you thought that would be a suitable Halloween --

6 A. Yeah. Well, they had all kinds of stuff. I

7 remember we were just in this kind of storage area. And some

8 people put on military stuff. And there was just a bunch of

9 '70s stuff.

10 Q. Okay.

11 A. I thought that would be the easiest.

12 Q. I'm sorry. I didn't mean to cut you -- did you have

13 a driver's license back then?

14 A. I believe so, yes.

15 Q. Did you have your own car back then?

16 A. No. No, I didn't.

17 Q. So if you drove, whose car did you drive?

18 A. My folks'. My parents'.

19 Q. Okay. But you weren't doing the driving after

20 school --

21 A. No.

22 Q. -- on this -- huh?

23 A. No.

24 Q. Okay. Let me show you what's, if I can here --

25 first of all, let me show it to the defense -- what's marked

1 for identification State's Exhibit 5.

2 Let me first show this to you. This is a drawing.
3 Map. Do you recognize what's generally depicted in this
4 photograph?

5 A. Yes, I do.

6 Q. Does this look like a portion of Columbia, Missouri?

7 A. Yes.

8 Q. Okay. And some of these locations are already
9 marked on here?

10 A. That's correct.

11 Q. Okay.

12 MR. CRANE: Well, let me just see if there -- do
13 you -- Judge, I would offer at this time State's Exhibit 5.

14 MR. ROGERS: No objection, Your Honor.

15 THE COURT: State's Exhibit 5 is admitted.

16 - - -

17 State's Exhibit 5 admitted into evidence.

18 - - -

19 Q. I'm going to turn this around real quick. Let's go
20 back, if we could. And I --

21 MR. CRANE: The jury will have another opportunity
22 to see these, Your Honor, if I'm able to pass them, but at
23 this point I want to cover it with the witness.

24 MR. ROGERS: You want the easel?

25 MR. CRANE: Well, he can't get down at this point.

1 He's got the leg irons on.

2 Q. Let's go back. Your place is marked here at the
3 lower corner here. What's -- what was your address?

4 A. It was 3706 Chinkapin Court.

5 Q. Okay. And then what street was Ferguson on?

6 A. I think it was Lloyd Drive.

7 Q. Okay. Down here?

8 A. Yeah.

9 Q. Okay. Is that -- I mean, I know this isn't to scale
10 or anything, but is this roughly --

11 A. Yeah, that's correct.

12 Q. -- accurate?

13 A. That's correct.

14 Q. And then you said after school you went to Jon
15 Cole's residence?

16 A. That's correct.

17 Q. And do you remember what part of town that was in?

18 A. Northern part of town.

19 Q. And do you remember a street near there or anything
20 like that where Cole lived?

21 A. It was -- I think he lived off of Jackson. And that
22 was off of Texas.

23 Q. Okay. We've got Jon Cole's residence up here.
24 Again, without being just completely accurate on scale, is
25 that roughly where we're talking?

1 A. Yeah.

2 Q. Okay. And then after you got your -- did you --
3 well, did you get something different to wear to the deal?
4 To the party?

5 A. Yeah, I did. I found some bellbottom pants, some
6 jeans, some light blue jeans, and a -- like a button-up
7 shirt, a blue button-up shirt that had a kind of -- had a
8 wide collar on it, and the sleeves were kind of wide. And
9 when it was untucked, it kind of looked '70s I guess. And --

10 Q. What about -- do you remember what you did with the
11 clothes you took -- had on when you got there?

12 A. I can't remember.

13 Q. Okay. What about shoes?

14 A. I had some -- they were kind of like penny loafers.
15 I'm not exactly sure what kind of shoes they were.

16 Q. Well, no, I'm asking, where did you -- what did you
17 wear from the Cole --

18 A. Oh.

19 Q. -- residence to the party?

20 A. Yeah. Yeah. I just wore -- they were like penny
21 loafer shoes.

22 Q. Okay. That you got at -- from Mr. Cole's folks?

23 A. Yeah, that's correct.

24 Q. Okay. All right. Now, you got that getup on. And
25 where did you go?

1 A. From there I went to Ryan Swilling's house.

2 Q. Okay. And was this, again, with a group of the
3 buddies you were with that night? Everybody was going to the
4 party?

5 A. That's correct, yes.

6 Q. How did word get out about this party?

7 A. It was just kind of word around school.

8 Q. Okay. And do you remember the street that the
9 Swilling party was on? If you don't, the area?

10 A. It was across from the Forum Shopping Center. I
11 think it was Highridge.

12 Q. Okay. Well, we don't have Forum Shopping Center on
13 State's Exhibit 5, but, again, "Swilling party,"
14 (indicating). Does that roughly look accurate?

15 A. Yeah. That's correct.

16 Q. Okay.

17 A. It was -- yeah. It was behind Dairy Queen.

18 Q. So it's really not far from your-all's houses.

19 A. No. No.

20 Q. Okay. What was this -- we keep saying "Swilling
21 party." Who's that guy -- who is that guy?

22 A. His name was Ryan Swilling. And he was I think a
23 couple years older than I am. He was at least a couple
24 grades higher than I was. And I just knew him through a
25 friend. I didn't -- I didn't really know him very well.

1 Q. Okay. He's an older guy that had moved out and had
2 his own pad?

3 A. Yeah, with a couple other guys. I think Ryan Alder
4 also lived with him. And I can't -- I can't remember who
5 else.

6 Q. Okay. And let me show you what's marked for
7 identification as 6, 6A and B.

8 MR. ROGERS: No objection.

9 Q. Take a look at these photos. Do you recognize
10 what's in those two photos?

11 A. Yeah. That's Ryan Swilling's house.

12 Q. Okay. Are those fair and accurate depictions of how
13 it looked back then? Although I guess it was dark back then.

14 A. Yeah. That's correct.

15 Q. Okay.

16 MR. CRANE: Judge, I'd offer 6, 6A and 6B.

17 MR. ROGERS: No objection, once again, Your Honor.

18 THE COURT: State's Exhibits 6, 6A and 6B, are
19 admitted.

20 - - -

21 State's Exhibits 6, 6A and 6B, admitted into
22 evidence.

23 - - -

24 Q. Okay. So this is a picture of where the party went
25 down?

1 A. Yeah.

2 Q. Okay. Do you remember exactly when you got there?

3 Or if you don't, can you estimate?

4 A. I think it was around 8:00. Sometime around there.

5 I can't be certain, though.

6 Q. And while you were at this party at the Swilling

7 residence, what were you wearing? The whole time you were at

8 that party.

9 A. I was wearing the bellbottom jeans and the blue

10 button-up shirt and the penny loafers.

11 Q. Okay. The same thing you described you left Jon

12 Cole's in?

13 A. Yeah. That's correct.

14 Q. How big was this thing, this party at Swilling's?

15 A. There were probably between, I don't know, 50 and 75

16 people there. Maybe a hundred. It just changed from time to

17 time. People would come; people would go.

18 Q. What was going on?

19 A. Just a lot of drinking, listening to music. Just

20 standing around for the most part.

21 Q. Okay. Loud music?

22 A. It wasn't real loud.

23 Q. You didn't think it was all that loud?

24 A. No.

25 Q. What about -- what about alcoholic beverages?

1 A. Yeah, there was a keg there.

2 Q. Okay. Did you drink?

3 A. Yes, I did.

4 Q. Okay. What about drugs?

5 A. Yeah, I did -- I did a little bit of cocaine.

6 Q. How much?

7 A. I think one or two lines at the most.

8 Q. And did you that at Swilling's party.

9 A. That's correct.

10 THE COURT: Mr. Crane, just a minute. Are you going
11 to put something on that that's already admitted into
12 evidence?

13 MR. CRANE: No.

14 THE COURT: Well, I suggest that perhaps you want to
15 show it to defense counsel.

16 MR. CRANE: No, I am -- I'm not going to show
17 anything on that until -- well, first until I see if we can
18 operate it. And then I'm going to wait until it's in
19 evidence, yeah.

20 THE COURT: All right. I just want to make sure you
21 didn't put anything on that screen.

22 MR. CRANE: Show counsel 7, 7A and 7B.

23 MR. ROGERS: No objection.

24 Q. I'm going to show you what's marked here for
25 identification as State's Exhibit 7, 7A and 7B. Do you

1 recognize what's in those photographs?

2 A. Yeah. It's a picture of myself.

3 Q. Okay. The top one's a picture of yourself and
4 several other people?

5 A. That's correct, yes.

6 Q. And the bottom one's a picture of you and several
7 other -- and a couple other guys.

8 A. Yeah. Two guys --

9 Q. Don't say too much about it until we get it into
10 evidence. If we get it into evidence. Are those fair and
11 accurate pictures of you and other people at the Swilling
12 party that was going on October 31st, 2001?

13 A. That's correct, yeah.

14 MR. CRANE: Judge, I'd offer 7, 7A and 7B.

15 MR. ROGERS: No objection, Your Honor.

16 THE COURT: State's Exhibits 7A, 7B, and 7 are
17 admitted.

18 - - -

19 State's Exhibits 7, 7A and 7B, admitted into
20 evidence.

21 - - -

22 MR. CRANE: Okay. Judge, we -- the only way you can
23 see this well is if we turn off the second -- the center
24 recessed lights, because there's a shadow on there. It
25 doesn't make it so dark that you can't operate. Would that

1 be all right if we at least try that?

2 THE COURT: You may try it to display the
3 photograph, yes.

4 MR. CRANE: Okay.

5 (Lights turned off.)

6 Q. Mr. Erickson, can you see that from your location?

7 A. Yes, I can.

8 Q. Okay. First of all, I want to direct your attention
9 to I believe this is 7B in the board there. Who's this
10 individual over here on my left?

11 A. That's me.

12 Q. Okay. And you're sure -- is that the one you were
13 describing earlier as the one you put on at Cole's?

14 A. That's correct, yes.

15 Q. Okay. And who are these other two guys?

16 A. That's David Igleheart and -- in the middle is David
17 Igleheart, and then to the right is Scott Turner.

18 Q. Okay. And those were just other buddies of yours?

19 A. Yeah. That's correct.

20 Q. Okay. I'm going to show you now --

21 MR. CRANE: Look on that thing. Does that say "7"
22 on there?

23 MR. ROGERS: 7A.

24 Q. Okay. I'm going to show you what's marked as 7A. I
25 don't know how well this is going to show up. Can you see

1 that, Mr. Erickson?

2 A. Yes, I can.

3 Q. Okay.

4 MR. CRANE: Do you got that laser?

5 Q. Here. One of these laser pointers.

6 A. Yeah.

7 Q. Can you --

8 A. Do you want me to stand up?

9 MR. CRANE: Judge, can -- would the Court have any
10 objection to Mr. Erickson's hands being released from the
11 cuffs?

12 THE COURT: That depends on whether or not the
13 sheriff would have any objection. Perhaps one of his --
14 could one be released? But I'm not saying that you have to.
15 I'm asking if it would be agreeable.

16 SHERIFF'S DEPUTY: (Nodding head up and down.)

17 (Deputy uncuffing one of the witnesses's hands.)

18 MR. CRANE: For the record, the sheriff has
19 indicated -- sheriff's deputy has indicated that it's okay to
20 remove the black box. His hands are going to remain cuffed.

21 THE COURT: All right.

22 MR. CRANE: Okay. Now, I was going to give him this
23 laser pointer, so that he doesn't have to come down and
24 point. May I have the Court's permission to do that?

25 THE COURT: To have him use the laser --

1 MR. CRANE: Yes.

2 THE COURT: -- pointer? That's fine, as long as he
3 doesn't point it at someone's eyes.

4 MR. CRANE: Okay.

5 Q. See that button on there?

6 A. Yeah.

7 Q. Okay.

8 A. That's me right there.

9 Q. Okay. That's you in the photograph?

10 A. That's correct.

11 Q. Okay. And there's some other partiers. Who -- do
12 you remember -- this guy that's got his back to us here.

13 A. I believe that was -- that was Jon Cole. That was
14 the man's -- the man who -- he had the house where we got the
15 clothes from.

16 Q. What about up here?

17 A. That would be Dallas Mallory.

18 Q. That's not a real cop?

19 A. No, it's not a real cop.

20 Q. And that was Dallas Mallory at the party; correct?

21 A. Yes, that's correct.

22 Q. Okay. Do you recognize any of these other people?

23 A. That's -- that's Abbey Atkins. That's Evan Perry.
24 I can't remember her name.

25 Q. Okay. Somebody -- was that -- another kid at the

1 party.

2 A. Yeah.

3 Q. Okay.

4 A. That's correct.

5 Q. All right. Go ahead and -- go ahead and have a
6 seat.

7 Did you see Ryan Ferguson inside or around the
8 Swilling party while -- well, let me ask it this way. Before
9 it broke up, did you see Ryan Ferguson anywhere at the
10 Swilling party that night?

11 A. No, I did not.

12 Q. Okay. Now let me ask you this. Can you say whether
13 or not he was there somewhere in the crowd, or not?

14 A. No, I cannot.

15 Q. Okay.

16 THE COURT: Can we turn the lights back on,
17 Mr. Crane, or are you going to be using that setup?

18 MR. CRANE: Yeah, we can get them started. Probably
19 stay -- it takes a long time for them to get back up. We can
20 start --

21 THE COURT: That is true. These are not normal
22 lights. They take a while to boot up.

23 Q. What broke the party up?

24 A. The police arrived.

25 Q. Okay. And what -- tell us about what you remember

1 when that happened.

2 A. I remember I was kind of in the back of the party,
3 and it was just -- the word got out that the police had shown
4 up, and everyone just started -- just -- just leaving the
5 party.

6 Q. Okay. And what did you do?

7 A. Well, the guys that I came with, I was coming up,
8 and then I came out the front door, and I saw that they were
9 getting in the car real quick and already -- they were
10 already taking off. And so I just -- I just wanted to get
11 away from the house, just because I didn't want to be there
12 when the police came. And so I just -- I just went -- I just
13 started walking down the road. Walking down -- walking down
14 Highridge, away from Forum.

15 Q. Okay. Whatever the street is in front of the
16 Swillings house?

17 A. Yes.

18 Q. Okay. And what happened? You start to walk out,
19 you're walking along the street, and what happened?

20 A. I'm walking down the street, and the cops are behind
21 me, and I'm just -- I'm walking down the street, and I don't
22 know if I was going to ask someone for a ride or just -- I
23 was thinking I might just walk to my house, because it really
24 wasn't that far.

25 Q. Wait. You said the cops are behind you. What do

1 you mean?

2 A. Well, my back is to the police, because -- and
3 Swilling's house would be to the left of me. All right?

4 Q. Okay.

5 A. And then the cops, they came up on the Forum side of
6 Highridge, and they kind of blocked off the street right
7 there.

8 Q. Okay. They're behind -- they're not chasing behind
9 you.

10 A. No. No. No.

11 Q. Okay.

12 A. They're stopped on the street.

13 Q. All right. And then what happened?

14 A. And then -- and I'm walking, and then all of a
15 sudden I hear someone say, "Hey, Chuck. Hey, Chuck." And I
16 look over, and Ryan is at the corner of Highridge and another
17 street. He's kind of -- he's kind of turned and stopped,
18 like, you know, where he's still making a turn a little bit.

19 Q. Okay.

20 A. And says, "Hey, Chuck." And I go over and go,
21 "What's up, man?" And he said, "Man, get in here." You know
22 what I'm saying? So I get into his car.

23 Q. Was there anybody else in his car when you got in
24 there?

25 A. No, there wasn't.

1 Q. What type of a vehicle was Ryan Ferguson driving?

2 A. He drove a Mercedes, I think E320. It was blue.

3 Q. Okay. Had you -- had you seen it before?

4 A. Yes.

5 Q. Was that what he was driving that night?

6 A. That's correct, yes.

7 Q. Do you know how he got that vehicle?

8 A. I believe his dad gave it to him.

9 Q. Okay. And he -- I mean, he had been driving that

10 for -- well, he was 17 at this time, but he had -- do you

11 know how long he had it or anything like that?

12 A. I believe he got it when he was 16, but I'm not --

13 I'm not sure.

14 Q. Okay. So you got in the Mercedes. And it's just

15 you and he in the car at that point.

16 A. Yes.

17 Q. Okay. What happened then?

18 A. We were -- we were trying to figure out something to

19 do. And we were still on Highridge. And he mentioned

20 something about his sister could get us into a club. So I

21 said -- he asked me if I wanted to go, and I said, "Yeah,

22 yeah, that's fine. Let's go to the club."

23 Q. Now when you say "club," what do you mean?

24 A. I mean By George's club.

25 Q. Okay. A club to you is -- do you use the term

1 "club" and "bar" as the same thing?

2 A. Yeah. I mean, I had never been to --

3 Q. I mean, you're not talking about Kiwanis --

4 A. No.

5 Q. -- Rotary.

6 A. No.

7 Q. Okay. I'm sorry.

8 A. It's a, you know, drinking, dancing, just partying

9 club.

10 Q. Okay. All right. By the way, were you carrying a

11 cell phone that night?

12 A. No, I wasn't.

13 Q. Okay. So this issue, this idea of going to the

14 club -- George's specifically?

15 A. Yes. That's correct.

16 Q. -- that was discussed. And then what happened?

17 A. It was also discussed that it was going to be a

18 little while until we could meet up with his sister to get

19 into the club. And I was -- these pants that I was wearing

20 were kind of tight and they were starting to get

21 uncomfortable, and my shoes were starting to get

22 uncomfortable. And since we had some time to kill, I just --

23 I suggested -- I asked him if we could go back to my house

24 real quick and I could change. I also wanted to check in

25 with my parents, to see if my parents were asleep, because I

1 knew they wouldn't want me going to a club on a school night
2 at 11:00.

3 Q. By the way, you testified to what you were wearing,
4 at least at this juncture of the night. When you got into
5 the car with Mr. Ferguson, do you remember what he was
6 wearing?

7 A. Not specifically. I think he may have been wearing
8 a gray shirt and he had -- he had a puffy Ralph Lauren coat
9 on. And I think he had jeans on, but I can't remember.

10 Q. Okay. You don't remember the type of pants? What
11 about shoes?

12 A. I can't remember.

13 Q. Let me ask, was it -- to your recollection, was it a
14 costume of any kind?

15 A. No. He was just wearing street clothes.

16 Q. Regular -- just regular clothes.

17 A. Yeah, that's correct.

18 Q. Where did you guys go from there?

19 A. From my house?

20 Q. Well --

21 A. Or from Swilling's?

22 Q. Yeah.

23 A. We went to my house. And he --

24 Q. Where did he let you off?

25 A. He let me off in front of my house.

1 Q. And what did you do?

2 A. And I went in through the front door, and I saw that
3 my parents were asleep, and so I just went downstairs into my
4 room, and I changed into -- I changed clothes. I changed
5 into a pair of jeans and a gray Tommy Hilfiger shirt and a
6 big blue puffy reversible Nautica coat.

7 Q. Do you remember what kind of shoes you put on?

8 A. No. I just remember that they were more comfortable
9 than the ones I was wearing.

10 Q. Okay. The ones you borrowed?

11 A. Yeah.

12 Q. Okay. And backing up on the cell phone question,
13 before you got to your house, from Swilling's, with the
14 defendant, was there any cell phone conversation?

15 A. I believe I called Scott Turner and asked --

16 Q. On whose phone?

17 A. On Ryan's phone.

18 Q. Okay. What about Ryan? Was he talking on the cell
19 phone?

20 A. Yeah. He talked to his sister.

21 Q. Okay. By the way, what's his sister's name?

22 A. His sister's name is Kelly Ferguson.

23 Q. Did you -- do you or did you know her?

24 A. I'd -- I'd seen her. I met her just when I was over
25 at her house. I didn't really know her, though, you know.

1 Q. Okay. She's older than Mr. Ferguson and older than
2 you.

3 A. Yeah, that's correct.

4 Q. Okay. Now, when you -- you went in to change
5 clothes, what about your folks?

6 A. They were asleep when I went in.

7 Q. Okay. And your sister?

8 A. She was asleep also.

9 Q. Okay. You didn't see them?

10 A. I didn't see any of them, no.

11 Q. And you went downstairs. And how did you then leave
12 your residence?

13 A. I left through the back.

14 Q. Okay. How come?

15 A. I snuck out through the back, so my parents -- the
16 front door, it's louder. And I've got the basement to
17 myself.

18 Q. Okay.

19 A. So no one would have known if I would have went out
20 the back.

21 MR. CRANE: Judge, I'm going to show the witness
22 8 -- State's Exhibit 8 for identification. 8A through 8C.

23 Q. Ask if you recognize what's depicted in that
24 photo -- these three photographs.

25 A. The top one is my house. The middle one is Grant

1 Lane, where Ryan Ferguson parked, where he --

2 Q. All right. Just -- you recognize that photograph as
3 Grant Lane, back of your place?

4 A. Yeah. And then that's the back of my house.

5 Q. Okay. When I show you something like this, don't
6 start talking too much about it until we got it in. Okay?

7 A. All right. Sorry.

8 Q. And we might not get something in, so, you see,
9 you're not suppose to do that. You with me?

10 A. Yeah.

11 Q. Okay.

12 MR. CRANE: Judge, there's no objection, it's my
13 understanding --

14 MR. ROGERS: That's correct.

15 MR. CRANE: I'm offering 8A through 8C.

16 THE COURT: 8A through 8C are admitted without
17 objection.

18 - - -

19 State's Exhibits 8, 8A through 8C, admitted into
20 evidence.

21 - - -

22 Q. So the top photograph now -- now you can talk about
23 it. What's this top photograph of?

24 A. That's the front of my house.

25 Q. Front of your house.

1 A. Yeah. That's correct. That's where Ryan would have
2 dropped me off at, when I first went in.

3 Q. Okay. And then how did you get out?

4 A. I went out the back of my house.

5 Q. Okay.

6 A. And I went --

7 Q. If we look at 8B here, could we see your house
8 somewhere on there or --

9 A. Yeah. It's about the -- it's about the third one
10 down. You can see the roof.

11 Q. Okay.

12 A. And I came back here, behind these houses. After I
13 went out the back like that, I came out here. I met Ryan at
14 Grant, right there.

15 Q. How did he know where to meet you?

16 A. He picked me up there before, when I snuck out.

17 Q. So this wasn't the first time you'd snuck out.

18 A. No, it wasn't.

19 Q. Okay. So that was the spot back there.

20 A. That was the spot, yes.

21 Q. Okay. And you got out -- if we look at 8C, you got
22 out the back door. And your folks were less likely, I guess,
23 to know you were slipping out?

24 A. Yeah, that's correct.

25 Q. Okay. When you got back to the car, what was going

1 on?

2 A. Ryan was on the phone. And he told me he was on the
3 phone with Holly Admire.

4 Q. With whom?

5 A. With Holly. A girl named Holly Admire.

6 Q. Okay. And now you're talking about on the cell
7 phone?

8 A. That's correct, yes.

9 Q. Okay. Do you remember what the defendant told you
10 about that -- what he was talking to her about or anything?

11 A. He said something regarding -- he -- I know he
12 wanted to date her and he wanted to get together with her.
13 And we'd been at a friend's house a couple weekends before
14 that, and he'd seen -- he'd seen Holly Admire's boyfriend,
15 who's a brother of a friend of mine, his name is Dan Dunn, go
16 into room with another girl. And he was going to tell Holly
17 that -- that -- about -- that Dan was messing around on her,
18 because he wanted to get together with her. He thought that
19 that might break it off.

20 Q. Okay. Was that something he told you, or was that
21 something you picked up on the phone call with Holly that
22 night or maybe multiple phone calls that night or both?

23 A. That was something he told me.

24 Q. Okay. So the guy that Holly Admire was dating, that
25 was allegedly cheating on her, was -- what was his name?

1 A. Dan Dunn. Daniel Dunn.

2 Q. Okay. All right. Now -- and you don't know whether
3 he was cheating on her or not. I mean --

4 A. I don't know.

5 Q. -- innocent until proven guilty; right?

6 A. That's correct.

7 Q. Okay. But in any event, that was the topic of the
8 phone call with Holly Admire and the defendant.

9 A. Yes.

10 Q. At some juncture during the night?

11 A. Yes.

12 Q. When you got back out to the vehicle, where did you
13 guys go then?

14 A. We went to By George's.

15 Q. Okay. And what happened when you arrived at that
16 location?

17 A. Well, I remember we had to park up the road. We had
18 to park up the road a little bit, because there -- the
19 parking lot was packed. And it was Halloween. They were
20 having a Halloween party. And there was so many people that
21 we had to park up the road a couple blocks. I can't remember
22 the name. I think -- I can't remember the -- it was First
23 Street, the same road that the club was off of, but I
24 can't -- it was -- it was almost two intersections down after
25 the club.

1 Q. Okay.

2 MR. ROGERS: Your Honor, we have no objection to
3 State's Exhibit 9.

4 THE COURT: That is 9?

5 MR. CRANE: Your Honor, I'm going to -- I'm going to
6 show you what's marked for identification -- or not you.

7 Q. Mr. Erickson, I'm going to show you what's marked
8 for identification State's Exhibit 9. Do you recognize this
9 aerial photograph?

10 A. Yes, I do.

11 Q. Okay. And you're from Columbia. This depicts, from
12 the air, a portion of downtown Columbia; is that right?

13 A. That's correct.

14 Q. Okay.

15 MR. CRANE: And 9's in? Is that -- otherwise --

16 THE COURT: You haven't offered it yet.

17 MR. CRANE: Well, I'd offer 9.

18 MR. ROGERS: No objection.

19 THE COURT: 9 is admitted.

20 - - -

21 State's Exhibit 9 admitted into evidence.

22 - - -

23 MR. CRANE: Okay. Can you all kind of see that? Is
24 there a glare?

25 JUROR: A little bit, but not bad. Better.

1 Q. Okay. For the record here, on State's Exhibit 9 --
2 and Mr. Erickson, can you see this from where you're at?

3 A. Yeah.

4 Q. Okay. The numeral 1 is over what?

5 A. By George's.

6 Q. Okay. We got this legend up here. Now, you were in
7 the middle of testifying to where you recall Mr. Ferguson
8 parked prior to the time you went into the bar.

9 A. That's correct.

10 Q. Can you show the jurors where that location was.

11 A. Yeah. It was right about here (indicating).

12 Q. Okay. So George's -- and you just pointed to this
13 location (indicating).

14 A. Yeah. That's correct.

15 Q. Okay. All right. So it's actually not on the same
16 block, but a block over, closer to what street?

17 A. Ash Street.

18 Q. Okay. All right. Now, from there, where did you
19 and Mr. Ferguson go?

20 A. We went to the club.

21 Q. And before you got in, what happened?

22 A. We had to -- we had to meet up with his sister,
23 Kelly, and a friend of his sister's, because we weren't 21,
24 and you had to be 21 to get into the club that night.

25 Q. Okay. And, I mean, that was the idea that

1 Mr. Ferguson brought up -- had brought up earlier?

2 A. Yeah. She said that she could get us into the club.

3 Q. Okay. So what happened when you got to the parking
4 lot? Tell us.

5 A. We got in the parking lot. And we met up with
6 Ferguson's sister and his friend -- and her friend. I'm
7 sorry. And we got to the front, where there was a bouncer
8 who was admitting people into the building, and --

9 Q. What do you remember about the friend of
10 Mr. Ferguson's sister?

11 A. She was of Asian descent.

12 Q. Did you ever know her name? Did you remember her
13 name?

14 A. No.

15 Q. Okay. I want to show you what's marked for
16 identification as State's Exhibit 4. Ask if you recognize
17 that lady?

18 A. Yes. That's -- that's -- that was Kelly's friend
19 that was there with us that night.

20 Q. Okay.

21 MR. CRANE: Judge, I'd offer State's Exhibit 4.

22 MR. ROGERS: No objection.

23 THE COURT: State's Exhibit 4 is admitted.

24 - - -

25 State's Exhibit 4 admitted into evidence.

1

- - -

2 Q. And let me show you that little thing there. Do you
3 rec -- is this the same photo?

4 A. Yes. I believe so. Yes, it is.

5 Q. Okay.

6 MR. CRANE: Judge, I'd offer State's Exhibit 4A,
7 which is a student --

8 MR. ROGERS: No objection, Your Honor.

9 THE COURT: 4A is admitted.

10

- - -

11 State's Exhibit 4A admitted into evidence.

12

- - -

13 Q. Okay. And you didn't know what her name was.

14 A. No.

15 Q. But Christine Lo, you're not going to argue with
16 that?

17 A. No.

18 Q. Okay. After you met Kelly Ferguson and this female
19 out front, what did you do?

20 A. After that, there was a discussion between Kelly
21 Ferguson and the bouncer. And it went something to the
22 effect of: She -- she said that we were -- that I was her
23 boyfriend and that Ryan was Christine's boyfriend. And
24 basically she just asked if we could get into the club. It
25 was obvious we weren't 21. At least I thought. We didn't

1 have IDs. Most people had to show IDs. And he let us into
2 the club, because we were with these two girls.

3 Q. They let you in?

4 A. Yes.

5 Q. You didn't really have any trouble getting in.

6 A. No, we didn't.

7 Q. Okay. The cover charge, was there one?

8 A. Yeah.

9 Q. And do you remember how much it was?

10 A. I don't remember. It was somewhere in the
11 neighborhood of \$10 or something like that.

12 Q. Okay. If you got in with the cover charge, was
13 there anything like a stamp or anything?

14 A. I know that there was stamps. I think there were
15 bracelets also. I can't be sure about the bracelets, but I
16 know there were stamps.

17 Q. Okay. Can you describe for us the size of the
18 crowd, what was going on in there that night?

19 A. It was pretty packed. There were a lot of people
20 there. There was loud music. A lot of people dancing. A
21 lot of people dressed up --

22 Q. Okay.

23 A. -- for Halloween.

24 Q. All right. Had you been in that bar before?

25 A. Yeah.

1 Q. Tell us about that.

2 A. I went -- it was a teen night, though. They weren't
3 serving alcohol, I don't think. There was an age
4 requirement. And it was just -- it was just a bunch of kids
5 dancing.

6 Q. It was a kid thing?

7 A. Yeah.

8 Q. When -- when was this?

9 A. I believe it was my freshman year.

10 Q. Okay. What grade's that?

11 A. That was 9th grade.

12 Q. 9th grade?

13 A. Yeah.

14 Q. And by now you're a junior?

15 A. Yes.

16 Q. The night we're talking?

17 A. Yeah.

18 Q. Okay. Who did you go with when it was a teeny
19 bopper night?

20 A. My girlfriend wanted me to go, so I went.

21 Q. Okay.

22 MR. ROGERS: I'm sorry. I didn't hear that answer.

23 THE COURT: Would you speak up, please.

24 THE WITNESS: My girlfriend wanted me to go, so I
25 went with her.

1 Q. Back in 9th grade.

2 A. Yeah. I met her there.

3 Q. Okay. But now this night it was wide open, regular
4 old bar.

5 A. Yeah. That's correct.

6 Q. Grown-up deal.

7 A. Yes.

8 Q. Okay. After you got in there, you and Ryan got in,
9 what did you see of Kelly and her friend?

10 A. Not much at all. We kind of just -- we kind of
11 separated. I think that -- she was older than us, so it
12 would have been kind of weird, we were hanging out with
13 someone four years older than us. And she -- I think she had
14 her own friends there, and she was dancing and stuff. And me
15 and Ryan kind of just went off on our own.

16 Q. Okay. What did you and Ryan do then while you were
17 inside?

18 A. For the most part we just sat around. And Ryan
19 would go up to the bar and buy drinks. Sat around. I saw a
20 couple of people I knew. For the most part, though, I didn't
21 -- I didn't really know anyone. We just -- we just sat and
22 drank and watched people dance.

23 Q. Okay. Who paid for the drinks?

24 A. Ryan Ferguson did.

25 Q. And what about money -- what about your money?

1 A. I remember -- I didn't know there was going to be --
2 the cover charge was kind of expensive. I didn't have that
3 much cash on me. And so I -- I remember that I ran out of
4 money with the cover charge, and then Ryan got the rest of
5 the cover charge, and then Ryan was going to pay for the
6 drinks and I was going to pay him back.

7 Q. Do you -- were you aware -- do you recall another
8 source of money that Ryan either indicated or you saw occur?

9 A. Yeah. He told me he was getting money from his
10 sister.

11 Q. He what?

12 A. He told me he was getting money from his sister.

13 Q. Okay. What -- was there -- at any time did you see
14 actually money change hands between the two of them?

15 A. No. I saw him approach his sister. And he would --
16 he would leave, and he told me that he was going to go and
17 get money from his sister, but --

18 Q. Okay.

19 A. -- but I would stay where I was at, just because it
20 would be easier to find each other afterward.

21 Q. What type of drinks were you -- what did you want?
22 What were you drinking?

23 A. I believe he just -- he bought Amaretto Sours and --

24 Q. Amaretto Sours?

25 A. Yeah.

1 Q. Okay.

2 A. And at some point he might have gotten a Rum and
3 Coke for himself. But for the most part I just drank
4 Amaretto Sours.

5 Q. How many of those do you think you consumed?

6 A. Two or three.

7 Q. Did you keep track of how many drinks Ryan had?

8 A. No.

9 Q. Okay.

10 A. He was -- he was paying, so I'm pretty sure he drank
11 more than I did, but I'm not -- I don't know.

12 Q. So you each might have had three or four cocktail
13 type drinks.

14 A. Yeah. At the most.

15 Q. Okay. Not -- you weren't drinking beer?

16 A. No.

17 Q. That was -- that was back at Swilling's party?

18 A. That's correct.

19 Q. Okay. During the time you and Ryan Ferguson were in
20 George's, how often or how long were you two separated from
21 one another?

22 A. Not more than a few minutes. One of us would go to
23 the bathroom. He would get money from his sister. Maybe one
24 of us would step outside and smoke a cigarette.

25 Q. Okay.

1 A. No more than ten minutes.

2 Q. You generally kind of hung around each other?

3 A. Yeah. That's correct.

4 Q. Okay. Did you ever go away from the bar, outside
5 and away, during the time period in George's we're talking
6 about right now?

7 A. No.

8 Q. Okay.

9 A. Other than step outside and smoke a cigarette, no.

10 Q. Okay. Yeah. Out on the parking lot, but you came
11 right back in.

12 A. Yeah, that's correct.

13 Q. Up until this point, did you ever go out, like, to
14 the car and come back?

15 A. No.

16 Q. Or down the street and come back?

17 A. No.

18 Q. Okay. And to your knowledge, did Ryan go outside
19 and come back, to your knowledge?

20 A. No.

21 Q. You don't know whether he did or not?

22 A. I don't know whether he did or not.

23 Q. But if he did, that would have been, as you've
24 already testified, a brief period of separation?

25 A. That's correct.

1 Q. Okay. After you'd been there a while, drinking,
2 what did you want to do?

3 A. I wanted to go home. I wanted to go home. The
4 music was really loud, and I was a little intoxicated, and I
5 was just -- I wasn't really having a good time, you know. I
6 was 17. I never really been in a club. And everyone was
7 older than me. I was -- and I can't dance either, so.

8 Q. Okay. Did you -- I mean, you thought the club was
9 going to be cool, but when you actually got there, it wasn't
10 that great or --

11 A. Yeah, that's correct. Yeah. And I was tired too.

12 Q. Well, eventually what happened? What did you guys
13 do?

14 A. We ran out of money.

15 Q. Okay. And what happened next?

16 A. After that, we left -- we left the bar, we left the
17 club, because there was really no point in sticking around,
18 you know, other than drink, I guess. And I wanted to go
19 home. Ryan wanted to try to find something else to do. So
20 he made a few phone calls in between the club and his car.
21 And we were kind of hesitant --

22 Q. Well, let me stop you right there. Who was on the
23 cell phone?

24 A. Ryan Ferguson.

25 Q. Okay. And after you got outside, you were in the

1 parking lot or walking on the street or at the car?

2 A. Yeah. That's correct.

3 Q. And during that time period, what do you recall, if
4 you do recall, about cell phone usage? Let me ask it in a
5 general --

6 A. He called a few different people.

7 Q. Okay. Were you paying attention to what he was
8 talking about or who he was --

9 A. Just trying -- trying to find something to do, for
10 the most part. I remember he said he was going to call that
11 Brian Dunn. He was going to call Brian Dunn.

12 Q. Okay. Now, you went -- the car was -- the Mercedes
13 was back in the same spot we talked about. Back up there on
14 the --

15 A. On First Street, yeah.

16 Q. Yeah. On down from the bar.

17 A. That's correct.

18 Q. Towards Ash; correct?

19 A. Yes.

20 Q. When you got up to the vehicle, what -- tell us what
21 happened.

22 A. We got into the car. And he stayed on the phone for
23 a little bit. And I told him I wanted to go home. He said,
24 "Well, if we could get some more money, we could get some
25 more drinks. We could buy some more drinks and stay out

1 later." And he proposed that we rob someone in order to get
2 more money to buy more drinks.

3 Q. What were you thinking he was thinking about? What
4 was your impression of that "get more money to buy more
5 alcohol, more drinks"? What --

6 A. I don't know. I never robbed anyone before. And I
7 thought it was just going to amount to a pickpocket, or
8 something of that nature. I wasn't -- I really wasn't sure
9 what -- what -- what he had in mind.

10 Q. But what did you -- what was your reaction?

11 A. At first I was weighing my options, and I was -- you
12 know, I wanted to go home, but he was driving me, and I don't
13 know, I -- it kind of seemed a little, you know, rebellious
14 or whatever.

15 Q. Rebellious. I mean -- what's that mean?

16 A. I mean, there was -- there was -- there was a little
17 bit of attraction to it, just because it was -- I was young
18 and I was stupid and I was a little drunk, and it seemed like
19 it would be something cool to do.

20 Q. Okay. What happened next?

21 A. After that, we got out of the car, and we decided
22 that we should go downtown, in the -- more in the center of
23 downtown, and get away from the club, when we were going to
24 do this robbery. And we decided to leave our jackets and I
25 left my wallet in the car and my keys. I believe he left his

1 cell phone in the car. And if we start to walk --

2 Q. How come -- how come you left this stuff in the car?

3 A. Well, the jacket that I had on, it was blue, and it
4 was reversible, and one side was really shiny and it wasn't
5 very inconspicuous, and I just didn't want to drop anything,
6 if we got into a scuffle or something. And Ryan's coat was
7 puffy too. So we took that off.

8 Q. Okay. And so what did you put on? Do you remember?

9 A. At that point -- I had clothes in the back of his
10 car, because he had taken to me to school a lot, and
11 sometimes I'd just leave stuff in his car. And I had a
12 zip-up -- it was a zip-up Abercrombie sweatshirt. A hooded
13 sweatshirt.

14 Q. Okay. Did you put the hood up?

15 A. At one point, but I didn't keep it up.

16 Q. Okay. What -- so that's what you had on on your
17 top.

18 A. Yeah, that's correct.

19 Q. Okay. Do you remember what he had on?

20 A. No. I'm not sure.

21 Q. Okay. Do you think he took the coat? His coat?

22 A. Yeah. He took his coat off.

23 Q. All right. Back at the car, what else happened,
24 before you left?

25 A. Well, we start -- we start to walk. And he says,

1 "Hold on a second. We need to take something with us." I
2 said, "What do you mean, we need to take something with us?"
3 He said, "We're young, we're not that big, and if something
4 happens, one of us might get -- one of us might get messed
5 up, and we need to take something with us." So he goes back
6 to his trunk, he opens his trunk, he digs around for a little
7 bit, not very long, it was maybe -- not more than a few
8 seconds, and he finds this tire tool. He takes this tire
9 tool out of the trunk and he hands it to me.

10 Q. So now you've got it.

11 A. I've got it.

12 Q. And what did you do with it?

13 A. I've got this tire tool, and I was looking at it,
14 and I saw it had a connection piece, and there was a button
15 to release the connection. And I took the connection piece
16 off and put it back in the trunk and we closed the trunk and
17 we left.

18 Q. Okay. What happened after that?

19 A. After that, I believe we -- we got to First Street
20 and Ash. And we took a right down Ash.

21 Q. Okay. Let me show you what's marked as State's
22 Exhibit 9. Point to the location of the car again.

23 A. His car is right here (indicating).

24 Q. Okay. Up in this area right here (indicating)?

25 A. Yeah.

1 Q. Okay. And then show us where you went.

2 A. Then we went down Ash, toward Providence.

3 Q. Okay. You're indicating Ash. Down this way?

4 A. Towards --

5 Q. Can you see where I'm pointing?

6 A. Yeah. Towards -- towards Providence.

7 Q. Okay. Now, Providence, right here, it runs north
8 and south; correct?

9 A. Yes.

10 Q. Okay. What -- tell us about what you recall about
11 your path after that.

12 A. We took a right on Providence. We got to right
13 here. There's a little alleyway. And that was where we saw
14 Kent Heitholt.

15 Q. Okay. Now point again to the alley.

16 MR. CRANE: Can -- Judge, can we try to get him to
17 come down? We can try it, and if it doesn't work out, he
18 could return to the witness stand.

19 THE COURT: You may.

20 You can step down.

21 MR. CRANE: Okay. Let's see if we can move it up a
22 little closer.

23 How's that on the glare?

24 JUROR: Okay.

25 Q. Okay. Now, why don't you -- see, you're blocking

1 this guy.

2 A. Sorry. Where do you want me?

3 Q. Why don't you show us, first of all, where the car
4 was, now that we got you down here.

5 A. All right. The car was right here (indicating).

6 Q. Okay. And then from the car, where did you and the
7 defendant go?

8 A. We walked, and we took a right on Ash Street. We
9 went down here, until we got to Providence.

10 Q. Okay. And then what did you do?

11 A. Then at Providence we took a right. And we got to
12 this alleyway.

13 Q. Okay. Now at that --

14 A. Right here (indicating).

15 Q. Okay. What did you see from that location you've
16 just taken the jurors to?

17 A. Saw Kent Heitholt.

18 Q. And you didn't know who the guy was, though.

19 A. No, I didn't know who he was at the time.

20 Q. Where was -- now I don't -- are you able to show us
21 where it was generally you saw him at that location?

22 A. Yeah. He was at the Tribune building. He was in
23 between the building and the parking lot, in the alleyway.

24 Q. Okay. I mean, what was he doing? Was he
25 stationary?

1 A. No. He was -- he was walking to the car.

2 Q. Coming out of the building --

3 A. That's correct.

4 Q. -- headed onto the parking lot?

5 A. Yes.

6 Q. Okay. After -- well, what -- let me ask you this.

7 When you saw Mr. Heitholt, what happened? What happened

8 between the two of you or what happened at that point?

9 A. Well, we went down the alley. And we were hiding

10 behind this Dumpster enclosure, that's somewhere in here

11 (indicating). We're hiding behind that Dumpster enclosure,

12 and someone else comes out of the building, and they start

13 talking. And so we hide behind the Dumpster enclosure until

14 the person comes out. Then this person gets in their car and

15 they leave. So after that person left, Ryan and I are behind

16 the Dumpster enclosure.

17 Q. Okay. And it's -- where's this Dumpster thing?

18 A. It's -- if you --

19 Q. Well, you -- just describe it. Is it -- where is it

20 in relation to the parking lot?

21 A. It's -- it's --

22 Q. I mean, is it far away or is it close to the parking

23 lot?

24 A. No, it's close to the parking lot.

25 Q. Okay.

1 A. It's right across the alley from the Tribune
2 building.

3 Q. Now -- go ahead and sit down.

4 A. All right.

5 Q. After you got to the Dumpster spot, what did you
6 say? There was initially, by the time you got up there,
7 there was initially somebody else out there?

8 A. Well, we got up there, and we were behind the
9 Dumpster enclosure, and then someone else came outside.

10 Q. Okay. Let me show you what's marked as State's
11 Exhibit 12 for identification. Do you recognize this
12 diagram?

13 A. Yes, I do.

14 Q. Okay. Is that a diagram of the Tribune building and
15 the parking lot?

16 A. Yes.

17 Q. Okay.

18 MR. CRANE: Judge, I'm going to offer -- I don't
19 think there is an objection -- State's Exhibit 12.

20 MR. ROGERS: No objection, Your Honor.

21 THE COURT: State's Exhibit 12 is admitted.

22 - - -

23 State's Exhibit 12 admitted into evidence.

24 - - -

25 Q. Can you come back?

1 A. Yeah.

2 MR. CRANE: With the Court's leave.

3 THE COURT: You may step down.

4 Q. Mr. Erickson, on this diagram, which way is
5 Providence? If we look at it in connection with this.

6 A. If you're going down the alley this way, it's over
7 here.

8 Q. Okay. And so how did you and Mr. Ferguson approach
9 the parking lot?

10 A. We came down the alley, coming from Providence,
11 coming that way. Then we hid behind the Dumpster enclosure.

12 Q. Okay. After being at that location, what did you
13 do?

14 A. After we got to the Dumpster enclosure, we were
15 sitting there, and we saw the victim go up to his car. He
16 had papers on top of his car. Ryan was to my right. I still
17 had the tire tool. Ryan said, "We need to get this over
18 with. We need to get this over with. Just go do it." So I
19 stand up. I come -- kind of creep around a little bit.
20 There's a wall. It's about that high. I creep around the
21 wall. And I come up to where I'm not in the victim's
22 peripheral vision. I stand up and I go over the wall.

23 Q. What's the victim doing? What's Mr. Heitholt doing?

24 A. He's facing his car.

25 Q. Standing up?

1 A. Yes.

2 Q. Okay.

3 A. His doors are open and he's -- he's messing with
4 stuff in his car. On the roof of his car. On the driver's
5 side.

6 Q. What did you do to him?

7 A. I stepped over the wall, and I walked quickly, and I
8 hit him with the tire tool. I crept up behind him. And as I
9 crept up behind him, he started to turn. That is when I hit
10 him. And I kept hitting him.

11 Q. So he's standing at his car, and you came up -- you
12 said you came up behind him?

13 A. That's correct.

14 Q. Okay.

15 A. On his right side.

16 Q. And what side of the vehicle were you -- his vehicle
17 was Mr. Heitholt?

18 A. He was on the driver's side.

19 Q. And you came from around that way to get in behind
20 him?

21 A. (Nodding head up and down.)

22 Q. And what happened before you hit him?

23 A. He started to turn. And before he -- he started
24 turn, look over his shoulder like that. And before he got
25 around, I hit him, on the top of his head.

1 Q. What happened when you hit him?

2 A. I hit him. He turned around to face me. He put his
3 hands up, like that. And I kept on hitting him. He was in
4 between me and the car. And the open door. And I kept on
5 hitting him. And I hit him until -- at one point he groaned.
6 He groaned and he came to his knees. And I -- I hit him one
7 more time. Then he came to the ground. Then I dropped the
8 tire tool. I -- I just -- when he groaned, that's just -- I
9 don't know. That's just something that I really remember.
10 It was this -- I couldn't believe that a person made that
11 sound because of something I did to them.

12 Q. What about blood?

13 A. There was -- there was blood everywhere. There was
14 blood on the ground, blood on me, blood on the car.

15 Q. And where was Ryan Ferguson during all this? I
16 mean, were you -- could you see him at this point or --

17 A. He was behind me.

18 Q. Okay. And he hadn't had the tire tool in his hand,
19 at least up to this point.

20 A. That's correct.

21 MR. ROGERS: Your Honor, unless they have some more
22 to do with exhibits, I'd request the witness resume the
23 stand.

24 MR. CRANE: Well, not just yet.

25 THE COURT: What are we about to do? Is he going to

1 point out something else?

2 MR. CRANE: I need him to have his -- I would again
3 request -- maybe we -- can we approach?

4 Have a seat I guess.

5 - - -

6 Counsel approached the bench and the following
7 proceedings were held:

8 MR. CRANE: In order for him to show --

9 THE COURT: Their lunch is here too.

10 MR. CRANE: Okay. All right. I guess we could talk
11 about this later. We'll talk about it later. That's fine.

12 THE COURT: Okay.

13 MR. ROGERS: That's a good plan.

14 - - -

15 The following proceedings were held in open court:

16 THE COURT: Ladies and gentlemen, I have been
17 advised that your lunch has arrived, and so we will break for
18 the noon hour.

19 The Court again reminds you of what you were told at
20 the first recess of the Court. Until you retire to consider
21 your verdict, you must not discuss this case among yourselves
22 or with others, or permit anyone to discuss it in your
23 hearing. You should not form or express any opinion about
24 the case until it is finally given to you to decide. Do not
25 read, view, or listen to any newspaper, radio, or television

1 report of the trial.

2 Lunch is actually physically in the courthouse.

3 Yes?

4 DEPUTY COURT MARSHAL WERNER: It's in the room,
5 Judge.

6 THE COURT: In the room. Why don't we take a break
7 for an hour. Come back at, say, 5 after 1.

8 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

9 THE COURT: And resume.

10 Ladies and gentlemen of the jury, you may step
11 outside.

12 - - -

13 The following proceedings were held out of the presence
14 of the jury:

15 THE COURT: You may step down, Mr. Erickson.

16 May I assume that lunch would be provided for
17 Mr. Erickson and also Mr. Ferguson? Yes?

18 SHERIFF'S DEPUTY: Yes.

19 THE COURT: Okay. We will come back then at 5 past
20 1.

21 Anything further, before we recess?

22 MR. ROGERS: Kevin, we need to talk about why you
23 want him off the stand.

24 MR. CRANE: Huh? Well, I mean -- the -- at some
25 point the -- I talked to the sheriff's department about it.

1 At some point I'm going to ask again that his hands be
2 undone, because --

3 THE COURT: His hands are undone.

4 MR. CRANE: No. He's cuffed. But, you know, if
5 he's going to show us, for instance, describe, either for the
6 defense or the state, the length of the tire tool, he can't
7 do it. So I -- you know, he can go up there for a little
8 while longer with it like that, but at some point I'm going
9 to ask that his hands be undone.

10 I don't think you got a problem with that, do you?

11 MR. ROGERS: I don't have a problem with his hands
12 being undone, although I think he can show us the length of
13 the tire tool from the witness stand as well as can standing
14 down here.

15 MR. CRANE: Well, there may be -- okay. That's
16 fine. But I -- now wasn't saying I was going to have him
17 stand up the whole time.

18 MR. ROGERS: I just wanted him to resume the stand,
19 is all. I got tired of watching him stand.

20 THE COURT: Well, I certainly need to confer with
21 law enforcement, because I leave it to them for the security
22 of any prisoner that's in their custody.

23 MR. CRANE: Yeah. We -- and we can even wait until
24 later before we do that, and then cuff him back up.

25 SHERIFF'S DEPUTY: Judge, it's up to Bill Hawes

1 right now. Bill Hawes has -- technically has custody of him.

2 MR. CRANE: Okay.

3 SHERIFF'S DEPUTY: So if he --

4 MR. CRANE: He's saying it's my -- all right.

5 MR. ROGERS: Bill works for Kevin.

6 MR. CRANE: All right. I'll take it up with --

7 THE COURT: I mean, I assume it's possible -- I've

8 had other inmates --

9 MR. CRANE: No. No. I can -- yeah.

10 THE COURT: -- that had their one -- the cuff on one

11 hand, and the other hand, for example, the writing hand,

12 free.

13 SHERIFF'S DEPUTY: Well, in this case, since the

14 cuffs are already in front, I have to take them both off.

15 He's still got leg irons on.

16 THE COURT: But there's no belt.

17 SHERIFF'S DEPUTY: I can put a waist chain back

18 around.

19 THE COURT: You might -- you might want to do that.

20 You might want to put a waist chain around him so you can

21 cuff one hand and not the other.

22 SHERIFF'S DEPUTY: Yeah. Whatever you want.

23 THE COURT: Okay. Why don't we plan to do that.

24 We'll be in recess then.

25 (Recess taken.)

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The following proceedings were held out of the presence of the jury:

(The defendant not present in the courtroom.)

THE COURT: We need to swear some of the marshals that will be with our jury. And I'm wondering how long it will be before your client is here.

MS. BENSON: That's what we were wondering.

THE COURT: I think -- I saw him in the hall. And I -- maybe Jack will check on...

MR. ROGERS: I think I can waive his presence for the swearing of the marshals.

THE COURT: Do you mind?

MR. ROGERS: I do not mind, Your Honor.

THE COURT: I mean, I don't know that that's a critical part of the proceeding, that the marshals are sworn.

MR. ROGERS: I don't think it is either, but if it is, I'll waive it, and then I'll make a record on it when he gets here.

THE COURT: All right.

Would you then -- it's fine. Come on in.

(Court Marshal Jack Wonneman and Deputy Court Marshals Steve Lake, Jim Purdy, and Angie Lane sworn by Sheri Vanderhoof, Deputy Clerk, to take charge of the jury.)

MR. ROGERS: Your Honor, is -- I mean, that's

1 obviously the oath appropriate to swear in the marshals who
2 will take charge of the deliberations, but in terms of having
3 charge of the jury before that, are they being sworn to do
4 that as well?

5 THE COURT: Yes.

6 MR. ROGERS: I don't think that was necessarily
7 covered with that particular oath, and I don't --

8 THE COURT: Do you have an oath that you would
9 propose?

10 MR. ROGERS: I don't have one, but I would suggest
11 that it be directed to allowing people to communicate with
12 them or allowing them to read or view or watch --

13 THE COURT: To me, this covers everything.

14 MR. ROGERS: Okay.

15 THE COURT: When they're discharged -- I mean,
16 they're not to have any conversation with anyone at any time.

17 MR. ROGERS: All right. Well, that's -- that's okay
18 with me.

19 THE COURT: All right.

20 MR. ROGERS: It is maybe over-inclusive, but that's
21 all right.

22 THE COURT: I'd rather it be over- than
23 under-inclusive.

24 MR. ROGERS: As long as you understand it and they
25 understand it --

1 THE COURT: They certainly do understand it.
2 And I trust that our jurors are all back.
3 DEPUTY COURT MARSHAL WERNER: Yeah.
4 THE COURT: Is Don Claxton here? Dan Claxton?
5 MR. CLAXTON: Yes.
6 THE COURT: I have a media request form from you.
7 And I understand that CBS will provide an audio feed.
8 MR. CLAXTON: Yes. They're doing that.
9 THE COURT: I want to know if they don't.
10 MR. ROGERS: CBS or ABC?
11 THE COURT: It's CBS.
12 MR. ROGERS: Okay. That's good.
13 (Defendant present in the courtroom.)
14 THE COURT: All right. You may return the jury to
15 the courtroom.
16 MR. ROGERS: Your Honor, for the record,
17 Mr. Ferguson is now here. I explained to him that the Court
18 swore the marshals in his absence.
19 And Mr. Ferguson, is that okay with you? You don't
20 need to be here while she swore the marshals.
21 THE DEFENDANT: That's all right.
22 MR. ROGERS: Okay.
23 THE COURT: You may return the jury to the
24 courtroom.
25 So you understand, we will go 'til around 6:30 this

1 evening. We do take breaks during the afternoon. But we
2 will go until approximately that time in the evening. Just
3 so you'll know, if you have anything with your schedule.

4 - - -

5 The following proceedings were held in the presence of
6 the jury:

7 THE COURT: Mr. Erickson, you were sworn before the
8 recess was taken for noontime.

9 THE WITNESS: That's correct.

10 THE COURT: You'll remember you're still under oath.

11 THE WITNESS: Yes.

12 THE COURT: Okay.

13 The clerk may be excused.

14 (Clerk excused.)

15 - - -

16 CHARLES TIMOTHY ERICKSON,
17 resumed the stand and testified further:

18 THE COURT: You may inquire.

19 - - -

20 RESUMED DIRECT EXAMINATION

21 BY MR. CRANE:

22 Q. I wanted to show you also another photograph before
23 we go on with some other things. It's State's Exhibit 10 for
24 identification, 10A through 10E. Mr. Erickson, does this
25 fairly and accurately depict the area around By George's and

1 down the street towards Ash Street, from By George's, in
2 these series of photographs?

3 A. Yes. Yes, it is.

4 MR. CRANE: Judge, I'd offer State's Exhibit 10, 10A
5 through 10E.

6 MR. ROGERS: No objection, Your Honor.

7 THE COURT: Exhibit 10 and 10A through E are
8 admitted.

9 - - -

10 State's Exhibits 10, 10A through 10E, admitted into
11 evidence.

12 - - -

13 Q. Okay. If we look at this, the top photograph is an
14 aerial; correct?

15 A. Yeah.

16 Q. And can you -- can you find By George's on there?

17 A. Yeah. By George's is right here.

18 Q. Okay. Now, the remaining photographs are ground
19 level; correct?

20 A. Yes.

21 Q. Okay. The first photograph over here on my -- to my
22 left is 10B. And what's that showing?

23 A. That's By George's.

24 Q. Okay. That's obviously during the daytime, shot of
25 the bar; right?

1 Okay.

2 THE COURT: I'm sorry. I didn't hear your answer.

3 A. Yes.

4 Q. Is that correct?

5 A. Yeah, that's correct.

6 Q. Now, in 10C and 10D, what's depicted?

7 A. This is First Street, heading away from Broadway.

8 Q. Okay. So in 10C here, can you show us where
9 George's would be?

10 A. George's would be to the left. And this is the
11 drive into the parking lot.

12 Q. Okay. So this is looking on down -- these two
13 photographs are looking on down the street from By George's;
14 is that accurate, sir?

15 A. That's correct.

16 Q. And where do you recall the defendant parked his
17 vehicle?

18 A. The defendant parked his vehicle down the street
19 here, just in front of the corner of First and Ash.

20 Q. Okay. As you've indicated on the larger one, on
21 across that next street and down towards Ash. In this area.
22 Correct?

23 A. That's correct.

24 Q. Where you pointed. Correct?

25 A. That's correct. Right there.

1 Q. Okay. Now 10E, at the bottom, what does that
2 depict?

3 A. This is Ash Street and --

4 Q. This?

5 A. This street right here.

6 Q. Okay.

7 A. And then down here where this moving truck is or
8 this truck right here, that's Providence.

9 Q. Okay. Now, can you see the Tribune parking lot?

10 A. Yeah. The Tribune parking lot is right here.

11 Q. Okay. Let me get around here.

12 A. Right there.

13 Q. Okay. You're pointing right here?

14 A. That's correct, yeah.

15 Q. So that's the view down Ash --

16 A. Yes.

17 Q. -- across Providence, to the parking lot. Okay?

18 A. (Nodding head up and down.)

19 Q. I wanted to ask you also, would you describe for us
20 this -- we've referred to it as a tool, a tire tool. Would
21 you describe for us what it looked like.

22 A. It's probably about -- maybe a little more than a
23 foot long. It was metal. And it had a waffle grip, that was
24 kind of rough on it. And it had -- it went up like this, and
25 then it went off a little bit like that. And then there was

1 a place where you could -- you could connect -- connect
2 pieces to it.

3 Q. Okay. Now I'm going to show you what's marked for
4 identification State's Exhibit 90. Okay? Show you that
5 exhibit. Do you see it?

6 A. Yes, I do.

7 Q. Is that the tire tool?

8 A. No, it's not.

9 Q. That's not the one.

10 A. No, it's not.

11 Q. Okay.

12 MR. CRANE: We're going to -- we're going to
13 actually offer this through another witness, Judge. But that
14 is State's Exhibit 90 there.

15 Okay. Your Honor, at this point I'm going to ask
16 that the defendant again be allowed to step down. And would
17 ask that his handcuffs be removed, at least for this portion
18 of the testimony.

19 MR. ROGERS: That's the witness; not the defendant.

20 MR. CRANE: The witness. I'm sorry. Mr. Erickson.

21 MR. ROGERS: Mr. Erickson.

22 THE COURT: Well, I'm looking -- I don't see the
23 sheriff's deputy here.

24 MR. CRANE: Ben White here, with the prosecutor's
25 office, has been given the key to the cuffs, and he can do

1 it.

2 THE COURT: All right.

3 MR. ROGERS: We have a deputy now.

4 THE COURT: Ah. Here comes the deputy.

5 Is it -- is it -- there's a proposal to remove the
6 handcuffs for a brief period of time. Is that agreeable with
7 you?

8 SHERIFF'S DEPUTY: Yeah.

9 THE COURT: All right.

10 (Witness's handcuffs removed.)

11 Q. Okay. Now you previously testified before our lunch
12 break that -- well, let me ask you this. If we use this
13 as -- this area right in here as the victim's vehicle.

14 A. Yeah.

15 Q. Okay. And you indicated that the victim was
16 standing on which side of the vehicle when you attacked him?

17 A. The driver's side.

18 Q. Okay. May we use this as the driver's side of the
19 vehicle?

20 A. Yes.

21 Q. Okay. Now, was the car door open or closed?

22 A. It was open.

23 Q. All right. And may we use this board as the car
24 door?

25 A. Yes.

1 Q. Okay. Now, where was the victim standing? How was
2 he standing when you approached him?

3 A. He was standing at his car. Right in front of
4 the -- in between the car and the car door a little bit. And
5 he was facing the car. And he had his stuff on top of the
6 car. Papers and whatnot.

7 Q. Okay. So he was standing at the car.

8 A. Yes.

9 Q. And what did you do to him?

10 A. I came around -- came around this side. Came around
11 from behind, from his right side. And he turned, like that,
12 and I hit him.

13 Q. You hit him just like that?

14 A. Well, I hit him harder than that.

15 Q. How did you hit him?

16 A. I hit him like that (indicating). And he turned --
17 after I hit him the first time, he put his hands up, like
18 this, and he turned towards me, like that. And I kept
19 hitting him. And I hit him until --

20 Q. What part of his body were you hitting?

21 A. His head.

22 Q. And how did you do it?

23 A. Just -- just like this (indicating), only faster.
24 And at some point he put his hands up.

25 Q. And what did you keep doing after he put his hands

1 up?

2 A. I hit him.

3 Q. And then what did he do? What did he do from the
4 car? Did he stay at that location? Did he move? What do
5 you remember?

6 A. He staggered. He staggered. He leaned on the car.
7 And then I hit him one time -- at one point I hit him and he
8 groaned, and he came to his knees. And then he was on the
9 ground, on his knees, and I hit him one more time, and then
10 he went down.

11 Q. All the way down?

12 A. Yeah.

13 Q. Okay.

14 A. Yeah.

15 Q. Now, after that -- after that point, when
16 Mr. Heitholt was all the way down on the pavement, what did
17 you do?

18 A. I dropped the tire tool, and I remember -- because
19 after I -- after I hit him the second to the last time and he
20 moaned, I -- I don't know. I just -- I kind of realized what
21 we were doing, you know. Just -- I mean, we were doing this
22 for nothing really. There wasn't any point. And it just --
23 just -- that I could make that sound come from someone, it
24 just -- it made me feel horrible about what I was doing.

25 Q. Did you give him any warning?

1 A. No.

2 Q. Did you say anything to him before you hit him?

3 A. No.

4 Q. Did Ryan say anything to the victim before you hit
5 him?

6 A. No.

7 Q. Do you know how many times you hit him?

8 A. No.

9 MR. ROGERS: Your Honor, if we're done --

10 Q. Let me --

11 MR. ROGERS: -- with the demonstration --

12 MR. CRANE: We're not. We're not quite done with
13 that, but thank you. I assure you, I will not leave him
14 standing for any inordinate period of time.

15 MR. ROGERS: I'm an old guy and I get tired.

16 Q. Okay. Now, I want to show you what's marked for
17 identification as State's Exhibits 13, 13A through 13F.

18 THE COURT: You want to take a look at that, Mr. --

19 (Mr. Crane showing the exhibit to Mr. Rogers.)

20 MR. CRANE: Okay.

21 Q. These are some still photographs taken from the
22 crime scene video. And ask if you recognize what's depicted
23 in these photographs. And let me ask you, if I may indulge
24 the defense, a leading question. Do these appear to be fair
25 and accurate depictions of the parking lot area, with some

1 exceptions. For instance, that police car wouldn't have been
2 there at the time --

3 A. Yeah.

4 Q. -- on night of the homicide?

5 A. That's correct, yeah.

6 Q. Okay.

7 MR. CRANE: Judge, I'm going to offer State's
8 Exhibit 13, 13A through 13F.

9 THE COURT: Does defendant have --

10 MR. ROGERS: No objection.

11 THE COURT: 13 and 13A through F are admitted.

12 - - -

13 State's Exhibits 13, 13A through 13F, admitted into
14 evidence.

15 - - -

16 Q. Okay. Now, sir, if you look there at 13A, you've
17 mentioned your route earlier. You described -- if we look
18 back here at State's Exhibit 9, can you show us again your
19 route from the car. And you may have to keep from blocking
20 the gentleman over here to your right.

21 A. His car was parked right here. And then we took --
22 we took a right on Ash Street and went down Ash Street until
23 we got to Providence. And then when we got to Providence, we
24 took a right until we got to this alley. And that was where
25 we saw the victim. Across the street from Providence. Or --

1 yeah. Well, across Providence from the Tribune building.
2 And then we crossed Providence. Stayed -- went down
3 Providence. And after we got to the other side of
4 Providence, we stayed on that. Right there. And then we
5 kept going down the alley.

6 Q. Okay. Now let me go to the next -- let me go to
7 this one now. Okay. So if you look up here at State's
8 Exhibit 13A, can you show the jury in 13A where the alley is
9 at Providence?

10 A. That's the alley right there.

11 Q. Okay. And what did you and the defendant walk up
12 to?

13 A. We walked up to this Dumpster enclosure.

14 Q. All right. Well, now you're looking at 13B, which a
15 bigger shot of it?

16 A. Yeah. Over here.

17 Q. Is it -- okay. You're pointing out of 13A. It's
18 also in that photograph?

19 A. That's correct, yes.

20 Q. Now what did you do from that location? What did
21 you do from your position up here behind the enclosure?

22 A. From this location?

23 Q. Yeah.

24 A. I came to right here a little bit. And I climbed up
25 this wall. I -- I just stepped over it.

1 Q. And now take a look at 13B. Is that also depicted?

2 A. Yeah. That's correct.

3 Q. Okay. There's a little low wall here?

4 A. That's correct.

5 Q. Okay.

6 A. Then I came over this wall. And I came so I was
7 behind the victim and to his right.

8 Q. Okay. And that's what you just talked about a
9 minute ago; correct?

10 A. Yes, that's correct.

11 Q. Okay.

12 A. And I came -- I came away from the Dumpster
13 enclosure, up over here, across the parking lot, to the
14 victim's car.

15 Q. Okay. Now let me ask you, after you -- the events
16 that you've described, where you started to hit Mr. Heitholt
17 and he went down, what did you do next?

18 A. I -- I dropped the tire tool, and I started to feel
19 sick. And I didn't -- I don't know if it was the blood or --
20 and groaning, I don't know what it was, but --

21 Q. And what did you do then?

22 A. And -- there's a -- there's a -- there's a little
23 wall area behind where the car is, and there's -- behind the
24 parking lot. And I sat back -- sat on the ground, kind of
25 with my head in between my knees.

1 Q. Now when you did that, what side of the victim's
2 vehicle were you on?

3 A. I was on the driver's side.

4 Q. Okay. So you remained on that side of the vehicle.

5 A. That's correct. Yeah.

6 Q. Now, this diagram here, I'm going to show you
7 State's Exhibit 12. There will be some other photographs
8 we'll show in a minute, but if you'll look at that, where's
9 the Dumpster enclosure that you pointed out here on 13?

10 A. Here's the Dumpster enclosure.

11 Q. Okay. All right. And then you went to the victim's
12 car.

13 A. Yeah. That's where -- well, I came around to the
14 right a little bit.

15 Q. Okay.

16 A. And then I went over the wall and came -- so I was
17 on the victim's right.

18 Q. All right. Watch. This guy can't see back here.

19 A. Sorry.

20 Q. Now what I'm asking you now is: After you had
21 beaten the victim, dropped the weapon, where did you sit? On
22 this diagram.

23 A. It was -- it was right about in between here. It
24 was on the edge of this little wall. And it was behind the
25 parking lot.

1 Q. Okay.

2 A. About in here.

3 Q. Okay. You can go ahead and return to the witness
4 stand.

5 What can you tell us, at least at that point, about
6 the victim's condition after you'd beaten him and he was down
7 on the pavement?

8 A. I don't know. I just know that he was down. I
9 wasn't -- I wasn't concentrating on it at that point.

10 Q. Okay. What -- what did you do during this period of
11 time when you're sitting there, after you dropped the tire
12 tool and felt sick?

13 A. I just -- I just sat there. I guess I was kind of
14 in shock at what I had done. I thought I was going to vomit.
15 I didn't really know what --

16 Q. In fact, you told the police you felt maybe you had
17 vomited.

18 A. Yeah.

19 Q. Okay. Did -- what happened next?

20 A. I look up.

21 Q. Well -- so wait a minute. What were you doing while
22 you were on the wall?

23 A. I was just sitting there. I was sitting there like
24 this (indicating).

25 Q. Okay. So you weren't looking out on the parking lot

1 at that point.

2 A. No. I wasn't even -- I wasn't paying attention.

3 Q. Okay. Then what's the next thing you remember?

4 A. I looked up. Ryan was over the victim. His -- his
5 back was to me and he was bent down, with his hands down in
6 this region (indicating).

7 Q. Okay. His back's to you?

8 A. Yes.

9 Q. And he's bent over?

10 A. Yes.

11 Q. Okay. And what else did you see?

12 A. At -- at that point I kind of -- I got up to see
13 what he was doing, because I thought -- we had already done
14 enough. I mean, we were just doing this to get some money
15 for drinks, and -- I mean, I already -- I knocked this guy --
16 I hit this guy until he was on the ground. I got up to see
17 what he was doing.

18 Q. Do you remember whether the victim at that point was
19 face up or face down, or could you tell at that point?

20 A. I couldn't tell at that point.

21 Q. Okay. What happened next?

22 A. I came around to Ryan's right, from behind him and
23 to his right. And he was down here, and he had a belt, and
24 he had his foot on his back, on the victim's back, and he was
25 pulling up on the belt, like this.

1 Q. What did you do?

2 A. I was to his right. And I kind of got upset. And I
3 grabbed Ryan, I grabbed him by his shirt, and I pulled him.
4 And I pulled him back away from the car. And then I started
5 yelling at him. I started, you know, asking him what we were
6 doing. "What are we doing?" I ripped the -- ripped the belt
7 off the victim.

8 Q. How did you do that?

9 A. I grabbed it in between his neck and the belt, and I
10 just -- I just ripped it off. I was really upset. I just
11 ripped it. And I remember I -- I heard the -- I heard the
12 belt buckle, or something, I heard it clink on the ground.

13 Q. Did you ever see it?

14 A. I don't remember. I just remember hearing it.

15 Q. Okay. Well, why don't you -- come down here and
16 show us what you recall seeing the defendant doing when you
17 looked up from your position on the wall.

18 A. I would have been right about here, sitting on the
19 ground.

20 Q. Is this the wall?

21 A. Yeah.

22 Q. Okay.

23 A. Ryan is over here, bent down, like this
24 (indicating), with his back to me.

25 Q. And that's what you first observed when you looked

1 back up?

2 A. That's correct, yes.

3 Q. Okay. And then you got up and approached him?

4 A. I approached him from the right. I came over here.

5 And I couldn't see what he was doing at first. When I got to

6 his right, I kind of looked over his shoulder, and I saw that

7 he was down here like this with a belt, and he was strangling

8 the victim.

9 Q. Okay. At that point were you able to determine

10 whether the victim was face up or face down?

11 A. The victim was face down.

12 Q. You didn't know this guy, Mr. Heitholt, before this,

13 did you?

14 A. No, I didn't.

15 Q. Okay. Now -- you can go back.

16 After that, what happened? I know that's a broad

17 question, but what do you recall happening after that -- the

18 strangling portion?

19 A. I got kind of upset. Started arguing with him.

20 Didn't really know what to do. I felt bad about this man on

21 the ground. At the same time I'm thinking, you know, What am

22 I going to do now? Am I going to sit here and take

23 responsibility for this or --

24 Q. You worried about getting caught?

25 A. Yeah, I was also, but I --

1 Q. Okay.

2 A. -- I was -- I didn't know what to do really. And I
3 sat back down for a second. And Ryan was going through his
4 pockets and he was going through the car. And then someone
5 came outside. I remember I heard someone come outside.

6 Q. Where -- when you say "come outside," tell us what
7 you recall their location being. Come outside of what?

8 A. Came outside the Tribune building.

9 Q. And what do you remember seeing?

10 A. I remember I saw -- I saw a lady, and I saw -- in
11 the door that she came out of, there was a light on inside.
12 And I remember I saw the silhouette of a cord. And I saw her
13 messing with the cord.

14 Q. A what?

15 A. It was like a cord, like to a vacuum cleaner or
16 something. I don't know what it was. But I saw her with
17 this cord. And then I saw her -- she came outside. And then
18 she -- then I crouched down a little bit. And then she went
19 back inside. And then -- I can't remember if I told Ryan I
20 saw her or not. But I remember I'm still -- I'm worried
21 about this man on the ground. I'm worried about what we're
22 going to do; if I'm going to leave. I'm worried about what I
23 touched. I'm worried about --

24 Q. What you touched.

25 A. Well --

1 Q. Fingerprints, you mean?

2 A. Yeah. I'm --

3 Q. Okay.

4 A. -- you know -- and --

5 Q. All right.

6 A. -- and I just didn't --

7 Q. Let me ask you this. When you first saw this female
8 come out and go back in, what did you say to her at that
9 point?

10 A. I didn't say anything to her.

11 Q. And what was said to you by her?

12 A. Nothing was said.

13 Q. Okay. The -- after this female -- you saw this
14 female come out, where was she, to the best of your
15 recollection, when she came out?

16 A. She was just out in front of the building.

17 Q. Okay. So she came actually out onto the lot, or did
18 she stay back --

19 A. No. She stayed back by the building. She didn't
20 come out to the parking lot.

21 Q. All right. But she was by the building then.

22 A. That's correct. Yeah.

23 Q. Okay. Show you what's -- State's Exhibit 12. Can
24 you show us --

25 A. She was right in here.

1 Q. Hold your finger up there so he can -- here. Just
2 touch the board.

3 A. Right there.

4 Q. Right in that area?

5 A. Yeah. Yes.

6 Q. Okay.

7 Okay. After she went back inside, what happened?

8 A. After she went back inside, we were still there.
9 Ryan was still going through his stuff. I was still trying
10 to decide what to pick up and what not to pick up. I
11 remember he said -- I was going to pick something up on the
12 ground, and he said, "That's not ours. Don't touch that."
13 And then a few seconds later, more people came outside.

14 Q. Okay. Did you see where these people were exactly?

15 A. No. I just saw them -- I just saw them up by the
16 building. I didn't see exactly where they were.

17 Q. Okay. And what started going on? What started
18 happening then?

19 A. They started yelling. And I don't remember what
20 they yelled at first, but then I remembered, they yelled
21 something to the extent of, "Hey, what's going on? What's
22 going on?" And I yelled -- I yelled, "This man's hurt. Go
23 get help." But it was more -- I was really upset, so it was
24 more -- I was more --

25 Q. Well, why would you do that?

1 A. Because I didn't -- I didn't want to leave until I
2 knew what had happened. I mean, I didn't want that man to
3 die for no reason, just right there. I didn't know -- I
4 didn't know what else to do. I don't know why I said that.

5 Q. Do you remember how you yelled back?

6 A. Yeah. I was really upset. I was almost on the
7 verge of tears when I yelled. I mean --

8 Q. What -- what did you yell?

9 A. I yelled -- I yelled -- I yelled, "Go get help.
10 This man needs help."

11 Q. Okay. And then what happened?

12 A. And then they went back inside, like they were
13 scared.

14 Q. Okay. And what did you do then?

15 A. After they went back inside, we left. I walked --
16 we kind of walked briskly. I walked in front of the -- in
17 front of the car. And Ryan walked behind the car. And we
18 walked up -- we met in the alley; then we walked up -- walked
19 down the alley --

20 Q. All right. Well, let me show you the diagram. You
21 say you walked around the front end of the vehicle?

22 A. Yeah. That's correct.

23 Q. Okay. And we're -- are we talking about the
24 victim's car?

25 A. That's correct.

1 Q. Okay. I'll show you State's Exhibit 12. Take a
2 look at that. Show us what you remember doing.

3 A. I was here. Ryan was over here.

4 Q. Well, so, for the record, you're saying that Ryan
5 was where? Point that out.

6 A. To the rear of the car.

7 Q. Towards the rear of the car?

8 A. Yeah.

9 Q. And where were you?

10 A. I was towards the front of the car.

11 Q. Towards the front of the car. And after these
12 people -- this exchange, they're yelling and you yelled back
13 and then they left --

14 A. Yes.

15 Q. -- you did what?

16 A. I walked around in front of the parking lot and went
17 into the alley. Ryan went around. We went down the alley.

18 Q. Okay. In this direction? That would be east,
19 towards Fourth Street?

20 A. Towards Fourth Street, yes.

21 Q. Okay. So you went around the front of the car. He
22 was in the rear area. And then you went up the alley towards
23 Fourth Street.

24 A. That's correct.

25 Q. Are you ahead or behind the defendant at that point?

1 A. I'm ahead of the defendant.

2 Q. Okay. Did you -- well, strike that. What did you
3 see of anybody else in the area of the building?

4 A. Well, first I went left down Fourth Street. And
5 then Ryan stopped me. And he grabbed me. And he pulled me
6 back and said, "No, we got to go that way." So we turned
7 around. And I started to go towards Broadway on Fourth
8 Street. And when we're crossing the alley, that's when a lot
9 of people came outside. And a lot of people were yelling.
10 And I saw them out of the corner of my eye. And that's when
11 we really took off.

12 Q. Down?

13 A. Down Fourth Street.

14 Q. Okay.

15 A. We started running.

16 Q. Okay. Look again at State's Exhibit 9. First of
17 all, can you show us the Tribune building there? Number 2;
18 right?

19 A. Yeah. This is the Tribune building. And here's the
20 alley.

21 Q. And which way did you go?

22 A. First I went left. But then he stopped me and
23 turned me around, and then we went right. And we were about
24 right here, we were just back at the alley, when people came
25 out and started yelling. And then we went down Fourth

1 Street. We started running along here.

2 Q. Okay.

3 A. On Fourth Street.

4 Q. Headed towards Broadway.

5 A. Towards Broadway, yeah.

6 Q. What did you take from the crime scene?

7 A. I took the belt.

8 Q. What about the buckle?

9 A. No, I didn't -- I didn't take that.

10 Q. What did you do with the belt? I mean, how did you

11 carry it?

12 A. At -- at some point I put it in my pocket.

13 Q. What else did you take from the crime scene, if

14 anything?

15 A. That was it.

16 Q. Okay. Keys?

17 A. No.

18 Q. Watch?

19 A. No.

20 Q. What about the tire tool?

21 A. No.

22 Q. You didn't take that? After you dropped it, you

23 didn't pick it back up?

24 A. No, I didn't.

25 Q. Okay. What about blood on you or on the pavement?

1 A. I had blood on me. I had blood on my hands.

2 Q. What about around the scene? Do you remember --

3 A. There was blood all over the ground. There was

4 blood on the car.

5 Q. Do you remember what kind of shoes you had on?

6 A. No.

7 Q. Did you have on a pair of Sketchers brand shoes?

8 A. I don't remember.

9 Q. Do you remember what Ryan had on?

10 A. No.

11 Q. What was said, after you guys started heading down

12 Fourth Street? Do you remember?

13 A. We're heading down Fourth Street, and I asked

14 Ryan -- I thought of the tire tool when we were going down

15 Fourth Street. I said, "Ryan, did you get that?" He said,

16 "Yeah." And I didn't see it with him.

17 Q. Did you see him at that point carrying anything?

18 A. No. But he told me he had it.

19 Q. Okay. All right. You went down Fourth Street --

20 MR. CRANE: Judge, I'd ask the witness to step down

21 again.

22 THE COURT: You may.

23 Q. Can you show us on State's Exhibit 9 where you went

24 from there.

25 A. We went down through the Tribune, went down Fourth

1 Street, about here. And we crossed Broadway. Crossed
2 Broadway on Fourth Street. And then we went into the parking
3 lot of the diner. There's a diner right here. I remember
4 they got a fence along the perimeter of the diner.

5 Q. And what kind of a fence?

6 A. Or not a fence. I'm sorry. It's a chain. It's
7 just -- it's about that high. And it's for just parking, to
8 keep I guess other people from parking there. I don't know
9 what it's there for. But it's on the perimeter of the
10 parking lot. And I remember stepping over that, to -- I
11 remember stepping over that. And then I -- we went through
12 the parking lot of the diner, and then we went across Fourth
13 Street again, and we went down into Flat Branch Park.

14 Q. Now what -- tell -- they're not from Columbia.
15 What's down in there?

16 A. There's -- basically it's just a creek. And there's
17 a little park area. It's this grassy area right here. And
18 down here, you can't really see it very well, but there's a
19 creek right in here and a tree line right here.

20 Q. Okay. So you went down Fourth Street?

21 A. We went down Fourth Street. We went through the
22 diner parking lot. Right here. Then we went across Fourth
23 Street. And we went into the park. We went to the creek.
24 We got to the creek, and I washed the blood off my hands in
25 the creek.

1 Q. So there was -- can you describe for us how much
2 water -- or what was the creek like?

3 A. I remember it was about up to my ankles, because
4 when I went back to the club, my pants were wet up -- about
5 up to my ankles. My jeans.

6 Q. Wet feet.

7 A. Well, I mean, my legs were -- about up to my ankles.
8 My pants. I was wearing baggies like this. Well, I did wear
9 them, but. So they would have been wet also.

10 Q. Okay. How did you come up out of the creek then?

11 A. We came up, and there's a -- there's kind of a rock
12 embankment. And we went up the rock embankment, up here,
13 after we crossed the creek, and then there's -- there's a
14 grassy area where there's a lot of tree and foliage and
15 stuff. And I remember Ryan was ahead of me at this point,
16 and I couldn't get up. I couldn't get up after I got on this
17 rock embankment. I was trying to get up, and it was slick,
18 this grassy area. And finally I got up. And then we came
19 around -- we came around here, and we came back behind the
20 Phillips 66 gas station, which is -- which is somewhere -- I
21 think it's right there.

22 Q. Okay. Show them in the photo where you're at now.

23 A. Yeah. It's right here. And we came to the -- we
24 came around behind the gas station, to the right of the gas
25 station. And then we got up to Providence. We came out from

1 the gas station. And right -- when -- right here on
2 Providence, I see this car pull up. And I see it's the same
3 guy that I was at the party with who was wearing a cop suit.
4 His name is Dallas Mallory.

5 Q. Okay. Had you -- we showed a photograph of Dallas
6 Mallory a while ago at the Swilling party in a police
7 uniform. Had you met him, though, before this night? I
8 mean, had you known him before the Swilling party?

9 A. Yeah. I knew him before that.

10 Q. Okay. And when you saw Mallory, what did you do?

11 A. I didn't -- I didn't really know what to do. I was
12 upset. And I didn't know what to do. And I saw him sitting
13 there, and I just told him what we did. I told him that Ryan
14 told me to hit this guy and we beat this guy down back there.
15 I was motioning behind me. And I didn't know what to do. I
16 don't know if I wanted a ride or what, but I just -- I had to
17 tell someone what we did. And so I'm telling -- I'm telling
18 Dallas, and --

19 Q. Was anybody else in the car with him?

20 A. Yeah. There -- there were a couple of girls in the
21 car.

22 Q. Do you know who they were?

23 A. No. I think I did at the time. I can't remember,
24 though.

25 Q. What was Mallory's reaction to all that?

1 A. He didn't really -- he didn't really react. I mean,
2 like -- he didn't -- he didn't understand the gravity of the
3 situation. He knew -- I believe he knew that I was upset,
4 but other than that --

5 Q. Where was Ferguson when you were talking to Mallory?

6 A. He was right behind me. He was about two feet
7 behind me.

8 Q. What did the defendant, Mr. Ferguson, say to
9 Mallory?

10 A. He didn't say anything to Mallory.

11 Q. What was the defendant's reaction, if you remember,
12 to you telling Mallory --

13 A. He was mad about it.

14 Q. About what you'd done?

15 A. About what I told Mallory.

16 Q. Okay. About -- okay. After that -- well, what
17 happened next? You said something to Mallory. What happened
18 next?

19 A. We're setting at Dallas's car, and we see -- we're
20 looking down -- Dallas's car is right here. And down
21 Providence, in the area of the Tribune building -- no. I'm
22 sorry. Dallas's car is right here. Right here. That --
23 about number 3, where this gas station is.

24 Q. Okay.

25 A. And down here --

1 Q. He can't see.

2 A. Right there. And down Providence, at the Tribune
3 building, somewhere on Providence a cop turned his lights on
4 and turned his siren on. I guess he was responding to a
5 call. At that point Dallas, he hit the gas. He about ran me
6 over. And he -- and he just drove off. We ran up --

7 Q. Well, wait. Let me ask you a question. At that
8 point do you remember -- well, strike that. When you went up
9 to Dallas, do you remember, other than driving, what he was
10 doing?

11 A. He was -- he was smoking pot. I remember he was
12 smoking -- he was smoking a zeppelin.

13 Q. What's a zeppelin?

14 A. It's -- it's a little pipe that comes apart, and it
15 looks like -- I guess it looks like a blimp, kind of. That's
16 why they call it a zeppelin. And it's got a top to it. And
17 he was -- he was smoking that.

18 Q. What do you put in there?

19 A. You put marijuana in there.

20 Q. Okay.

21 A. And I remember -- I don't know if I was going to ask
22 him or I asked him for a hit of it, beings I was -- I was
23 just -- I was just out of it. My nerves were shot. I just
24 -- I didn't know what to do.

25 Q. You talked to him. You heard sirens.

1 A. Yeah.

2 Q. He takes off.

3 A. That's correct.

4 Q. And then what happens? Where did you guys go?

5 A. We didn't know if the cops were responding to us or

6 not, but -- so we started -- we didn't know if they seen us

7 or we didn't know -- we didn't know. And so when he took

8 off, we just started running. And we ran -- we were --

9 basically we were standing in the middle of the street,

10 because that's where Dallas was, at this intersection. And

11 then we went across Providence, over this little grassy area,

12 into the Osco parking lot.

13 Q. Okay. And that -- I think we got a number on Osco.

14 A. It's number 4 right here.

15 Q. Okay. And where did you go in that parking lot?

16 A. We came up through here. And then we came up this

17 way. And we came up to the -- right in front of -- in front

18 of this building right here, until we got to Broadway, about

19 here. So it was --

20 Q. And then where did you go from Broadway?

21 A. We walked across Broadway. We walked back up to

22 First Street. We walked back to his car.

23 Q. Okay. Now, so, that -- once you'd gotten up to

24 Broadway, you're back to George's, and then on down is the

25 car?

1 A. Yeah, that's correct.

2 Q. Okay. You can have a seat.

3 Now, while you -- once got back up there to
4 George's, what do you remember going on? Or By George's.
5 What do you remember going on? You're across Broadway. What
6 do you remember?

7 A. I remember -- I remember asking Ryan something
8 about, "What are we going to say to this bouncer?" Because
9 this bouncer's sitting in front of the club still. Just
10 sitting in front of the door. And I'm thinking that this
11 bouncer is going to know that -- he's going to eventually
12 find out that something -- that something happened that night
13 and that we were coming from that direction. I don't know.
14 I was just -- it was a thought. And he said something about,
15 "Don't worry about it. Don't -- it's not a big deal."

16 And we go -- we go past the bouncer, and the club's
17 on our left, and we're on First Street, and we're across the
18 street -- across First Street from By George's. And I
19 remember I'm walking like this, with my hands in front of my
20 sweatshirt, because I've got blood on them. And we're
21 walking down First Street, and we get to his car. To Ryan's
22 car. And we get to Ryan's car --

23 Q. What happened there?

24 A. He opens the trunk. And I was going to put the belt
25 in the trunk, but he said, "No, wait." And he fished around

1 in his trunk and he got out a plastic grocery bag. I don't
2 remember what kind it was, but it was just a regular grocery
3 bag. And he said, "Here, put that -- put this stuff in
4 here."

5 Q. Plastic kind? Not brown paper bag?

6 A. That's correct. Yeah. Yeah. And I remember he
7 put -- he put some stuff in there. I saw him put the tire
8 tool in there. And I put the belt in last. And then he --
9 he -- he -- he twisted it up and he put it back in the trunk,
10 and then we went to the car. I took my sweatshirt off.

11 Q. What do you mean? You were at the car. You mean
12 from the trunk?

13 A. We went from the trunk to the -- to the car.

14 Q. And then what?

15 A. We had our coats in the car. And I can't remember
16 if I took my sweatshirt off and I put my coat on top of it or
17 not, but I know I put my coat on. And he put his coat on.
18 And then we went back into the club.

19 Q. You went back inside.

20 A. That's correct.

21 Q. And from the time you talked to the police back in
22 March '04, you've said you went back inside.

23 A. That's correct.

24 Q. Went in the second time that night.

25 A. Yeah.

1 Q. And what went on inside?

2 A. We went back into the club. And I was -- I was
3 just -- I was really upset. I didn't know -- I'm sitting
4 here thinking, We -- we didn't know if the man was dead yet.
5 We didn't know. I remember I asked Ryan. He said, "Well, I
6 think he's dead." And I remember just sitting there
7 thinking -- we went back to a table, and I'm just sitting
8 there thinking, you know, We really did that for nothing. I
9 mean, that was -- it was -- it was just disgusting. And --

10 Q. Was there -- what about people in there?

11 A. I mean, there was still people in the club. It
12 was -- they were still serving drinks. There were still a
13 lot of people there. People were still dancing.

14 Q. Did you see Kelly -- the defendant's sister, Kelly?

15 A. Not that I can remember.

16 Q. What about her friend, Christine Lo?

17 A. No, not that I can remember.

18 Q. And what did you do in there? Did you drink? What
19 did you do?

20 A. Ryan -- he wanted -- and he got a couple drinks. I
21 remember he got one for me. I didn't really -- I didn't
22 really feel like drinking.

23 Q. Well, I thought you guys were out of money.

24 A. Yeah. Well, I don't know if he got money from the
25 victim or not. But I know when we got back to the bar, he

1 goes in a compartment in his wallet and he takes out this \$20
2 bill, and he -- he says, "Man" -- he's looking at me, he's
3 kind of smiling, and he says, "We just did that for nothing.
4 We just did that for nothing. I had this the entire time and
5 I forgot about it."

6 Q. What did you drink?

7 A. He bought me another -- another -- I believe it was
8 an Amaretto Sour. I didn't drink most of it. I got a glass
9 of water.

10 Q. What did you and him talk about inside the bar?

11 A. I didn't -- I didn't say anything. I was just upset
12 about what we'd done. I really didn't say anything to him.

13 Q. If -- if this murder occurred at -- in between 2 and
14 2:30, roughly, that's certainly after what a normal closing
15 time would be for the bar.

16 A. Yeah. I believe normal closing time is 1:30.

17 Q. But it's your testimony you guys went in there.

18 A. We went in there.

19 Q. When did you leave? What was going on when you
20 left? How did that happen?

21 A. Well, we didn't leave. I remember I wanted to go
22 home. That's all I really wanted to do, was go home. And
23 Ryan would go up to the door. He went up to the door, to the
24 front of the building, and he said, "We can't leave yet.
25 There's a cop outside." And I just -- I was intent on going

1 home. And he would -- periodically he'd go back to the front
2 of the bar, and he'd say, "No, the cop's still there. The
3 cop's still there. We can't leave." And I was just sitting
4 at this table. Finally he came back. And everyone was
5 getting up, and they were making everyone leave. Ryan says
6 to me, "Everyone's leaving. Let's go." So we get out. And
7 we go out with the crowd. We go out the doors of By
8 George's, and there's cop parked on First Street, just
9 standing outside of his car. We go until about -- we get to
10 First Street, and we go left, just not even in the
11 direction -- opposite direction of the cop. And I remember
12 I'm still walking like this. Then we go left. We go back to
13 Ryan's car.

14 Q. Okay. Left is to the car.

15 A. Yeah. Left down First Street.

16 Q. All right. And what happened then?

17 A. Then we got in Ryan's car. At some point he -- he
18 turned around, or he took a right down First Street, and so
19 we were going down Ash, the way that we went when we did the
20 robbery. And he went down --

21 Q. Towards Providence?

22 A. Towards Providence on Ash.

23 Q. Okay. So you're coming from the bar area, First
24 Street, down Ash, to Providence in the car now.

25 A. That's correct.

1 Q. And what -- tell us about what happened.

2 A. We go down Ash. And then we take a right on
3 Providence. And we see that there's -- there's cops
4 everywhere. And I just remember thinking, "We did this.
5 This is all because of us." There's kids running across the
6 street, not knowing what the cops are doing. And we look off
7 to our left, and there's cops everywhere. And there's people
8 walking around. And I -- I saw -- I saw what I thought was a
9 white body bag. And then I just -- at that point I just -- I
10 realized that, you know, that man was dead. That we -- we
11 killed that man. For nothing.

12 Q. Where did you drive to then?

13 A. Well, we're on Providence, and he takes a right onto
14 Broadway. So we go onto Broadway.

15 Q. What were you thinking then?

16 A. Then I'm -- I'm just -- I remember -- I didn't know
17 what to do. I wanted to -- I wanted to turn myself in. And
18 I remember it was -- we were going down Broadway, and I
19 remember the feeling of just -- it was so unreal, that we
20 could just do something like that, and now we're --

21 MR. ROGERS: I'm going to object, Your Honor. It's
22 not responsive to the question.

23 THE COURT: All right. If you'll ask a question,
24 Mr. Crane.

25 Q. Well, when you were driving down Broadway, after

1 you -- you were on Providence, and then you headed on
2 Broadway?

3 A. Yeah. That's correct.

4 Q. And you were leaving the area.

5 A. Yes.

6 Q. What were you thinking?

7 A. I was thinking how -- how unreal it was. How messed
8 up it was that we could just do something like that and then
9 just drive away from it. How we could just -- we could just
10 -- we could just kill this man -- rob this man and kill this
11 man, and we could just drive away and leave it all behind us.

12 (Discussion off the record between counsel.)

13 - - -

14 Counsel approached the bench and the following
15 proceedings were held:

16 MR. CRANE: This is the part where -- subject of the
17 defendant's motion in limine, wherein there's a conversation
18 about the prior -- the one -- the prior -- where a month ago
19 they were together and he had gotten -- Erickson had got
20 arrested. Ferguson was upset about that. Remember that
21 motion in limine?

22 THE COURT: Yes, I remember.

23 MR. CRANE: I've admonished him not to bring it up
24 until such time as we approached.

25 MR. ROGERS: I would renew the motion in limine at

1 this time. Object, Your Honor. It's not relevant to
2 anything.

3 THE COURT: What is its relevance?

4 MR. CRANE: The testimony -- I believe this came up
5 in deposition too. The testimony of this witness would be
6 that he said: If I hadn't gotten arrested, back a month ago,
7 I wouldn't have done this.

8 THE COURT: Purportedly what the defendant said.

9 MR. CRANE: Correct. Correct.

10 THE COURT: The motion in limine is sustained.

11 - - -

12 The following proceedings were held in open court:

13 MR. CRANE: Can I approach the witness and make sure
14 he understands --

15 THE COURT: The ruling of the Court?

16 MR. CRANE: -- the ruling of the Court on that?

17 THE COURT: You may.

18 (Discussion off the record between Mr. Crane and the
19 witness.)

20 MR. CRANE: I've advised the witness of the Court's
21 ruling.

22 THE COURT: Thank you.

23 Q. During this time, as you are leaving the
24 defendant's -- the defendant drove the whole time; correct?

25 A. That's correct.

1 Q. Leaving, headed down Broadway, what conversation do
2 you recall?

3 A. All I remember, a conversation about what we were
4 going to do. Came on the topic of all the stuff in his
5 trunk. He said, "Don't worry. I'm going to take care of
6 it." He said, "You know, it doesn't really matter, man. I
7 always wanted to kill someone before I was 60 anyway, so I
8 just -- I just accomplished that." Like he was just crossing
9 it off his list of goals.

10 Q. Said he always wanted to kill somebody before he was
11 what?

12 A. Before he was 60 anyway.

13 Q. The -- well, let me ask you, he said he was going to
14 take care of the stuff in the trunk. Do you know what
15 happened to the belt?

16 A. No.

17 Q. Do you know what happened to the tire tool?

18 A. No, I don't.

19 Q. The watch?

20 A. No.

21 Q. The keys?

22 A. No.

23 Q. The Kroger bag? Or the grocery bag, you said.

24 A. No, I don't.

25 Q. Okay. Where -- did you go straight home from there

1 or what happened?

2 A. No. We went down Broadway. We took a right onto
3 Stadium. We went in front of the Crossroads Shopping Center
4 and went to a gas station and bought a pack of cigarettes.

5 Q. And then what?

6 A. And then he took me home.

7 Q. Who went in?

8 A. Ryan went in.

9 Q. And what did you do?

10 A. I sat in the car.

11 Q. And then he came back out?

12 A. That's correct.

13 Q. And where did he drive then?

14 A. He drove down -- I believe he drove back down
15 Broadway. I can't remember -- I can't be sure. I can't
16 remember.

17 Q. Well, let me ask you this. Where did you -- where
18 did he drive to?

19 A. Well, we went down Fairview, and then we went down
20 Chapel Hill, and we drove to my house.

21 Q. Okay. And back to Exhibit 5. Back to your
22 residence on Chinkapin?

23 A. Yeah, that's correct.

24 Q. Okay. And what happened there?

25 A. Then he dropped me off in front of my house; I went

1 around back; I went into my basement.

2 Q. You didn't go in the front door; you went around the
3 back?

4 A. I went around back.

5 Q. Okay. So he let you in front -- at the front of the
6 house this occasion?

7 A. That's correct.

8 Q. And what did you do with your clothes?

9 A. I don't remember.

10 Q. Where are they now?

11 A. I know I left my coat that I was wearing that night
12 at Brian Walters' house at some point.

13 Q. Have you seen it since?

14 A. No, I haven't seen it. I don't know what happened
15 to my clothes.

16 Q. Shoes?

17 A. No.

18 Q. What happened the next morning?

19 A. Next morning, I woke up. Completely put it out of
20 my mind. Didn't think about it at all.

21 Q. What woke you up that morning?

22 A. My mom woke me up. She told me that my friend was
23 on the way to pick me up for school.

24 Q. Who was that?

25 A. Scott Turner.

1 Q. What happened?

2 A. Scott Turner picked me up. I got in his car. We
3 drove to school. I went to school. I stayed until about
4 second hour. Started to feel sick from my hangover. I went
5 home. I don't remember who took me home. And I went home
6 and I went to sleep.

7 Q. On that day, that's now Thursday day, November 1,
8 2001, what contact did you have with the defendant?

9 A. At some point I called him that night and I told him
10 that I was going to pay him back for the drinks that he got
11 for me. I asked him if he'd give me a ride to school the
12 next day.

13 Q. Any conversation about this killing?

14 A. No.

15 Q. Did you see Ryan Ferguson at school that Thursday?

16 A. On the 1st?

17 Q. Yeah.

18 A. No.

19 Q. All right. The next morning, this Friday, November
20 2nd, 2001, how did you get to school?

21 A. Ryan Ferguson came to my house and picked me up.

22 Q. And what was he driving?

23 A. He was driving his blue Mercedes. The one that we
24 drove the night of the murder.

25 Q. And before you got in the car with him -- was there

1 anybody else in the car?

2 A. No, there wasn't.

3 Q. Before you got in the car with him that Friday
4 morning, what did you take with you?

5 A. There was a newspaper in front of my house. I don't
6 know if it was from the night before or what, but it was just
7 in front of my house. I picked up the newspaper and I got in
8 his car. So I got in his car. We started driving. He
9 starts taking me to school. I open the newspaper.

10 Q. You what?

11 A. I opened up the newspaper. I didn't -- it was on
12 the front page.

13 MR. ROGERS: I'll object to the narrative.

14 Q. What did you -- without going into any detail as to
15 the, you know, exact contents of the article, what was the
16 article that you opened the newspaper up to about?

17 A. It was about the murder of Kent Heitholt.

18 Q. Okay. And you're riding along with the defendant,
19 with that article out.

20 A. That's correct.

21 Q. What was said?

22 A. I said something to the extent of, "That's messed
23 up. Did -- this happened two blocks away from where we were
24 partying at the other night." He said, "So what?" He got
25 kind of irritated. He said, "So what?" Like I was going to

1 say something else after that. And that's just my opinion.
2 I don't know whether he was going to or not. I said, "Aw,
3 that's just messed up, because it happened a couple blocks
4 away from where we were at." And that was the end of the
5 conversation.

6 Q. What did you do -- what happened to your memory of
7 the murder?

8 A. Best way that I can explain it is I just put it out
9 of my mind. It wasn't something that I would have normally
10 done. It wasn't my normal behavior. I was drunk. It wasn't
11 something I ever wanted to remember again. And for the life
12 of me, I just wanted to just be rid of those memories. There
13 was no way I could go on dealing with my everyday life having
14 to think about that. I couldn't deal with it.

15 Q. How did you and the defendant interact after the
16 murder?

17 A. Less than usual. We stopped hanging out as much.
18 There weren't really any spoken words.

19 Q. Up until New Year's, did you have any direct
20 conflict or arguments?

21 A. We got in a shoving match once. It was just -- it
22 was kind of unspoken stuff. Consciously, I don't know. I --
23 I don't know if I -- if I addressed anything at that point,
24 but I was mad at him. I pushed him; he pushed me back.

25 Q. Did you say anything about the murder on that

1 occasion?

2 A. No. He said something to the extent of, you know,
3 "Friends stop hanging out in high school."

4 Q. Okay.

5 A. And I said, "You know, that's -- I understand. That
6 doesn't bother me."

7 Q. The fact that you didn't associate with Ferguson any
8 more, I mean, did that break your heart?

9 A. No.

10 Q. What happened then? That's 2001. You had the rest
11 of your junior year and senior year in high school.

12 A. That's correct.

13 Q. What did you do? Did you graduate?

14 A. Yes, I did.

15 Q. Went ahead and graduated?

16 A. Yes.

17 Q. What did you do after that? What did you do after
18 you graduated high school?

19 A. Went to college, and I stopped messing around so
20 much, I stopped partying so much.

21 Q. What college did you go to?

22 A. I went to Moberly Area Community College. And I
23 was --

24 Q. In Moberly?

25 A. No. It was in Columbia. I was going to transfer

1 into MU after my second semester there. And --

2 Q. Okay. And how were things going? I mean --

3 A. Pretty good. I stopped partying so much. I started
4 working out a little bit. I started running a little bit.

5 Q. Had a job?

6 A. Had a job.

7 Q. Going to school?

8 A. My grades in college were better than they ever were
9 in high school.

10 Q. But then what started to happen?

11 A. I started to allow myself to remember some of the
12 stuff that I had done. Some of the things that happened that
13 night.

14 Q. What -- can you tell the jury what caused that to
15 happen? What caused you to think about that?

16 A. Well, a lot of it -- a lot of it was: On the second
17 anniversary of the murder, they had something in the
18 newspaper about it. And they talked about it. And they
19 talked about this man and his life and what he had done.
20 They talked about the murder. And they had composite
21 sketches. And I started to think about that night. And
22 before that, there were some memories that -- that I knew
23 that they were significant, but they were just like
24 snapshots, like you pause a movie. And I knew that they were
25 significant. And whenever I thought about it, a kind of

1 buzzer would go off in my head, as that's a defining moment
2 in my life, but I just couldn't put a -- I couldn't put my
3 finger on what it was. I wouldn't address it. It was too --
4 too -- too horrible to address. It was too horrible to
5 contemplate in my mind, that I'd been capable of doing
6 something like that.

7 Q. You saw a psychologist in -- later on in the same
8 month of November of 2001. Do you remember that?

9 A. Yes, I do.

10 Q. How come you went to a psychologist?

11 A. I just -- I had gotten in trouble with -- my parents
12 had found some pot, and my grades weren't good, and I was
13 sneaking out and drinking on the weekends. And my parents
14 thought that I needed someone -- I needed someone to talk to,
15 and so I talked to a psychologist.

16 Q. Okay. And that's the same month, about a month
17 after the murder happened.

18 A. Yeah. She was a -- she was a family counselor, was
19 the title that -- I mean, I'd sit down with my parents and
20 we'd talk about the problems and everything.

21 Q. Well, do you remember talking to a psychologist over
22 at the University of Missouri?

23 A. Yeah.

24 Q. In the -- in November of 2001?

25 A. Yeah.

1 Q. About your grades being bad?

2 A. That was about my grades. That was -- that was for
3 ADD.

4 Q. Did you have ADD?

5 A. No. I just -- I smoked pot and I just didn't -- I
6 did what I liked to do in school and I did what I had to to
7 pass.

8 Q. During that meeting with that psychologist, and I'm
9 talking about the university psychologist, was there any
10 discussion about the murder?

11 A. No. Not at all.

12 Q. Did they do any dream therapy with you?

13 A. No.

14 Q. Did they use any sodium pentathol or truth serum on
15 you or anything?

16 A. No, they didn't.

17 Q. Did he hypnotize you?

18 A. No.

19 Q. Did you bring up anything about the murder? And
20 this is November of 2001; correct?

21 A. That's correct. No, I didn't.

22 Q. After you started to think about it, this murder
23 more in October of 2003, how did that progress? Explain to
24 us what was going on in your head.

25 A. After a while, I was able to start to address these

1 memories. And I started to -- there were a lot of things I
2 always had in the back of my mind. And they were always
3 there. I was just --

4 Q. Like what? What's a snapshot? You mentioned the
5 word "snapshot" a minute ago. What's -- what's something
6 that was there --

7 A. For instance, snapshot was when I -- I remember I
8 saw Dallas. I remember seeing Dallas at that intersection.
9 I don't remember what I did at first, when I was talking to
10 Dallas. I don't remember -- I didn't remember what I did
11 before I talked to him; I didn't remember what I said to him;
12 I didn't remember where I went afterwards. I just remembered
13 seeing him there, and I remembered that something horrible,
14 something life-defining, something -- something -- something
15 just clicked in my mind whenever I thought about that. I
16 might be driving down Providence and driving by that
17 intersection and thinking about, "Well, I saw Dallas there,
18 but why is this important? Why is this relevant to me now?
19 This happened this long ago; why does this matter?"

20 Q. And as it progressed, what about -- did you have any
21 snapshots or memories of the murder itself?

22 A. Yes, I did. Yes, I did.

23 Q. What's an example of that?

24 A. I remember hitting the victim. I remember sitting
25 down. I remember yelling at the cleaning lady to get help.

1 I remember walking by the bouncer with my hands like this. I
2 remember taking my coat off before I went to do the robbery.

3 Q. Is this all something that you dreamed? You're in
4 rapid eye movement, you go to bed one night, and you wake up
5 in the morning and you go, "Gosh, I've got this memory of
6 killing a man"?

7 A. I wish it were a dream.

8 Q. Did you use that word to try to re -- talk -- when
9 you were talking about this? The word "dream"?

10 A. Yes, I did.

11 Q. What did you mean by that?

12 A. What I meant by that was that -- well, I hoped that
13 it was a dream. I did. I did hope that it was a dream. And
14 the memories, they seemed so -- seemed so distant. They were
15 so hard to tap into, that they seemed kind of dream-like.
16 And also --

17 Q. As you sit there right now, did you dream about
18 this? You're using that term "dream."

19 A. No. I never -- I never -- I never dreamt about
20 killing this man.

21 Q. Okay. Let me ask you, Mr. Erickson, have you ever
22 had a dream where you were -- you're asleep, and during the
23 dream you think you're doing something or something bad's
24 happening or whatever, and when you wake up, before you get
25 completely conscious, you think that what you were dreaming

1 was true? Have you ever had that experience?

2 A. Yeah. And -- I mean, I've been in jail for a year
3 and a half now. Over that. I've been dreaming that I've got
4 to get a paper in for class, or I've got to go pick someone
5 up; I'm driving around in my car. And then I'll wake up, and
6 I'm in Boone County Jail, and I don't have a paper I got to
7 turn in; I don't have anyone I got to pick up. I don't have
8 anything I have to do.

9 Q. You don't get up and still try to finish the paper
10 or go find your car keys.

11 A. No.

12 Q. Because you're in jail.

13 A. That's correct.

14 Q. How did you deal with these memories as time
15 progressed? What did you --

16 A. As time progressed, I would allow more memories to
17 surface. And the more that I thought that I was capable of
18 doing something like this, the more I allowed to surface; the
19 more that I remembered; the more accurately I remembered it.
20 Because when I knew that I was capable of this, when I
21 admitted to myself that I was capable of this, that's when I
22 could really -- I could really admit to myself and I could
23 really allow these memories to surface and I could really --

24 Q. So what did you do? Who did you talk to, if
25 anybody, about this?

1 A. The first person I talked to, his name is Korey
2 Iranpour.

3 Q. Korey Iranpour?

4 A. That's correct.

5 Q. Okay. Now, with him, tell us about that
6 conversation.

7 A. We were at his mom's house. It was out in the
8 country. It wasn't in Columbia. We'd been drinking. And
9 this is around November. And I'd been thinking about the
10 murder and thinking about these memories, and deep down I
11 knew that I'd done this. I knew that I -- I knew that I was
12 responsible for this. And I didn't know how to deal with it.
13 I didn't know anyone that had ever been in a situation like
14 that.

15 Q. So what did you say?

16 A. So I said, "Have you ever done anything, just
17 horrible, that you're going to have to live with for the rest
18 of your life?"

19 Q. You told your buddy that?

20 A. Yes.

21 Q. Or asked your buddy that?

22 A. I asked him. And I didn't know what to do. I
23 was -- I didn't know what to do.

24 Q. Now at that point, though, did you go any further?

25 A. No. I didn't get any more specific. I just --

1 Q. Okay.

2 A. -- I said that there was something I had to deal
3 with. And I know I mentioned that I was -- I wanted help,
4 really. I mean, I just -- I didn't know what -- what to do.

5 Q. And who, in -- later on, still in 2003, the end of
6 2003 actually, was the next person that you talked to about
7 the murder?

8 A. The next person I talked to was my friend Nick
9 Gilpin.

10 Q. Before -- let me direct your attention --

11 A. Oh, no. I'm sorry. I'm sorry. The next person I
12 talked to in 2003 was Ryan Ferguson.

13 Q. When was that?

14 A. That was on New Year's of 2003-2004.

15 Q. Okay. And where was this location?

16 A. It was at John Whitworth's house.

17 Q. And there was -- were you -- you two the only two
18 there or --

19 A. No. There was a party. There was a New Year's
20 party. There was a little get-together.

21 Q. All right. And what -- how did you approach him?
22 How did this go?

23 A. There were a lot of people there. And there weren't
24 so many people outside. And I said, "Man, why don't you go
25 outside and smoke a cigarette with me." He said, "Okay." So

1 we stepped outside. We started smoking. I said, "You know
2 what a repressed memory is, man?" He said, "Yeah, I think I
3 do." I said, "Well, I think I've had some of those. I think
4 that the night we went out to that club, that we killed that
5 man. On Halloween." And I said, "You know, I haven't
6 remembered this for a long time, and I really think we did
7 this."

8 Q. And what was the defendant's reaction to you saying,
9 "We're at this club and we killed that guy"?

10 A. He said, "You mean the Tribune guy?"

11 Q. And I said, "Yeah. Yeah." And he said, "No, we
12 didn't do that. We didn't do that. We never done anything
13 like that."

14 Q. How did that conversation end?

15 A. It was kind of continuous conversation. I asked him
16 a couple of things that I remembered. That I could remember
17 then. I said, you know, "Well, why did we sit in the club
18 until closing time, beings there was a cop outside?" He
19 said, "Well, because we weren't 21." And I remember -- I'm
20 sitting there thinking, "So what? What -- are we going to
21 get arrested for trespassing? We didn't have anything on us.
22 What was the big deal?"

23 And also I remember that he called me a few months
24 after the murder and he told me that his dad had woken him up
25 strangling him, because he found a wallet.

1 Q. Now this was a conversation before the New Year's
2 party?

3 A. This was before New Year's. And I said, I said, "So
4 what? What's -- what's the big deal?" He didn't give the
5 detail. He just said, "My dad found a wallet." Like that
6 was supposed to be significant to me. And I said, "So? So
7 what are you -- what are you going at here?" I said, "You
8 know, what's the big deal?" He said, "You know, I -- never
9 mind. Just never mind."

10 Q. And you talked to him about that on New Year's?

11 A. I talked to him about that. And he said -- he said,
12 "Well, that could have been about -- I don't know. My dad
13 woke me up strangling me a bunch of times." Something to
14 that effect.

15 Q. Okay. And what else was said on New Year's?

16 A. He asked me if I was wearing a wire. And we'd been
17 going -- we'd go back outside and back inside.

18 Q. At the party?

19 A. At the party. And he asked me if I was wearing a
20 wire.

21 Q. A wire. Like you were having a recording device on
22 you?

23 A. Yeah. Yeah, that's correct. And I said -- I said,
24 "No." And he'd been going in and out, and I asked him, "You
25 know, are you wearing something?" I was just -- I was

1 curious, because he was walking in and out and he was talking
2 to other people. I didn't know if he was discussing what I
3 said to him. I didn't -- I didn't know.

4 But -- and then at one point, when we come back in,
5 he's still -- he's still saying, "No, man, we didn't do
6 that." And I still know that we did this. And he said, "No,
7 we didn't do that." We get in the kitchen. We come back
8 inside. He said, "You know, though, man, I always did want
9 to kill somebody before I was 60 anyway." I said, "Man,
10 that's not the first time you said that to me." He said,
11 "So? So what?" And he kind of got -- that kind of freaked
12 him out a little bit, because he knew I was starting to
13 remember a lot of stuff that happened that night.

14 Q. And so how did the conversation end?

15 A. And then it just -- it kept going on and on. And
16 then -- I didn't know what to do. And I was -- I was
17 thinking about -- I knew they had DNA in the case. And I was
18 thinking about this man's family. And I was thinking about
19 maybe turning myself in or telling the police what I could
20 remember, or turning my DNA in, so there could be some
21 closure about this. And I told him, I said, "You know, I
22 might go -- I might go and I might say something -- I might
23 go talk to the police about this. You know, if we didn't do
24 this, what's the big deal?"

25 Q. What was his reaction to that?

1 A. He said he'd kill me if I went and told the police
2 about it.

3 Q. And then what was said?

4 A. And then I kept on -- we were in the kitchen at this
5 point. And we're more under hushed tones. And I kept on
6 talking about it. He said -- at some point he said, "Man, we
7 didn't kill anybody." But he said it loud. And I knew other
8 people were hearing it. And at this point, this was
9 something I was trying to take care of with him. This wasn't
10 really anyone else's business. This was something I wanted
11 to take care of on my own. I didn't want the police to come
12 and arrest me for this or something. That if I -- if I took
13 responsibility for this, I wanted to come in and I wanted
14 to -- I want to take responsibility on my own.

15 Q. Well, then, at that point you didn't want to get
16 caught.

17 A. Well, that also, but I also didn't want to get
18 caught by the police. If I was going to get caught, I wanted
19 to get caught on my terms.

20 Q. Okay. And so how did it end?

21 A. And he said -- he yelled and he said, "No, man, we
22 didn't kill him." He said, "No, we didn't kill anybody,
23 man." And he yelled at me. And then I was pretty mad. And
24 I drove to the party. I was the DD that night. And -- I
25 wasn't driving my car, though. And I remember walking away.

1 And I was just mad at this point. I was mad ever since when
2 we were sitting in the kitchen and he said to me the thing
3 about being 60 years old, because I knew he was just messing
4 with me. And I said, "Man, that's not something that
5 somebody can forget, man. That's not something somebody can
6 forget." And I just left.

7 And then I was driving my friend Art's car --

8 Q. Well, let me -- let me stop you right there. After
9 the New Year's confrontation with Mr. Ferguson, who was the
10 next person that you talked to about the murder?

11 A. The next person I talked to was Nick Gilpin.

12 Q. Okay. Now, we got the New Year's Eve party in
13 '03-'04, and now approximately when did you talk to Nick
14 Gilpin?

15 A. I talked to Nick Gilpin early March of 2003. 2004.
16 I'm sorry.

17 Q. How -- so we're into 2004 now?

18 A. That's correct, yeah.

19 Q. How do you know Nick Gilpin?

20 A. I went to school with him. He went to Rockbridge
21 High School with me. We hung out. We knew some of the same
22 people.

23 Q. Where was it that this conversation occurred?

24 A. We were at my friend John Alder's house.

25 Q. Okay. So you're with Gilpin at another buddy's

1 house.

2 A. That's correct.

3 Q. And tell us what happened.

4 A. We just pulled up to John Alder's house. And we're
5 parked in front of his house. Or it's a -- it's a duplex.
6 And I said --

7 MR. ROGERS: Your Honor, may we approach?

8 THE COURT: You may.

9 - - -

10 Counsel approached the bench and the following
11 proceedings were held:

12 MR. ROGERS: I'm going to object, Your Honor. It's
13 self-serving, hearsay, bolstering, out-of-court statements
14 allegedly made by this witness, which he says he made to
15 other people, which are, if they're inconsistent with his
16 trial testimony, I get to impeach them with him. If they're
17 consistent, it's improper bolstering.

18 MR. CRANE: The defense says that, as you heard in
19 opening, that he was inconsistent in his details to the
20 police, that he dreamed this up, that the police basically
21 implanted these memories in his mind. This witness can, A,
22 talk about what he told someone else. That's not hearsay.
23 And it also goes directly to a relevant issue with the case,
24 which is what his memory of this crime is. Because he talks
25 about events in the crime. Now you heard this in my opening.

1 MR. ROGERS: And here's the basis, Your Honor.
2 Hearsay is, by definition, an out-of-court statement offered
3 to prove the truth of the matter asserted in the statement.
4 I'm assuming this is shown to prove that he had these
5 memories and asserted to Nick Gilpin or whoever that he had
6 the memories. So therefore it's hearsay.
7 MR. CRANE: Also that he did it.
8 MR. ROGERS: Well -- and there's two levels of
9 hearsay.
10 MR. CRANE: That's not hearsay.
11 MR. ROGERS: Sure, it is. It's an out-of-court
12 statement.
13 MR. CRANE: But it's his own statement.
14 MR. ROGERS: Doesn't matter. It's still hearsay.
15 THE COURT: I assume that if he's impeached, you
16 would agree that he could be recalled --
17 MR. ROGERS: That's correct.
18 THE COURT: -- to -- or on redirect examination.
19 MR. ROGERS: That's correct.
20 THE COURT: That he can be asked about prior --
21 MR. ROGERS: Consistent --
22 THE COURT: -- consistent statements.
23 MR. ROGERS: Which are basically, my understanding
24 of the law, the evidence law of Missouri, okay, is that, if
25 he's impeached with a prior inconsistent statement, by that I

1 mean, prior to his courtroom testimony today, that he can be
2 rehabilitated with statements which are consistent with his
3 courtroom testimony, but earlier in time than the
4 inconsistent statement with which he's been impeached.
5 That's my understanding.

6 MR. CRANE: Your Honor, he's going to testify --
7 what I was going to elicit from him is a conversation that he
8 had with his buddy, wherein he articulates facts that he
9 recalls about the murder. Now, there's a motion in limine to
10 keep out the buddy, which I think is a consistent statement
11 that comes in after he's been impeached. I don't know why
12 his -- he would be precluded from testifying as to words that
13 came out of his own mouth about the homicide.

14 MR. ROGERS: Until --

15 MR. CRANE: This witness's own mouth.

16 MR. ROGERS: Until he had been impeached about
17 something which is inconsistent with his courtroom testimony,
18 and unless there is some testimony in the earlier statement
19 which is consistent with the courtroom but inconsistent with
20 the impeachment, it's hearsay.

21 MR. CRANE: No, it's not.

22 THE COURT: I agree that under the federal rules it
23 probably would not be hearsay. If we were in the federal
24 court of Boone County. However, we are not in a federal
25 court. I will certainly, depending on what happens on

1 cross-examination, let you revisit it. At this time I would
2 sustain the motion.

3 - - -

4 The following proceedings were held in open court:

5 MR. CRANE: You -- can I -- I hope you'll -- well,
6 we'll see if you'll grant me a little indulgence.

7 Q. You and Nick Gilpin had a conversation -- when --
8 what did you say? Late February, early March of 2004?

9 A. Early March.

10 Q. And you talked to Nick about your memories of the
11 murder.

12 A. That's correct. Yes.

13 Q. When you and Nick -- when you told Nick these
14 memories of the murder, was it just you and him present?

15 A. Yes.

16 Q. I mean, there wasn't anybody else around?

17 A. No.

18 Q. Well, after you talked to Nick, was there someone
19 else that you spoke to about the murder?

20 A. Yeah. I spoke to Art Figueroa.

21 Q. Art?

22 A. Arturo Figueroa.

23 Q. And he goes by Art?

24 A. That's correct.

25 Q. And his last name's what?

1 A. Figueroa.

2 Q. Figueroa. Now, when you talked to Art Figueroa
3 about the murder, when was that? Was that the same night or
4 was it a different night than you talked to Nick?

5 A. It was less than a week later.

6 Q. Okay. And when you talked to Art about the murder,
7 were you with anybody other than Art?

8 A. No, I was not.

9 Q. In either of these conversations about the murder
10 with Nick or Art, who initiated the conversation about the
11 murder?

12 A. I did.

13 Q. Okay.

14 Okay. What were you planning on doing for spring
15 break of 2004?

16 A. I was going to Breckenridge, Colorado, with Art.

17 Q. You get a week off from school; right?

18 A. That's correct. He has some friends in Florida, and
19 they had rented this bed-and-breakfast out. And he told me
20 about it. And so --

21 Q. Did you have occasion to contact Mr. Ferguson prior
22 to spring break of 2004?

23 A. Yes, I did.

24 Q. Tell us about that conversation.

25 A. I called him -- I didn't have his number. I was

1 just at a party. And I wanted to talk to him about the
2 murder. And I called him. And at the time I was in the car
3 with some girls. And I just wanted to let him know that I
4 was going to keep in contact with him.

5 Q. What did you ask him for, though?

6 A. Well, I asked him how he was doing. And I asked
7 him -- I was in the car with a bunch of girls, and so I
8 mentioned something about I was going to Colorado for spring
9 break and I needed a snow board. And I knew he had a snow
10 board. And I asked him if he still had that snow board that
11 he used to have. He said no, he didn't. And at that time I
12 told him that I would call him back.

13 Q. Did you?

14 A. No, I didn't.

15 Q. After those conversations with the defendant --
16 well, your first one -- first time you started to verbalize
17 this was Korey Iranpour. And then in January -- at the
18 January New Year's Eve party, you talked to Mr. Ferguson
19 about your memories, and then Mr. Gilpin, and then
20 Mr. Figueroa. In early March of 2004, who made contact with
21 you?

22 A. On March 10th of 2004, Columbia police, they made
23 contact with me outside of Moberly Area Community College.

24 Q. Okay. You didn't go to them.

25 A. No, I didn't.

1 Q. And they came and found you.

2 A. Yes, they did.

3 Q. And that was after you'd talked to Nick?

4 A. That's correct.

5 Q. And what did they ask you to do?

6 A. They told me they wanted to go talk to me -- a
7 detective came up to me. And I was -- I was outside of my
8 car. I was getting my books out of my trunk. And the
9 detective said -- I didn't even see him coming until he put
10 his badge up. He said, "We want to talk to you -- some
11 detectives downtown want to talk to you about your car." And
12 I knew -- I figured it didn't have anything to do with my
13 car, and I in fact knew what they wanted to talk to me about.
14 I said I had class and "Can we wait?" They said, "Do you
15 have any tests?" I said, "No. We can do this now."

16 Q. Did you go with them voluntarily or --

17 A. Yes, I did.

18 Q. I mean, they didn't wrestle you to the ground?

19 A. No. I put my books in my car, I locked my car, and
20 we left.

21 Q. Keep your voice up so the gentleman over here can
22 hear you.

23 A. Okay.

24 Q. Not that you can't hear well, but he's the farthest
25 away. Okay?

1 A. Yeah. I put my books in my car, and I locked my
2 car, and I left with the police.

3 Q. And you went to the Columbia Police Department.

4 A. That's correct.

5 Q. And who did you talk to there?

6 A. A detective by the name of -- I believe it's John
7 Short.

8 Q. What's he look like?

9 A. He's short. He's balding. Oh, yeah. He wears
10 glasses.

11 Q. All right. Now, how did that -- this is -- so far,
12 nobody from the police department had talked to you about the
13 murder.

14 A. That's correct, yes.

15 Q. Tell us how this first portion of your conversation
16 with Detective Short when you first met him went.

17 A. He just said, "You know, I'm going to be frank with
18 you. We had Nick Gilpin down here this morning. He told us
19 that you told him that you and Ryan Ferguson were responsible
20 for the Kent Heitholt murder."

21 Q. Okay. Did he -- did they give you Miranda?

22 A. Yes, they did.

23 Q. Okay. That's your right to remain silent and all
24 that?

25 A. Yes.

1 Q. And he -- so then you found out, well, Nick had been
2 talking to them.

3 A. Yes, that's correct.

4 Q. Okay. And what happened from there? What was said?

5 A. I told them that there are some things I remembered
6 and that I was -- I thought I had done this. And at the same
7 time -- I wanted -- I wanted to take responsibility for what
8 I had done, but at the same time, it was hard to step over
9 that ledge and just -- and just accept it.

10 Q. Because what did accepting it mean?

11 A. It meant going to prison, for a long time. It meant
12 embarrassing my family. It meant admitting to participating
13 in a murder.

14 Q. When you talked to Detective Short, and thereafter
15 another detective, Nichols, there were things you couldn't
16 remember.

17 A. That's correct, yes.

18 Q. There are things that you still don't remember
19 today.

20 A. That's correct.

21 Q. And there are things that you've remembered that
22 have come back to you since you talked to the police.

23 A. Yes, that's correct.

24 Q. And do you recall telling the police on occasion
25 that you didn't know whether this had happened or not?

1 A. Yes, I do. Yes, I do. That's what I was hoping. I
2 was hoping it hadn't happened. But I knew that it had. I
3 just wouldn't accept it. I was in denial, is the best way I
4 can explain it.

5 Q. Now, the police drove you around the crime scene.

6 A. That's correct.

7 Q. And the surrounding area.

8 A. That's correct.

9 Q. Could you remember that day, March 10th, how you
10 guys had left the scene?

11 A. Yes, I could.

12 Q. Why didn't you explain that to the police?

13 A. Well, I did my best. And I remembered that we'd
14 gone behind the Tribune building. And I remember that we
15 came back across Providence, because I remember seeing Dallas
16 on Providence at the intersection. I just -- at that time I
17 just couldn't remember where we went in between. It was -- I
18 put it out of my mind for so long. For dang near two years I
19 didn't think about it. And so sitting here having these guys
20 ask me questions, I wasn't able to recall everything
21 accurately.

22 Q. Did you, while you were at the police station, did
23 you provide the police with your -- a sample of your saliva
24 for DNA?

25 A. Yes, I did.

1 Q. What about a sample of your hair?

2 A. That's correct, yes.

3 Q. And what about fingerprints?

4 A. Yes.

5 Q. Okay. Eventually, when they were done talking to
6 you that day, March 10th, where were you taken?

7 A. I was taken to the --

8 Q. From the police department.

9 A. I was taken from the police department -- I was
10 taken from the major crimes unit to the police department,
11 where I was charged with second degree murder and first
12 degree robbery. And after that I was taken to Boone County
13 Jail.

14 Q. And where have you been ever since?

15 A. Boone County Jail.

16 Q. You've been in Boone County Jail since March 10th of
17 2004.

18 A. That's correct.

19 Q. Now, after -- let me show you what's marked for
20 identification as State's Exhibit 17 and 18.

21 MR. ROGERS: No objection to 17, Your Honor. I
22 object to 18 as irrelevant. May we approach?

23 THE COURT: You may.

24 - - -

25 Counsel approached the bench and the following

1 proceedings were held:

2 MR. ROGERS: Your Honor, 18 is a photograph of my
3 client, the defendant, Ryan Ferguson, which appears to me to
4 be a blow-up of his high school senior yearbook picture.
5 There is no foundation and no evidence that he looks in that
6 picture like he looked a year earlier at the time of these
7 alleged events. And I don't think there's any relevance to
8 it.

9 THE COURT: Okay. Are you objecting there is an
10 improper foundation? I don't know that the state has
11 actually offered this yet.

12 MR. CRANE: I haven't even inquired with the
13 witness.

14 MR. ROGERS: They are getting ready to offer it.

15 MR. CRANE: Can't lay a foundation until I talk to
16 him, but that will be the objection; right?

17 MR. ROGERS: That will be the objection. And --

18 THE COURT: Well, I'll have to -- I'll have to see
19 what foundation is laid.

20 MR. ROGERS: Great.

21 THE COURT: And it may well be relevant or it may
22 not be, depending on the foundation.

23 MR. ROGERS: I may have jumped the gun with the
24 objection too.

25 - - -

1 The following proceedings were held in open court:

2 Q. Show you what's marked for identification State's
3 Exhibit 17. What's that?

4 A. That's me in my junior year. That's my yearbook
5 picture.

6 Q. Okay. So this was taken your junior year. And what
7 year in school were you when the murder occurred?

8 A. 11th grade.

9 Q. Junior year.

10 A. That's correct.

11 MR. CRANE: Judge, I'd offer State's Exhibit 17.

12 MR. ROGERS: No objection to 17, Your Honor.

13 THE COURT: 17 is admitted.

14 - - -

15 State's Exhibit 17 admitted into evidence.

16 - - -

17 Q. It's an enlargement of your yearbook; right?

18 A. Yes.

19 Q. And also want to show you what's marked for
20 identification as State's Exhibit 18. Do you recognize who's
21 in that photograph?

22 A. That's Ryan Ferguson our junior year. That's his
23 yearbook picture.

24 Q. Okay. And is that a fair and accurate depiction of
25 how he appeared while you were going to high school with him,

1 junior year of high school, 2003?

2 A. Yeah. Usually he didn't look that disheveled.
3 Usually he had his hair -- like if we were going out or
4 something, he had his hair spiked up and had gel in it and
5 usually wouldn't have it that messy.

6 Q. Okay.

7 MR. CRANE: Judge, I'd offer State's Exhibit 18.

8 THE COURT: Do you have an objection at this time?

9 MR. ROGERS: No, Your Honor.

10 THE COURT: State's Exhibit 18 is admitted.

11 - - -

12 State's Exhibit 18 admitted into evidence.

13 - - -

14 Q. I'll also show you what's marked as State's Exhibits
15 19 and 20.

16 THE COURT: Do you want to see those before the
17 witness does?

18 (Mr. Crane showing the exhibits to Mr. Rogers.)

19 THE COURT: All right.

20 Q. Show you State's Exhibit 19. Do you recognize who
21 that is?

22 A. That's me when I got arrested on March 10th of 2004.

23 Q. This is your arrest photo.

24 A. That's correct.

25 Q. Okay.

1 MR. CRANE: Judge, I'd offer State's Exhibit 19.

2 MR. ROGERS: No objection.

3 THE COURT: 19 is admitted.

4 - - -

5 State's Exhibit 19 admitted into evidence.

6 - - -

7 Q. Show you State's Exhibit -- well, let me ask you,
8 before I do this, did you at any time on March 10th have
9 occasion to see -- of '04, have occasion to see the
10 defendant?

11 A. Yes, I did.

12 Q. Did you talk to him, though?

13 A. No, I didn't.

14 Q. Okay. But you did see him that day?

15 A. Yes, I did.

16 Q. Okay. And I want to ask you if you'll take a look
17 at this photograph, State's Exhibit 20 for identification.
18 Is that a fair and accurate depiction of how the defendant
19 appeared on the day of your arrest, March 10, 2004?

20 A. Yes, it is.

21 MR. CRANE: Judge, I'd offer State's Exhibit 20.

22 MR. ROGERS: No objection.

23 THE COURT: State's Exhibit 20 is admitted.

24 - - -

25 State's Exhibit 20 admitted into evidence.

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- - -

Q. Now, from the time you were arrested and put into jail, who did you have contact with up until October of that same year? March '04 to October '04, who did you have -- and I'm not talking about other people in the prison or jail personnel.

A. Uh-huh.

Q. From outside the jail, who did you have contact with?

A. I had contact with Arturo Figueroa.

Q. On the phone?

A. On visits and on the phone.

Q. Okay.

A. I had contact with McKya (phonetic) Brown. I had contact with --

Q. What about your parents?

A. With my parents, with my sister.

Q. Okay.

A. I had contact with my lawyer.

Q. Your what?

A. With my lawyer.

Q. All right. So who paid for your lawyer?

A. My parents paid for my lawyer.

Q. Okay. And what's his name?

A. His name's Mark Kempton.

1 Q. All right. Do you see him in the courtroom today?

2 A. Right here in the front row.

3 Q. This gentleman right here is your attorney, Mr. Mark
4 Kempton.

5 A. That's correct. Yes.

6 Q. And he was your criminal defense attorney on this
7 case; is that correct?

8 A. That's correct. Yes.

9 Q. Okay. What items -- well, did -- during the course
10 of the prosecution of you, while you're in jail, did
11 Mr. Kempton provide you with some documents?

12 A. Yes. The police reports.

13 Q. Speak up, man.

14 A. The police reports. It was discovery.

15 Q. Okay. How extensively -- or what photographs were
16 you actually given?

17 A. I was -- I was not given any photographs.

18 Q. Okay. You communicated with your lawyer, your
19 parents, some of your -- you mentioned some friends while you
20 were in jail?

21 A. Yes, that's correct.

22 Q. Mr. Erickson, what contact during the time between
23 March of '04 and October '04 did you have with anybody from
24 the Columbia Police Department?

25 A. None.

1 Q. Okay. They can't talk to you while you're
2 represented by an attorney, after you've been taken to the
3 jail; correct?

4 A. That's correct.

5 Q. What about anybody from the prosecutor's office?
6 Anybody at all.

7 A. No one.

8 Q. What contact did you have with anybody from law
9 enforcement during -- from March 10, '04, up until October
10 2004?

11 A. Besides jail staff, no one.

12 Q. Who's Dr. Delaney Dean?

13 A. She was a lady I saw, that my lawyer had come see
14 me, because I was -- I was having some anxiety problems with
15 my case.

16 Q. Okay.

17 A. And I was just -- I was just feeling bad about it.

18 Q. That was a psychologist that your attorney referred
19 you to?

20 A. That's correct.

21 Q. And where did she meet with you?

22 A. At the jail.

23 Q. Okay. And that was, again, in between March and
24 October of 2004?

25 A. That's correct.

1 Q. Okay. While you've been in jail, have you received
2 medication?

3 A. Yes, I have.

4 Q. For what?

5 A. I received Lexapro for anxiety. And I stopped
6 taking that. And I received Prozac for anxiety after that.

7 Q. Okay. Have you been depressed --

8 A. Yes.

9 Q. -- at some points during this?

10 A. I believe so, yes.

11 Q. Why?

12 A. Just because I -- I felt bad about what I'd done. I
13 felt bad about embarrassing my family. I didn't know what
14 was going to happen next. I didn't --

15 Q. You're in jail.

16 A. Yeah.

17 Q. That's not a happy thing?

18 A. No. No, it's not.

19 Q. Now, you mentioned Prozac?

20 A. That's correct.

21 Q. What was that for?

22 A. It was just anxiety. I was having some anxiety
23 problems, like -- I don't know if it was because I've been
24 locked up for so long. I was in the same eight-man tank for
25 so long, I've seen some pretty gross stuff, I wash my hands a

1 lot. And --

2 Q. Did they talk to you about OCD?

3 A. Yeah. They said that it was --

4 Q. What's OCD?

5 A. It's OCD -- it's obsessive-compulsive disorder.

6 It's just like when you worry about germs and stuff like that

7 a lot. And she -- the lady said that some people get that

8 who -- who -- if you're -- if you've got like a lot of

9 freedom taken away from you, if you got a lot of anxiety.

10 Q. Okay. Now Prozac, though, you know, is that --

11 Prozac, does that make you go nuts?

12 A. No. It just --

13 Q. And OCD, I mean, were you a Howard Hughes guy, that

14 couldn't stand to touch anything and --

15 A. No. No.

16 Q. Okay.

17 A. I just -- see, if I played a game of chess or

18 something, I'd wash my hands. After I went to the bathroom,

19 I'd wash my hands. Before I ate, I'd wash my hands.

20 Q. Were you ever diagnosed with OCD prior to when

21 you've been in jail, that you're aware of?

22 A. No. No.

23 Q. Okay. And you talked to this psychologist about

24 maybe having ADD, which you didn't get diagnosed for, after

25 all was said and done anyway.

1 A. Yeah.

2 Q. Did anybody say anything about OCD?

3 A. Before that?

4 Q. Yeah.

5 A. No. No.

6 Q. How you feeling now? I mean, are you seeing
7 elephants floating around the room or --

8 A. No. I feel fine. I feel good.

9 Q. Eventually, after you talked to your attorney,
10 talked to your parents, had been in jail, what did you decide
11 to do?

12 A. I decided to plead guilty and enter on a plea
13 agreement with the state.

14 Q. Now, through negotiations with your -- your attorney
15 was negotiating with my office. Before any plea could be
16 entered, what did you do?

17 A. Well, I decided to do a proffer.

18 Q. A proffer?

19 A. It was a meeting between -- between myself, my
20 attorney, the prosecutor, and the police.

21 Q. So this was the first occasion you talked to law
22 enforcement since your arrest.

23 A. That's correct.

24 Q. And where did we meet?

25 A. We met at the major crimes unit.

1 Q. Over at the Columbia Police Department, right next
2 door here; correct?

3 A. That's correct.

4 Q. And where was your attorney during that meeting?

5 A. He was right next to me.

6 Q. He was there the whole time; correct?

7 A. That's correct.

8 Q. And you talked again about this murder.

9 A. That's correct. Yes.

10 Q. And I guess I can't -- you talked about things that
11 you had already stated you recalled when you spoke back to
12 Nick and Art and the police the first time; correct?

13 A. Yes. That's correct.

14 Q. There were some things that you had remembered since
15 those conversations about the murder; correct?

16 A. That's correct, yes.

17 Q. And there were some things that you still could not
18 remember. Some details you still could not remember.
19 Correct?

20 A. Yes.

21 Q. Now, after that discussion with the police, with
22 your attorney present, then what did you do?

23 A. I decided to take a plea agreement with the state.

24 Q. I'm going to ask you to take a look at what's marked
25 for identification as State's Exhibit 25. Tell me, first of

1 all, without reading its contents, if you recognize that
2 document. Look at both pages.

3 A. Yes, I do.

4 Q. What is that?

5 A. It says that if I --

6 Q. No, I didn't say -- you can't do that yet.

7 A. Oh. Sorry. It's --

8 Q. What --

9 A. -- it's my plea agreement with the state.

10 Q. Okay. And that sets out the terms of the agreement
11 under which you're testifying today.

12 A. Yes.

13 Q. And at the back of -- on the second page, flip it
14 over, of State's Exhibit 25 for identification, whose
15 signatures are they?

16 A. That's your signature, my lawyer's signature --

17 Q. Mark Kempton, seated right there?

18 A. -- and my signature.

19 Q. And what's the date? Turn it over.

20 A. It's November 4th, 2004.

21 Q. Okay.

22 MR. CRANE: Judge, he wants to -- you got -- I would
23 offer State's Exhibit 25.

24 MR. ROGERS: Objection, Your Honor. May we
25 approach?

1 THE COURT: You may.

2 - - -

3 Counsel approached the bench and the following
4 proceedings were held:

5 THE COURT: Let me look at the document before
6 you --

7 (Court reading document.)

8 THE COURT: Yes, sir.

9 MR. ROGERS: Your Honor, we would object to this,
10 based upon our previous motion in limine concerning the
11 prosecuting attorney vouching for the truthfulness of this
12 witness's testimony. That plea agreement contains the term
13 "truthful" at least three times. Sometimes it has "truthful,
14 honest, and complete." Sometimes it has "completely
15 truthful." And it is clearly intended to communicate to the
16 jury that the state, from its font of wisdom and experience,
17 has determined that this witness is credible. Now, I think
18 that that is an improper inference and I object. Or improper
19 vouching, actually. So we object.

20 MR. CRANE: Can I respond?

21 MR. ROGERS: And it is also repetitious.

22 THE COURT: Okay.

23 MR. CRANE: Can I respond?

24 THE COURT: You may respond.

25 MR. CRANE: Judge, this is the same form of

1 agreement that came in in Ringo, when Jones testified. It's
2 been upheld. That's the terms of the agreement. The thing
3 that the motion in limine goes to is me over and over and
4 over saying "truthful," to vouch for the witness. This is
5 the agreement. And that agreement memorializes the
6 obligations of the defendant.

7 THE COURT: You mean of the witness.

8 MR. CRANE: Of the witness. Sorry. He was a
9 defendant then.

10 THE COURT: The objection's overruled. 25 is
11 admitted.

12 - - -

13 The following proceedings were held in open court:

14 MR. CRANE: 25 is admitted, Your Honor?

15 THE COURT: State's Exhibit 25 is admitted.

16 - - -

17 State's Exhibit 25 admitted into evidence.

18 - - -

19 Q. Now, that is the agreement that you and your
20 attorney entered into with me. You said I signed that as
21 well.

22 A. Yes.

23 Q. The State of Missouri.

24 A. Yes.

25 Q. Correct? And in that agreement, first of all --

1 well, actually, I should ask: When did you plead guilty?

2 A. I believe it was the 4th of November.

3 Q. That day.

4 A. Yeah. That's correct.

5 Q. And before you pled guilty, that agreement was
6 entered into; correct?

7 A. That's correct, yes.

8 Q. Okay. And first of all, what did you plead guilty
9 to?

10 A. Pled guilty to second degree murder, first degree
11 robbery, and armed criminal action.

12 Q. Okay. And you had always been charged with second
13 degree murder and armed -- and robbery; correct?

14 A. That's correct.

15 Q. All right. Acting in concert with Ryan Ferguson?

16 A. That's correct.

17 Q. And then a third charge was added?

18 MR. ROGERS: Objection, Your Honor. Excuse me.

19 THE COURT: I'm sorry?

20 MR. ROGERS: May we approach?

21 THE COURT: You may.

22 - - -

23 Counsel approached the bench and the following
24 proceedings were held:

25 MR. ROGERS: I would object to the gratuitous

1 comment of the prosecutor: "Acting in concert with Ryan
2 Ferguson." Certainly this witness's guilty plea cannot be
3 taken as any evidence that Mr. Ferguson is guilty of
4 anything. This witness is responsible for his own guilty
5 plea. And he can make admissions on his own behalf. He
6 certainly can't make admissions on behalf of Mr. Ferguson.

7 MR. CRANE: He's not. I'm only saying that's what
8 he pled guilty to.

9 MR. ROGERS: But you already asked him what he pled
10 guilty to. He had already affirmed that he pled guilty to
11 robbery in the first degree. Then you threw in
12 Mr. Ferguson's name, which had nothing to do with what he
13 pled guilty to.

14 MR. CRANE: Well, golly.

15 MR. ROGERS: Only possible --

16 MR. CRANE: I believe it was felony murder and
17 robbery, acting in concert with Ryan Ferguson.

18 MR. ROGERS: Well --

19 THE COURT: Was that the charge?

20 MR. CRANE: Yeah. The only thing we did was add
21 armed criminal action.

22 MR. ROGERS: My point, Your Honor, is that
23 gratuitous -- to put in the part about Mr. Ferguson, because
24 this witness, pleading guilty to acting in concert with
25 Mr. Ferguson, creates an improper inference based upon the

1 plea that Mr. Ferguson must be guilty of something.

2 THE COURT: I am going to overrule your objection.

3 MR. CRANE: I think it's been asked and answered
4 anyway, hadn't it? I thought he answered the question.

5 MR. ROGERS: I don't know. I was yelling.

6 - - -

7 The following proceedings were held in open court:

8 Q. You pled guilty to murder second, robbery in the
9 first degree, acting in concert with Ryan Ferguson, and a
10 third count of armed criminal action; is that correct?

11 A. Yes.

12 Q. And you pled guilty to those three counts in this
13 courtroom.

14 A. Yes.

15 Q. Is that right?

16 A. Sitting right here.

17 Q. You were sitting right there in that chair.

18 A. Yes.

19 Q. And it wasn't Judge Roper; it was another judge.

20 A. Yes.

21 Q. And your attorney was here.

22 A. Yes.

23 Q. And I was here.

24 A. Yes.

25 Q. And it was on the record; is that correct?

1 A. That's correct.

2 Q. And what is your understanding of that agreement?
3 State's Exhibit 25.

4 A. My understanding is that I have to --

5 MR. ROGERS: Objection, Your Honor. The document
6 speaks for itself.

7 THE COURT: The document does speak for itself,
8 Mr. Crane.

9 MR. CRANE: Okay.

10 THE COURT: The objection is sustained.

11 Q. Sir, what -- if you live up to the terms of the
12 agreement, what is your sentence?

13 A. 25 years.

14 Q. 25 years --

15 A. Yes.

16 Q. -- in the department of corrections.

17 A. Yes.

18 Q. Mr. Erickson, you entered those pleas of guilty on
19 November 4, 2004. You talked to the police in October of
20 2004, knowing that there wasn't any physical evidence to
21 connect you or Ryan Ferguson to the crime scene.

22 A. That's correct.

23 Q. You entered those pleas of guilty, having consulted
24 with your attorney about -- previously talking to your
25 attorney about, without getting into the details of that,

1 conversations with your attorney, but various options that
2 you might have with respect to your case.

3 A. Yes.

4 Q. And do you understand, sir, that you will receive
5 those 25 years, assuming you have honored your part of the
6 agreement, whether Mr. Ferguson is found guilty by this jury
7 or not?

8 A. Yes, I do.

9 Q. Why did you plead guilty?

10 A. Because I am guilty.

11 MR. ROGERS: Objection, Your Honor. Self-serving.

12 THE COURT: The objection --

13 MR. CRANE: Self-serving what?

14 THE COURT: The objection is overruled.

15 You may answer the question.

16 A. Because I am guilty.

17 Q. As the memory of this murder has progressed, you
18 have talked about it to various people we've discussed here
19 today, you expressed uncertainty to friends as you talked
20 about this murder, these memories, and uncertainty to the
21 police. What is your level of certainty today?

22 A. I'm a hundred percent certain that me and Ryan
23 Ferguson committed this crime.

24 Q. And when you pled guilty, sir, what was your level
25 of certainty about your involvement and Ryan Ferguson's

1 involvement in this murder?

2 A. It was a hundred percent.

3 Q. You know, we've met several times prior to today. I
4 mean, we weren't -- we had investigator -- or somebody was
5 with us when we were together. But I'm going to ask you
6 something I asked you before. You know, if you didn't do
7 this, then tell me now. You know, I've told you before, I
8 have no interest in putting anybody that didn't do it in
9 jail.

10 A. Yes, you did.

11 Q. You got an attorney, you know.

12 A. Yes, I do.

13 Q. I guess it's never too late. Tell us now if it was
14 all a dream.

15 A. I did this. He did this. I didn't dream anything.

16 MR. CRANE: No further questions at this time,
17 Judge.

18 THE COURT: We will take our afternoon break at this
19 time.

20 Ladies and gentlemen, the Court again reminds you of
21 what you were told at the first recess of the Court. Until
22 you retire to consider your verdict, you must not discuss
23 this case among yourselves or with others, or permit anyone
24 to discuss it in your hearing. You should not form or
25 express any opinion about the case until it is finally given

1 to you to decide. Do not read, view, or listen to any
2 newspaper, radio, or television report of the trial.

3 If you'll let me know when the jurors have had an
4 opportunity to refresh themselves.

5 Jury may be excused.

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: We'll be in recess then.

10 MR. ROGERS: Your Honor, excuse me. Before the
11 recess, Your Honor, may we be heard a minute?

12 THE COURT: Is there something you need to approach
13 the bench on?

14 MR. ROGERS: Yes.

15 THE COURT: Mr. Crane.

16 MR. ROGERS: Your Honor, I'd ask that Mr. Kempton,
17 who's been sitting here throughout the testimony and the
18 opening statements, not be allowed to consult with the
19 witness during the recess, before cross-examination. The
20 rule has been invoked.

21 THE COURT: Well --

22 MR. ROGERS: And he's not the person on trial. So
23 he has no constitutional right to consult with counsel during
24 his testimony.

25 MR. CRANE: Wait a minute. You're worried about

1 Kempton testifying?

2 MR. ROGERS: I'm worried about Kempton talking to
3 this witness during his testimony before cross-examination.

4 MR. CRANE: Well, I don't know. Is that a big deal?
5 Can you talk to him later?

6 MR. KEMPTON: That's fine.

7 MR. ROGERS: Great. Thank you.

8 THE COURT: No, I don't think that he would have the
9 right to talk to him.

10 MR. CRANE: Okay.

11 THE COURT: Okay.

12 MR. CRANE: Okay. Come back then.

13 (Recess taken.)

14 - - -

15 The following proceedings were held out of the presence
16 of the jury:

17 THE COURT: Before we bring the jury back, if you
18 would swear this marshal as well.

19 (Deputy Court Marshal Misty McKee sworn by Sheri
20 Vanderhoof, Deputy Clerk, to take charge of the jury.)

21 THE COURT: Is state ready to proceed?

22 MR. CRANE: Ready, Your Honor.

23 THE COURT: And the defendant ready to proceed?

24 MR. ROGERS: Yes, Your Honor. I don't know if the
25 Court has a copy of Mr. Erickson's deposition.

1 THE COURT: Our local rules don't require they be
2 filed unless they become at issue in some trial. I assume if
3 you're asking questions relating --

4 MR. ROGERS: I intend to --

5 THE COURT: -- to his deposition, then I assume it
6 becomes at issue. So you're filing the original deposition?

7 MR. ROGERS: I'm filing the original, and the
8 signature page is in the back, but it's not --

9 MR. CRANE: We agreed to sign the signature page.

10 THE COURT: Did he waive? He did waive? Or he
11 signed it?

12 MR. ROGERS: He signed it. And there it is.

13 MR. CRANE: We didn't waive signature, but
14 presentment on everybody, didn't we?

15 THE COURT: I assume that it's somewhere here.

16 All right. Thank you. I'll show that it's filed.

17 Other than that, is the defendant ready to proceed?

18 MR. ROGERS: Yes, Your Honor.

19 THE COURT: Is the jury ready to come into the
20 courtroom?

21 You may be excused.

22 (Clerk excused.)

23 - - -

24 The following proceedings were held in the presence of
25 the jury:

1 THE COURT: Mr. Erickson, you will remember you're
2 still under oath.

3 THE WITNESS: Yes.

4 THE COURT: Although we took a recess, I'm not going
5 to swear you in again. You understand that.

6 THE WITNESS: Yes, I do.

7 THE COURT: All right.

8 - - -

9 CHARLES TIMOTHY ERICKSON,
10 resumed the stand and testified further:

11 THE COURT: Defense counsel may inquire.

12 MR. ROGERS: Thank you, Your Honor.

13 - - -

14 CROSS-EXAMINATION

15 BY MR. ROGERS:

16 Q. Mr. Erickson, would you say that during the end of
17 2003 and the first three months of 2004, Art Figueroa was
18 your best friend?

19 A. Yeah, I'd say so.

20 Q. And are you the kind of guy who would lie to your
21 best friend about something important?

22 A. No.

23 Q. And you told Art Figueroa that you didn't know
24 whether the impressions you were having concerning the death
25 of Mr. Heitholt were memories or dreams, didn't you?

1 A. That's correct.

2 Q. That's what you told Nick Gilpin too, isn't it?

3 A. That's correct.

4 Q. And that's what you told Ryan Ferguson at the New
5 Year's Eve party at John Whitworth's house.

6 A. That's correct.

7 Q. And by the way, did you tell us earlier today,
8 before the recess, that you were the designated driver that
9 night and therefore you were not drinking anything?

10 A. I didn't say I wasn't drinking. I said that I was
11 the designated driver.

12 Q. But you were, in fact, drinking.

13 A. I was drinking, yes.

14 Q. And you were using cocaine.

15 A. That's correct.

16 Q. And so you will agree that your memory of your
17 conversations with Mr. Ferguson might be somewhat impaired.

18 A. No. I wasn't drunk when I talked to Ryan Ferguson.

19 Q. But you were drinking and you were using cocaine.

20 A. That's correct.

21 Q. But that doesn't impair you.

22 A. I -- I wasn't impaired. I wasn't impaired to where
23 I couldn't drive. I wasn't intoxicated, and that's why I was
24 driving my friend's car.

25 Q. All right. Now, after you talked with Gilpin, and

1 after you talked with Figueroa, it wasn't that long until the
2 police arrested you, was it?

3 A. No, it wasn't.

4 Q. And what happened then is: You were leaving your
5 house to go to school; right?

6 A. That's correct.

7 Q. And looking at the state's map, Exhibit 5, you were
8 still living here?

9 A. Yes.

10 Q. On Chinkapin Court?

11 A. That's correct.

12 Q. And the Moberly Area Community College is up here
13 off of Broadway?

14 A. Yes. That's correct.

15 Q. Just to the --

16 A. To the left of Fairview.

17 Q. -- west, left or west of Fairview Road.

18 A. That's correct.

19 Q. Am I correct that the Moberly Area Community College
20 has more than one campus?

21 A. That's correct.

22 Q. Doesn't make sense to have the Moberly Area College
23 in Columbia if there wasn't also one in Moberly; right?

24 A. Yes. That's correct.

25 Q. All right. When you arrived there and parked your

1 car, you got out of your car, you started to get your books
2 out of the trunk, and you were approached by Detective
3 Piester; is that correct?

4 A. I can't remember what his name was.

5 Q. He tells you something about your car; correct?

6 A. He said that the detectives downtown wanted to talk
7 to me in regards to my car.

8 Q. You knew that wasn't true.

9 A. Yes, I do.

10 Q. Did you tell him that?

11 A. No, I didn't.

12 Q. But you did agree to go downtown with him.

13 A. That's correct.

14 Q. When you got there, you talked first with a
15 Detective Short; correct?

16 A. That's correct.

17 Q. And you described him as a short guy.

18 A. Yes.

19 Q. By the way, how tall were you back in October of
20 19 -- excuse me, of 2001?

21 A. Probably five six, five seven.

22 Q. Okay. You were a short guy too.

23 A. Yeah.

24 Q. Have you grown since then?

25 A. I might be five seven, five eight. Maybe an inch or

1 two. Not more than that.

2 Q. Okay. And was Ryan about the same size as you were?

3 A. Yes.

4 Q. Were you husky? Were you skinny? Were you medium?

5 How were you built?

6 A. I was pretty skinny. Skinnier than I am now.

7 Q. Skinnier than you are now.

8 A. Yeah.

9 Q. Okay. And was Ryan's build about the same as he

10 appears to be now?

11 A. I don't know. He's -- he's more muscular than -- he

12 was more muscular than me then. He's more muscular than he

13 was then. Now.

14 Q. He is more muscular now than he was then?

15 A. Yes.

16 Q. Okay. So he was skinnier then than he is now.

17 A. Yes.

18 Q. Okay. The first guy you talked to was Detective

19 Short; is that correct?

20 A. Yes.

21 Q. And that first conversation with Detective Short was

22 not recorded or videotaped, was it?

23 A. I don't believe so.

24 Q. And after that, Detective Short told you he was

25 going to do a videotaped interview of you, didn't he?

1 A. No, I don't think he ever said that he was turning
2 the video camera on. I remember that I saw that there was a
3 video camera on in -- there was a video camera in the room,
4 and so I figured that it was being videotaped, but I don't
5 believe he ever said anything to me about turning on the
6 video camera.

7 Q. Is that a different room than the first conversation
8 we showed?

9 A. No. It was the same room.

10 Q. Same room. Was the video camera on during the first
11 one, as far as you know?

12 A. No. Not that I know of, no.

13 Q. Could you see a little red light when it was on?

14 A. I don't recall if there was a red light or not.

15 Q. Okay. Anyway, there was a second -- you since
16 learned that your second conversation with Mr. Short was
17 videotaped; correct?

18 A. Yeah. Yes.

19 Q. And you viewed that videotape with your lawyer or
20 somebody; correct?

21 A. Yes. That's correct.

22 Q. And then, after that videotape, you went driving
23 around downtown Columbia with Detective Nichols; is that
24 correct?

25 A. Yes.

1 Q. And that trip was also videotaped, even though the
2 video camera was mainly showing what's outside the car and
3 not you; is that right?

4 A. That's correct.

5 Q. And there was -- you've also viewed that videotape.

6 A. Yes, I did.

7 Q. And that's the day you were arrested.

8 A. Yes.

9 Q. And then after that, you went back to the police
10 department, didn't you?

11 A. Yes, I did.

12 Q. Back in the same room.

13 A. Yes.

14 Q. That you had been in with Mr. Short.

15 A. Yes.

16 Q. And at that time you were questioned by Mr. Nichols.

17 A. That's correct.

18 Q. And that was also videotaped, wasn't it?

19 A. Yes, it was.

20 Q. Okay. Have you had an opportunity view that
21 videotape?

22 A. Yes, I have.

23 Q. Now, let's talk, first of all, about the
24 conversation that was not videotaped. When you were first
25 arrested, advised of your rights, and questioned by

1 Mr. Short. The first thing he told you was, "Hey, Nick
2 Gilpin tells us you said you and Ryan did it." Right?

3 A. Yes.

4 Q. And your response to him at that time was, "I don't
5 even remember," wasn't it?

6 A. I believe that was one of the things I said, yes.

7 Q. That was your immediate response to being
8 confrontated -- confronted with the accusation that you had
9 been involved in the murder of Kent Heitholt, wasn't it?

10 A. Yes.

11 Q. Okay. At that time, you wanted to satisfy your own
12 mind as to whether or not you had been involved, didn't you?

13 A. Deep down I always knew that I had done this.

14 Q. I'm not asking about deep down.

15 A. Well, you -- I mean --

16 Q. At that time you wanted --

17 A. In my mind, my conscious mind, maybe.

18 Q. You wanted to satisfy your conscious mind as to
19 whether or not you'd been involved; right?

20 A. Possibly. I don't really know how to explain it,
21 honestly.

22 Q. You were not deliberately lying to the police at any
23 time, were you?

24 A. No, I was not.

25 Q. And you were not deliberately lying to your best

1 friend Art Figueroa when you told him you didn't know if it
2 was a dream or a memory, were you?

3 A. I told them that I had these memories. And I said I
4 might be confusing them with dreams. But honestly, if you
5 want to know the truth, that was more of just wishful
6 thinking.

7 Q. The question is: Were you deliberately lying to Art
8 Figueroa when you said you might be confusing these memories
9 with dreams?

10 A. No, I wasn't. Because I was still in denial at that
11 point.

12 Q. Okay. And I -- if you can listen to the question
13 and answer the question --

14 A. I'm just trying to --

15 MR. CRANE: Judge, I think he responded to the
16 question. If he doesn't like the answer, that's one thing.
17 But he responded to the question.

18 THE COURT: Is there an objection, Mr. Crane?

19 MR. CRANE: Yeah. There's no question on the table.
20 He's commenting on the answer. He responded.

21 Q. Mr. Ferguson, I will ask a question. Please
22 limit --

23 MR. CRANE: This is Mr. Erickson.

24 Q. Excuse me. Mr. Erickson. I'm sorry. Mr. Erickson,
25 I will ask a question. Please limit your answer to the

1 question and not try to explain something that I'm not asking
2 you. Okay?

3 A. Well, I'm just trying to explain my answer.

4 Q. If your answer needs to be explained, Mr. Crane will
5 have a chance to do a redirect examination and explaining. I
6 will ask a question, and I'm entitled to an answer. Okay?

7 A. Yes.

8 Q. Now, the question is: You were not consciously
9 lying to Mr. Figueroa when you said that you didn't know
10 whether they were dreams or memories, were you?

11 A. No. I was hoping they were dreams.

12 Q. And you were not consciously lying to Mr. Gilpin
13 when you said you didn't know if they were dreams or
14 memories, were you?

15 A. No. No, I wasn't.

16 Q. And you were not consciously lying to Detective
17 Short when you said you didn't really remember the murder,
18 were you?

19 A. The best way to explain it --

20 Q. Excuse me. Did you hear the question?

21 A. I don't know. It's hard to explain, because I
22 always had the memories, and they were always --

23 Q. Let me ask you another question.

24 MR. CRANE: Well, Judge, doesn't he get an
25 opportunity to complete his answer?

1 MR. ROGERS: He doesn't get an opportunity to make
2 speeches that are not responsive, Your Honor.

3 THE WITNESS: I'm trying to respond.

4 THE COURT: Excuse me. Pardon me.

5 THE WITNESS: Sorry.

6 THE COURT: Mr. Erickson, when the attorneys are
7 discussing a matter, we don't need a third party. Okay?

8 THE WITNESS: I'm sorry.

9 THE COURT: Thank you.

10 Now, what was your response, sir?

11 Q. My question is: You were not consciously lying to
12 Detective Short when you said, "I -- I don't even remember
13 it," were you?

14 A. No.

15 Q. Okay. Thank you. You did tell Detective Short,
16 during that initial interview, some of the things that you've
17 said here today, didn't you?

18 A. Yes. Yes, I did.

19 Q. And one thing you mentioned to him was the statement
20 that you attributed to Mr. Ferguson, about "I always wanted
21 to kill somebody before I was 60."

22 A. Yes, I included that.

23 Q. And you told that to Detective Short; correct?

24 A. Yes.

25 Q. And today you've told us that's something that he

1 said to you in the car after leaving By George's the second
2 time, on the way home. Correct?

3 A. That's correct.

4 Q. But you told Detective Short back on March the 10th
5 that Ferguson had said that earlier in the evening, before
6 the incident occurred, didn't you?

7 A. I believe I was wrong about that.

8 Q. But you told him, didn't you?

9 A. I suppose I did.

10 Q. And you told us today that Mr. Ferguson parked up
11 near the corner of First and Ash; is that correct?

12 A. That's correct.

13 Q. Can you see where I'm pointing?

14 A. Yeah.

15 Q. But you told Detective Short on March the 10th that
16 Ferguson parked in the restaurant parking lot next to By
17 George's, didn't you?

18 A. No, I didn't say that.

19 Q. You didn't say that you had parked on the restaurant
20 parking lot next to By George.

21 A. No, I don't believe I ever said that.

22 Q. Have you had an opportunity to review Mr. Short's
23 report?

24 A. I don't know if I read it or not.

25 Q. Okay. Well, let me show you it, to see if that will

1 refresh your recollection.

2 MR. ROGERS: May I approach the witness, Your Honor?

3 MR. CRANE: Well, wait a minute, Judge. I'm going
4 to object at this point. He's going to refresh the witness's
5 recollection with what somebody else wrote?

6 MR. ROGERS: Yes.

7 MR. CRANE: That's -- that's improper.

8 MR. ROGERS: I'm attempting to.

9 THE COURT: Well, the objection is sustained. You
10 may refresh his recollection with a writing that he wrote,
11 but not with someone else's writing. It's the author of the
12 subject that you may refresh the recollection with.

13 MR. ROGERS: My understanding, Your Honor, is that
14 anything can be used to attempt to refresh a witness's
15 recollection.

16 THE COURT: I've ruled on the objection. It's
17 sustained.

18 MR. ROGERS: May we approach?

19 THE COURT: You may.

20 - - -

21 Counsel approached the bench and the following
22 proceedings were held:

23 MR. ROGERS: I'm not attempting to introduce this
24 report as evidence, or use it as past recollection recorded,
25 in which case it could only be used with a foundation laid by

1 the person who made the recording. But I think in terms of
2 refreshing recollection, physical objects can be used.
3 Statements of other people can be used. Anything can be
4 used.

5 MR. CRANE: Judge, the other objection I would make
6 is that it's hearsay. I mean, he's giving him a police
7 report, that he didn't write, about what somebody else said
8 he said? Now if he wants to call the author of the report,
9 to refute the witness's statement on the stand now, that's
10 another thing. But if he's going to start giving him other
11 things, like a newspaper -- that means he can give him a
12 newspaper article or a police report --

13 MR. ROGERS: Sure.

14 MR. CRANE: -- and that can be hearsay, and ask him
15 whether or not the person that wrote it got it right?

16 MR. ROGERS: That's not what I'm asking. I'm just
17 going to show it to him and see if that refreshes his
18 recollection. If he says no, then it doesn't, and I'm done
19 with it. But if it does refresh his recollection, then it's
20 present recollection refreshed. That is the evidence.

21 MR. CRANE: But it's what somebody else wrote down
22 that he said. You're trying to bootstrap --

23 MR. ROGERS: We can --

24 THE COURT: One at a time.

25 MR. ROGERS: I'm sorry. I stepped on your --

1 The following proceedings were held in open court:

2 Q. So you deny telling Detective John Short that you,
3 and I'm using "you" in the plural sense, you and
4 Mr. Ferguson, parked on a restaurant parking lot next to By
5 George.

6 A. I don't deny saying it. I don't remember ever
7 saying it, though.

8 Q. Okay. Do you recall telling Detective Short that
9 you vomited there at the scene?

10 A. I remember telling him that I -- that I -- I knew
11 that I vomited, and I thought I may have vomited at the
12 scene, yes.

13 Q. Maybe you're confusing two different places -- two
14 different interviews. During your videotaped interview, you
15 told him what you just told us. "I'm sure I vomited; I just
16 know don't know where." Correct?

17 A. That's correct.

18 Q. During the nonvideotaped interview, the first
19 interview, you told them you vomited, didn't you?

20 A. Yes.

21 Q. At the scene.

22 A. I told them I vomited at the scene, yes.

23 Q. And you asked him if any vomit was, in fact, found
24 at the scene.

25 A. Yes. That's correct.

1 Q. Because the memory of vomiting there at the scene
2 was one of these memories that you had, that you didn't know
3 whether it was accurate or a dream.

4 A. I remember I vomited. I -- no, I never dreamt about
5 vomiting. I remember vomiting. And I couldn't remember
6 where I vomited. But I thought I may have vomited at the
7 scene. I knew I vomited that night, sometime during or after
8 the robbery took place. But I couldn't remember exactly
9 where it was. So that's why I asked Detective Short if there
10 was vomit found at the scene.

11 Q. Now, you came down here right after lunch, and you
12 and Mr. Crane did a little reenactment? Is that correct?

13 A. That's correct.

14 Q. And during the reenactment, the only things that you
15 said that Heitholt did was turned towards you and then
16 attempted to cover himself with his hands in a defensive
17 posture; is that correct?

18 A. That's correct.

19 Q. When you say you were attacking Heitholt, did he do
20 anything to you?

21 A. No, he did not.

22 Q. Did he hit you?

23 A. No.

24 Q. Did he strike at you?

25 A. No.

1 Q. Did he kick you?

2 A. No.

3 Q. You sure of all of that.

4 A. Yes.

5 Q. Okay. And you recall telling Detective John Short
6 during your initial interview that Heitholt had kicked you in
7 your testicles.

8 A. Yeah. I thought he had, yes.

9 Q. You thought he had.

10 A. Yes.

11 Q. You thought you remembered that.

12 A. That's correct.

13 Q. But now you remember that he didn't.

14 A. Yes. I thought it was a -- it was a possibility
15 that he had.

16 Q. Okay. You have told us now, and you have
17 demonstrated with Mr. Crane, striking Mr. Heitholt several
18 times.

19 A. Yes.

20 Q. And during your initial interview, Mr. Short asked
21 you how many times you hit Heitholt, and you said, "Just
22 once"; isn't that true?

23 A. That's correct. Yes.

24 Q. But you were not deliberately lying to Mr. Short.

25 A. No, I wasn't. I wasn't sure -- I remember I -- the

1 first -- I remembered I hit him and he groaned. But before I
2 hit him and he groaned, at first I couldn't remember hitting
3 him more than that. Just the fact that he groaned, that just
4 -- that stood out in my mind. That was what made that stand
5 out in my mind. And that's why --

6 Q. When you were talking to Mr. Short --

7 A. No.

8 Q. -- the first time during the initial interview, were
9 you deliberately lying to him about the number of times that
10 you hit Mr. Heitholt?

11 A. No, I wasn't.

12 Q. You told him, however, that you only hit
13 Mr. Heitholt once.

14 A. Yeah. I told him I thought I only hit him once.

15 Q. Do you recall during the initial interview telling
16 Mr. Short that you thought Ferguson had strangled Heitholt?

17 A. Yes, I do.

18 Q. Do you recall Mr. Short asking you, "What did he
19 strangle him with?"

20 A. I told him that I couldn't remember. I couldn't be
21 sure. I started making presumptions. I remember I told him
22 I saw Ferguson down like this, over the victim, but --

23 Q. Okay. And when you say "down like this," I can see
24 your hands, but the jury can't, so I will copy -- is that the
25 gesture you're making (indicating)?

1 A. That's correct. With his back to me.

2 Q. But you told Short that you thought Ferguson had
3 strangled Heitholt with a shirt.

4 A. I said -- I said maybe. I was asking, "A shirt?" I
5 couldn't remember at first what it was.

6 Q. You were asking for the details.

7 A. That's correct.

8 Q. Of these memories that you had repressed, but
9 recovered.

10 A. Yes, that's correct.

11 Q. And, of course, during that interview, the first
12 interview, not the one videotaped, Mr. Short didn't tell you
13 whether you were right or wrong about the shirt, did he?

14 A. No, he didn't.

15 Q. Okay. And then Mr. Short asked you what had been
16 taken from Heitholt, and you told him you thought it was a
17 wallet, didn't you?

18 A. Yes. That's correct.

19 Q. And you told him that this conversation you claim
20 you had with Ryan Ferguson about a wallet happened a day or
21 two after the incident.

22 A. That's not correct. I said it happened about six
23 months after the incident. At least six months after the
24 incident.

25 Q. Do you then deny telling Detective Short that

1 Ferguson contacted you a couple of days later after this
2 incident and stated Ferguson's father had found a wallet in
3 his residence and Ferguson stated he had gotten in trouble
4 for this?

5 A. Yeah, I don't believe it was a day or two later. I
6 believe that it was months later.

7 Q. The question is: Do you deny --

8 A. And I believe -- I believe that I told him that it
9 was more than a day or two later. I believe that I told him
10 that it was months later.

11 Q. Okay. So you deny telling Detective Short that it
12 was a couple of days later.

13 A. Yeah. I don't think I did. I don't think I did.
14 If I did, I was mistaken.

15 Q. You got some water up there?

16 A. I'm all right. Thank you.

17 Q. Okay. Then you were -- you talked with Detective
18 Short during this initial interview, the one that's not
19 videotaped, about seeing Dallas Mallory, didn't you?

20 A. Yes.

21 Q. And you said that you saw Dallas Mallory by the
22 Break Time, didn't you?

23 A. Yeah. I thought I had.

24 Q. Okay. And the Break Time, on State's Exhibit --
25 whatever this is.

1 THE COURT: It's on the back.

2 MR. ROGERS: Thank you.

3 Q. 9. The Break Time is right here --

4 A. That's correct.

5 Q. -- at the intersection -- the northeast corner of
6 Providence and Ash.

7 A. That's correct, yes.

8 Q. And that's the only Break Time downtown that you
9 know of.

10 A. Yes.

11 Q. You never call the Phillips station down further
12 south at Locust and Providence a Break Time, do you?

13 A. No.

14 Q. And you were not referring to the Phillips station
15 when you told Detective Short it was a Break Time, did you?

16 A. I don't believe so, no.

17 Q. Okay. And you've told us I believe earlier today
18 that you saw Mr. Mallory stopped on Providence at a
19 stoplight? Is that correct?

20 A. Yes, that's correct. At an intersection.

21 Q. Okay. An intersection with a traffic signal.

22 A. Yes.

23 Q. So he stopped for the light when he come up to it.

24 A. I don't know if the light -- I don't know what color
25 the light was. I know that he stopped at that intersection.

1 Q. Okay. And you walked halfway across the street to
2 the middle of Providence, because he's southbound; correct?

3 A. That's correct.

4 Q. And you're crossing from east to west.

5 A. I'm not sure. I'm crossing across Providence.

6 Q. Right. From the east side of Providence, the
7 downtown side, to the west side of Providence, where By
8 George's is.

9 A. I'm going to have to take your word on that, because
10 I'm not sure.

11 Q. Okay. Well, let's look again at the map. And
12 that's Exhibit 5. And it shows Providence Road going north
13 and south; right?

14 A. Right.

15 Q. It shows the Columbia Daily Tribune on the right or
16 east side?

17 A. Yeah. So we went west.

18 Q. Across Providence.

19 A. That's correct. We went west.

20 Q. Okay. And so whatever the color of the light would
21 have been, Mr. Mallory was sitting there long enough for you
22 to cross half of --

23 A. When we got to Providence, he was pulling up to the
24 light. And then I don't know if he was fully stopped when I
25 saw him and I yelled at him or not. But I know when I

1 approached his car, his car was stopped.

2 Q. Okay. And he wasn't looking at you. He was
3 watching the traffic; correct?

4 A. Actually, I think he might have been taking a hit of
5 marijuana, and that's the reason he stopped at the light.

6 Q. We'll get there in a while. Anyway, you told us --
7 told Detective Short back on March 10th, the day you were
8 arrested, it was by the Break Time; correct?

9 A. Yeah. I thought that had it had been at the Break
10 Time.

11 Q. All right. Well, there's a traffic light at that
12 intersection, isn't there?

13 A. I wasn't exactly sure where. I just knew that there
14 was a gas station. And I really wasn't sure which one it
15 was.

16 Q. But you told him Break Time.

17 A. Yeah. That's the one I thought. Because I remember
18 seeing the Break Time. And I remember seeing the Phillips.
19 I knew that we came back across Providence after we committed
20 the robbery and the murder. And I just -- I had all these
21 things in my mind, and I was trying my best to recall them
22 accurately, but when I'm under pressure like that, when I
23 haven't thought about these things for two years, it's hard
24 to recall that stuff accurate.

25 Q. Then you had the videotaped interview with Detective

1 Short, didn't you?

2 A. No. I believe I had a videotaped interview with
3 Detective Nichols. After -- after they drove me around, you
4 mean?

5 Q. No. Here we have the initial interview with
6 Mr. Short. Correct?

7 A. Yes.

8 Q. Then you have a videotaped interview with Mr. Short,
9 after he's already talked to you; right?

10 A. Yeah.

11 Q. So it's actually round two.

12 A. I suppose.

13 Q. Okay. And you've viewed that videotape.

14 A. Yes, I have.

15 Q. You've seen it.

16 MR. ROGERS: Your Honor, at this time we propose to
17 play the video. It's actually a cassette which is -- or a
18 DVD which is made from a videocassette. It's a DVD made from
19 a videocassette of the interview between Detective Short and
20 Mr. Erickson in its entirety.

21 THE COURT: Is it marked as an exhibit?

22 MR. ROGERS: It is not. And I can take it out and
23 mark it and et cetera.

24 THE COURT: I think that would probably be a good
25 idea.

1 MR. CRANE: Judge, assuming that's the -- you
2 transferred it from video to DVD?
3 MR. ROGERS: Right.
4 MR. CRANE: Assuming that's the entire contents of
5 what the state tendered to the defense as to John Short's
6 interview with Mr. Erickson, state has no objection.
7 THE COURT: Is this an edited version or --
8 MR. ROGERS: No. This is the entire version.
9 THE COURT: All right.
10 MR. CRANE: Assuming it's everything that we gave to
11 them --
12 MR. ROGERS: I will make that representation. I
13 probably still need it marked, though.
14 THE COURT: Oh, you do.
15 MR. ROGERS: Your Honor, this -- the defendant would
16 offer Defendant's Exhibit A, which I will represent is an
17 unedited DVD of the videotaped interrogation of Mr. Erickson
18 by Detective Short.
19 THE COURT: And there's no objection by the state?
20 Mr. Crane? No objection?
21 MR. CRANE: Well, no, except one thing. I mean...
22 (Discussion off the record between Mr. Crane and
23 Mr. Rogers.)
24 MR. ROGERS: Can we fast-forward through the --
25 MR. WEIS: Yeah.

1 MR. CRANE: I mean, if you want to show him sitting
2 there by himself --

3 MR. ROGERS: Just give Mr. Weis the time.

4 MR. CRANE: If you want to do that, that's your
5 prerogative. It's your --

6 MR. ROGERS: Okay. Great. Thank you.

7 THE COURT: Defendant's Exhibit A is admitted.

8 - - -

9 Defendant's Exhibit A admitted into evidence.

10 - - -

11 MR. ROGERS: And we'd ask leave then to publish it
12 to the jury.

13 THE COURT: You may.

14 Q. Mr. Erickson, I'll be asking you questions about
15 this videotape.

16 THE COURT: Let me just ask you this. Since this
17 has been marked as an exhibit, is it necessary that the court
18 reporter take down what is on this video?

19 MR. ROGERS: No, Your Honor. In fact, we have a
20 transcript by another court reporter.

21 THE COURT: For the state?

22 MR. CRANE: I don't -- no. I don't --

23 THE COURT: You don't object.

24 MR. CRANE: -- think that's necessary.

25 THE COURT: Okay. All right. Then she need not.

1 MR. CRANE: Just one moment, though.
2 Did you provide me a copy of that transcript?
3 MR. WEIS: We --
4 MR. CRANE: Huh?
5 MS. BENSON: I don't know.
6 MR. CRANE: Well, you didn't. I'd like to get a
7 copy of that transcript if you've got it.
8 With that, Judge, I'll shut up.
9 THE COURT: Mr. Rogers?
10 MR. ROGERS: Yes, Your Honor.
11 THE COURT: Would you please approach the bench.
12 MR. ROGERS: Yes.
13 THE COURT: Along with Mr. Crane.

14

- - -

15 Counsel approached the bench and the following
16 proceedings were held:

17 THE COURT: You should be aware that some of the
18 jurors who don't have hearing problems are having trouble
19 hearing you.

20 MR. ROGERS: All right.

21 THE COURT: There is one that is using an assistive
22 hearing device, and he is sitting close enough that he can
23 hear you, but some of the others can't. I would strongly
24 suggest that if you want to be heard, that you raise your
25 voice.

1 MR. ROGERS: I will do my best. Thank you, Judge.

2 THE COURT: And I'm not sure that we can get --
3 maybe we can get you a lapel mic. I don't know if we can
4 look for one. Do you happen to have that bit of technology
5 with you?

6 MR. ROGERS: I can speak up --

7 MR. CRANE: You can yell.

8 MR. ROGERS: -- or I can stand behind the
9 microphone.

10 THE COURT: I don't think that microphone amplifies.
11 There is -- there should be a mic on the jury box that
12 amplifies. If you'll stand there, then the jurors can hear
13 you better.

14 - - -

15 The following proceedings were held in open court:

16 THE COURT: And I would ask the jurors, if you have
17 any trouble in hearing this DVD, let us know, so we can
18 increase the volume.

19 MR. ROGERS: With that, would you please play the
20 video?

21 THE COURT: How long is the DVD?

22 MR. ROGERS: It's 53 minutes, Your Honor. But there
23 are some periods where nothing's being asked or said.

24 THE COURT: And you're going to fast-forward --

25 MR. ROGERS: And we're going to fast-forward through

1 those, if we can figure out how to do it.

2 THE COURT: All right. Okay.

3 (Defendant's Exhibit A playing.)

4 Q. You recognize yourself, Mr. Erickson?

5 A. Yes, I do.

6 THE COURT: Excuse me. The jury is not able to
7 hear.

8 JUROR: It's real -- over here, it's real echoey and
9 real fuzzy. We can't understand what they're saying. Turn
10 it up or take the bass out of it.

11 THE COURT: I don't know if there's a feedback with
12 it or what. I am having the same difficulty and was hoping
13 you were not.

14 JUROR: It's echoing or something.

15 MR. ROGERS: It's probably because it was --

16 JUROR: Better.

17 THE COURT: Is that better?

18 JUROR: Better.

19 (Defendant's Exhibit A played.)

20 Q. And that's the end of the first videotaped
21 interview, the second interview with Mr. Short; is that
22 correct?

23 A. Yes.

24 Q. And when you told him that you might have flipped
25 out, you weren't talking about "I flipped out and hit

1 Heitholt more than once"; you're saying, "I might have
2 flipped out and thought I did something I didn't really do,"
3 weren't you?

4 A. No.

5 Q. That's not what you were trying to communicate to
6 Short at that time during that video?

7 A. I don't believe so, no.

8 Q. Okay.

9 MR. ROGERS: Mr. Weis, could you go back to the part
10 marked "Unsure 2"?

11 (Excerpt played.)

12 Q. Now you're telling us now, here today, under oath,
13 that you were not trying to tell Short that you were unsure
14 about whether or not you were involved in the murder of
15 Mr. Heitholt?

16 A. No.

17 Q. That's what you're telling us. You're not -- you're
18 telling us that you're not --

19 A. I had -- I had told them that, but by saying that I
20 flipped out, I meant I flipped out and hit him more than one
21 time.

22 Q. That's what he said. I'm talking about what you
23 said.

24 A. That's what I meant by saying I flipped out.

25 Q. Okay. But you do agree that you had told him

1 earlier in the conversation, "I mean, I might not even know
2 what I'm talking about now." Right?

3 A. Yeah, I said that.

4 Q. And when you said that, did you mean that you might
5 not even have been there? You might not have been involved
6 in the death of Mr. Heitholt?

7 A. Yeah. At that point I was thinking, I want to take
8 responsibility for what I done, but I was also thinking
9 self-preservation.

10 Q. But you were also thinking maybe you didn't do it.

11 A. I was hoping I hadn't done it.

12 Q. Right.

13 A. Deep down I knew that I had --

14 Q. But --

15 MR. CRANE: Wait a minute. Can he finish his
16 answer?

17 A. I was telling him that because I really hoped that I
18 hadn't been there. And I hoped that I hadn't done that.

19 Q. Right.

20 A. But I did do that.

21 Q. That's what you're telling us now. But what you
22 were telling them then was that you didn't know whether or
23 not you had done it. Isn't that what you were telling him
24 then?

25 A. I was telling him that, but deep down I knew that I

1 had done it. I just was too much of a coward to take
2 responsibility for it.

3 Q. Even though you were there for the express purpose
4 of taking responsibility.

5 A. Yes. But I couldn't take -- I couldn't -- I
6 couldn't step over that ledge, is the best way to explain it.
7 It was hard, after -- after dealing with it by myself, and
8 not thinking about it for two years, and then I'm sitting
9 down here, and it's all just rushing at me. "My God, I
10 killed this man. I got to take responsibility for this now.
11 I've got to go to prison for the rest of my life. I've got
12 to tell them what than man did. I've got to embarrass my
13 family." It was a hard thing to do. And I didn't want to do
14 it. And I was hesitant.

15 Q. Are you done?

16 A. Yeah.

17 Q. Okay. I'll ask a question. Can you see this?

18 A. Yeah.

19 Q. Do you recognize that as an aerial photograph of
20 downtown Columbia, or part of it?

21 A. I can't really tell, to tell you the truth. It's
22 not very dis -- I mean, it's all black and white.

23 Q. It's black and white; correct?

24 A. I mean, it's hard to distinguish --

25 Q. Okay.

1 A. -- what --

2 Q. Let me point out, this is By George's here.

3 A. Okay.

4 Q. First Street. Ash. Break Time. Tribune building.

5 Are you oriented now?

6 A. Yeah.

7 Q. Okay.

8 A. I might -- I might get confused, because it's hard

9 to tell what's going on. So we're going to have to go slow.

10 Q. Okay. I will represent to you that where I'm

11 circling in red, or orangy red, is the parking lot of the

12 Tribune building? Okay?

13 A. Yeah, I believe so. I believe -- yeah.

14 Q. Okay. And that where I'm now circling is the Break

15 Time.

16 A. Yeah. That's correct.

17 Q. Okay. And do you recall in the videotape, when

18 Mr. Short asked you, "Are you sure it's the Break Time and

19 not the Express Lane further south on Providence?" Do you

20 remember that?

21 A. Yes, I do.

22 Q. And the Express Lane is, in fact, the Phillips

23 station down here; correct?

24 A. That's correct. Yes.

25 MR. CRANE: Can I -- does that got an exhibit number

1 on it?

2 MR. ROGERS: I'm sorry.

3 MR. WEIS: No.

4 MR. ROGERS: No. Oops. Let me fix that.

5 MR. CRANE: Was the disk Number 1?

6 MR. ROGERS: It was A. And this is B.

7 Your Honor, at this time I would offer Defendant's
8 Exhibit B.

9 THE COURT: Is there an objection by the state?

10 MR. CRANE: Well, it'd be a little bit late now.

11 MR. ROGERS: That's right.

12 MR. CRANE: No. Have at it.

13 THE COURT: Defendant's Exhibit B is admitted.

14 MR. ROGERS: Thank you.

15 - - -

16 Defendant's Exhibit B admitted into evidence.

17 - - -

18 Q. And what you were telling Short is that you and you
19 say Ferguson left the parking lot and went back across
20 Providence. Is that correct?

21 A. I'm -- I believe I said we went back around the
22 Tribune building. But I -- I told him -- I told him a couple
23 different things, because I couldn't -- I mean, I had
24 different kind of frames in my memory. I remember seeing the
25 Break Time. And I remember going back behind the Tribune

1 building. And I know that we crossed Providence. I was
2 having a hard time trying to remember which gas station we
3 went past before we went back on Providence.

4 Q. But my question to you now is: What you were
5 telling Short during the videotape is that you came back here
6 by the Break Time.

7 A. That was one of the things I said.

8 Q. Yeah. And you told him it was at this intersection
9 here, that I'm drawing in just a solid blur, that you saw
10 Mr. Mallory.

11 A. Yeah. I believe that's correct, yeah.

12 Q. Okay. And this was before you had seen any police
13 reports.

14 A. Yeah. That's correct.

15 Q. But you had read newspaper accounts and seen
16 television broadcasts concerning Mr. Heitholt's death for two
17 and a half years.

18 A. Yeah, I believe so.

19 Q. And when Mr. Short drew your attention to the
20 Express Lane, the Phillips, you said, "No, it's the one right
21 there by the Tribune building. The Break Time."

22 A. Yeah, that's right.

23 Q. All right.

24 A. That's right.

25 Q. Okay. You will agree with me, will you not, that

1 you were certain, during your interviews with Mr. Short, that
2 you had only hit Mr. Heitholt once, until he told you, "Wait
3 a minute. I've seen the autopsy pictures. He was hit
4 multiple times, up to 15 times."

5 A. Yeah. I said -- I remembered hitting him, and then
6 he groaned. I didn't remember hitting him before that.

7 Q. And you kept saying, "I remember the first time I
8 hit him," didn't you?

9 A. I thought it was the first time.

10 Q. That's what you said.

11 A. Well, that's what I thought, yeah.

12 Q. Okay. Now, do you know what kind of shoes you were
13 wearing that night?

14 A. No, I don't.

15 Q. You told Mr. Short that they were Nikes or New
16 Balance?

17 A. I told him the shoes that I wore. And I wore Nike,
18 New Balance, K-Swiss. I also -- I believe I also said that I
19 might have been wearing boots. But I couldn't -- I couldn't
20 remember what I wore.

21 Q. And you might have been wearing boots as well.

22 A. I don't remember what shoes I put on. I just
23 remember that my feet hurt from the shoes I was wearing with
24 the Halloween costume, and I was happy to put something
25 on that wasn't --

1 Q. So what you were wearing with the Halloween costume
2 were penny loafers?

3 A. They were something like that. I mean, they were --
4 they were shoes I wouldn't -- they were like penny loafer
5 adult shoes. They were -- I remember they were too small for
6 me. They just went with my outfit.

7 Q. And they made your feet hurt. What size shoe do you
8 wear, sir?

9 A. About 10, 10 and a half.

10 Q. Is that the size you've always worn, or --

11 A. No.

12 Q. Since you were in high school?

13 A. It varies, just depending on what type of shoes they
14 are. I mean, my shoes have gotten bigger as I've grown. My
15 feet have gotten bigger.

16 Q. Back when you were a junior in high school, what
17 size would you wear?

18 A. Probably around the same thing. My feet haven't
19 grown that much since then. Probably about a 10, 10 and a
20 half.

21 Q. Okay. And whether it was a 10 or a 10 and a half
22 would depend on the kind of shoes.

23 A. That is correct.

24 Q. Okay. And the kinds of shoes that you owned at the
25 time, you owned some boots, you said?

1 A. I owned boots; I owned shoes. And that was really
2 it.

3 Q. In terms of boots, you owned what? Timberland
4 boots?

5 A. Yeah. A pair of Timberland's. I think I had a pair
6 of American Eagle boots. I had some dress shoes. I can't
7 remember what kind of shoes they were.

8 Q. Okay.

9 A. And I word Nikes, New Balances, and K-Swiss.

10 Q. Nikes, New Balances, and what?

11 A. And K-Swiss.

12 Q. K-Swiss?

13 A. Yes.

14 Q. And those are tennis shoes or running shoes or
15 athletic shoes, whatever you want to call it?

16 A. Yeah, that's correct.

17 Q. And are those the only brands that you owned, of
18 tennis shoes, running shoes, athletic shoes? Nikes, New
19 Balance, K-Swiss.

20 A. I believe so. I might have had a pair of something
21 else. I don't know.

22 Q. Okay. Nothing that springs to mind.

23 A. No.

24 Q. Nothing that you --

25 A. In the past I've had all sorts of Reeboks -- I mean,

1 you name it, I probably had that brand of shoe. But I -- I
2 mean, then, the only thing I can think of is probably I --
3 like in high school I wore a lot of K-Swiss. Mostly Nike and
4 New Balance and some K-Swiss. And I wore boots a lot.

5 Q. Okay. During high school, you never owned a pair of
6 Sketchers, did you?

7 A. No.

8 Q. Never had them in your life, have you?

9 A. No, I haven't.

10 Q. And you've never seen Ryan wear Sketchers either,
11 have you?

12 A. I don't -- I don't know if I have or not.

13 Q. Okay. You don't recall ever seeing Ryan wear
14 Sketchers.

15 A. No.

16 Q. You know what they are, though, don't you?

17 A. Yeah, I know what they are.

18 Q. Okay. Now, you told Detective Short in the first
19 interview, the one that wasn't on the videotape, and also on
20 this videotape, that you thought Ryan had strangled Heitholt
21 with a shirt. Is that correct?

22 A. I said I didn't -- I didn't know what it was. I
23 thought it might have been a shirt.

24 Q. Okay. And that's what you told him on the
25 videotape.

1 A. Yeah. I wasn't sure. Honestly.

2 Q. And when you said, "I think it was a shirt or
3 something," you weren't trying to lie to him, were you?

4 A. No, I wasn't. I was just --

5 Q. You were telling what you could remember at that
6 time.

7 A. I wasn't -- it was what I thought. It was what I
8 thought was possible. It wasn't necessarily what I
9 remembered.

10 Q. What you thought was possible.

11 A. Well, I was making presumptions some of the time --

12 Q. Making presumptions some of the time.

13 A. -- because there was some things I couldn't
14 remember.

15 Q. Because you didn't remember; right?

16 A. There was some things I couldn't. And so I was
17 asking him. But if you saw in the video, I'd ask him, "I
18 don't know. Was it a shirt? Was it a bungee cord?" I
19 couldn't remember. And I told him I couldn't remember.

20 Q. Okay. And you said to him, "I think it was a shirt
21 or something." Right? That was your exact words on the
22 videotape?

23 A. I think so. I'm not sure.

24 Q. And he said, "Well, I know it wasn't a shirt,"
25 didn't he?

1 A. Yes, he did.

2 Q. And there was nothing equivocal about him, was
3 there?

4 A. No.

5 Q. You know what equivocal means?

6 A. It means that he was certain that it wasn't a shirt.

7 Q. When I say "nothing equivocal," means he was
8 certain, and he was projecting to you it obviously definitely
9 wasn't a shirt; right?

10 A. Yeah.

11 Q. Correct?

12 A. That's correct. I guess.

13 Q. All right. And that's when you said, "Maybe a
14 bungee cord or something from his car. I don't see why he'd
15 have a rope in his car." Right? Is that correct?

16 A. Yeah.

17 Q. Because you were trying to rule out things that you
18 thought might have been used. Correct?

19 A. That's correct. Yeah.

20 Q. And so you didn't have any memory of a bungee cord.

21 A. (Shaking head from side to side.)

22 Q. You didn't have any memory of a rope.

23 A. No.

24 Q. You were just guessing.

25 A. Yes.

1 Q. Because it certainly never occurred to you that it
2 might be a belt.

3 A. That's correct.

4 Q. Correct? And, in fact, when Short told you it was
5 the belt, you were incredulous, weren't you?

6 A. Yes.

7 Q. And you said, "Oh, really? A belt?"

8 A. Yes. That's correct.

9 Q. And again, later in the same interview, just a
10 little bit later, he talks about -- he, Mr. Short, says, "So
11 it's possible Ryan could have strangled this guy with his
12 belt, got the keys, and you not know about it?" And you
13 again are incredulous. And you say, "The guy -- the man's
14 belt?" Correct?

15 A. That's correct.

16 Q. "His own belt?"

17 A. That's correct.

18 Q. And Short says, "Yes. Does that ring a bell?" And
19 your answer is, "Not at all."

20 A. (Nodding head up and down.) I believe he asked if I
21 had anything in my hand, and I said, "No, I don't remember
22 that at all."

23 Q. Well, wait a minute.

24 MR. ROGERS: Could you play the part marked "belt"?

25 (Excerpt played.)

1 A. All right. Yeah, there are two different instances,
2 though.

3 Q. Two different instances.

4 A. Yeah.

5 Q. In that instance, you're saying that the belt did
6 not ring a bell at all.

7 A. That's correct. Yes.

8 Q. And when he follows up, "But you saw Ryan strangle
9 him, though," you say, "I thought I did." Correct?

10 A. Yes. That's correct.

11 Q. That's, once again, expressing uncertainty as to
12 whether you really remembered being there; right?

13 A. That's correct.

14 Q. Now, do you recall acting out with Mr. Crane what
15 you say happened between you and Mr. Heitholt?

16 A. Yes.

17 Q. And at no time during that demonstration did you
18 demonstrate Mr. Heitholt being thrown to the ground, did you?

19 A. I don't believe so. I believe I said that he came
20 to his knees, and then I hit him one more time, and then he
21 came down.

22 Q. Right. But you didn't say, "I threw him to the
23 ground" or "Ryan threw him to the ground," did you?

24 A. No, I didn't.

25 Q. And that did not happen, did it?

1 A. I don't believe so, no.

2 Q. But you told Detective Short in this videotape that
3 you -- that either you or Ryan threw him down, didn't you?

4 A. I said, "Either that, or he fell." I said I wasn't
5 sure. I said, "Maybe I threw him down. Maybe Ryan threw him
6 down." I wasn't sure.

7 Q. And then he said, "So one of you threw him down,"
8 and your answer was, "Yeah."

9 A. That's what I thought.

10 Q. Okay. That's what you thought there.

11 A. Yes.

12 Q. And that was March the 10th.

13 A. Yes.

14 Q. Before you read the police reports.

15 A. That's correct. Yeah.

16 Q. Before you read the autopsy report.

17 A. Yeah. That's correct.

18 Q. Before you reached your plea agreement.

19 A. That's correct.

20 Q. Before you made your proffer statement.

21 A. Yes.

22 Q. Now, you told us earlier today, in painstaking
23 detail, about seeing Ryan with his back to you while you're
24 sitting on the retaining wall of the parking lot, throwing
25 up, and seeing Ryan reach down, as if strangling

1 Mr. Heitholt. Correct?

2 A. Yes.

3 Q. And you talked about coming around the right side of
4 Ryan, while he's choking Mr. Heitholt.

5 A. Yes.

6 Q. And seeing Mr. Heitholt there lying on his face;
7 correct?

8 A. Yes.

9 Q. But you told Detective Short, the day you were
10 arrested, on the videotape, that when you saw Ryan strangling
11 Mr. Heitholt, that Heitholt was on his back, didn't you?

12 A. I believe so, yes.

13 Q. Any question about it? Would you like to see it?

14 A. That's all right.

15 Q. Was your purpose in talking to your friends about
16 what you thought might have happened, to get their advice
17 about what you should do?

18 A. Yes.

19 Q. And --

20 A. Well, that, and also I needed to -- I needed to -- I
21 had to tell someone. I couldn't deal with it on my own any
22 more.

23 Q. Had to tell someone. Couldn't deal with it on your
24 own.

25 A. Yeah.

1 Q. Between November 1st, 2001, and March 10th, 2004,
2 you lived at your parents' house on Chinkapin Court here in
3 Columbia.

4 A. Yes.

5 Q. Your father, even though he does not practice, is a
6 licensed attorney.

7 A. Yes.

8 Q. You have an uncle who is a licensed attorney and
9 practices criminal defense.

10 A. Yes.

11 Q. You have another uncle who is a licensed attorney
12 and practices law.

13 A. No longer.

14 Q. Used to practice.

15 A. Yes.

16 Q. You have three lawyers in the family, one of whom
17 practices criminal defense.

18 A. Yes.

19 Q. And you didn't ask any of them for advice about what
20 to do in a situation where you were uncertain. Correct?

21 A. That's correct.

22 Q. And during that same time frame, between November
23 1st, 2001, and March 10th, 2004, you saw a family counselor.

24 A. Yes.

25 Q. What was her name?

1 A. I believe her name was Dr. Bauer.

2 Q. Dr. Bauer. And you had private conversations with
3 her.

4 A. Yeah. That's correct.

5 Q. And she told you those conversations were
6 privileged.

7 A. Yes.

8 Q. And you didn't tell her anything about this
9 repressed memory you might have had.

10 A. No, I didn't.

11 Q. And also during that time, in fact, just within
12 weeks of November 1st, during the month of November, 2001,
13 you underwent testing by some psychologists at the University
14 of Missouri; is that correct?

15 A. Yeah.

16 Q. And that testing included memory testing.

17 A. Yeah. Yes.

18 Q. It included another battery of educational type
19 tests.

20 A. That's correct.

21 Q. And they talked to you. And they gave you a chance
22 to say anything that was on your mind. Correct?

23 A. I don't believe that came up. It wasn't -- they
24 weren't counseling me. They were trying to figure out why my
25 grades were bad.

1 Q. Okay. Your grades were bad before Halloween too,
2 weren't they?

3 A. Yeah.

4 Q. They'd been bad for a while.

5 A. Yeah.

6 Q. And they were bad because you did as little as
7 possible.

8 A. Yeah.

9 Q. And bad because you had smoked pot.

10 A. Yeah. I had motivation problems. I smoked pot and
11 I didn't really -- I just, like you said, I just did what
12 I -- what was required, and I just skated by, for the most
13 part. I didn't really take an interest in anything that was
14 in school. But when I did take an interest in, I did well.
15 Other than that, I didn't.

16 Q. And in fact --

17 MR. CRANE: I couldn't hear.

18 When you did take an interest, what?

19 THE WITNESS: In -- in my -- in my classes, in my
20 courses, I'd do well if I -- if I enjoyed learning about
21 something, I'd do well in it, but.

22 MR. CRANE: Sorry.

23 Q. Okay. And your pot smoking had also been addressed
24 professionally, hadn't it?

25 A. Yes. I believe so. Yeah.

1 Q. As a matter of fact, November 1st, 2001, was the day
2 that you officially graduated from an outpatient substance
3 abuse treatment program, wasn't it?

4 A. I believe so. I'm not -- I'm not sure if that was
5 the day before that or not. I don't know.

6 Q. Okay. And during your participation in that
7 program, you continued to smoke pot.

8 A. Yeah.

9 Q. And somehow beat the urine tests.

10 A. That's correct.

11 Q. And how did you do that?

12 A. I would -- I would go downtown, and there's a store
13 called The Peace Nook. I would --

14 Q. Called what?

15 A. It's called The Peace Nook. It's off of Broadway.
16 And they sold bottles of this stuff. And it was actually
17 called "The Stuff." And it was about \$20 a bottle. And it
18 was a detoxifier. And you -- as long as you didn't smoke
19 weed for a couple days, you could drink it, and -- about an
20 hour before you had to take a test, you drank that, and then
21 it would clean out your system.

22 Q. And it would also make the test results look --

23 A. Yeah. For like five or six hours your -- it would
24 appear that you had not been using drugs.

25 Q. And so you did that on a regular basis while you

1 were in the program.

2 A. When I needed to, yes.

3 Q. Let's go back to the day of your arrest, March the
4 10th. After you finished the interview we've seen on
5 videotape, was that when you went driving around with
6 Detective Nichols and others?

7 A. I believe so, yes.

8 Q. And have you seen the videotape of the trip you took
9 with Nichols?

10 A. Yes.

11 Q. You okay?

12 A. I'm fine.

13 Q. You need a cup of coffee or anything?

14 A. Not right now. Thank you.

15 Q. Okay. And you've had an opportunity to review that
16 videotape.

17 A. Yes.

18 MR. ROGERS: Your Honor, I would now offer into
19 evidence Defendant's Exhibit C, which I will represent to the
20 Court and counsel is a DVD copy of the videotape of the car
21 interview of Mr. Erickson.

22 MR. CRANE: Yeah. Judge, assuming that's a complete
23 copy of what we provided to the defense in the normal course
24 of discovery, I don't have any objection to defense playing
25 it with this witness.

1 MR. ROGERS: And this is 27 minutes and 22 seconds?
2 Sound about right?
3 MR. CRANE: Yeah. I think that sounds right.
4 THE COURT: Are you offering --
5 MR. ROGERS: Yes, Your Honor.
6 THE COURT: -- Defendant's C?
7 MR. ROGERS: Defendant's --
8 THE COURT: Exhibit C?
9 MR. ROGERS: Yes.
10 THE COURT: Defendant's Exhibit C is admitted.
11 - - -
12 Defendant's Exhibit C admitted into evidence.
13 - - -
14 MR. ROGERS: And ask leave to publish it to the
15 jury, Your Honor.
16 THE COURT: You may.
17 MR. ROGERS: And once again --
18 THE COURT: How long did you say it was?
19 MR. ROGERS: 27 minutes and 22 seconds.
20 THE COURT: And is it --
21 MR. ROGERS: Mr. Nichols does not jump out of the
22 car. So it goes straight through.
23 THE COURT: All right. Well, hopefully not.
24 MR. CRANE: And once again --
25 THE COURT: Let me just ask, before you turn it on,

1 would the jurors like to take just a brief break before?
2 Because this will be playing 'til probably -- for another 27
3 minutes and 22 seconds. If you need to take a brief break,
4 that's fine. If not, we'll go ahead and play it.

5 MR. ROGERS: Once again, Mr. Erickson, pay
6 attention, because I'm going to ask you questions afterward.

7 THE COURT: And let us know if it's not clear or
8 you're not able to hear.

9 (Defendant's Exhibit C played.)

10 Q. Now, Mr. Erickson, the purpose of you driving around
11 with Detective Nichols was for you to tell him, as best you
12 could, places you remembered being that night; right?

13 A. Yeah.

14 Q. And we're coming back to Defendant's Exhibit B,
15 which is now in evidence. And I'm trying to put it so
16 everybody can see it.

17 MR. ROGERS: Can you guys see it there?

18 Q. Can you see it?

19 A. Yeah.

20 Q. Okay. Basically -- you again start out with the
21 police. You're driving north here on First Street. Correct?

22 A. We're driving?

23 Q. Yeah. North on First Street?

24 A. Well, that's where -- that's where we parked before
25 we went into the club.

1 Q. No. I'm talking about you and Detective Nichols.
2 A. Oh, okay. Yeah. All right.
3 Q. You and Detective Nichols didn't go to the club.
4 A. Yeah. Yeah.
5 Q. If so, it's not on the video.
6 A. Yeah.
7 Q. Okay. You start here by By George's, by the club;
8 right?
9 A. Yeah.
10 Q. All right. And you go north on First Street.
11 A. Yeah.
12 Q. And --
13 A. That's where I told him that Ryan parked.
14 Q. That's where you told him Ryan parked.
15 A. Yeah.
16 Q. That's where you told us today Ryan parked.
17 A. Correct.
18 Q. Then you turned -- let me --
19 A. Took a right on Ash there.
20 Q. Took a right on Ash. And you drive down here, to
21 the intersection of Providence and Ash; correct?
22 A. Yeah. That's correct.
23 Q. And there's the Break Time. We saw it on the
24 videotape; right?
25 A. Yeah.

1 Q. Then you drive on around and back on around east on
2 Ash to Fourth Street, turn, go south on Fourth to Walnut, and
3 back around to Providence?

4 A. Yeah.

5 Q. While you're driving with the policeman.

6 A. Yes.

7 Q. And then come up and come down the alley; correct?

8 A. That's correct.

9 Q. And it's during that little loop that you ask him
10 where the crime happened; right?

11 A. That's right.

12 Q. And he --

13 A. I believe I asked him, "Where exactly did this
14 happen?"

15 Q. Right. And then you drive up the alley, and he
16 shows you where that white or beige jeep with the dark top is
17 parked.

18 A. Yeah.

19 Q. He tells you that's where Heitholt's car was parked;
20 is that correct?

21 A. Yes.

22 Q. You didn't know that before.

23 A. I knew that on the night that we did it. I couldn't
24 remember it before then.

25 Q. You didn't know that during this interview on March

1 the 10th, before that -- before Nichols told you.

2 A. I couldn't -- I couldn't recall it then, no.

3 Q. Okay. And the other thing different about the
4 alleyway was the -- different from March -- different between
5 November 1st and March 10th was that the Dumpster enclosure
6 was not there; correct?

7 A. Yes.

8 Q. So there's no Dumpster enclosure.

9 A. Yes.

10 Q. In fact, some of the shots of the cameras as the car
11 comes up the alleyway look through where the Dumpster
12 enclosure would have been.

13 A. I believe so.

14 Q. That Dumpster enclosure was tall, wasn't it?

15 A. Yeah. I believe so.

16 Q. Taller than you.

17 A. Yes.

18 Q. But when you get up there, and Nichols asks you
19 which way you left, you look north and west; correct?

20 A. Yeah. I looked that way. I couldn't -- I couldn't
21 really remember which way left. I just know that -- I
22 knew that we crossed back across Providence.

23 Q. And you told him, "That way." And when you said
24 "that way," you were looking -- indicating, with the
25 direction of your eyes, north and west, back towards the

1 Break Time; right?

2 A. Yeah -- yeah. Yeah. I suppose that's right.

3 Q. Okay. And then is when he told you, "Well, don't
4 you think you might have gone around the building and then
5 back to the Break Time?"

6 A. I said that was possible too.

7 Q. And you said, "That's possible. I don't remember."
8 Kind of an "anything's possible" kind of deal? Right?

9 A. Not anything's possible. I knew that -- that we
10 went -- we went around and that we went -- we ended up
11 crossing Providence. And I knew -- I saw Dallas at the
12 intersection. I wasn't sure exactly where I saw him, but I
13 knew I saw him at an intersection on Providence, and I saw
14 him after we did the robbery.

15 Q. And you were sure, at the time you were talking to
16 Nichols, driving around in the car, that you saw him at this
17 intersection, the intersection of Providence and Ash, by the
18 Break Time, didn't you?

19 MR. CRANE: Now that misstates the evidence he just
20 testified to. He wasn't sure if he went around the building
21 and saw him or before.

22 THE COURT: Would you rephrase your question,
23 please.

24 Q. My question is: You were sure, when you were
25 driving around with Mr. Nichols, that the intersection where

1 you saw Dallas Mallory was the intersection of Providence and
2 Ash, where the Break Time is.

3 A. I -- I wasn't sure -- completely sure. I thought
4 that's may -- that may have been where I had seen him.
5 Honestly. I mean --

6 Q. Well, he asked you how long it took, and you looked
7 right at the Break Time, and you said, "I don't know. Maybe
8 no time at all. Five seconds? If that's what it takes to
9 run there."

10 A. Well, if that's how -- how far is that? I still
11 hadn't completely confirmed that that's where I saw Dallas.

12 Q. That's what you were trying to do, though, say,
13 "That's where I saw him, and it couldn't have taken very long
14 to get there"; right?

15 A. That's if I saw him there.

16 Q. That's right. And you said you saw him very quickly
17 after leaving the parking lot.

18 A. Yeah. I also said I wasn't completely sure where I
19 saw him.

20 Q. Okay. Now, Detective Nichols said that he was going
21 to familiarize you with the area; right? You heard that?

22 A. Yeah.

23 Q. And that's when he starts going down Fourth Street,
24 past the Broadway Diner. Right?

25 A. Yeah.

1 Q. Now, you have lived in Columbia several years.

2 A. Yes.

3 Q. Were you familiar with that downtown area?

4 A. A little bit. Not -- not real familiar with it,

5 but --

6 Q. Okay.

7 A. -- a little bit.

8 Q. You knew -- had you been in Flat Branch Park before?

9 A. No. No. I had been to Flat Branch Restaurant

10 before, but -- I mean, I couldn't name -- I couldn't tell you

11 probably where Walnut Street was. I couldn't tell you where

12 Ash was. I could tell you where Providence and -- Providence

13 and Broadway were.

14 Q. Okay.

15 A. I didn't spend a lot of time downtown.

16 Q. Had you been in the park before --

17 A. No.

18 Q. -- whatever its name might have been?

19 A. No.

20 Q. Okay. And when you saw the Broadway Diner, nothing

21 looked familiar to you.

22 A. Not at that time, no, it didn't.

23 Q. And when you drove on down further and saw Flat

24 Branch Park, nothing looked familiar to you.

25 A. No.

1 Q. And when you drove over here to Fifth Street, and on
2 down by the campus, nothing looked familiar to you.

3 A. No.

4 Q. And when you drove back across to Locust and
5 Providence, nothing looked familiar to you.

6 A. No.

7 Q. And when you passed the Phillips 66 station, which
8 Nichols referred to as a convenience store, it didn't look
9 familiar.

10 A. No.

11 Q. And you didn't look to the left and see the Osco
12 parking lot and say, "Oh, my, that looks familiar," did you?

13 A. No, I didn't.

14 Q. Even though the Osco parking lot is right across
15 from the Phillips station.

16 A. That's correct, yes.

17 Q. And then you came back, across Broadway, and you
18 were driving around, looking for the -- what you call wooden
19 embankment; is that correct?

20 A. Yeah. I remember I had to climb up something. I
21 remember having a hard time doing it. And I couldn't
22 remember exactly what it was. So we drove by a couple
23 things. They looked a little familiar. And I said, "That
24 may have been what I had to climb up."

25 Q. And when you saw the wooden embankment, where was

1 that?

2 A. I think that was behind the bank. One of them --
3 one of them was behind the car rental place. I think. I
4 don't know. And one of them was behind the bank, I think.
5 I'm not sure.

6 JUROR: Your Honor.

7 THE COURT: Yes, sir.

8 JUROR: Can I clarify where a location is?

9 THE COURT: You may not ask questions, but hopefully
10 the attorneys will make that clear to you.

11 MR. ROGERS: Hopefully I will. I may be able to.

12 THE COURT: If you're not able to see something, do
13 let me know.

14 JUROR: But two exhibits show it two different
15 places.

16 MR. ROGERS: Okay. I might need to clarify that
17 myself.

18 Q. Let me ask you this. By George is at the corner of
19 First and Broadway; is that correct?

20 A. Yeah.

21 Q. Would that be here where I'm putting a red X?

22 JUROR: Okay.

23 Q. And so this labeled "By George" is actually wrong?
24 Is that a fair statement?

25 JUROR: Yes.

1 MR. CRANE: Just for the record --

2 MR. ROGERS: I'm asking the witness. I'm sorry.

3 MR. CRANE: Just so we can make a record of this, am
4 I correct that your exhibit --

5 MR. ROGERS: Exhibit B had the wrong building.

6 MR. CRANE: -- your exhibit, you labeled another
7 building "George's" --

8 MR. ROGERS: Right.

9 MR. CRANE: -- and had that wrong, marked wrong on
10 your exhibit --

11 MR. ROGERS: Right.

12 MR. CRANE: -- all this time.

13 MR. ROGERS: All this time. And I'm now going to
14 have to change it, if I can.

15 (Mr. Rogers marking on Defendant's Exhibit B.)

16 THE COURT: And we're talking about Exhibit B; is
17 that correct?

18 MR. ROGERS: Talking about Exhibit B.

19 MR. CRANE: Defendant's Exhibit B.

20 MR. ROGERS: Defendant's Exhibit B. And I have now
21 removed the label that says "By George" from the wrong place,
22 and I'm going to put it on the right place.

23 Q. Does that square with your recollection?

24 A. Yes. Yes.

25 Q. Okay. I'm going to get something that erases and

1 erase the marks I made.

2 Okay. And you, of course, from where you are, can't
3 even read the little "By George" on the black and white
4 thing, can you?

5 A. I didn't even notice it.

6 Q. Okay. Fair enough.

7 Now, behind what bank is the wooden -- or what
8 building is the wooden fence that you were talking about?

9 A. I believe it's right there, at the corner of
10 Providence and Ash. I think it's the Boone County National
11 Bank. I think that's it.

12 Q. You think it's right here where you see these trees?

13 A. Well --

14 THE COURT: If you need to step down to see, I will
15 permit you to step down.

16 Q. Yeah.

17 A. I mean, like I said, it's hard to tell, because
18 everything's in black and white, and a lot of stuff looks the
19 same, but. Let's see. I think that's the bank right here.
20 And I think that would be the car rental place. So one of
21 them was behind the car rental place. That was that fence
22 right there. And then this retaining wall was -- I think it
23 was -- well, it was somewhere over here.

24 Q. Okay.

25 A. Where the bank is.

1 Q. All right. And let me ask you this. Would it be
2 easier to tell on --

3 THE WITNESS: Shall I go back up there?

4 THE COURT: You can step back up.

5 Q. On government's exhibit 9, do you see -- or State's
6 Exhibit 9, do you see where it might be?

7 MR. CRANE: What are we looking for now?

8 MR. ROGERS: The retaining wall.

9 A. The retaining wall is right here. I think.

10 Q. Okay.

11 A. I think. And that fence I was talking about I think
12 is -- it's on -- it's one of those two. I think it's that
13 one right there.

14 Q. Okay. And so, to put the two together, the fence
15 would be around here someplace?

16 A. Yeah. That's correct.

17 Q. And the retaining wall -- I'm having trouble finding
18 it. Maybe it's not shown on this picture.

19 MR. CRANE: You're welcome to just stick with 9, if
20 you want to.

21 MR. ROGERS: Well, I want to draw on it, though, and
22 I would hate to mess up your beautiful exhibit.

23 MR. CRANE: Yeah, I don't really want the grease
24 pencil on there too bad.

25 Q. Okay. Anyway, basically --

1 A. I mean, I can show you if you need me to.

2 Q. Yes, please.

3 THE WITNESS: Can I get back down?

4 THE COURT: You may step down.

5 A. I think the retaining wall -- well, is this a
6 recent -- a more recent --

7 Q. It's an older picture, I think.

8 A. It's an older picture? It might not have even been
9 there then.

10 Q. Okay.

11 A. But I think it would have been right there.

12 Q. Right around here?

13 A. Yeah.

14 Q. Okay. So basically what you're remembering at the
15 time you're talking to Nichols is coming across Providence up
16 here by Ash, talking to Mallory, and then somehow coming
17 across this direction?

18 A. It was a -- it was a thought. It was feasible. I
19 couldn't really remember which way that I came. And I
20 remember -- there -- like I said before, there were certain
21 frames, like if you pause a movie, I would remember. And
22 other than that, for a long time I couldn't remember anything
23 other than that. And so when I saw things that looked like
24 memories that I had that night, I got confused, and I said,
25 "Well, that might have been in it. I might have gone that

1 way." I knew I had seen Dallas at an intersection. I got
2 confused on that also.

3 Q. And you'll agree that there was nothing down in this
4 area that looked familiar, even though Nichols was pointing
5 it out to you.

6 A. At the time, no.

7 Q. Now after doing the little drive-around with
8 Detective Nichols, you were again interviewed by Detective
9 Nichols back in the videotape room; right?

10 A. That's correct.

11 Q. And you have seen that tape recording of that
12 interview too, haven't you?

13 A. Yes, I have.

14 Q. And you've gone over it with your lawyer.

15 A. Yes.

16 Q. And you've gone over it with Mr. Crane.

17 A. Yes.

18 Q. Now then --

19 MR. CRANE: Judge, we got a juror raising his hand
20 back there.

21 JUROR: Judge, we really need to stand a minute and
22 maybe take a short break, if possible.

23 THE COURT: I will be glad to do that. Why don't --
24 and particularly if you need to take a rest room break or
25 something like that, why don't we take about a five- or

1 ten-minute break and let you go out. And then we'll finish
2 up with this.

3 JUROR: Thank you, Judge.

4 THE COURT: Okay?

5 Ladies and gentlemen, the Court again reminds you of
6 what you were told at the first recess of the Court. Until
7 you retire to consider your verdict, you must not discuss
8 this case among yourselves or with others, or permit anyone
9 to discuss it in your hearing. You should not form or
10 express any opinion about the case until it is finally given
11 to you to decide. Do not read, view, or listen to any
12 newspaper, radio, or television report of the trial.

13 We'll take a really brief recess. And you may be
14 excused at this time.

15 JUROR: Thank you, Judge.

16 THE COURT: Thanks for letting me know.

17 - - -

18 The following proceedings were held out of the presence
19 of the jury:

20 THE COURT: I don't know if the witness needs to be
21 excused or not for this brief --

22 THE WITNESS: I wouldn't mind taking a break, if you
23 don't mind.

24 THE COURT: You may step down. And ask the -- if
25 this witness needs to be excused also, take a break. You may

1 step down.

2 MR. ROGERS: 22:41 on this one. So we're timing it
3 pretty well.

4 THE COURT: I don't know that you'll finish with
5 your cross-examination.

6 MR. ROGERS: I will not finish with my cross, but I
7 can I think finish with his video maybe.

8 THE COURT: All right. That would be good.

9 MR. ROGERS: Does that sound like a plan?

10 THE COURT: That sounds like a good plan. And if
11 counsel wants to take a brief recess --

12 MR. ROGERS: I'm running out there even as we speak.

13 (Recess taken.)

14 - - -

15 The following proceedings were held in the presence of
16 the jury:

17 THE COURT: Quiet, please.

18 You have marked Defendant's D? A video?

19 MR. ROGERS: That's correct, Your Honor.

20 THE COURT: And that is offered, is it?

21 MR. ROGERS: It is now being offered. It's the
22 interview by Jeff Nichols, of March 10th, 2004, 5 p.m.
23 Running time: 22 minutes and 41 seconds.

24 THE COURT: Does the state have an objection?

25 MR. CRANE: Again, for the record, as long as that's

1 the same tape, in it's entirety, that the state tendered to
2 the defense in discovery, I don't have any objection.

3 MR. ROGERS: And yes, it is.

4 THE COURT: Exhibit D will be admitted.

5 - - -

6 Defendant's Exhibit D admitted into evidence.

7 - - -

8 THE COURT: And assuming that the reporter will not
9 have to report this, since it is on a DVD.

10 MR. ROGERS: Right.

11 THE COURT: Available if need be.

12 MR. ROGERS: Thank you.

13 THE COURT: All right. And after this, the
14 understanding is is that the jury will recess for the evening
15 and come back tomorrow morning at 8:30 to begin again. Yes?

16 MR. ROGERS: Fine with me.

17 THE COURT: All right. You may play it then.

18 - - -

19 CHARLES TIMOTHY ERICKSON,

20 resumed the stand and testified further:

21 RESUMED CROSS-EXAMINATION

22 BY MR. ROGERS:

23 Q. Once again, pay attention, Mr. Erickson.

24 (Defendant's Exhibit D playing.)

25 THE COURT: Are there places where there is nothing

1 going on? You might move it along.

2 (Defendant's Exhibit D played.)

3 MR. ROGERS: That's the end of the tape, Your Honor.

4 THE COURT: Is that the end of the -- of this?

5 MR. WEIS: Yes.

6 THE COURT: Ladies and gentlemen, we will take our
7 evening recess at this time.

8 The Court again reminds you of what you were told at
9 the first recess of the Court. Until you retire to consider
10 your verdict, you must not discuss this case among yourselves
11 or with others, or permit anyone to discuss it in your
12 hearing. You should not form or express any opinion about
13 the case until it is finally given to you to decide. Do not
14 read, view, or listen to any newspaper, radio, or television
15 report of the trial.

16 We will reconvene in court at 8:30 in the morning.
17 We'll see you at that time. Have a good supper and a restful
18 night.

19 - - -

20 The following proceedings were held out of the presence
21 of the jury:

22 THE COURT: You may step down.

23 I don't know if we can find --

24 THE WITNESS: There's Bill right there.

25 THE COURT: Kevin? Kevin?

1 MR. CRANE: Yes, ma'am.

2 THE COURT: We need to get a deputy over here for --

3 MR. CRANE: Okay.

4 THE COURT: And we need to make sure that both

5 Mr. Ferguson and Mr. Erickson are here before 8:30 in the

6 morning.

7 MR. HAWES: Yes, Judge.

8 THE COURT: I don't want them to run into the jury,

9 and I want them to be available.

10 MR. HAWES: Yes, Judge.

11 THE COURT: Okay. Anything further that the state

12 needs to discuss then this evening?

13 MR. CRANE: I don't think so.

14 THE COURT: The defense? Anything further this

15 evening?

16 MR. ROGERS: I don't believe so, Your Honor.

17 THE COURT: All right. We will be in recess. This

18 courtroom will be locked, so if there's any equipment that

19 you need to leave here, you may do that. And we'll see you

20 at 8:30 in the morning then.

21 Court will be in recess.

22 (Adjourned for the evening.)

23 - - -

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P R O C E E D I N G S

October 18, 2005

- - -

The following proceedings were held out of the presence of the jury:

THE COURT: Case 165368, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Your Honor.

THE COURT: The defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: Mr. Crane, we had another case scheduled for today.

(Matters not pertaining to this case were heard.)

THE COURT: Jury ready then to come in?

DEPUTY COURT MARSHAL BAER: Yes, Judge.

THE COURT: All right. If you would bring the jurors in, please.

- - -

The following proceedings were held in the presence of the jury:

THE COURT: Good morning, ladies and gentlemen. I trust you had a restful evening. I don't know if you were informed about the Cardinals' good fortune.

JUROR: Yes, we were.

THE COURT: All right. A miracle. In the ninth

1 inning.

2 Anyway, if you would please answer as your names are
3 called, please.

4 (Roll call by Eileen Moore, Deputy Clerk.)

5 THE COURT: The clerk may be excused at this time.

6 (Clerk excused.)

7 THE COURT: When we concluded last evening, there
8 had been a video played. I believe it was Defendant's
9 Exhibit D. And you may inquire further in cross-examination
10 of this witness.

11 MR. ROGERS: Thank you, Your Honor.

12

- - -

13

CHARLES TIMOTHY ERICKSON,

14 resumed the stand and testified further:

15

RESUMED CROSS-EXAMINATION

16

BY MR. ROGERS:

17

Q. Good morning, Mr. Erickson. As the Court has just

18

reminded us, at the end of yesterday's session we watched the

19

video of your interrogation by Detective Jeff Nichols; is

20

that correct?

21

A. That's correct.

22

Q. And were you paying attention to that?

23

THE COURT: Pardon me just a minute. The

24

microphones are not on. And there is a mic on the bench,

25

both near you as well as near this witness. If we could turn

1 it on, please.

2 It's on now. All right.

3 MR. ROGERS: Did anyone have trouble hearing my last
4 question?

5 Thank you.

6 Q. Now, Mr. Erickson, is that videotape from yesterday
7 afternoon still fresh in your mind?

8 A. Yes.

9 Q. We don't need to see it again before we ask you
10 questions about it.

11 A. No.

12 Q. Thank you. First of all, during that videotaped
13 interrogation, you drew a picture or a diagram of the tire
14 tool that you said Mr. Ferguson took from his car and handed
15 to you; is that correct?

16 A. Yes, I did.

17 Q. I'm going to show you what has been marked for
18 identification as State's Exhibit 22.

19 A. Okay.

20 Q. You see that?

21 A. Yeah.

22 Q. Is that, in fact, at least this drawing here, in the
23 upper left-hand corner of it, what you drew for Detective
24 Nichols on March 10th, 2004?

25 A. That's correct, yes.

1 MR. ROGERS: Your Honor, at this time I would move
2 the admission of State's Exhibit 22. And --

3 MR. CRANE: I meant to ask the witness about it when
4 I had him. I don't have any objections to it.

5 THE COURT: State's Exhibit 22 is admitted.

6 - - -

7 State's Exhibit 22 admitted into evidence.

8 - - -

9 MR. ROGERS: And ask permission to publish it.

10 THE COURT: As long as you are publishing it through
11 a video means. If we have individual copies, we have to have
12 enough for each of the jurors. But if you're publishing it
13 on a video display, that's fine.

14 MR. CRANE: Yeah. You know, this is the thing that
15 works better with that -- dimming the lights on. Here,
16 I'll -- is that okay, Judge?

17 THE COURT: Yes. You may turn them off -- dim them
18 somewhat, if it...

19 (Lights dimmed.)

20 Q. Mr. Erickson, is that what you drew?

21 A. Yes.

22 Q. And the notation over here, "18-24 inches," was
23 written by Mr. Nichols?

24 A. Yeah. That's correct.

25 Q. And you saw, on the videotape, how you showed how

1 long you thought it was, and he moved up to you and moved
2 your hands out a little bit and then told you, was that 18 to
3 24 inches? Right?

4 A. I don't know.

5 Q. Okay. You don't know whether that happened on the
6 videotape?

7 A. I can't remember, no.

8 Q. But you do remember agreeing with him, saying that
9 it was 18 to 24 inches.

10 A. Yeah. It was -- I can't do it now, but it was
11 somewhere in that neighborhood.

12 Q. All right.

13 A. I mean, that's an estimate. I'm not sure how long
14 exactly it was.

15 Q. And you told us yesterday, I think, that you had
16 taken an attachment off of this tool?

17 A. Yeah. Yes, I did.

18 Q. And was that down at this end?

19 A. No. Basically I was having problems. I couldn't --
20 I knew that there was something on the end of it. On the top
21 part. The part that I -- I used to strike the victim with.
22 And I couldn't remember exactly what was -- what was on
23 there. I was having -- I was having problems remembering
24 that. And that was -- that was what I thought at the time
25 that might have been there, but I was wrong.

1 Q. So is the attachment that you took off down at this
2 end, where you've drawn the crook?

3 A. Yeah.

4 Q. And that was your best memory as of March 10th, when
5 you were telling Detective Nichols, of what this looked like.

6 A. Yeah, that was a possibility, yeah.

7 Q. A possibility.

8 A. Yeah.

9 Q. So you were not --

10 A. I mean --

11 Q. -- certain?

12 A. I wasn't certain, yeah, that's correct. I wasn't
13 certain.

14 Q. Because you were not certain on March 10th, talking
15 to Detective Nichols, that you were even there; right?

16 A. On some level I was certain, but.

17 Q. And on that level, were you certain this is what it
18 looked like?

19 A. No.

20 Q. That's what you drew for him.

21 A. Yeah.

22 THE COURT: Are you going to be using the video for
23 any other exhibits at this point?

24 MR. ROGERS: I don't believe so, Your Honor.

25 THE COURT: We can turn the -- if we can turn the

1 lights back on then. Don't want anyone falling asleep.

2 MR. ROGERS: Especially not me.

3 THE COURT: Well, hopefully that wouldn't happen,
4 sir.

5 Q. It's fair to say, Mr. Erickson, that several times
6 during your interview with Detective Nichols, you attempted
7 to tell him that you were not sure that you had been involved
8 in the death of Mr. Heitholt. Isn't that correct?

9 A. That's correct.

10 Q. And, in fact, towards the beginning of the
11 interview, he told you what Ryan Ferguson had told the police
12 that same day.

13 A. That's correct.

14 Q. And what Ryan told the police, paraphrasing what
15 Mr. Nichols told you, was: "I didn't do it. I didn't -- I
16 wasn't there. And if Chuck says I did, he must be crazy."

17 A. Yeah. That didn't change my memory, though.

18 Q. Okay. Well, that's what Mr. Nichols told you. And
19 your response to that was: "Well, I don't know," wasn't it?

20 A. There was a lot that I didn't want to accept at that
21 point. The more I accepted, the more I remembered; the
22 bigger the price I had to pay; the higher the cost.

23 Q. Did you hear the question?

24 A. Yeah. I just answered you.

25 Q. The question was: Your response to that statement

1 by Detective Nichols, about what Ryan Ferguson had said, was
2 "I don't know," wasn't it?

3 A. Yeah.

4 Q. And when you said that, you meant to convey that you
5 did not know whether you were being accurate in what you
6 were -- what you had told Detective Short earlier and
7 Detective Nichols earlier during the drive around the
8 neighborhood.

9 A. Yeah, I knew some things were accurate. I wasn't
10 certain that everything was accurate.

11 Q. But what you said "I don't know" in response to was
12 the statement that Ryan Ferguson wasn't there, had nothing to
13 do with it, and if you're accusing him, you must be crazy.
14 Right?

15 A. No. I don't know.

16 Q. That's not what you said "I don't know" in response
17 to?

18 A. I'm not sure.

19 MR. ROGERS: Would you, Mr. Weis, play the segment
20 "I don't know."

21 MR. WEIS: Which one?

22 MR. ROGERS: "I don't know."

23 (Excerpt played.)

24 Q. Do you remember saying that?

25 MR. CRANE: Well, whoa, wait --

1 A. I mean --

2 MR. CRANE: -- what was the question? Where are we
3 at there?

4 MR. ROGERS: Could you back that up maybe about 30
5 seconds?

6 MR. WEIS: No.

7 MR. ROGERS: Okay.

8 MR. CRANE: All right. Well, I guess I'll withdraw
9 my objection. He said, "I don't know."

10 Q. Well, let me ask you this.

11 A. I don't know what was said before that. I mean --

12 Q. You don't know what was said before that. Would you
13 dispute that the question was: "Okay. I wanted to start off
14 by just telling you a little bit about what -- what I've
15 learned. And that is that, you know, the officers, they've
16 gone to Kansas City, and they've gotten in touch with Ryan.
17 And to make a long story short, Ryan is saying, 'I don't know
18 anything; wasn't there. I don't know what Chuck's talking
19 about. He's crazy. You know, if it happened, if it went
20 down the way he said, obviously he did it himself.' And
21 pretty much that's what's happening."

22 Now, that's what's said by Detective Nichols. And
23 then you have the response that we just saw. "I mean" --

24 A. Not that -- I said "I don't know" after that?

25 Q. Right.

1 A. I don't know what I meant by that. Honestly. I was
2 just -- I mean --

3 Q. Well, after --

4 A. I really thought I had done this. And I knew that
5 if I did it, he was with me. And he's sitting here denying
6 it. Then I didn't really know what to think at that point.
7 And I was just -- like I said, I was -- I was unsure, I was
8 hesitant, and I didn't want to accept what I had done.

9 Q. And Detective Nichols then went on to talk to you
10 about Ryan's denial, didn't he?

11 A. Yes.

12 Q. And then you again said to Detective Nichols, "I
13 don't know. I mean, I don't even -- it's just so foggy.
14 Like, I could just be sitting here and fabricating all of it
15 and not know. Like, I don't know. I don't." Do you
16 remember saying that?

17 A. Yeah.

18 Q. Do you remember seeing yourself say that on the
19 video yesterday?

20 A. Yes.

21 Q. And there's no question that what you were trying to
22 tell Detective Nichols is that you didn't know at that point
23 whether you had participated in the Heitholt homicide or not;
24 correct? Isn't that what you were trying to say?

25 A. Yes.

1 Q. And you told him even that you might be sitting
2 there fabricating it; right?

3 A. Yeah. That's what I was hoping.

4 Q. And by "fabricating," you mean making it up.

5 A. That's what I was hoping, yes.

6 Q. And you were hoping that.

7 A. Yes, I was.

8 Q. And you were hoping that that was what was really
9 going on.

10 A. Yeah. That's correct. I was hoping that.

11 Q. And then he tried to tell you, "Oh, you can't be
12 fabricating it, because you've told us things that only
13 somebody who was there would know." Right?

14 A. Yeah. I believe he said something like that.

15 Q. And your response to him was: "Hey, I read about
16 all this stuff in the paper."

17 MR. CRANE: Well, I'm going to object to that. What
18 section are you talking about where he says "all this stuff
19 in the paper"?

20 MR. ROGERS: I'm not -- that's a paraphrase.

21 MR. CRANE: Okay. If you're going to -- Judge, I
22 would ask, if he's going to paraphrase, that he indicate
23 that, because he's -- he's got a record. They gave me a
24 transcript of it yesterday. And appropriate impeachment
25 would be that he not paraphrase, because that's the

1 indication. He was indicating that that's what the witness
2 said on the video. And the witness is trying to remember,
3 after seeing it yesterday, what he said on the video. I
4 think. But if he paraphrases and represents that it's from
5 the transcript or the video, I don't think that's fair.

6 MR. ROGERS: I was not making that representation,
7 Judge, and I'm happy to make it clear that I was not making
8 that representation, and I will, in fact, quote directly.

9 Q. And my question will be: Do you remember saying
10 that during the videotaped interview of -- by Detective
11 Nichols? Detective Nichols asked you: "This is -- all
12 right. This is after reading the newspaper article in
13 October." And you say, "Uh-huh." Do you remember that?

14 A. Yeah.

15 Q. And then he says -- excuse me. I'm sorry. This is
16 you, saying to Detective Nichols -- I'm getting my Qs and As.
17 Detective Nichols' question: "And my understanding is -- and
18 I'm just going to try to briefly explain to you what my
19 understanding is, is that you guys needed money." And then
20 you say to Detective Nichols, "This is -- all right. This is
21 after reading the newspaper article in October." And he
22 says, "Uh-huh." Does that sound better?

23 A. Yeah. I was more or less explaining everything. It
24 wasn't just that. I was trying to -- I mean, I wanted to --
25 I wanted to explain it, and I wanted to try to remember it,

1 but -- I mean, I'm trying to explain my response, so if
2 you'll just hold on a second. But at the same time, I didn't
3 want to. I didn't want to take that leap. I didn't want to
4 sacrifice all that I had. I didn't want to go to prison for
5 the rest of my life.

6 Q. But what you said to Detective Nichols in the
7 videotape is: "And this is kind of put together with -- I
8 mean, I don't know if I'm just flipping out or whatever."

9 A. Yeah, but I also said that I was --

10 Q. Excuse me. I'm not done yet.

11 MR. CRANE: Can you tell me where you're at?

12 MR. ROGERS: I'm on page 5, beginning at line 14.

13 Q. "And this is kind of put together with -- I mean, I
14 don't know if I'm just flipping out or whatever. But, I
15 mean, this is kind of what I put together with what could
16 have happened. I remember we were at the club. We ran out
17 of money. Like, he'd been asking his sister to borrow money.
18 And from there on, I'm just kind of presuming what happened.
19 I'm making presumptions based on what I read in the
20 newspaper." Do you remember saying that?

21 A. Yes, I do.

22 Q. And that was an accurate description of what was
23 going on in your mind at the time you were talking to
24 Nichols, wasn't it?

25 A. Not completely, no.

1 Q. So you were lying to Nichols.

2 A. I wasn't lying, but I was worried about myself also.

3 Q. And so you're trying to deflect responsibility from
4 yourself by trying to sound like you read everything in the
5 newspaper? Is that what you're telling us?

6 A. What I was saying was: I was still unsure about it.
7 And that was one possibility that had crossed my mind, and
8 that was something that I was hoping had happened.

9 Q. So you were trying to tell Detective Nichols: "I'm
10 not sure. I could be making this all up. I read all this
11 stuff in the newspaper, you know. The part I remember is
12 being at the club with Ryan." Is that the gist of what you
13 were trying to convey to Nichols?

14 A. I don't know. I'm not sure.

15 Q. Okay.

16 A. I mean, not -- not completely. Not as far as you're
17 taking it, no.

18 Q. Well --

19 MR. ROGERS: Could you play the part marked
20 "newspaper"?

21 (Excerpt played.)

22 Q. Do you remember it?

23 A. Yeah, I remember saying that --

24 Q. Okay.

25 A. -- but I'm saying, I don't think that was an

1 accurate description of what was going on in my mind at the
2 time. I -- I was backing off a little bit once I realized
3 how serious the situation was. I'm -- do you understand?

4 Q. Claiming you didn't realize how serious the
5 situation was before then.

6 A. Well, I did, but it took a little while to kick in.
7 I mean, one -- at one time I'm sitting here telling a friend
8 that I think I may have done something, and the next thing I
9 know I'm sitting in the police station. And I'm -- I don't
10 know. Maybe if you had been through something like this, you
11 would understand where I'm coming from.

12 Q. Well, we'll go on and talk about that, because
13 that's when Detective Nichols tells you: "Well, you're
14 making accurate presumptions that, like I said, you would
15 only know if you were there." Do you remember him telling
16 you that?

17 A. Yes.

18 Q. And you asked him: "Like what? The lady, the
19 cleaning lady?"

20 A. Yeah.

21 Q. Do you remember that? And he said, "That's one."
22 Correct?

23 A. That's correct.

24 Q. And you said, "That was in the newspaper."

25 A. But that wasn't in the newspaper.

1 Q. Was?

2 A. Was not.

3 Q. Was not.

4 A. No. In the newspaper it said I believe a janitor
5 cleaning lady went to go get help. It didn't say anything
6 about one of the suspects told the cleaning lady to go get
7 help. That was never in the newspaper.

8 Q. We'll see what was in the newspaper, but --

9 A. Okay.

10 Q. What you told him was, "That was in the newspaper,"
11 isn't it?

12 A. I -- I thought it may have been, I was hoping it may
13 have been, because at that point, if it was in the newspaper,
14 then there was a possibility that I was just fabricating
15 this; that I was just, you know, reading about this and just
16 thinking I may have done it. But if it wasn't in the
17 newspaper, then how would I know that someone told the
18 cleaning lady to go get help?

19 Q. Well, that's what he asked you, wasn't it?

20 A. Exactly.

21 Q. And he said, "Well, no. About what was specifically
22 said to that lady." And your answer was, "She went to get
23 help? I mean." Isn't that right?

24 A. I -- I don't know. You can replay it if you want.

25 MR. ROGERS: Can you play the cleaning lady part,

1 Mr. Weis? "Cleaning lady."

2 (Excerpt played.)

3 MR. CRANE: Wait. Can we keep going?

4 MR. WEIS: Sure. Can you tell me where that begins
5 and ends? And then I can show it.

6 MR. CRANE: Well, I guess I can do it when I'm --
7 forget it. You do what you want. I can run that by later.

8 MR. ROGERS: Go ahead and play the next part.

9 MR. WEIS: Tell me where it begins and ends, because
10 I don't have that sheet.

11 MR. ROGERS: It's on page 7 --

12 MR. WEIS: No. I need the time stamp, which is on
13 your sheet.

14 MR. ROGERS: Oh. Okay.

15 Start at 906.

16 (Excerpt played.)

17 MR. ROGERS: Stop there. Stop there.

18 Q. All right. So once again, you're trying to explain
19 to Mr. Nichols that, "Look, I'm just here trying to come up
20 with something that I can -- think I remember based on what I
21 read." Correct? Isn't that what you're telling him?

22 MR. CRANE: I'm going to object, Judge. That's not
23 what he said. He said, "I mean, you understand, like, I
24 wouldn't be here if I didn't feel guilty about it." That was
25 his response. I mean --

1 Q. The whole response, and we can play it again a
2 zillion times, but your whole response was: "I mean, you
3 understand, like, I wouldn't be here if I didn't feel guilty
4 about it. But it's just I don't -- I can't recollect."

5 A. Yeah.

6 Q. "I mean, it's just a trip for me to have to sit here
7 and try to look at something that happened that I read about
8 and try to base what I remember off of that, you know? It's
9 a mind fuck, you know."

10 A. That's what I said, yeah. I said -- I explained to
11 him that I was having trouble with my memories, and that was
12 the reason I looked in the newspaper, and I had to make some
13 presumptions off of what I read in the newspaper, to help
14 deal with the memories that I had and to help piece things
15 together that I couldn't remember. And I've explained that
16 over and over.

17 Q. And so are you telling us now that your memories are
18 also based on things you have read?

19 A. No, they're not.

20 Q. Okay. But at that time, what you thought were your
21 memories were presumptions --

22 A. No, I wasn't. I was making presumptions. But I
23 never said they were my memories. I asked him questions. I
24 said, "Well, could this have happened?" And -- well -- I
25 never -- I never used a presumption or I never used something

1 I read in the newspaper and turned it into a memory.

2 Q. Well, you told him that you had read in the
3 newspaper about the cleaning lady, and that you had told
4 Short that you remembered the cleaning lady. Right?

5 A. I told them I told the cleaning lady to go get help.
6 I didn't read that a cleaning lady was told to go get help in
7 the newspaper. So yeah, I read something about a cleaning
8 lady or janitor going to get help. I'll admit to that. But
9 I never read anything about one of the suspects telling the
10 cleaning lady or janitor to go get help.

11 Q. Let me ask you this. You were doing your best at
12 that time to express to Detective Nichols your uncertainty as
13 to the accuracy of what you thought you might remember; is
14 that a fair statement?

15 A. No.

16 Q. Okay. That's not a fair statement.

17 A. No.

18 Q. You were expressing to Detective Nichols your
19 uncertainty as to the accuracy of what you had been talking
20 about. Is that a fair statement?

21 A. I suppose so, yes.

22 Q. All right. You were, in fact, uncertain at that
23 time, when you were talking to Detective Nichols on the
24 videotape.

25 A. On a certain level I was uncertain. On a certain

1 level I knew that I had done it.

2 Q. All right. On the conscious level with which you
3 were talking to Detective Nichols, your conscious mind, you
4 were uncertain as to whether or not you had been involved in
5 the death of Kent Heitholt; isn't that true?

6 A. Yeah. I'd say so. I was -- I was hoping that I
7 hadn't.

8 Q. And when you expressed that uncertainty to Detective
9 Nichols, you remember what he did.

10 A. I think he got rather irate actually. I can't -- I
11 can't recall accurately.

12 Q. Do you remember seeing it on the video yesterday?

13 A. Yeah. Yeah, I think so.

14 Q. He moved his chair right up next to you.

15 A. Yeah.

16 Q. You're backed into the corner.

17 A. Uh-huh.

18 Q. He gets in your face. He starts pointing his hands
19 at you.

20 A. Yeah.

21 Q. Starts yelling at you.

22 A. Uh-huh.

23 Q. Correct?

24 A. Yeah. And I didn't say anything that I hadn't said
25 before.

1 Q. You didn't say anything. He told you, "Shut up and
2 listen to me. I'll do the talking."

3 A. I'm saying after that. I didn't say anything I
4 hadn't said before. It's not like he coerced me. It's not
5 like he scared me into saying, "Oh, well, we did this." I
6 said everything I said to him before. I said it to other
7 people.

8 Q. What he told you was: That you, if you continued to
9 express uncertainty, would be the one hanging out. Right?

10 A. Yes, he did.

11 Q. And that the only way that you would not be the one
12 hanging out is if you quit expressing uncertainty and
13 addressed more certainty that Ryan had done it. Isn't that
14 true?

15 A. He said something to that effect. It was more just
16 that I needed to -- I needed to stop saying that "I believe
17 so" and that "Well, to the best of my knowledge" and things
18 like that. I needed to be more concise in my wording, was
19 what some of it was. But also, yeah, I needed to -- I needed
20 to stop -- stop -- stop hoping and stop dreaming and stop
21 wishing that I hadn't done this and I needed to man up to
22 what I did and I needed to take responsibility for what I did
23 and I needed to acknowledge that. And that I think was part
24 of the point he was trying to get across also.

25 Q. But he didn't talk anything about you accepting

1 responsibility. He talked about blaming Ryan, didn't he?

2 A. I think he said something about both of us.

3 Q. What he said was, beginning on line 16, page 7,
4 "Well" -- excuse me. Line 16. "And I don't want to hear,
5 'Oh, all of a sudden I just think I maybe fabricated all of
6 this.'" Do you remember that on the videotape?

7 A. Yeah.

8 Q. When he makes his voice sound a little wimpy and
9 whiny?

10 A. Uh-huh.

11 Q. Correct?

12 A. Yeah.

13 Q. As opposed to the command voice he's using in the
14 rest of that particular segment --

15 A. Yeah.

16 Q. -- correct?

17 A. Yeah.

18 Q. And then your answer is: "Well" -- and you were
19 trying to, again, to say, "Wait a minute. That's what I
20 really think." Correct? But he doesn't let you say that.

21 A. I don't -- I don't know what I was going to say.

22 Q. Then he says, "No. What I want to hear is exactly
23 what Ryan told you, because that's what's going to keep you
24 in a position to where you are not going to be the sole
25 individual out here responsible for what happened to Kent,"

1 didn't he?

2 A. Yeah, he said that.

3 Q. And you said, "Okay." Correct?

4 A. And I said, "Okay," yeah.

5 Q. And at that point, in your mind, you had no way out,
6 did you?

7 A. No way out? What do you mean? I mean, I was taking
8 responsibility for what I did. I can't make him take
9 responsibility for what he did. I can only take
10 responsibility for what I did. That's all I can do. And you
11 know what? When I go home, when I go look at myself in the
12 mirror, when I lay down in my bunk, I'm going to know that I
13 did the right thing, no matter -- regardless of what happens
14 to him after he leaves. What happens -- I could care less
15 about what happens to him. I'm just doing this because I
16 know it's the right thing to do.

17 Q. You done?

18 A. Yeah.

19 Q. What was my question?

20 A. I don't remember.

21 Q. Didn't answer it either, did you?

22 A. The answer was no, by the way.

23 Q. At the time that --

24 A. No, I didn't -- I didn't think that I was stuck. I
25 didn't think that -- that -- that I was, you know, screwed.

1 Q. You didn't think, Hey, you know, I said some stuff
2 to some friends of mine, and the police got word of it, and
3 they came and arrested me, and I tried to tell them as best I
4 could what I remembered, what I didn't remember, how vague it
5 was, and they didn't want to hear that, and now I'm in a
6 situation where I'm either going to have to be real certain
7 and real specific about --

8 A. It wasn't --

9 Q. -- Ryan's involvement, or else I'll be the only
10 person hanging out.

11 A. Like I said, I didn't think I was stuck. You know.
12 It is what it -- it was what it was. My life wasn't over. I
13 still had time to -- time to consider what happened. It's
14 not -- it doesn't mean life stops just because I did
15 something horrible.

16 Q. Did you believe that, at that point in the
17 interrogation with Detective Nichols, you could tell the
18 police, "Look, I'm not sure we did this," and they would
19 check into it and find out whatever they could and --

20 A. Yeah. That's --

21 Q. -- act accordingly?

22 A. That's -- I was asking them questions also, because
23 I couldn't -- there were some things I couldn't remember.
24 And yeah, I was in denial and I was hesitant about accepting
25 what I had done. So, yeah. I -- that's why I willingly went

1 to the police station and I was talking to them.

2 Q. But you had tried during the interview with
3 Detective Nichols to tell him exactly that. "I'm not sure
4 about it." And the response was him getting up in your face
5 and waiving his hand in your face and yelling at you and
6 telling you, "I don't want to hear any of this 'Maybe I just
7 fabricated it.'" Right?

8 A. Yeah, that was his response.

9 Q. And you knew that he was not going to listen to any
10 uncertainty, didn't you?

11 A. I don't know.

12 Q. And you accepted --

13 A. I mean --

14 Q. -- his representation that he -- the only way for
15 you to not be the only person hanging out was to blame things
16 on Ryan, didn't you?

17 A. No, that's not true. I knew I could have stopped
18 talking whenever I wanted to. I was just taking
19 responsibility for what I did. I was trying to portray the
20 truth as well as I could.

21 Q. So when he --

22 A. And I didn't say anything -- I didn't say anything
23 different after he said that to me than I did before he said
24 that to me. And if you saw in the video, he didn't scare me
25 at all. Did you see me back up or flinch one time in that

1 video? I was listening to what he had to say, but he didn't
2 scare me. I -- I could have told him, "You know what? Screw
3 you. I'm not saying a damn thing to anyone." But I wanted
4 to talk to him, because I knew it was the right thing to do.
5 And if I --

6 Q. Here's my question.

7 A. I heard your question, and I just answered it.

8 Q. Here's my question.

9 MR. CRANE: No, you can't -- just answer the
10 question.

11 THE WITNESS: All right.

12 Q. When he told you, "No. What I want to hear is
13 exactly what Ryan told you, because that's what's going to
14 keep you in a position to where you're not going to be the
15 sole individual out here responsible for what happened to
16 Kent," did you believe him or disbelieve him?

17 A. I don't know what I thought.

18 Q. You believed him, didn't you?

19 A. I don't know.

20 Q. You said, "Okay," didn't you?

21 A. I just wanted him to stop rambling, honestly. I
22 wasn't going to tell him anything different from what I told
23 him before. I said "Okay," but I don't know -- I mean, that
24 doesn't necessarily mean that I thought he was right. It was
25 just "okay," like you're talking to me now. "Okay." You

1 know. "End of conversation. Whatever gets you to be quiet."

2 Q. So your answers today are whatever gets me to be
3 quiet?

4 A. No, that's not true.

5 Q. So far it's not working.

6 A. Well, it's -- to a certain extent. I mean, when you
7 go on with, you know, snakey and devious ways and things like
8 that, you know, I mean, I'm going to do my best to just tell
9 you the truth. And then when you go off on some rant about
10 something that's -- has nothing to do with the truth, you
11 know, what else can I say but "okay"?

12 Q. Well, the truth is that you tried to tell Detective
13 Nichols you weren't sure. That you might be fabricating it
14 and you might make it up. Were making it up. And then is
15 when he yelled at you and got in your face. And then is when
16 you started responding like a recruit response to the drill
17 sergeant: Yes, sir, yes, sir, yes, sir. Right? Isn't that
18 what happened? Isn't that the truth?

19 A. Yeah, I believe so, yes.

20 Q. Is that snakey and devious, or is that on the TV?

21 A. No, that was on the TV.

22 Q. Now, your testimony yesterday was that you remember
23 striking Kent Heitholt several times.

24 A. Uh-huh.

25 Q. That --

1 THE COURT: Excuse me. You're going to have to say
2 yes or no.

3 A. Yes. Yes.

4 Q. You remember striking him after several other blows,
5 at a time that he goes to his knees; correct?

6 A. Yes.

7 Q. That you remember him moaning. Making a noise.

8 A. Yes.

9 Q. And that at that point you remember striking him one
10 more time.

11 A. Yes.

12 Q. And that you remember then feeling sick, going to
13 sit down, and you think you threw up. Is that correct?

14 A. No. At the time I thought I had, but right now, no,
15 I don't think that I threw up there.

16 Q. Right now you don't think you threw up.

17 A. That's correct.

18 Q. All right. But the rest of it is what you told us
19 yesterday.

20 A. Yes.

21 Q. But when you're talking to Detective Nichols on the
22 videotape, you tell him you only remember striking Heitholt
23 once, don't you?

24 A. Yes.

25 Q. And you tell him that that's the time when he made

1 the moan. Correct?

2 A. Yeah.

3 Q. And that that's the time -- the last time you
4 remember hitting him.

5 A. Yes.

6 Q. And that that's actually the first blow you struck.

7 A. I thought it was the first blow I struck, because I
8 didn't remember what happened before that.

9 Q. Okay. So what you're telling us now is: There's
10 all kinds of things, all kinds of blows by you, struck at
11 Mr. Heitholt, and you demonstrated on Mr. Crane how you did
12 it.

13 A. Yes.

14 Q. And you remember all those now, and then you
15 remember the next to the last time you hit him was when he
16 went to his knees and made the groaning sound. Correct?

17 A. Yes.

18 MR. CRANE: Well, then, that mischaracterizes the
19 testimony. I don't think the witness testified that he went
20 to his knees and made the groan sound. Unless I'm mistaken.
21 It was after one of the blows.

22 MR. ROGERS: Well --

23 A. He moaned and then went to his knees. After my
24 second to the last blow.

25 Q. Right. He went -- he moaned and went to his knees

1 after your second to the last blow; correct?

2 A. Yes.

3 Q. That's what you told us yesterday.

4 A. Yes.

5 Q. That's what I've asked you, this is probably the
6 third time this morning; right?

7 A. Yes.

8 Q. Okay. But when you were talking to Detective
9 Nichols, you -- and when you were confronted and earlier when
10 you were talking with Detective Short and were confronted
11 with the notion that there was more than one blow struck, you
12 asserted the position that you remembered striking the first
13 blow, which is the blow when he moaned, and that after that
14 you blacked out and didn't remember what happened. Is that
15 true?

16 A. I'm not sure.

17 MR. ROGERS: Play the one marked "assumed."

18 (Excerpt played.)

19 MR. ROGERS: That's enough.

20 A. Yeah, I did say that.

21 Q. So that's what you told him --

22 A. Yes.

23 Q. -- was that you had hit him the one time, and then
24 blacked out, and you were just assuming that you must have
25 hit him more times.

1 A. Yeah, I told him that.

2 Q. Okay. And you were assuming that based upon what
3 Short had told you about the number of blows.

4 A. Yes.

5 Q. Now, did you tell him that -- him, Mr. Nichols --
6 that Ryan had held Mr. Heitholt while you were hitting him?

7 A. I don't remember if I said that or not.

8 Q. Okay.

9 A. I don't believe I ever said that.

10 Q. And as a matter of fact, you didn't tell us anything
11 about that yesterday.

12 A. No.

13 Q. And as you claim to remember, or believe that you
14 remember, or whatever the state of your mind is, you're not
15 asserting any memory that Ryan Ferguson ever held Kent
16 Heitholt while you hit him with the tire iron.

17 A. That's correct.

18 Q. Now -- back to the subject of vomit. Throwing up.

19 A. Uh-huh.

20 Q. You had told Detective Nichols, in your first
21 interview with him, the one that was not recorded --

22 A. Detective Short?

23 Q. Detective Short. I'm sorry. Thank you. You had
24 told him that you had thrown up there at the scene, in the
25 parking lot of the Tribune building.

1 A. Yeah. I told him I thought that I had thrown up at
2 the scene.

3 Q. And you told him that again at the -- in the
4 videotaped interview with Detective Short.

5 A. I believe so, yes.

6 Q. And then Detective Nichols and you talked about it
7 in that videotaped interview that we saw the end of
8 yesterday. Correct?

9 A. I can't recall.

10 Q. Okay. Let me go back a step. When you told
11 Detective Short about it during the videotape interview, you
12 actually even asked him, "Was there vomit found there";
13 right?

14 A. Yes.

15 Q. And he didn't tell you, did he?

16 A. I can't remember if he told me or not. I think the
17 second time he said, "No, there wasn't." The first time --
18 the first time I think he said something to the effect of,
19 "Well, I'm holding my cards back," or something like that.

20 Q. Playing poker.

21 A. Yeah. Yeah.

22 Q. But when you were talking to Detective Nichols
23 afterwards, you told him, page 18, beginning line 19,
24 "Because I remember vomiting. Like, I'm pretty sure that I
25 did. And I thought that that was when that happened. And

1 then I looked up." And he said, "But earlier you said you
2 don't remember if you vomited -- you remember getting sick,
3 but you don't remember if you vomited there or vomited
4 somewhere else." And then your answer was, "I assumed I did
5 there." Correct?

6 A. Yeah, I did say that, because I thought -- I
7 remember feeling sick, and I thought that, yeah, that I
8 had -- I had thrown up there.

9 Q. And you remember vomiting somewhere.

10 A. Yes. That's correct.

11 Q. And you remember vomiting somewhere that night.

12 A. Yes. Either during or after the robbery.

13 Q. And your belief was that you did it right there at
14 the scene, before you look up and see Ryan, you say, standing
15 over or crouching over Mr. Heitholt.

16 A. Yeah, I thought that I had, because I felt sick.

17 Q. Now, this all happened on March the 10th, 2004.

18 These videos we've talked about.

19 A. Uh-huh.

20 Q. Correct?

21 A. Yeah. Yeah.

22 Q. And after that, you did not talk with police or
23 prosecutors for several months.

24 A. That's correct. Until October, I believe.

25 Q. And during those months, your attorney provided you

1 with copies of the police reports.

2 A. That's correct.

3 Q. Your attorney got copies of the videotapes.

4 A. Yes.

5 Q. Your attorney went over the videotapes with you.

6 A. I'm not sure if it was before or after October. I
7 can't remember when that was exactly.

8 Q. But he did.

9 A. Yeah.

10 Q. And you were eager to see the videotapes.

11 A. I was -- I don't know if I was eager to see the
12 videotapes.

13 Q. You also --

14 A. My attorney advised me that I should look at the
15 videotapes. And so I said, "Okay. I'm going to do what
16 you're telling me to do because you're the professional."
17 But I wasn't exactly eager to see the videotapes.

18 Q. And your attorney also went over with you the police
19 reports of the physical evidence that had been found.

20 A. I'm not sure if we did that or not.

21 Q. Your attorney went with -- over with you --

22 A. He -- I -- I believe he mailed some stuff to me,
23 regarding the DNA and whatnot, but I don't think that I
24 actually went over any of the paperwork regarding the
25 physical evidence that was found.

1 Q. Okay. You and I may be using the term differently.
2 Your attorney went over with you the fact that, the night of
3 the homicide, the police were able to follow a partial trail
4 of blood which fluoresced with luminol. Correct? From the
5 crime scene?

6 A. I know I read that in the police reports. I can't
7 remember if I went over it with my attorney or not.

8 Q. You certainly read it in the police reports.

9 A. Yeah. Yes, I did.

10 Q. And you read in the police reports that that trail
11 went east --

12 THE COURT: Are you able to see it from there?

13 THE WITNESS: No, I can't see that.

14 MR. ROGERS: Okay. I'll make it better.

15 Q. Can you see it now?

16 A. Yeah, I can see it. It's fine. Don't worry about
17 it. I was going to say, I could get down if you need me to
18 point something out.

19 Q. That's fine. I'll use the laser pointer, now that I
20 figured out how to turn it on.

21 You read in the police reports that this luminol
22 trail went east up the alley from the parking lot, south on
23 Fourth Street, towards Broadway; correct?

24 A. Yeah. Yes.

25 Q. And you read that between March the 10th, when you

1 told the detectives about going the way that's marked in
2 orange here; right?

3 A. Yeah. That wasn't the -- just for the record, I
4 mean, that wasn't -- that wasn't the only way that I told
5 them I might have gone.

6 Q. Okay. We saw the video when you're driving around
7 and you say, "Well, it's possible," when Detective Short is
8 taking you down this way; correct?

9 A. I don't know if I said that either. I know I said
10 that it's -- that I thought we'd gone behind the Tribune
11 building, but I -- I mean --

12 Q. So what you were telling him was possible is that
13 you could have gone around this way and back this way.

14 A. I'm not -- I'm not sure. Like I said, I mean, I was
15 having -- when we left the scene, it was all -- it was too
16 fast. We were running. I was -- I was getting memories
17 mixed up.

18 Q. My question --

19 A. I was doing my best to, yeah, on the video, to tell
20 them what route we had taken when we left, yes.

21 Q. And what you had initially said was that you had
22 gone this way.

23 A. That's correct, yes.

24 Q. And then when he asked you, "Is it possible you went
25 around the building," what you thought he meant was, "Is it

1 possible you went this way."

2 A. I don't know what I thought. I mean -- what I
3 thought he meant. I'm sorry.

4 Q. What did you say was -- what did you agree was
5 possible? Anything?

6 A. That we went around the back of the building. I
7 couldn't -- after that --

8 Q. Okay. You weren't talking about going this way
9 (indicating).

10 A. No.

11 Q. Okay.

12 A. I don't -- I don't believe so, no.

13 Q. Let me ask you this. Does this -- do these marks
14 here accurately reflect what you were trying communicate to
15 them on March the 10th was your route leaving the scene?

16 MR. CRANE: Wait a minute. What -- what marks?

17 MR. ROGERS: These orange marks on the piece of
18 plastic over the aerial photo.

19 A. Yeah. That was a possibility, yeah.

20 Q. So, can we put here, so we won't confuse this
21 diagram with others, "CE," for Chuck Erickson?

22 A. Well, what does that mean?

23 Q. Those are your initials, because these were the
24 marks made during your testimony? Okay?

25 A. Well --

1 Q. We're going to get another piece of plastic and
2 we're going to take this one away and draw on it. That's
3 what we're going to do. Okay. And I want to put here "CE,"
4 to show that that's what you told the police on 3-10-04.
5 Okay?

6 A. All right.

7 Q. Will that -- you don't have a problem with that, do
8 you?

9 A. No.

10 Q. All right.

11 Now, can you see that now?

12 A. Uh-huh.

13 Q. Okay.

14 THE COURT: Is that a yes?

15 THE WITNESS: Yes. I'm sorry.

16 Q. Now, you had read the police report about the
17 luminol going east up the alley from the parking lot, south
18 on Fourth Street towards Broadway; correct?

19 A. Yeah.

20 Q. And you also read the police reports about Officer
21 Alber and the canine. The dog.

22 A. Yeah. Yes, I did.

23 Q. And that also indicated that the dog had taken a
24 trail out east from the parking lot to Fourth Street --

25 MR. CRANE: Judge, wait a minute. Now you're

1 testifying -- the defense counsel is testifying about a
2 report --

3 MR. ROGERS: I'm asking --

4 MR. CRANE: -- that the defendant may have read --
5 sorry, Mr. Erickson may have read. Is that essentially what
6 you're doing?

7 MR. ROGERS: I am asking a leading question, Kevin.
8 I'm not testifying.

9 MR. CRANE: Well, the defense counsel, in his
10 question, is assuming facts not in evidence by asking about
11 the text of a police report. And I think that's improper,
12 Judge.

13 MR. ROGERS: I can break it up into a couple little
14 questions, if that will help.

15 THE COURT: You may rephrase your question.

16 MR. ROGERS: Thank you.

17 Q. You read a police report about the police dog,
18 didn't you?

19 A. Yeah.

20 Q. And you read what the report said the dog had done
21 that night, didn't you?

22 A. Yes.

23 Q. And you remember what you read in that report, don't
24 you?

25 A. Yes, I do.

1 Q. And what the report that you read, that you remember
2 reading, said was: That the dog --

3 MR. CRANE: Well, I'm going to object, Judge. Same
4 objection. I mean, first of all, it's hearsay. If he wants
5 to call the officer with the dog, this is America; he can do
6 that. But to ask this witness what he read in somebody
7 else's police report is improper. And further, for the
8 defense counsel to ask a question about what he presumes is
9 the text of the police reports is improper.

10 MR. ROGERS: Your Honor, I think I'm allowed to show
11 the source of the change in this witness's testimony. And
12 there will be evidence -- there has already been evidence of
13 his testimony, which is inconsistent with what he told the
14 police at the time of arrest. And there has certainly been
15 opportunities for him to tailor his testimony to suit other
16 evidence in the case. And I think we get to show that he
17 knows about the other evidence he's tailoring his testimony
18 to suit.

19 MR. CRANE: Oh, and I'm not saying he can't try to
20 do all that.

21 MR. ROGERS: Okay.

22 MR. CRANE: I'm just saying he can't do it in this
23 fashion.

24 MR. ROGERS: Why not? It's not hearsay. It's not
25 being offered for the truth of the matter asserted. Whether

1 the report is accurate or inaccurate, his testimony has
2 changed to try and match it.

3 THE WITNESS: Well, that's your opinion.

4 MR. CRANE: Well --

5 THE COURT: Excuse me, Mr. Erickson. Need to ask
6 you to refrain from joining in the colloquy. If you would.

7 The objection's overruled. You may -- if you're not
8 offering it for the truth of what it purports to be, you may
9 ask it for the purpose of impeaching this witness's --

10 Q. The report that you read about the dog said that the
11 dog had gone east in the alleyway to Fourth Street; correct?

12 A. I believe so, yes.

13 Q. And said that it had gone south on Fourth Street,
14 across Broadway.

15 A. Yes.

16 Q. To the area of the Broadway Diner.

17 A. Past the Broadway Diner.

18 Q. Past the Broadway Diner.

19 A. Continuing down Fourth Street.

20 Q. Continuing down Fourth Street.

21 A. Up that street right there.

22 Q. This street right here, which would be --

23 A. And I'm not sure --

24 Q. -- Locust Street?

25 A. And up into the -- I believe it was one of the --

1 the dormitory areas.

2 Q. Okay. And that would be up to basically Fifth and
3 Elm? Is that what that is?

4 A. Yeah. That's correct.

5 Q. And that the dog stopped at the dormitory area of
6 Fifth and Elm.

7 A. That's correct.

8 Q. And you knew that by the time you went to the
9 prosecutor's -- the police department to give your proffer on
10 October 1st.

11 A. Yes. I had read that. That's correct.

12 Q. Okay. You had also read the autopsy report, had you
13 not?

14 A. I believe so, yes.

15 Q. You had seen photographs, had you not?

16 A. Yes, I have.

17 Q. And you have seen photographs of the injuries to
18 Mr. Heitholt.

19 A. Yes. Not in detail at that point, no. I don't
20 believe so. Not in detail.

21 Q. Not before October 1st?

22 A. I don't believe so, no.

23 Q. You've seen them since then.

24 A. Yes.

25 Q. And when's the last time you saw any of those

1 photographs?

2 A. Well, there's one right next to me. I mean -- I --
3 they're -- when I have to go to the prosecutor's office,
4 they're just sitting out, so.

5 Q. You've been to the prosecutor's office several times
6 in preparation for your testimony.

7 A. That's correct.

8 Q. And you've been there as recently as last week.

9 A. Yes.

10 Q. And you've been there several times within the last
11 couple of months.

12 A. Yes.

13 Q. And you've gone over your proposed testimony with
14 Mr. Crane.

15 A. Yes.

16 Q. And you've gone over it with Mr. White, who's an
17 investigator in the prosecutor's office.

18 A. That's correct.

19 Q. And you've gone over it with Mr. Hawes, who's an
20 investigator in the prosecutor's office.

21 A. Yes.

22 Q. And have you gone over it with Mr. Knight, the
23 assistant prosecuting attorney?

24 A. Yes.

25 Q. And you've done that repeatedly since August of

1 2005.

2 A. Yes. Yes.

3 Q. And they have discussed with you photographs, maps,
4 charts, things like that.

5 A. Yes, they have.

6 Q. And you and Mr. Crane had gone through, in his
7 office, the demonstration that you conducted here yesterday.

8 A. Yes, I showed him what happened, that's correct.

9 Q. Yeah. The same way -- and he was playing the part
10 of Mr. Heitholt or whatever. Right?

11 A. Yes.

12 Q. Same way.

13 A. Yes.

14 Q. So that wasn't a first-time deal either, was it?

15 A. No.

16 Q. Let's take you back to October 1st, when you went to
17 the police station with your lawyer for your proffer session.
18 Correct?

19 A. Okay.

20 Q. And let's talk specifically about the route that you
21 told them you took leaving the Tribune parking lot.

22 A. Okay.

23 Q. Who, by the way, was present at that meeting?

24 A. Kevin Crane, my attorney, I believe John Short, and
25 another detective. I can't remember his name.

1 Q. Okay. Maybe Detective Liebhart?

2 A. Yeah. Yeah. That's correct.

3 Q. Now, you told those people in your proffer
4 session -- by the way, what was your understanding the
5 proffer session was about?

6 A. It was just me -- because I -- there were some
7 things I had remembered -- that I remembered that I hadn't
8 remembered before and some things that I remembered more
9 accurately. And it was -- it was just -- at some point I had
10 to divulge this stuff to the prosecution. To the state. If
11 I was going to be completely truthful.

12 Q. So your understanding of what you were there to do
13 was to tell them, "Look, if you make a deal with me to tell
14 the truth, this is what I'm saying the truth is"?

15 A. No. That's not correct at all.

16 Q. That's not what the proffer's about?

17 A. No.

18 Q. The proffer is not: This is what I will testify to
19 if I make an agreement to tell the truth?

20 A. This is -- I told them that this is what happened.
21 This is the truth. And this is what I -- yeah. Exactly.
22 This is what I will testify to, if I do make a deal.

23 Q. All right. And that was the deal. And you signed a
24 letter that basically said, "If I don't make a deal, you
25 can't use it against me," didn't you?

1 A. Yes, I did.

2 Q. And they signed it too.

3 A. Yes, they did.

4 Q. And so this was what you were offering to say in
5 return for the deal. Correct?

6 A. What I was offering to say?

7 Q. Uh-huh.

8 A. I mean --

9 Q. Do you know the word "proffer"?

10 A. Yeah.

11 Q. It means a -- an offer. Correct?

12 A. I suppose, yeah.

13 Q. Okay. Now what you told those people -- and by the
14 way, you've had a chance to go over Detective Short's report
15 of that conversation, haven't you?

16 A. I think.

17 Q. More than once.

18 A. I don't know.

19 Q. Okay. You told them that, when you began to run
20 from the scene, you left the opposite direction from which
21 way you -- from the way you came. Correct?

22 A. Yes. Yes.

23 Q. And so if you came up the alley from the west, you
24 would leave up the alley to the east. Correct?

25 A. Yes.

1 Q. I'm marking a dark red here on the plastic overlay
2 of Defendant's Exhibit D.

3 Then you told them that you ran towards Broadway --

4 A. Well, first I went left, and then Ryan grabbed me,
5 and we went towards Broadway.

6 Q. That's what you told us yesterday.

7 A. I believe I said that in the proffer also.

8 Q. Okay.

9 A. I might be wrong about that. I might --

10 Q. You might be wrong.

11 A. -- have left that out.

12 Q. Would it refresh your recollection as to what you
13 told them in the proffer --

14 A. Yeah.

15 Q. -- if I were to show you Mr. Short's report?

16 A. Yeah. That's fine. Well, I mean, I don't know if,
17 I mean, if his report's accurate.

18 MR. CRANE: Judge, I'm going to make the same
19 objection with respect to that recollection of memory as I
20 did yesterday.

21 THE COURT: The objection is sustained.

22 MR. ROGERS: May we approach, Your Honor?

23 THE COURT: You may approach.

24 - - -

25 Counsel approached the bench and the following

1 proceedings were held:

2 MR. ROGERS: This is not being offered to show the
3 truth of the matters asserted in the report, or during the
4 proffer. It's being showed -- it's being shown to the
5 witness to refresh his recollection as to what he said in the
6 proffer. And he has said that he doesn't know, he might have
7 said that, he doesn't know, and I was going to see whether or
8 not if it refreshed his recollection. Either it does, in
9 which case he can testify as to his present recollection of
10 what he said in the proffer, or it does not, in which case
11 I'm stuck and will leave it alone. But I think it's
12 perfectly proper to refresh his recollection about what he
13 said with the report about what he said.

14 MR. CRANE: He's using it as a transcript and he is
15 using it for the -- for whether or not the matter was stated.
16 That's the truth of the matter.

17 THE COURT: I'm sustaining the objection because,
18 number one, he didn't write that report. Number two, it's
19 not a transcript of what he said. Either of those two -- you
20 could ask him to refresh his recollection by looking at
21 either what he said that was transcribed or if he had some
22 writing that he could refer to. I'm sustaining the objection
23 as to that.

24 MR. CRANE: Some writing that he -- that he did.

25 THE COURT: That the witness did.

1 MR. CRANE: Okay.

2 THE COURT: The objection is sustained.

3 - - -

4 The following proceedings were held in open court:

5 Q. Let me ask another question, Mr. Erickson. This
6 report -- this proffer session took place on October the 1st;
7 is that correct?

8 A. I believe that's correct, yes.

9 Q. And you entered into your plea agreement on November
10 the 4th; correct?

11 A. Yes.

12 Q. And we're talking about 2004. Last year.

13 A. Yes.

14 Q. And when you entered into your plea agreement, you
15 were asserting that what you had said in the proffer was
16 true; correct?

17 A. Yes.

18 Q. And you have had a chance to go over with your
19 attorney what was in the report that you said in the proffer;
20 correct?

21 A. I had a chance. I don't recall I ever did go over
22 what was in the report with my attorney. I had a copy of the
23 report.

24 Q. Okay.

25 A. But I don't think I ever went over it with my

1 attorney.

2 Q. But you have gone over the report.

3 A. I may have. I might have skimmed it. I mean, I
4 skimmed everything, all the legal documents were sent to me.
5 I thought it was probably the best thing to do.

6 Q. Best thing to do was to read it?

7 A. To make sure there weren't any problems.

8 Q. To make sure there weren't any problems?

9 A. Yes.

10 Q. And at the time that you entered into your plea
11 agreement, you had an opportunity, if you wanted to, to
12 correct any misstatements in the report; correct?

13 A. Yeah, if I noticed it.

14 Q. Okay.

15 A. And -- I mean, no one came to me and said, you know,
16 "If there is a problem with this report, feel free to change
17 it now."

18 Q. But you didn't spot any problems when you went over
19 it.

20 A. I can't remember.

21 Q. If you had spotted a problem with the report, you
22 would have done something about it, wouldn't you?

23 A. I don't know.

24 Q. You wouldn't have let it stand as the truth when you
25 knew it wasn't accurate, would you?

1 A. No, I wouldn't do that.

2 Q. Okay. And so when you entered into your plea
3 agreement to let it stand as the truth, you were adopting it,
4 this report's accuracy, were you not, as to what you had said
5 during the proffer?

6 A. Yes.

7 MR. ROGERS: Now, Your Honor, I'd like to be able to
8 show the report to the witness to refresh his recollection.

9 THE COURT: What was the question that you asked him
10 that he needed to reflect his recollection -- refresh his
11 recollection upon?

12 MR. ROGERS: I have to refresh my recollection, Your
13 Honor. And that question was: Whether he told them during
14 the proffer about starting to go north on Fourth Street and
15 then being jerked back by Mr. Ferguson like he told us
16 yesterday.

17 THE COURT: And his answer was he didn't remember?

18 MR. ROGERS: And his answer was he didn't remember
19 whether he said that in the proffer or not.

20 Is that accurate?

21 THE WITNESS: That's correct.

22 MR. ROGERS: Yes.

23 THE COURT: I will allow --

24 MR. CRANE: Judge, can I -- he -- that's all well
25 and good. He can ask that question. And he can call

1 Detective Short and ask Detective Short what he recalled
2 being said. But he can't use it like a deposition
3 transcript. I'm not suggesting he can't impeach the witness,
4 if he wishes to, but not with what somebody else wrote that
5 hasn't testified yet in the case.

6 MR. ROGERS: I'm not attempting to impeach the
7 witness, Your Honor. I'm just attempting to refresh his
8 recollection.

9 THE COURT: Since he has adopted that report as
10 being accurate and correct, I will allow you to refresh his
11 memory with that report. Even though he did not write it
12 himself.

13 MR. ROGERS: Thank you.

14 A. Yeah, I still -- I mean, I still can't remember if I
15 mentioned it or not.

16 Q. Okay. You still can't remember whether you
17 mentioned it or not.

18 A. During the proffer. I don't know if I -- if I
19 noticed I hadn't said that or not. When it was in the
20 report.

21 Q. Okay. So your testimony now is you don't know
22 whether or not during the proffer you mentioned going
23 north --

24 A. Yeah, I thought I had, but I'm not sure if I had.

25 Q. Okay. Fair enough. And even having read the

1 report, you still are not sure. Is that fair?

2 A. Yeah, that's correct, because I found many errors in
3 a lot of the reports.

4 Q. So I'll put a question mark here. Okay.
5 Eventually, however, your testimony -- or your statement at
6 the proffer was that you went south on Broadway; correct?

7 A. That's correct.

8 Q. I got the question mark here because you don't
9 remember what you said at the proffer about going north, and
10 we're going south on Fourth Street towards Broadway.
11 Correct?

12 A. That's correct.

13 Q. And you said you ran southbound past the Broadway
14 Diner; is that correct?

15 A. Well, we went through the parking lot first.

16 Q. Through the parking lot of the diner.

17 A. Yeah. I can't remember if I went behind the diner
18 or not. I know that I went through a parking lot.

19 Q. And is the diner over here on the --

20 A. East.

21 Q. -- east side of Fourth Street?

22 A. Yeah. That's the diner.

23 Q. I'm going to circle that and put a "BD" for Broadway
24 Diner. Is that -- is that the building we're talking about?

25 A. Yeah.

1 Q. Okay. So you went across Broadway, and then across
2 Fourth Street, and through the parking lot of the diner?

3 A. Yeah.

4 Q. And you don't know whether you went behind the
5 diner, in this direction?

6 A. I can't remember if we went through -- I just
7 remember going through the parking lot. I can't remember if
8 I went behind the diner or not.

9 THE COURT: Mr. Crane, I think you may be blocking
10 someone's view.

11 MR. CRANE: Judge, can I block their view just for a
12 minute here? Because I am having trouble seeing this thing.
13 Is that all right?

14 (Mr. Crane looking at diagram.)

15 MR. CRANE: Judge, I want to make a record that on
16 Defendant's Exhibit D --

17 THE COURT: This isn't D. D was one of the --

18 MR. CRANE: What is this thing?

19 THE COURT: D was the DVD.

20 MR. ROGERS: I'm sorry. That's B.

21 MR. CRANE: Okay. Defendant's Exhibit B, there is
22 no diner on this photograph that they've been showing this
23 witness. That back when this photograph was taken -- and I
24 admit this is from having the benefit of living here in
25 Columbia -- the diner was up the street, around the corner.

1 And then they moved it later to the location that's
2 accurately portrayed on the State's Exhibit 9, which was
3 where it was in November -- on November 1, 2001.

4 Now the defense attorney, still continuing with this
5 record, has placed on Defense Exhibit B, having asked the
6 witness a question, a big old grease circle around what at
7 this time was the old Katie Station.

8 MR. ROGERS: And I --

9 THE COURT: Is there an objection that you have,
10 Mr. Crane?

11 MR. CRANE: I just was making a record that he's
12 asking the question about a diner, and there isn't one on
13 here.

14 MR. ROGERS: Okay. Well, I -- and I appreciate the
15 correction.

16 MR. CRANE: So the objection is: That's improper.

17 MR. ROGERS: I would appreciate the corrections,
18 Your Honor. And I would ask Mr. Crane to, from the basis of
19 his knowledge of Columbia, which I'm not from here, if he
20 would place a big old grease pencil where the Broadway Diner
21 is. Now I'm erasing the big old grease mark that I put here.

22 MR. CRANE: Well, I'm not trying to be an
23 obstructionist, but I don't think I'm going to do that.

24 MR. ROGERS: What I'm doing is offering to stipulate
25 to your statement correcting this photograph, which I've

1 already stated is -- was taken sometime before the events at
2 issue. So if you want to be accurate, let's be accurate.

3 MR. CRANE: Well, I'll tell you what I'll do. I'll
4 make an agreement with you. I'll tell you that the diner is
5 on State's Exhibit 9. I think that's 9, isn't it? Look on
6 the back of that. Yeah. 9. And it's located down Fourth
7 Street, right there.

8 MR. ROGERS: Right there.

9 MR. CRANE: Yeah.

10 MR. ROGERS: So that would be in what is the parking
11 lot behind the Katie Station? If I put that big old grease
12 pencil and write --

13 MR. CRANE: Yeah -- you can ask the witness.

14 A. Yeah, that's correct.

15 Q. Is that correct?

16 A. That's correct.

17 Q. Okay. You're not just agreeing to be agreeable now.

18 A. No.

19 Q. All right. So, are you're saying you went across
20 the parking lot of the Broadway Diner like that.

21 A. Yeah. That's correct.

22 Q. And now can I put a "BD" here where the Broadway
23 Diner really is?

24 A. That's right.

25 Q. Okay.

1 A. Yeah.

2 Q. And from the Broadway Diner -- we're now back to
3 your proffer on October the 1st of last year. Did you tell
4 them at that time that, after running south past the Broadway
5 Diner, you began to run in a westerly direction across and
6 through Flat Branch Creek?

7 A. Yes.

8 Q. So that would be this way?

9 A. I can't really tell.

10 THE COURT: You can step down and look at it, if you
11 would.

12 Q. Actually, if you can reach it -- in what -- could
13 you draw on that? Can you reach up that high?

14 A. No, I can't.

15 MR. CRANE: Your Honor, I need to make an objection.
16 At the time the defense --

17 THE WITNESS: There's --

18 MR. CRANE: -- photograph was -- just -- don't talk;
19 okay?

20 THE WITNESS: Sorry. Sorry.

21 MR. CRANE: At the time the defense photograph was
22 taken, Flat Branch Park was not there. And there's --

23 MR. ROGERS: Right.

24 MR. CRANE: You knew that.

25 MR. ROGERS: Right.

1 MR. CRANE: And there's several things in this area
2 that he's taking the defendant to now around Flat Branch
3 Creek, there were some old oil tanks, there was a gas thing
4 there, and various things that were not present on November
5 1, 2001. Those are, however, accurately represented as the
6 condition of that Flat Branch Park area in State's Exhibit 9,
7 but not on Defense Exhibit B.

8 MR. ROGERS: I agree with that, Your Honor.

9 Q. And stuff that wasn't there when you remember being
10 there, if you remember being there, ignore. But in terms of
11 the directions, the directions haven't changed. Right?

12 A. Right.

13 Q. Okay. So could you --

14 THE COURT: Is there an objection you have,
15 Mr. Crane? I -- I'm not certain that I heard you enunciate
16 it. Are you --

17 MR. CRANE: Well, I was making a record, that -- I
18 mean, the -- I realize that some photographs, it's impossible
19 to be exactly fair and accurate, particularly with aerials,
20 with businesses that may change and parks. Whole buildings,
21 though, and parks, I would make an objection with respect to
22 the fair and accurate depiction of this photograph. I mean,
23 with the understanding that all this has changed. And I'm
24 pointing to the Flat Branch Creek area. I guess he can
25 testify. But we're putting lines on it. The contour of the

1 creek's even been changed since then.

2 MR. ROGERS: With --

3 MR. CRANE: With the understanding it's not a fair
4 and accurate representation.

5 MR. ROGERS: With regard to the structures present
6 and the shape of the park, sure.

7 THE COURT: And what are you going to have him draw?

8 MR. ROGERS: The route that he told them during his
9 October 1st proffer he took.

10 MR. CRANE: And as long as we're in agreement that
11 that photograph is not a fair and accurate representation of
12 the area --

13 MR. ROGERS: In terms of the structure, sure.

14 MR. CRANE: -- I won't object. It's not.

15 THE COURT: Are you stipulating that it is not fair
16 and accurate in all respects?

17 MR. ROGERS: In all respects. Certainly in terms --
18 it's certainly a fair and accurate depiction of when it was
19 taken, but it's not a fair and accurate depiction -- things
20 changed between when this photograph was taken and 2001.

21 THE COURT: And specifically the area of Flat
22 Branch, the creek as well as the park there as well as the
23 diner.

24 MR. ROGERS: Right.

25 THE COURT: That those -- those are not portrayed

1 accurately on Defendant's Exhibit B.

2 MR. ROGERS: Right.

3 THE COURT: With that understanding, if he can mark
4 it, or if you want to --

5 THE WITNESS: Yeah. You're going to have to hold
6 it, because --

7 THE COURT: Or you may remove it from the easel and
8 put it at a point where he's able to mark it.

9 A. This isn't right.

10 Q. Right. I know that.

11 A. Okay.

12 Q. Just show us -- show the route that you took.

13 A. All right. I'm going to do my best.

14 (Witness drawing on exhibit.)

15 A. All right. You want me to stop at the creek?

16 Q. Go ahead and cross the creek, if you did.

17 A. Well, here's the creek. I'll circle the creek if
18 you want me to.

19 Q. No.

20 A. Okay. Here's the creek. And we came up here.

21 THE COURT: I don't know if the jurors can either
22 see or hear what you're --

23 Q. I'll hold it back up when he's done.

24 A. Behind the gas station. Went to the right.

25 Q. Okay. You can resume the stand for a minute.

1 A. All right.

2 Q. And we'll clean up the record a little bit.

3 Okay. So you have drawn this line, that I'm going
4 to now draw more firmly, going across where these buildings
5 used to be, but they're not at the time we're talking about;
6 right?

7 A. That's correct.

8 Q. And across Flat Branch Creek, and up behind the gas
9 station. And by "the gas station," you mean the Phillips 66
10 station.

11 A. Yes.

12 Q. And around the Phillips 66 station to Providence
13 Road. Correct?

14 A. Yes. The intersection of Providence and Cherry. I
15 think that's Cherry.

16 Q. Locust?

17 A. Or is that Locust? Yeah, Locust then. Okay.

18 Q. Okay. And the intersection of Providence and Locust
19 is where you saw -- that you told them during your proffer
20 session that you saw Dallas Mallory sitting southbound on
21 Providence at the stoplight.

22 A. Well, he was pulling up at the time, when we got to
23 Providence, and then he stopped.

24 Q. For the light.

25 A. So he was pulling up, yeah.

1 Q. Did you tell them in your proffer session on October
2 1st that you saw him sitting at the stoplight?

3 A. I believe that -- I'm not sure. That's when I
4 approached the car. I'm not -- I'm not sure.

5 Q. And so the car -- do you know if it was in the
6 middle lane or the right-hand lane of the two southbound
7 lanes?

8 A. I believe, if you're heading south, it was in the
9 left-hand lane, like the passing lane.

10 Q. So that would be where I'm drawing a rectangle and
11 putting an arrow to show the direction the car was
12 pointing --

13 A. Okay.

14 Q. -- is that correct?

15 A. Yeah.

16 Q. And is it your -- is what you told them at the
17 proffer session, that you then went up and talked to
18 Mr. Mallory?

19 A. Yes. That's correct.

20 Q. Where I've drawn the line.

21 A. Yeah.

22 Q. And then did you tell them at the proffer session
23 that you went through the Osco parking lot?

24 A. That's correct.

25 Q. Now back in 2001, was Osco open?

1 A. Yes.

2 Q. And is Osco shown on this picture?

3 A. I believe -- I don't know if it was Osco then, but I
4 think it's the same building.

5 Q. Okay. And so is this the parking lot we're talking
6 about?

7 A. Yeah. That's the parking lot.

8 Q. What direction did you go in the parking lot?

9 A. You want -- should I draw it?

10 THE COURT: You may step down.

11 Q. Let me ask you, did you -- I'll see if I can do it
12 verbally.

13 A. I believe we went west.

14 Q. Did you go straight west or did you go diagonally?

15 A. We went diagonally. I mean --

16 Q. From southeast to northwest?

17 A. Yeah. That's correct.

18 Q. An exact diagonal or more or less?

19 A. More or less.

20 Q. So this general direction?

21 A. Yeah. But we -- we weren't at the drive. We went
22 up in the grass, and then we cut through the parking lot.

23 Q. Okay. You went west on the drive and then cut
24 through?

25 A. Well, it would be better if you just let me draw it.

1 I mean --

2 Q. I'll bring it to you.

3 A. I don't know -- well --

4 MR. ROGERS: I apologize, Your Honor, for blocking
5 your view.

6 THE COURT: That's fine.

7 A. I just want to be, you know --

8 Q. Okay. Yes. I want you to be as accurate as you
9 can. And I can lean on it and make it --

10 A. We came across here. We ran up -- there's a little
11 hill right there. We ran up there. We cut across down here
12 to the parking lot.

13 Just tell me when you want me to stop.

14 Q. Keep going.

15 (Witness drawing on the exhibit.)

16 Q. All right. Now -- so you came from behind the car,
17 crossing a little hilly area between --

18 A. Well, the car took off. We didn't come from behind
19 the car. The car took off.

20 Q. The car took off.

21 A. Yeah.

22 Q. And you crossed the parking lot at a diagonal and
23 into the other parking lot.

24 A. That's correct.

25 Q. Which you also crossed at a more or less diagonal;

1 correct? To Broadway. Is that accurate?

2 A. Yes.

3 MR. ROGERS: Your Honor, would this be a good time
4 for a recess?

5 THE COURT: I don't know where you are in your
6 examination. Is this a good time to break your examination?

7 MR. ROGERS: It is for me.

8 THE COURT: All right.

9 Ladies and gentlemen, we will take our mid-morning
10 recess.

11 The Court again reminds you of what you were told at
12 the first recess of the Court. Until you retire to consider
13 your verdict, you must not discuss this case among yourselves
14 or with others, or permit anyone to discuss it in your
15 hearing. You should not form or express any opinion about
16 the case until it is finally given to you to decide. Do not
17 read, view, or listen to any newspaper, radio, or television
18 report of the trial.

19 And while the jury is out, would you have them make,
20 if they have not already made their selection for lunch, and
21 find out what time lunch would be delivered, so we'll know
22 about recessing for the noon hour.

23 You may be excused, ladies and gentlemen.

24 - - -

25 The following proceedings were held out of the presence

1 of the jury:

2 THE COURT: Before you all take your break, I want
3 to talk to you just a minute.

4 One of our jurors is using an assisted hearing
5 device. You've probably seen that. It's an older gentleman,
6 sitting in the back. And yesterday for a time he was having
7 some trouble with it. We got some new batteries for it. And
8 as far as I know, it's working all right. However, I've had
9 our marshal go back just to check, because it would concern
10 me if he's not picking up everything.

11 DEPUTY COURT MARSHAL LANE: It is working, Judge.

12 THE COURT: It is working.

13 MR. CRANE: You know, another thing might be good if
14 he would sit on the front row.

15 THE COURT: Well, I can't imagine why he wouldn't
16 want do that. He has been suggested to do that. He's a shy
17 fellow, I guess. I don't know. But I wanted --

18 (Audience becoming noisy.)

19 DEPUTY COURT MARSHAL LANE: Folks, court is still in
20 session.

21 THE COURT: With that understanding -- I just wanted
22 you to be aware of it.

23 MR. ROGERS: Have I been talking louder since you --

24 THE COURT: Yeah, you have. And I can hear that
25 you're closer to that mic. And you can hear it from that

1 mic. I can hear you better. And we haven't had any
2 complaints.

3 We'll be in recess then.

4 (Recess taken.)

5 - - -

6 The following proceedings were held out of the presence
7 of the jury:

8 THE COURT: State ready to proceed?

9 MR. CRANE: Ready, Judge.

10 THE COURT: And the defendant?

11 MR. ROGERS: Yes, Your Honor.

12 THE COURT: All right. And Mr. Ferguson is here.

13 All right.

14 You may return the jury to the courtroom, please.

15 - - -

16 The following proceedings were held in the presence of
17 the jury:

18 - - -

19 CHARLES TIMOTHY ERICKSON,

20 resumed the stand and testified further:

21 THE COURT: You may inquire.

22 - - -

23 RESUMED CROSS-EXAMINATION

24 BY MR. ROGERS:

25 Q. Mr. Erickson, during the recess I marked on the

1 plastic overlay on Defendant's Exhibit B the initials "CE"
2 for you and the date "10-1-04," because the markings on that
3 indicate what you told the police and prosecutors during your
4 proffer on October 1st, 2004; is that correct?

5 A. Yes.

6 Q. Now, when you say you encountered Dallas Mallory
7 stopped at the light on Providence and Locust, were you
8 carrying Mr. Heitholt's belt?

9 A. I had it in my pocket.

10 Q. Had it in your pocket.

11 A. Yes.

12 Q. Okay. And once again, you recall giving the proffer
13 statement to Detective Short and others on October 1st;
14 correct?

15 A. Yes.

16 Q. Isn't it true that you told Detective Short that you
17 had the belt in your hand when you talked to Dallas Mallory?

18 A. Yeah, I believe I may have said that, yes.

19 Q. But now you're saying that's not true.

20 A. I'm fairly sure it was in my pocket.

21 Q. And it can't be both in your pocket -- you didn't
22 have your hand in your pocket, did you?

23 A. I don't believe so.

24 Q. What you were trying to tell Short was you had it in
25 your hand, but what you're telling us is you had it in your

1 pocket.

2 A. Yes.

3 Q. Before your proffer session on October 1st, 2004,
4 but after your arrest on March 10th, 2004, in between those
5 times, had you ever told any law enforcement person,
6 policeman, prosecutor, deputy sheriff, FBI agent, any law
7 enforcement person that you had gone south on Fourth Street,
8 across the parking lot of the Broadway Diner, through Flat
9 Branch Park, and across the creek, coming out on Providence
10 by the Phillips gas station?

11 A. No.

12 Q. That was the first time you said that to any law
13 enforcement authority.

14 A. That's correct.

15 Q. Between those dates, your arrest, March 10th, 2004,
16 your proffer, October 1st, 2004, had you been taken to the
17 area of downtown Columbia to drive through or walk through or
18 be carried through the places that you've talked about?

19 A. No.

20 Q. You told us you had read police reports.

21 A. Yes.

22 Q. You told us you had seen the videotapes.

23 A. Yes.

24 Q. That would include the videotape of Mr. Nichols
25 driving through that area.

1 A. That's correct.

2 Q. Had you had any other contact with any information
3 about the geography of that area between your arrest and
4 between the proffer?

5 A. No.

6 Q. So you never sat down with your attorney and went
7 through a series of still pictures or anything like that.

8 A. No.

9 Q. And certainly not with any law enforcement agent,
10 because you didn't talk to them.

11 A. That's correct.

12 Q. In between your arrest and your proffer, you were
13 held in the Boone County Jail; is that correct?

14 A. Yes.

15 Q. And during that time, you had frequent conversations
16 with your family members.

17 A. Yes.

18 Q. And your familiar members include a younger sister
19 and two parents.

20 A. That's correct.

21 Q. And some of those conversations were in person, when
22 they would come to the jail to visit you at the designated
23 time.

24 A. Yes.

25 Q. And some of those conversations were on the

1 telephone.

2 A. That's correct.

3 Q. And especially early on, after your arrest, you'd
4 had very frequent telephone conversations with your parents,
5 didn't you?

6 A. That's correct.

7 Q. And even though you had been told not to discuss the
8 case on the telephone, you did anyway, didn't you?

9 A. Yes, I did.

10 Q. And you discussed with your parents many things
11 concerning the case; correct?

12 A. Yes, I did.

13 Q. And you also had conversations concerning your case
14 with people at the jail. Staff members.

15 A. Yes.

16 Q. And in particular, shortly after your arrest, you
17 had a conversation with the nurse in the jail, didn't you?

18 A. That's correct.

19 Q. And the nurse asked you whether or not you committed
20 the crime that you were there for; correct?

21 A. Yes.

22 Q. And you told them that you weren't sure really,
23 didn't you?

24 A. That's what I told them, yes.

25 Q. And that was not a lie when you told that to the

1 nurses in the jail, was it?

2 A. No.

3 Q. At that time, even after your arrest, you were not
4 sure that you had committed this crime, were you?

5 A. Yeah, consciously I was not sure.

6 Q. Okay. You were not sure.

7 A. Yes.

8 Q. And that's what you told the nurse.

9 A. That's correct. I was not a hundred percent
10 certain.

11 Q. Okay. And the rest of what you told the nurse was
12 that the police had told you that things that you had told
13 the police correlated with what actually happened. Right?

14 A. That's correct. Yes.

15 Q. And that, after that, it was over.

16 A. The conversation with the nurse was over after that.

17 Q. After that, your chance of not being convicted was
18 over.

19 A. I don't think I meant that.

20 MR. ROGERS: Would you play "nurse 3," please?

21 I will tell you, Mr. -- oh. I better offer it.

22 Excuse me.

23 Your Honor, at this time I would offer Defendant's
24 Exhibit E, which I will represent is an audio CD that we
25 received from the state, containing recorded telephone calls

1 from the jail.

2 MR. CRANE: Okay. Date?

3 MR. ROGERS: This particular call is on track 2,
4 which is April 8th, 2004, beginning at 1810 hours, which is
5 6:10 p.m.

6 MR. CRANE: Is this the one you were asking
7 questions about?

8 MR. ROGERS: Yes.

9 MR. CRANE: Okay.

10 MR. ROGERS: It contains the excerpt I want to play.

11 MR. CRANE: It doesn't have the whole track on
12 there?

13 MR. ROGERS: This is the whole track. The excerpt
14 has been excerpted from it.

15 MR. CRANE: Okay. I don't know what the excerpt is.

16 MR. ROGERS: It's my --

17 MR. CRANE: I guess if --

18 THE COURT: Do you want an opportunity to listen to
19 it before it's played to the jury?

20 MR. CRANE: Well, I can maybe -- if it's -- if it's
21 an accurate portion of it, I guess -- you know, I'm not
22 concerned about the jury hearing it. I guess I'm trying to
23 figure out, if it's not in -- the entire conversation or the
24 context isn't all in there, then I guess I can go back to the
25 big tape and find it and play that for the jury?

1 MR. ROGERS: Right.

2 MR. CRANE: I guess there's no chance you'd do that?

3 MR. ROGERS: I don't want to play the whole thing.

4 It would take forever.

5 MR. CRANE: No, it wouldn't. How long's that track?

6 MR. ROGERS: Well, this part that I intend to play

7 ends at 17 minutes and 11 seconds into it. And the part that

8 I intend to play takes less than 30 seconds.

9 MR. CRANE: Well, see, that's what I thought.

10 There's -- I believe I know the conversation that they're

11 wanting to put in now 30 seconds of.

12 MR. ROGERS: Right.

13 MR. CRANE: I -- you know, I suppose, Judge, I'll

14 have to go back and find it on our tapes and run the full

15 context on redirect.

16 THE COURT: Are you saying that 30 seconds would be

17 out of context and not --

18 MR. CRANE: Yeah.

19 THE COURT: -- the whole conversation?

20 MR. CRANE: If it's the same conversation I know

21 about, I know that 30 seconds is not going to get the full

22 conversation that they're talking about in.

23 THE COURT: How long is the full conversation,

24 Mr. Rogers?

25 MR. CRANE: Oh, I'm going to say three minutes

1 maybe.

2 MR. ROGERS: No. Full conversation is --

3 MR. CRANE: No. No. The full conversation on the
4 thing about the nurse. This is where the mother -- or the
5 witness's mother and he are talking about not talking to
6 people at the jail? At the beginning of -- that's not what
7 you're going to play. You're going to --

8 MR. ROGERS: That's not what I'm going to play.

9 MR. CRANE: You're going to play the end of it,
10 without the front, is what you want to do. And I guess my
11 only recourse, if I don't object to the excerpt, is to go
12 back and play it. I mean, I assume you wouldn't object to me
13 playing --

14 MR. ROGERS: For completeness, if you think it's
15 necessary for understanding. I think this is, in and of
16 itself, complete to answer the question that I --

17 MR. CRANE: I don't doubt that. I don't doubt
18 that's what defense counsel thinks.

19 THE COURT: Do you have an objection or not,
20 Mr. Crane?

21 MR. CRANE: No. As long as I can get into the other
22 aspects of this section of the conversation --

23 MR. ROGERS: I'm offering --

24 MR. CRANE: -- I have no objection.

25 MR. ROGERS: I'm offering the complete CD, which

1 contains three different telephone conversations, including
2 everything that he just talked about.

3 THE COURT: You do not object to Defendant's Exhibit
4 E.

5 MR. CRANE: Is that the excerpt?

6 MR. ROGERS: No. That's the big one.

7 THE COURT: That's the whole CD.

8 (Discussion off the record between counsel.)

9 MR. ROGERS: Let me put it this way. That's the
10 only excerpt from this particular CD that I intend to play
11 right now. And --

12 MR. CRANE: Well --

13 MR. ROGERS: -- if you don't want to play --

14 MR. CRANE: -- Judge -- well, I guess -- here's the
15 way I want to propose it. The issue here as to -- we gave
16 these conversations to the defense. There are numerous
17 things said on these tapes. The excerpt and its -- and its
18 contextual aspects I'm not going to object to. The entire
19 conversations on these tapes, there may be privilege with
20 respect to his defense counsel. There may be things that are
21 otherwise objectionable, that I can't sit here and index on
22 what they're showing me. So maybe the issue is: The matter
23 of it going back later in its full form may be an issue that
24 we could take up at a later time.

25 MR. ROGERS: That's fine, Your Honor. And we would

1 be happy to offer it subject to any objection they care to
2 make to any particular excerpt.

3 MR. CRANE: I mean, in other words, not only is he
4 putting on, in this exhibit, one track, and the excerpt from
5 it, for the jury to hear, there's two other tracks of, let's
6 say, 20-minute conversations.

7 MR. ROGERS: Right. And these are the forms we got
8 them in.

9 THE COURT: And are you saying those might be
10 objectionable?

11 MR. CRANE: Potentially, yeah. I mean, we'll have
12 to check that out again. We -- there's a lot of time on the
13 phone there.

14 THE COURT: As to the particular track that is
15 offered now to be played for this jury, do you have an
16 objection to that track?

17 MR. CRANE: The excerpt. No. I think I know the
18 one he's talking about, and I won't object to that.

19 THE COURT: All right. Well, I will admit that, for
20 that sole purpose. And if you hear that it's a different
21 track than you think it is, you'll need to speak up.

22 MR. ROGERS: Okay.

23 Mr. Weis, would you please play the excerpt from
24 Exhibit E which has been marked "nurse 3."

25 THE COURT: And as to this, it's a very brief

1 excerpt; is that correct?

2 MR. ROGERS: That's correct.

3 THE COURT: I'll have my reporter take it down.
4 Simply -- I mean, if it were a 20-minute excerpt, it would be
5 something else, but if it's 30 seconds, and she can hear it,
6 she will take it down. Now, if it's not clear, I can't
7 promise you that you'll get a good record of it, with the
8 court reporter.

9 MR. ROGERS: Okay.

10 THE COURT: She will do her best.

11 MR. ROGERS: "Nurse 3."

12 (Excerpt played.)

13 (The excerpt was unintelligible, and an accurate
14 record could not be made.)

15 Q. Now, my question is: When you said to your
16 mother -- that was your mother on the phone?

17 A. That's correct.

18 Q. And that was you.

19 A. That was me.

20 Q. When you said to your mother, "Basically it was over
21 after that," you meant the potential case of State of
22 Missouri versus Charles Erickson for the murder of Kent
23 Heitholt; right?

24 A. No.

25 Q. You meant your choices about what to do about your

1 feelings or intimations or beliefs that you may have been
2 involved with; right?

3 A. No.

4 Q. So you still believe that when you told your mother,
5 "It was all over after" -- or when you told your mother that
6 you told the nurse it was over after that, you weren't
7 saying --

8 A. I said the conversation was over. After that -- I
9 said, after that, it was over. Meaning, after I said that,
10 the conversation was over. Hence, I didn't say anything else
11 regarding the conversation with the nurse.

12 Q. So you were saying that basically your conversation
13 with -- you were trying to tell your mother basically the
14 conversation with the nurse was over?

15 A. That's correct.

16 Q. And so what you said was: "I just told them
17 basically that some other things that I had to say the cops
18 correlated with what had actually happened, and that I told
19 one of my friends about it, and then basically, I mean, after
20 that it was over." You're talking about: That's the end of
21 the conversation.

22 A. That's the end of the conversation.

23 Q. Not after telling the cops things that they said
24 correlated --

25 A. That's the end of the conversation with the nurse.

1 Q. All right. Now, many of these conversations, while
2 you were in jail, talking to your parents on the phone,
3 happened before you had received the police reports; correct?

4 A. Yes.

5 Q. Before your lawyer had received the police reports.
6 Correct?

7 A. Yes.

8 Q. Before your lawyer had a chance to view the
9 videotapes.

10 A. That's correct.

11 Q. And before you had had a chance to view the
12 videotapes.

13 A. Yes.

14 Q. Yet you and your parents had talked at some length,
15 both in person and on the phone, about you reaching some kind
16 of plea agreement to testify against Mr. Ferguson; isn't that
17 true?

18 A. Yes.

19 Q. And you were, at some points, reluctant to do that,
20 weren't you?

21 A. Yes, I was.

22 Q. And your parents were at some points attempting to
23 persuade you to testify against Mr. Ferguson or to reach a
24 plea agreement.

25 A. Yes. That's correct.

1 Q. And your father went so far as to tell you that the
2 more details you could provide the prosecutor, the better
3 your negotiating position would be; isn't that true?

4 A. I'm not sure if he said that or not. I believe when
5 he said that -- you're taking it out of context. When he
6 said that, he was telling me not to talk about the case with
7 other people, so that less -- the less other people that had
8 to come forward with details, and the more that I said
9 myself -- do you understand what I'm saying? The more that I
10 said myself and didn't come from other people, probably the
11 better deal I would get.

12 Q. All right. So he did tell you that the more details
13 you personally, Chuck Erickson, could provide, the better
14 deal you're going to get.

15 A. Provide myself, yes, that's correct.

16 Q. Obviously you would have no control over what
17 details anybody else could provide, unless you somehow gave
18 them to them.

19 A. That's correct.

20 Q. All right.

21 A. And just to clarify, he was telling me that so I
22 didn't talk about my case with other people. He wasn't
23 telling me that so I'd, you know, make up details.

24 Q. But the message was: The more details you give, the
25 better the deal.

1 A. Myself. That didn't come through an intermediary.

2 Q. Right.

3 A. That was his point. So I wouldn't talk about the
4 case. But it wasn't to manufacture -- he didn't say that so
5 I'd manufacture details and get a better deal, if that's what
6 you're getting at, which is I think what you're getting at.

7 Q. Well, this was a conversation that happened in
8 April -- at least once in April of 2004. Correct?

9 A. I don't know. I don't know.

10 Q. It happened between the time that you were arrested
11 and told the police the things we've seen on the videotape;
12 correct?

13 A. I believe so. I'm not certain.

14 Q. And the time that you went to give your proffer on
15 October 1st; isn't that true?

16 A. I'm not sure.

17 Q. Sometime in between those times?

18 A. Possibly.

19 Q. You would not deny that at least one of those
20 conversations -- and there may have been more conversations
21 about that. I'm not saying that's the only one. But you
22 would not deny that one of those conversations occurred on
23 April 14th, 2004, would you?

24 A. I'm not -- no, I won't deny that.

25 Q. Okay. Before that, on March the 13th of 2004, do

1 you recall having a conversation with your mother about the
2 case?

3 A. Yeah. I had a lot of conversations about the case
4 with my parents.

5 Q. And particularly, on March the 13th, 2004, do you
6 recall telling your mother, "I just want to see everything.
7 I just want everything laid out in front of me, because I
8 can't even fully make it make sense until I see that."

9 A. Yeah, I believe I said that.

10 Q. Okay. And you were talking about not being certain
11 about what happened and wanting to see police reports and
12 photographs and things so that you could put together in your
13 own mind a story that made sense to you. Isn't that true?

14 A. Not a story that made sense to me. The truth. It's
15 not like I was just going to look at these things and say,
16 "Oh, well, this might have happened." I'm not sitting here
17 lying about that now. I'm telling the truth. Whether you
18 believe that or not, I don't really care. But no, that's not
19 why I wanted to do that. I wanted to do that so that I could
20 accurately portray the truth.

21 Q. Did you hear my question?

22 A. Yeah. And I thought I answered it.

23 Q. Were the words "make sense" or "make it make sense"
24 my words?

25 MR. CRANE: I think you read it was "fully" -- I

1 think the question you asked was "fully make sense." Just to
2 be accurate, Judge.

3 Q. My question I'm asking now is: Were the words "make
4 it make sense" your words, on the phone, talking to your
5 mother, March 13th, 2004?

6 A. I don't know. If that's -- if that's what they
7 were, they very well may have been. I'm not -- I'm not sure.

8 MR. ROGERS: Your Honor, I would offer Defendant's
9 Exhibit F, which is a video -- excuse me, audio CD, with
10 three separate phone calls, including this one, which I
11 believe is track 3.

12 MR. CRANE: Okay.

13 MR. ROGERS: Subject to the other record we made on
14 the other one, about completeness and reserving objections to
15 other portions of it that may not be admissible.

16 MR. CRANE: Okay. So in other words, at this time
17 all you want to play is the excerpt off of that.

18 MR. ROGERS: Right.

19 MR. CRANE: F. Okay. Without going through all
20 that I said about E, I don't have any objection to the
21 excerpt being played.

22 THE COURT: Okay. You may play track 3 of
23 Defendant's Exhibit F, if that is the conversation that you
24 referred to.

25 MR. ROGERS: It's the conversation I referred to.

1 Do you have that queued up on the machine?
2 (Excerpt playing.)
3 THE COURT: Are you having trouble hearing?
4 (Tape stopped.)
5 THE COURT: Is --
6 MR. WEIS: That's just --
7 MR. ROGERS: Yeah. I don't think we can do any
8 better. I think that's the recording.
9 MR. CRANE: Real quick, that was on March 13, '04.
10 MR. ROGERS: That's right.
11 MR. CRANE: And that's CD number 3, track --
12 MR. ROGERS: 3.
13 MR. CRANE: CD 3, track 3?
14 MR. ROGERS: Right.
15 Just do it again, please.
16 (Excerpt played.)
17 MR. ROGERS: Okay.
18 MR. CRANE: Did he say "fully make a decision"?
19 MR. ROGERS: The way I heard it was: "Fully
20 make" -- I don't know. What did you say? Did you hear what
21 you said?
22 A. No.
23 MR. ROGERS: You want to hear it again?
24 A. It's hard to hear.
25 Q. It is hard to hear.

1 A. It's not in the transcript? I mean --

2 MR. ROGERS: Mr. Crane's not hearing what I read in
3 the transcript, and I'm not sure that I am either.

4 A. You want to replay it?

5 MR. ROGERS: Not an official transcript.

6 A. I mean, we can replay it if you want to. I don't
7 know. I can't -- I couldn't make out what I said.

8 MR. ROGERS: Play it again.

9 (Excerpt played.)

10 MR. CRANE: "Determination."

11 MR. ROGERS: Okay. You can stop now.

12 (Tape stopped.)

13 Q. Is that what you hear, "Because I can't even fully
14 make a determination"?

15 A. I believe that's what I heard, yeah.

16 Q. Okay. And you're talking about --

17 MR. CRANE: Just -- are you going to change your
18 transcript there? Because you asked him --

19 MR. ROGERS: The transcript's not in evidence. It's
20 just notes.

21 MR. CRANE: Okay.

22 MR. ROGERS: I'm not claiming it's a transcript.

23 THE COURT: Oh. Would you then approach the bench?
24 Both counsel?

25 - - -

1 Counsel approached the bench and the following
2 proceedings were held:

3 THE COURT: There is a camera -- it's off. I turned
4 it off.

5 There is a camera behind you in that box. When I
6 was out at recess, I was advised by someone in the local
7 media that -- who was looking at the feed that someone was
8 taking pictures of that particular -- of what was on the
9 podium. And the person who was taking the pictures said,
10 "Oh, I'm only taking pictures of transcripts. Legal
11 transcripts." I assume that you -- I didn't know that you
12 had other notes there. I wanted to caution you that there's
13 a camera there, and you might -- I strongly told them that
14 they were not to take pictures of counsel's notes. It's one
15 thing if they take a transcript like this and --

16 MR. CRANE: I thought you were going to say they
17 took a picture of his photo.

18 THE COURT: No. That camera that's sitting in that
19 box can photograph what you have on the podium. And if
20 you're asking questions from something that are just your
21 notes, that you maybe have typed up, that is accessible with
22 that camera. I've told them not to take any pictures of it.
23 And someone locally reported to me that they had seen things
24 that look like transcripts come across the line. But I
25 wanted to you be aware. And I mean, I've -- I don't know

1 what's going on with that.

2 MR. ROGERS: Your Honor --

3 THE COURT: We have a prompter over there, that our
4 bailiff is supposed to be taking a look at, to make sure that
5 your private personal notes, whether it's yours or the
6 prosecutors, would not be photographed and we have an
7 understanding locally that that's not done. And that's
8 what -- that's what the -- in fact, I don't think they ever
9 photograph the podium, that you might have information on.

10 MR. ROGERS: I didn't realize there was a camera in
11 that box. I had no idea that's what it was.

12 THE COURT: Well, you need to smile.

13 MR. ROGERS: Usually got the side of my head, so
14 it's happy enough, I guess.

15 THE COURT: I wanted you to be aware. And I don't
16 see anyone monitoring that now. And I will, during the noon
17 recess, have a discussion with someone.

18 MR. ROGERS: Is there some way we can just turn that
19 camera off? I don't see a legitimate purpose for the press
20 to be able to photograph anything on the podium. Now, this
21 particular document here was not on the podium during the
22 recess, but I have had handwritten notes, I have had other
23 police reports, I have had other things that are not
24 transcripts, and I have had transcripts which are not in
25 evidence --

1 THE COURT: Well --

2 MR. ROGERS: -- none of which should be photographed
3 by those people.

4 MR. CRANE: I don't think anyone was photographed.
5 We'll take the appropriate precautions. They couldn't --

6 THE COURT: I wanted you from now on to be careful.

7 MR. CRANE: Very good.

8 THE COURT: And I will look into that during the
9 noon hour.

10 MR. CRANE: Very well.

11 MR. ROGERS: Thank you.

12 - - -

13 The following proceedings were held in open court:

14 Q. So that was March the 13th, and you were telling
15 your mother you wanted to see everything laid out in front of
16 you before you could make a determination.

17 A. Yeah, I said that. That's correct.

18 Q. Okay. And the determination you're talking about is
19 whether what you thought were memories were accurate or
20 inaccurate?

21 A. I -- I'm not sure what I meant. Just in general
22 terms how I was going to proceed from there. I don't know.

23 Q. That was still at a time when you, in your conscious
24 mind, were not certain that you were involved in the crime;
25 correct?

1 A. Yeah, that's correct.

2 Q. And it was actually quite a while before you told
3 the nurses you were not certain. Correct?

4 A. That was a month.

5 Q. Right.

6 A. Yeah.

7 Q. Now later, on April 24th, 2004, you had a telephone
8 conversation with your father about whether you should be
9 cooperating with the prosecution in this case; is that
10 correct?

11 A. I -- I'm not sure.

12 Q. You're not denying that.

13 A. No, I'm not denying that.

14 Q. Okay. Do you recall a conversation where your
15 father told you that if you did not cooperate, you would be
16 looking at a substantially greater period of time to serve?

17 A. Yes. Yeah.

18 Q. Okay. And that was a fairly extensive conversation,
19 wasn't it?

20 A. I'm not sure.

21 Q. And that conversation, however, at least one of
22 those conversations, and there's probably been more than one,
23 but one of those conversations occurred before you had even
24 gotten the police reports or the discovery or had it all laid
25 out in front of you like you were talking to your mother

1 about; right?

2 A. I believe so. I can't be certain. I don't deny it.

3 Q. And even then your father was urging you to work
4 through your attorney to reach the best plea bargain you
5 could, wasn't he?

6 A. I believe so, yes.

7 Q. And he had also called in his brothers to help you
8 in that regard, wasn't he -- hadn't he?

9 A. No, he hadn't.

10 Q. You hadn't talked with --

11 A. He may have talked to them. He didn't call anyone
12 in to talk to me. The most I got was a letter from my -- one
13 of my uncles. And all that really consisted of was: Don't
14 talk about your case with people that you're locked up with.
15 But he didn't call anyone in. No one came down here. I
16 mean, no one came -- I didn't talk to my uncles about it.

17 Q. Did your father talk to your uncles about it and
18 tell you what they thought?

19 A. I --

20 MR. CRANE: Well, wait a minute now. He's asking if
21 his dad talked to his uncles about it? That's hearsay.

22 THE COURT: Sustained.

23 Q. Let me tell you -- ask you this. You and your
24 father were having an ongoing conversation about whether or
25 not you should look for a plea agreement and testify against

1 Mr. Ferguson, weren't you?

2 A. Yes.

3 Q. And part of that conversation included statements
4 about a guy named Ed; is that correct?

5 A. It's -- I don't deny it.

6 Q. Okay. And who's Ed?

7 A. Ed Guinn.

8 Q. Who's that?

9 A. He was the lawyer that was appointed to me when I
10 first got arrested.

11 Q. Okay. So that's a different person. Not one of
12 your uncles.

13 A. Not -- I'm sorry?

14 Q. Ed is not one of your uncles.

15 A. No. No.

16 Q. But you have an uncle who is, in fact, a lawyer who
17 practices criminal defense in Illinois; is that correct?

18 A. That's correct, yes.

19 Q. And to your knowledge, he had conversations with
20 your lawyer, Mr. Kempton; is that correct?

21 A. I don't know. I think he might have. I'm not sure.

22 Q. As a matter of fact, at one point, when you were
23 expressing reluctance to enter into plea agreements, your
24 father even told you, "Look, if you're not going to
25 cooperate, Mr. Kempton is not going to be your lawyer any

1 more," didn't he?

2 A. Yeah. He said there was no point, because all I
3 would be doing would be pleading guilty at that point. I
4 don't need a paid attorney to plead guilty.

5 Q. And so basically he was saying, "If you don't follow
6 the plan of cooperating and testifying against Ryan Ferguson,
7 you're not going to have Mark Kempton; you're going to end up
8 with a public defender." Correct?

9 A. Yeah. That was true, yes. Because I would be
10 pleading guilty, I wouldn't need a paid attorney for
11 anything.

12 Q. He didn't say, "If you don't -- if you plead
13 guilty." What he said was: "If you decide you're not going
14 to cooperate."

15 A. That was my only other -- that was the only other
16 thing I was going to do, was just to plead guilty and not
17 testify against him. He didn't state that, no.

18 Q. He didn't. And he told you that if you did not
19 cooperate, the time that you would spend in prison would
20 probably be at least 50 percent longer, didn't he?

21 A. Yeah, I think he said that, that's correct.

22 Q. And this is a conversation which takes place before
23 you've even had a chance to talk to Mr. Kempton about what's
24 in the police reports, about what you tell the police the day
25 you're arrested, about the uncertainties that you expressed

1 to the police on the videotapes that we saw yesterday;
2 correct?

3 A. I don't know. I don't know.

4 Q. Well, you would not quarrel with me if I represent
5 to you that this conversation --

6 A. You said April 24th?

7 Q. April 24th, 2004, at 9:12 p.m.?

8 A. I don't know if I had had my attorney talk to him or
9 not yet. That's the honest --

10 Q. And you don't know if your attorney had gotten the
11 videotapes yet.

12 A. I don't know.

13 Q. But as a matter of fact, on two days -- excuse me,
14 the next day, April the 25th, you talked again with your
15 father.

16 A. Okay.

17 Q. Who told you that in the meantime he had talked to
18 Mr. Kempton, who had gotten the police reports and
19 videotapes.

20 A. Okay.

21 Q. So if Mr. Kempton didn't get them -- didn't tell
22 your father he had them the next day, you certainly hadn't
23 had a chance to talk about them with Kempton, had you?

24 A. I suppose no, that I hadn't.

25 Q. So the decision to cooperate in your father's mind

1 had been made pretty well before --

2 MR. CRANE: I'm going to object to when his father's
3 mind had various thoughts.

4 MR. ROGERS: I'll rephrase it.

5 Q. Before you'd had a chance to look at the
6 information, before you had a chance to review the
7 videotapes, your father was urging you to plead guilty and to
8 testify against Mr. Ferguson. Is that a fair statement?

9 A. I don't know if I would use the word "urging."
10 I'm -- I'm not sure. He didn't really know exactly what was
11 going on at all. I mean completely. But if I was guilty of
12 it and what I said was true, then he -- he thought that yes,
13 I should plead guilty and that I should testify against Ryan
14 Ferguson.

15 Q. And that's what he was saying during that
16 conversation on April the 24th.

17 A. That's correct.

18 Q. And he was saying: "You're going to get less time.
19 Do it that way." Right?

20 A. Yes, that's correct, yes.

21 Q. Okay. Now let's talk a little bit about your plea
22 agreement here. You've told us I believe on direct
23 examination that you have agreed to a sentence of 15 years
24 for the offense of murder in the second degree; is that
25 correct?

1 A. That's correct.

2 Q. And murder in the second degree is a class A felony,
3 punishable by a range -- a term of years between 10 and 30,
4 is that correct, or life imprisonment.

5 A. I don't know. I'm not sure. I know it -- I thought
6 it was 10 to 25, but I could be wrong.

7 Q. Okay. And you've also said that you anticipate the
8 concurrent term of 15 years for robbery in the first degree.

9 A. That's correct.

10 Q. And do you know that the range of punishment for
11 robbery in the first degree, it's another class A felony,
12 not -- a term of years between 10 and 30 or life
13 imprisonment.

14 A. Okay.

15 Q. Okay? And you also anticipate a consecutive term of
16 10 years for armed criminal action; correct?

17 A. That's correct.

18 Q. And armed criminal action is an unclassified felony
19 that has a range of punishment for the first offense of not
20 less than three years; correct?

21 A. Yeah.

22 Q. And it's your understanding that, if you are
23 sentenced in accordance with that agreement, you will have to
24 serve, on the 15-year -- two 15-year concurrent sentences,
25 about 12 and a half years?

1 A. 12 years and nine months.

2 Q. 12 years and nine months. And that's because second
3 degree murder is one of the offenses for which someone must
4 serve 85 percent of their term before they're eligible for
5 parole.

6 A. Yes.

7 Q. It's also your understanding that, even though the
8 consecutive term of 10 years for the armed criminal action,
9 even though that's a consecutive sentence, and even though
10 under the law armed criminal action is punishable by a
11 minimum of three years without parole eligibility -- right?

12 A. Yes.

13 Q. -- that it's your understanding that in your
14 circumstances the parole board would have the discretion to
15 credit that three years for the 12 years and nine months you
16 have to serve on the murder sentence; correct?

17 A. That's correct.

18 Q. So you are hoping that, as a result of your plea
19 agreement in this case, you will be released 12 years and
20 nine months after your arrest on March 10th.

21 MR. CRANE: Objection, Judge. The plea agreement,
22 nor anything that the state or this Court would do with
23 respect to the defendant in terms of his parole --

24 THE COURT: You mean the witness.

25 MR. CRANE: The witness. When he -- I mean, he's

1 still a defendant.

2 THE COURT: I understand that.

3 MR. CRANE: Would -- the parole board is not
4 contemplating an agreement. That misstates the agreement.
5 And it's also asking for a legal conclusion from this
6 witness, because the parole -- the board of probation and
7 parole doesn't have anything to do with agreements on
8 sentencing.

9 MR. ROGERS: I think I'm entitled to inquire about
10 the witness's hope and expectations as a result of the plea
11 agreement, Your Honor.

12 THE COURT: Well, you may do that, but you may not
13 ask it in the context of that's what's going to happen as a
14 result of the plea agreement, because I don't believe
15 probation and parole is a party to that agreement.

16 MR. ROGERS: The parole board is not, Your Honor,
17 but I think -- my question was: That his hope is: That, as
18 a result of the sentence contemplated by the agreement, he
19 would be released 12 years and nine months --

20 A. As soon as possible, that's my hope, yes.

21 Q. And --

22 A. Is that my expectation? I don't know what to
23 expect.

24 Q. You don't know what to expect.

25 A. No.

1 Q. But that's your hope.

2 A. That's my hope.

3 Q. And you've been advised by your lawyer, prior to
4 your guilty plea and prior to your signing the plea
5 agreement, that that's the best you can hope for.

6 A. That's what he told me, yes.

7 Q. 12 years and nine months from the date of your
8 arrest, March 10th.

9 A. That's correct.

10 Q. Now, you indicated I believe on direct examination
11 that you are currently on some sort of psychotropic
12 medication; is that correct?

13 A. Yes.

14 Q. And what are you currently taking?

15 A. Prozac.

16 Q. And is that for your obsessive-compulsive symptoms?

17 A. Yes.

18 Q. And how long have you been taking that?

19 A. Since May.

20 Q. Since May of --

21 A. Of this year.

22 Q. -- this year? And before that you were taking
23 another psychotropic drug called Lexapro?

24 A. That's correct.

25 Q. How much Prozac are you taking?

1 A. 60 milligrams.

2 Q. 60 milligrams a day?

3 A. Yes.

4 Q. And how much Lexapro were you taking?

5 A. I don't know. It was the smallest dose available.

6 Q. In that connection, have you been seeing a

7 psychiatrist at the jail?

8 A. I've had to see a psych nurse in order to keep my

9 medication. I've got to see her every five weeks, something

10 like that. I talk to her briefly.

11 Q. And the last time you saw that psych nurse was

12 October 12th?

13 A. Of this month?

14 Q. Yes.

15 A. Yeah, I believe that's right.

16 Q. Last week.

17 A. Yeah. Yeah, I believe that's right.

18 Q. And last week is the first time you had ever told

19 that psych nurse anything about wanting help dealing with the

20 memory problems. Correct?

21 A. I don't believe I asked her for help to deal with my

22 memory problem.

23 Q. Did you tell the psych nurse that you were still

24 working on how you could not remember situations and then

25 have things trigger recollection?

1 A. Not in those words, no.

2 Q. Have you had a chance to look at your progress
3 notes?

4 A. No.

5 Q. Would you like a chance to look at your progress
6 notes?

7 A. Okay.

8 Q. I'm showing you October 12th, 2005.

9 (Witness reading document.)

10 A. I -- what I was talking to her about was how I was
11 going to explain that to people. Because it's not something
12 that's easy to explain. It's not an every day occurrence.

13 Q. Okay.

14 A. It wasn't a -- it wasn't about --

15 (Discussion off the record between counsel.)

16 Q. So you were asking the psychiatric nurse, who you
17 see every five weeks to monitor --

18 A. Well, this was a new person. I'd seen one lady,
19 named Pascha. And I saw her every time. And then this -- I
20 don't remember her last name. Her first name was Sara. That
21 was the first time I had ever seen her and the first time I
22 ever met with her.

23 Q. But you're asking her for advice about how to
24 explain to people, this jury and this Court, your changes in
25 memory; correct?

1 A. Well, I was -- I was -- I don't know if I was doing
2 that. I was trying to see how normal it was. You know. I
3 was asking her questions about repressed memory and questions
4 about post-traumatic stress disorder and things like that.
5 And I asked her how normal it was. I don't -- I don't
6 believe that I ever asked her to help me explain. You know,
7 I was having -- I was having some problems articulating what
8 was going on in my mind and how my memories have progressed
9 over time. And -- and, you know, I was trying to come to a
10 conclusion that -- about why that took place and what was --
11 you know, what has happened here, you know. I mean, I was --
12 I wanted an answer, just like everyone else.

13 Q. So is it fair to say that some of the things that
14 you have told us yesterday and today about how you believe
15 your memory works have been aided by this consultation about
16 how to express things?

17 A. No.

18 Q. Okay. Is it fair to say that you saw the other
19 psychiatric nurse, Pascha, last on November -- excuse me,
20 September 18th of this year?

21 A. That might be correct. I'm not sure of the date.

22 Q. And is it fair to say that at that time your memory
23 was intact?

24 A. I don't -- I don't know if I said that or not.

25 (Mr. Rogers showing a document to the witness.)

1 A. That's what she -- yeah, that's what she put down.

2 I mean, these are two different people also.

3 Q. Right.

4 A. Yeah.

5 Q. And on July --

6 A. It wasn't I was having memory problems. I was
7 trying to explain the prior problems I'd had with my memory.

8 Q. But at each time before that, when you would see the
9 psychiatric nurse, your memory was always reported as intact,
10 wasn't it?

11 A. I don't know how she recorded it. That was the
12 first time I had even seen a box with "memory" next to it. I
13 didn't -- I mean, I didn't -- I know -- I knew that she
14 checked things off at the end real quick and then I had to
15 sign it. Things about -- all sorts of stuff.

16 Q. Right.

17 A. But I mean, I don't even think that -- I mean, I had
18 mentioned to her before, Pascha, that I had memory problems,
19 and that there were some things I couldn't remember for a
20 long time, and some things I still can't remember. And --
21 but I never believed -- she -- we never really got talking to
22 my case -- about my case a whole lot.

23 Q. Well, in terms of your psychiatric condition and
24 your memory, isn't it fair to say that on July 21st, 2004,
25 your memory was intact?

1 A. That's what she says. I don't know if my memory was
2 intact or not. That's what she put down there. That's her
3 opinion. And I don't believe she ever asked me about my
4 memory.

5 Q. How about on September 10th, 2004?

6 A. Is that what it says there? "Intact"?

7 Q. Uh-huh.

8 A. Well, that's what she put there. I don't know if
9 that's true or not.

10 Q. And is that your signature at the bottom?

11 A. That's my signature.

12 Q. Okay.

13 A. Did I read that before I signed it? No, I didn't
14 read it. I just signed it because I had been signing it the
15 entire time.

16 Q. And on October 29, 2004, "intact"?

17 A. That's what it says, yes.

18 Q. Your signature?

19 A. Yeah.

20 Q. And on December 31st, 2004, "intact."

21 A. That's what it says, yeah.

22 Q. Your signature?

23 A. Yeah, that's -- let me see that.

24 That's not my signature.

25 (Mr. Rogers showing a document to the witness.)

1 A. That -- those aren't my signatures.
2 Let me see that, man.
3 Let me see this.
4 (Witness looking at documents.)
5 A. These are the same copies of the same page. That's
6 not my signature either. Let me see. Yeah. These aren't --
7 Q. Those are not your signature.
8 A. That's correct.
9 Q. None of them are.
10 A. Oh, no. Actually this one right here is my
11 signature.
12 Q. Okay. But that's not one I've shown you before.
13 That's a different form.
14 A. That's correct.
15 Q. Okay. So when you told us that was your signature
16 before on any of those pages, that was not.
17 A. I thought it was, yeah.
18 Q. But it's not.
19 A. No, it's not.
20 Q. Okay. But you're not disputing that --
21 A. I don't know what she marked.
22 Q. -- the box "intact" is checked there on your
23 records.
24 A. I don't know if that's mine, because I didn't -- my
25 name's up there, but I didn't sign that.

1 Q. Okay. On March 21st, 2005, your name's up there
2 again. Correct?

3 A. Yeah.

4 Q. "Intact"?

5 A. That's what it says. And I didn't sign that either.

6 Q. Didn't sign this.

7 The next day, March 22nd, 2005, "memory intact"?

8 A. That's what it says. Let me see that one.

9 No --

10 Q. Not your signature?

11 A. No, that's not mine either.

12 Q. But your name's on the top.

13 A. My name is on top, yeah. That's right.

14 Q. May 12th, 2005, "memory intact"?

15 A. That's -- yeah. I didn't write that, though. She
16 put that there.

17 Q. June 14th, 2005, "memory intact."

18 A. That's what's marked on that page, yeah.

19 Q. June 28, 2005, "memory intact."

20 A. That's what it says.

21 Q. July 29, 2005, "memory intact."

22 A. Yep. It's marked right there.

23 Q. And we've already talked --

24 MR. CRANE: Judge, I -- you know, we're willing to
25 agree that everywhere -- I mean -- and I don't know, maybe

1 there's one I missed, that his memory's intact. We're
2 willing to agree his memory's intact now. We're willing to
3 agree his memory is intact then. I don't know whether he
4 signed the things, but --

5 A. No, I didn't sign any of those.

6 MR. ROGERS: Is there an objection pending?

7 MR. CRANE: No. I'm just trying to move things
8 along. If you're trying to establish that his memory's
9 intact on those pieces of paper, I'm all for you.

10 MR. ROGERS: I don't think it's your turn to make
11 speeches.

12 MR. CRANE: I'm not making a -- I'm just stipulating
13 that the jail records indicate his memory was intact, unless
14 there's one I missed.

15 MR. ROGERS: Would you stipulate that the jail
16 records indicate he made no complaints about his memory until
17 the week before he was supposed to testify here on behalf of
18 the state? In which case he --

19 MR. CRANE: Actually there some notes where he talks
20 about not wanting --

21 MR. ROGERS: Excuse me.

22 MR. CRANE: Oh, you don't want me to answer that
23 question?

24 MR. ROGERS: If you're not willing to make that
25 stipulation, then let's -- allow me to proceed with my

1 cross-examination of your witness.

2 MR. CRANE: Okay.

3 A. I didn't state --

4 Q. Excuse me. There's not a question pending.

5 Isn't it true, Mr. Erickson, that you did not
6 complain to the psychiatric nurse that you've seen
7 periodically over the last year and a half about any problems
8 with your memory until last week, when you sought advice
9 about how to explain your position about having not
10 remembered things at one point and claiming to remember them
11 now? Isn't that true?

12 A. No. I wasn't discussing problems with my memory
13 now. I was discussing problems with my memory in the past.
14 And I was discussing how I was going to go about explaining
15 that. And I was just -- I asked her if she ever seen
16 anything, any other instances in which that occurred. I
17 didn't tell her that I had problems remembering what happened
18 now. I didn't say that I didn't remember hitting
19 Mr. Heitholt in the head with a tire tool and him strangling
20 him with a belt, if that's what you're getting at, which is I
21 think what you're getting at.

22 Q. Are you done?

23 A. That's -- yeah, that's all I had to say.

24 Q. My question is: Isn't it true --

25 A. No, it's not true.

1 Q. -- that last week is the first time you told anybody
2 there about anything having to do with your memory?

3 A. No, that's not true.

4 Q. Okay. Isn't it true that the records as far back as
5 July of 2004 reflect that you reported no problems with your
6 memory and your memory was intact? Consistently until last
7 week, when it has the notation that you previously explained
8 to us.

9 A. No. No. I've mentioned things about my memory
10 plenty of times. If she didn't mark it down, she didn't mark
11 it down. We really didn't get into that much detail about my
12 case. And plus, I was seeing one person the entire time, and
13 then I -- the last person I saw was a completely different
14 person, who I had never met with before.

15 Q. My question is: Isn't it true --

16 A. No.

17 Q. -- that the records that we have --

18 A. Yeah, the records, that's correct.

19 Q. -- reflect --

20 A. Yeah.

21 Q. -- that you never had any problems with your memory
22 until you had that one notation from last week?

23 A. Yeah, I'll agree with that, but I -- I don't think
24 that that notation necessarily stated that I had a problem
25 with my memory.

1 Q. But -- and you've previously explained that
2 notation.

3 A. Yes, I did.

4 Q. Okay. And you agree that you initially explained
5 that notation as saying you wanted advice about how to
6 communicate to people your beliefs that you had done
7 something, forgotten it, and then somehow recovered those
8 memories.

9 MR. CRANE: Objection. That misstates -- there is
10 absolutely no foundation for that question. The question's
11 been asked and answered in various forms, but the basis for
12 that question, if you're referring to October 12, '05, is not
13 here.

14 THE COURT: You want to approach the bench? And
15 bring the record with you, please.

16 - - -

17 Counsel approached the bench and the following
18 proceedings were held:

19 THE COURT: Let me look at the record.

20 MR. CRANE: If that's what he's referring to.

21 MR. ROGERS: I'm referring --

22 THE COURT: Let me just look at the record.

23 MR. ROGERS: Okay.

24 (Court looking at document.)

25 MR. CRANE: I highlighted that at one point because

1 I thought that's what he was referring to.

2 THE COURT: Okay. Your objection is?

3 MR. CRANE: The question that just got asked has no
4 basis in that document. If he is asking, "Isn't it true
5 that, when you talked to the nurses on" --

6 MR. ROGERS: That's not the question.

7 MR. CRANE: -- whatever that -- okay. What was the
8 question?

9 MR. ROGERS: The question that I asked him was
10 whether he had explained that notation earlier today by
11 claiming that that's what he was doing; asking for advice on
12 how to explain to people his --

13 MR. CRANE: Well, that doesn't make -- I don't know.
14 I think that is a question that's virtually impossible for
15 him to answer. You're asking him if what he said earlier
16 today about this document -- I mean, I'll object to the form
17 of the question. I don't know how the witness can answer
18 that. Can it be reformed? I mean, that's just -- that is --
19 well, that's my objection.

20 THE COURT: The objection is sustained. Please
21 rephrase your question.

22 MR. ROGERS: Okay.

23 - - -

24 The following proceedings were held in open court:

25 Q. Remember the note from last week, on the psychiatric

1 -- jail psychiatric records that I showed you when we first
2 started talking about this subject?

3 A. Let me see it again. If you don't mind. Just
4 because I don't want any more confusion.

5 Q. Okay. This is, just to show you what we're talking
6 about, October 12, 2005. Your name up there. No signature
7 at the bottom, except the nurse's.

8 (Witness reading document.)

9 A. Yeah, that says that here.

10 Q. Okay.

11 A. Yeah, that's what that says.

12 Q. Remember when I showed you that note, it seems like
13 forever ago, but probably about 20 minutes ago? For the
14 first time?

15 A. Yeah.

16 Q. And isn't it true that you told us then that what
17 you told the nurse was that you were looking for a way to
18 explain to people what you claimed had happened with regard
19 to forgetting and then remembering --

20 A. Yeah. I was having problems articulating what was
21 going on in my mind. Yeah. That's true.

22 Q. And so you were asking that nurse --

23 A. No. I --

24 Q. -- for help in articulating.

25 A. I didn't ask her help for anything. I told her -- I

1 explained to her my memory problems. And I explained to her
2 what was going on in my mind. And then she -- she said, yes,
3 you know, that's --

4 Q. I'm not asking you what she said.

5 A. Well, no, I didn't ask her for advice about how to
6 explain it, no.

7 Q. Okay. And so if you told us that earlier, that
8 would have been a mistake.

9 A. If I told you that earlier.

10 Q. Now, earlier we talked about your conversation with
11 Mr. Nichols about the cleaning lady; right?

12 A. Yeah.

13 Q. And where Nichols told you that you were making
14 accurate presumptions that you would only know if you were
15 there? Do you remember that?

16 A. Yeah.

17 Q. And you told him, "Like what? The cleaning lady?"
18 He said, "That's one." And you told him, "That was in the
19 newspaper." Correct?

20 A. I told him that -- well, I -- yeah, I said that, but
21 what I meant by that is that I read the newspaper that the
22 cleaning lady or janitor got help.

23 Q. Okay. And he goes on to say, "Well, no. About what
24 was specifically said to that lady." And you said, "She went
25 to get help. I mean." Right? Do you remember that from the

1 videotape?

2 A. Could you re -- could you rephrase that or reask
3 that -- ask that question again? Because I'm confused. I'm
4 not sure.

5 Q. Let me read to you the entire -- or just part of the
6 exchange. Let me put it that way.

7 A. Okay.

8 Q. And you know what we're talking about on the
9 videotape?

10 A. Yeah, I know what you're talking about.

11 Q. "Well, you're making accurate presumptions that,
12 like I said, you would only know if you were there." "Like
13 what? The lady, the cleaning lady?" "That's one." "That
14 was in the newspaper." "Well, no. About what was
15 specifically said to that lady." "She went to get help. I
16 mean." Right? Is that what we're talking about? Do you
17 remember that, on the videotape?

18 A. Yeah. Did I say that? I -- if that's what was on
19 the videotape, then that's what I said, that's correct.

20 Q. Okay. Now, what you're now telling us is that the
21 cleaning lady had been mentioned in the newspaper. That you
22 remembered that from reading the newspaper in November of
23 2003. Is that correct?

24 A. I don't remember when I read that.

25 Q. So you don't remember reading in the Columbia

1 Tribune --

2 A. No, I remember reading it at some point; I just
3 don't know when I read it.

4 Q. Okay. And "The cleaning lady witnessed two white
5 college-age men duck behind Heitholt's car"?

6 A. Yes.

7 Q. You remember reading that.

8 A. Yeah. I think.

9 Q. Okay.

10 A. I think.

11 Q. Now let's put this back into context. You have
12 already talked to Short, in the statement that was not
13 recorded; correct?

14 A. Uh-huh.

15 Q. You've talked to Short in the videotaped statement;
16 right?

17 A. Uh-huh.

18 THE COURT: Is that yes or no?

19 THE WITNESS: Yes. I'm sorry.

20 Q. You have talked to Nichols and the other two
21 detectives during the drive-around. Right?

22 A. Yes.

23 Q. And now you're talking to Nichols on videotape.
24 Correct?

25 A. Yes.

1 Q. Isn't it true that when you were talking to Short,
2 in the nonvideotaped part, that you told Short, after you saw
3 the cleaning lady, you sat down beside the vehicle and became
4 physically ill.

5 A. I'm not sure if I said that then or not.

6 Q. Okay. But isn't it true that Short, later in that
7 conversation, introduced the topic of saying something to the
8 cleaning lady?

9 A. No. I said that in a prior conversation.

10 Q. We're talking about your first conversation with
11 Short.

12 A. My first conversation with Short, I told him that I
13 told the cleaning lady, "Go get help." He didn't introduce
14 that to me whatsoever.

15 Q. Okay. So if Short says that he asked you if you had
16 said something to the cleaning lady before or after Ferguson
17 had strangled the victim, and you said that you did not know,
18 you thought you may have said something to the lady at that
19 time, but was not sure, is that inaccurate?

20 A. Did I say that?

21 Q. Did you say to Short --

22 A. I believe --

23 MR. CRANE: Judge, if I may object. At what point
24 is -- is this the very first interview with Short?

25 MR. ROGERS: Yes.

1 MR. CRANE: Okay.

2 MR. ROGERS: Very first interview. The one we don't
3 have the videotape of.

4 MR. CRANE: Okay. And also the one that you're
5 using that again as a kind of a transcript?

6 MR. ROGERS: No. I'm going to ask him whether or
7 not he said what it says he says. And then if he denies it,
8 we'll have to call Mr. Short to prove it up.

9 MR. CRANE: Okay. Okay.

10 MR. ROGERS: Or you'll call Mr. Short and we'll
11 prove it up on cross.

12 MR. CRANE: Okay.

13 MR. ROGERS: Something.

14 Q. Okay. Do you recall saying in response to
15 Mr. Short's question of you during that interview, about
16 whether you had said something to the cleaning lady, that you
17 did not know, you thought you said something to her, but were
18 not sure.

19 A. I don't know if I said that or not. I may have said
20 that.

21 Q. You may have said that. And do you recall Short
22 telling you that the cleaning lady told the police that
23 someone asked for help?

24 A. That wasn't until after I told Short that I had told
25 the cleaning lady to go get help. I said that before anyone

1 said anything to me about a cleaning lady going and getting
2 help and anyone saying anything about anyone telling a
3 cleaning lady to go get help.

4 Q. So you're saying that if Short were to say that he
5 told that to you before you had said that you were sure you
6 had said anything to the cleaning lady, that would be
7 inaccurate.

8 A. That would be inaccurate.

9 Q. So you're denying that Short told you --

10 A. He may have said something before that, but I said
11 something before he said something to me. Do you follow me?

12 Q. And so if Officer Short were to testify that after
13 he told you the cleaning lady told the police that someone
14 asked for help, you said that was you, that would be
15 inaccurate too.

16 A. No. No. That wouldn't be inaccurate.

17 Q. Okay. So -- we're talking about the one that's not
18 on the videotape.

19 A. Yeah. But I'm saying that wasn't the first time
20 that was said, which is what you're trying to portray.

21 Q. Okay. And so -- the question is: Before Detective
22 Short told you anything that the cleaning lady had told the
23 police, are you saying that you told Short for sure,
24 definitely, "I told the cleaning lady, 'Go get help.'"

25 A. Yes.

1 Q. For sure.

2 A. For sure. Definitely.

3 Q. And that -- if you said that you did not know, you
4 thought you may have said something to the cleaning lady at
5 the time, but were not sure, that would be inaccurate, as to
6 what he told you.

7 A. I may have said that afterwards. I'm not sure --
8 I'm not denying it. I don't know if I said that or not.

9 Q. Did you tell us yesterday that, when you were
10 talking to your friends about this before your arrest, that
11 you were seeking their advice about things?

12 A. Yes.

13 Q. And one of the things that you were considering
14 doing was submitting your DNA to the police so that they
15 could test it against whatever DNA standards they had?

16 A. Yes.

17 Q. So that they could confirm or disconfirm your
18 feelings that you might have been involved? Is that fair?

19 A. They could have confirmed it. I don't think they
20 would -- whether or not the tests came back positive or
21 negative -- if they would have come back negative -- let me
22 put it this way: If they would have come back negative, it
23 wouldn't have disconfirmed my memory. It wouldn't, you know,
24 rid me of the memories that I had of that night.

25 Q. But this was a time if you didn't know if these were

1 memories or dreams.

2 A. No. I think I knew that they were memories. I was
3 hoping they were dreams.

4 Q. Well, you were telling your friends you didn't know
5 if they were memories or dreams.

6 A. I thought that they were -- I told them I thought
7 that they were memories. And that I was hoping they were
8 dreams, but I wasn't sure what to do.

9 Q. Well, let me clarify that a little bit. Isn't it
10 true that the only time that you talked to your friends about
11 these memories or dreams was when you yourself had been
12 drinking.

13 A. Yes.

14 Q. And, in fact, you had been drinking and taking
15 cocaine at the New Year's Eve party where you confronted
16 Mr. Erickson.

17 A. Ferguson.

18 Q. Ferguson. I'm sorry.

19 A. Yeah.

20 Q. Thank you. And when you talked with Mr. Gilpin, you
21 were drinking.

22 A. Yes.

23 Q. In fact, you were so intoxicated at that point that
24 you had Mr. Gilpin drive your car.

25 A. Yeah, I had him driving my car. I didn't want to

1 drive.

2 Q. Because you were too drunk to drive.

3 A. I thought I -- I don't know if I could have driven
4 or not. I wasn't going to chance it.

5 Q. And you had Mr. Gilpin drive you, even though he had
6 been drinking as well.

7 A. That's correct.

8 Q. Okay. And when you talked to Art Figueroa, you had
9 been drinking.

10 A. Yes.

11 Q. And you told Art Figueroa that you were not
12 consciously certain that those were accurate memories and
13 that they could be something you dreamed about. Or something
14 that you dreamed up. Didn't you?

15 A. I don't know if I said it was something I dreamed
16 up. I think I may have said that I wasn't sure whether they
17 were a dream or memories.

18 Q. Okay. And do you recall giving a deposition in this
19 case back in June, June 30th, the last day of June of this
20 year?

21 A. Yeah. That's correct.

22 Q. And that was --

23 A. I think it was June 30th.

24 Q. -- here in this courthouse, downstairs in
25 Mr. Crane's office.

1 A. Yeah.

2 Q. And I was there.

3 A. Yes.

4 Q. Mr. Crane was there.

5 A. Yes.

6 Q. Mr. Weis was there.

7 A. Mr. -- Mr. who?

8 Q. Mr. Weis. The other bald guy.

9 A. Oh. Okay. Yeah. And --

10 Q. Mr. Knight.

11 A. Huh?

12 Q. Mr. Knight there for part of it?

13 A. No. I can't remember -- Elizabeth --

14 Q. The assistant prosecuting attorney?

15 MR. CRANE: No. I think he's talking about part of

16 your defense team.

17 Q. Miss Benson.

18 A. Kathryn Benson, yes.

19 Q. She was there for part of it.

20 A. Yeah.

21 Q. And speaking of your conversation with Mr. Figueroa,

22 do you recall the following -- let me first ask you: In a

23 deposition, you're sworn under oath to tell the truth, aren't

24 you?

25 A. Yeah, that's correct.

1 Q. And I, when I started asking you questions, made
2 sure that you would let me know if you didn't understand the
3 question? Correct?

4 A. That's correct.

5 Q. And do you recall the following questions being
6 asked and the following answers being given concerning your
7 conversation --

8 MR. CRANE: Where did you say you were?

9 MR. ROGERS: Page 136, beginning at line 23.

10 MR. CRANE: Thank you.

11 THE COURT: If you'll wait a minute, I'll let the
12 witness take a look at the deposition. 136, line --

13 MR. ROGERS: Beginning at line 23.

14 (The Court handing a copy of the deposition to the
15 witness.)

16 Q. Ready?

17 A. Yeah. Go ahead.

18 Q. "QUESTION: Okay. And did you tell him that you
19 were not consciously certain that these were accurate
20 memories? And that they could be something you dreamed about
21 or something that you dreamed up?" And your answer was
22 "Yes."

23 A. Okay.

24 Q. Is that correct?

25 A. Yeah, that's right.

1 Q. And then I went on to ask you: "Okay. And that was
2 after your conversation with Nick." Referring to Nick
3 Gilpin. Correct?

4 A. Yeah, that's correct.

5 Q. And your answer was: "Yes." And question: "Was
6 that an accurate description of your conscious mind at that
7 time?" Again you answered: "Yes." Is that correct?

8 A. That's correct.

9 Q. Okay. Thank you.

10 THE COURT: You can be seated.

11 Q. You may need that in a minute.

12 Now, back in June of this year, what type of
13 footwear did you believe that you had worn to By George's on
14 Halloween night, 2001?

15 A. I couldn't -- I -- I'm not sure. I believe I said
16 boots or tennis shoes.

17 Q. Okay. And when we say "boots," what did you mean by
18 boots?

19 A. Timberland boots or American Eagle boots.

20 Q. And what kind of boots are American Eagle boots?

21 A. There's a brand of clothes, it's American Eagle, and
22 they're -- they're boots. They're cut off at the ankle.
23 They're just --

24 Q. Are they western boots, with pointy toes?

25 A. No. They're just, you know, like the boots that

1 preppy kids wear.

2 Q. All right. And the soles of those boots are made
3 out of what?

4 A. I believe rubber.

5 Q. And do they have a tread or do they have an
6 insignia? What do they have on the bottom of the sole?

7 A. I believe they had an -- they had an "AE" on the
8 sole. An "A" and an "E" for American Eagle.

9 Q. Okay.

10 A. Yes.

11 Q. And you also had -- you also mentioned Timberland
12 boots?

13 A. Yeah.

14 Q. What kind of boots are those?

15 A. They're kind of -- they've got -- they're like snow
16 boots, kind of. I mean -- you know, like you see the guys
17 with the baggy pants and the big Timberland boots in
18 magazines and -- the boots that go up to, like, above the
19 ankle, to about -- to about the calf.

20 Q. Okay.

21 A. They're tan. I can't remember the tread patterns on
22 those, though.

23 Q. And then you said you might have worn tennis shoes?

24 A. Yeah. It's possible.

25 Q. And do you recall what brands of tennis shoes you

1 owned in October of 2001?

2 A. I believe I had --

3 MR. CRANE: You know what, Judge? This got asked
4 and answered. I realize it was a long time ago, it was
5 yesterday, but he asked him what kind of shoes he had back in
6 2001 yesterday.

7 Remember, this is when you asked him what size shoe
8 and all that?

9 MR. ROGERS: I remember asking him that, but I...

10 Q. Let me ask you this. The only kinds of tennis shoes
11 that you owned in October of 2001 were Nike, K-Swiss, and New
12 Balance; is that correct?

13 A. Yes.

14 Q. Okay. Now, did you tell us yesterday that you
15 didn't see anybody you knew at By George's?

16 A. No, I didn't say that.

17 Q. Did you see anybody you knew at By George's?

18 A. Yes, I did.

19 Q. Okay. Who did you see that you knew?

20 A. I saw Melissa Griggs. I saw Daniel Igleheart. I
21 saw Julie Dunn. I saw Kristen Blankenship. I saw Matt Gay.
22 And I saw Mills Menser.

23 Q. You saw who?

24 A. Mills Menser.

25 Q. Okay. Now, who is Danny Igleheart?

1 A. He's my friend David Igleheart's brother. And
2 he's -- he's deceased.

3 Q. Did you talk to him?

4 A. Yes, I did. I asked him for a ride home.

5 Q. And did he give you a ride home?

6 A. No, he didn't.

7 Q. Why not?

8 A. Because he was there with friends.

9 Q. Pardon?

10 A. He was there with friends, enjoying himself.

11 Q. He didn't want to leave?

12 A. Yeah. I wanted to go home.

13 Q. Do you remember giving your deposition, again on
14 June 30th?

15 A. Yeah, I remember doing that.

16 Q. Did you at any time during that deposition mention
17 seeing David Igleheart?

18 A. Daniel Igleheart?

19 Q. Daniel. I'm sorry.

20 A. I don't know if I did or not.

21 Q. Okay. When -- you say Mr. Igleheart's deceased?

22 A. That's correct.

23 Q. When did you learn that?

24 A. He died about two years ago.

25 Q. Okay. Before your arrest.

1 A. Yes. Actually, it's probably about three years ago
2 now.

3 Q. Did you tell us yesterday that you and Mr. Ferguson
4 would separately leave By George's to go smoke cigarettes?

5 A. I believe I stepped out one time to smoke a
6 cigarette. I don't know whether Ferguson did or not.

7 Q. Okay. So cigarette smoking was not allowed in the
8 bar.

9 A. I don't remember if it is -- if it was or not. I
10 just remember I wanted to step outside, because it was loud
11 and noisy and there were a lot of people in the bar. It was
12 nice to get some fresh air. Well, despite the cigarette I
13 guess.

14 Q. So you are now saying -- yesterday you told us that
15 you and he both went outside to smoke cigarettes. Now you're
16 saying that you think you may have gone outside once to get
17 away from the noise. Is that fair?

18 A. That's correct. I don't know if he did or not. And
19 I don't know if I said that he did or not.

20 Q. Now, is it your testimony today that after you got
21 to the alley behind the Tribune building --

22 MR. CRANE: Could you make a record of what he's
23 looking at there, please?

24 Q. Showing -- indicating the building on State's
25 Exhibit 9. -- that you saw Mr. Heitholt already out in the

1 parking lot?

2 A. No. I believe we saw him in the alley, and he --
3 when we -- when we were across Providence, and we saw him
4 walking out of the building.

5 Q. Okay. And that you then crossed Providence and went
6 up that alley yourself after he went into the parking lot?

7 A. Well, Ryan was with me. Yes, that's -- yes.

8 Q. Okay. And that, after that, you saw another man
9 come out of the building.

10 A. I don't know if we saw him or we heard him.

11 Q. Did another man come out of the building after you
12 had already seen Heitholt --

13 A. Yeah. Yes.

14 Q. -- cross the alley?

15 A. Yeah.

16 Q. And that's for sure.

17 A. That's for sure.

18 Q. And where did that man go?

19 A. I believe he went to his car. I'm not sure exactly
20 where he went, but I believe he went to his car.

21 Q. Was his car in the same parking lot as Heitholt's
22 car?

23 A. Yeah. That's correct.

24 Q. And did you see him go to his car?

25 A. No.

1 Q. Did you see him cross the alley?

2 A. Yes.

3 Q. Did you see him walk out of your sight?

4 A. Yes.

5 Q. Would you describe that person.

6 A. He was -- he was white and he was just regular, you

7 know, middle-aged. Just -- I think he just had regular dark

8 hair, but I can't -- I can't be certain. Honestly, I don't

9 really remember that well.

10 Q. Was he large? small? middle-sized?

11 A. I believe he was middle-sized.

12 Q. And was he thin? fat? stocky? muscular?

13 A. I believe he was just regular. He was just medium

14 build.

15 Q. Okay. And you saw him -- did you then see a car

16 leave the parking lot?

17 A. Yes, I did.

18 Q. And what kind of car was that?

19 A. It was a red car.

20 Q. A red car?

21 A. Yeah.

22 Q. You're sure about that.

23 A. I believe so, yes.

24 Q. Now, you told us yesterday that, when you were

25 leaving By George's, Ryan made some phone calls on the way to

1 the car? Is that correct?

2 A. That's correct.

3 Q. And --

4 A. And while we were sitting in the car.

5 Q. And later sitting in the car.

6 A. Yes.

7 Q. And this was not a whole long time, was it?

8 A. It was probably somewhere in the neighborhood of 10,
9 15 minutes.

10 Q. Okay.

11 A. We were kind of hesitant to leave the bar. He
12 didn't want to go home. But we couldn't buy any more drinks.
13 So there wasn't really any point in staying at the bar. He
14 was trying to find something to do. So we kind of loitered
15 around the parking lot and started walking to the car.

16 Q. And he's on the phone at this time.

17 A. Yeah.

18 Q. Did you tell us yesterday that, already inside the
19 bar, he had decided to rob somebody?

20 A. I never said that.

21 Q. You never said that yesterday.

22 A. I never said that.

23 Q. Okay. Did you ever tell the police that?

24 A. No, I don't believe I did.

25 Q. And did you tell us yesterday that when you and Ryan

1 were leaving the car, that he -- that you thought you were
2 going to do something like a pickpocket?

3 A. That's correct. That was what I had imagined. I --

4 Q. That's what you had imagined. That's what you
5 thought.

6 A. That's correct.

7 Q. And you told us that Ryan got out this tire tool,
8 that you drew for Mr. Nichols, just in case something
9 happened.

10 A. Yes.

11 Q. And gave it to you.

12 A. Yes.

13 Q. Now, when you got, you say, behind the Tribune
14 building, Ryan never told you to hit Mr. Heitholt, did he?

15 A. Yes, he did.

16 Q. He told you to hit Mr. Heitholt?

17 A. He said, "We need to get this over with. Hit him.
18 We need to get this over with."

19 Q. Excuse me. Did you hear the question?

20 A. Yeah. And I answered yes.

21 Q. Did he tell you to hit Mr. Heitholt?

22 A. Yes.

23 Q. Okay. That's your answer.

24 A. That's my answer.

25 Q. Isn't it true that you don't even claim that the

1 words "hit him" came out of Ryan Ferguson's mouth?

2 A. No.

3 Q. That's not true. You do claim the words "hit him"
4 came out of Ryan's mouth.

5 A. That's correct.

6 Q. And so you're not saying he said, "Get this over
7 with," and you thought he meant hit him?

8 A. No. He said, "Just hit him. We need to get this
9 over with."

10 Q. He said, "Just hit him."

11 A. Yeah. Something to that...

12 Q. Do you recall, once again during your deposition,
13 starting, Your Honor, on page 198 at line 1.

14 THE COURT: Can you --

15 (Court turning to page 198 for the witness.)

16 Q. Do you recall the following questions being asked
17 and you giving the following answers:

18 "QUESTION: And Mr. Ferguson had never said
19 explicitly, 'Go hit him.'"

20 Your answer: "Yes, he did. He said, 'Go' -- well,
21 no. He said, 'We need -- we need to get this over with.'
22 And I was assuming that's what Mr. Ferguson meant by saying
23 that.

24 "QUESTION: You were assuming that's what
25 Mr. Ferguson meant?

1 "ANSWER: Yes."

2 Do you recall giving those answers to those
3 questions under oath at the deposition?

4 A. Yeah, that's correct.

5 Q. Okay. So, as you sit here today, what do you claim
6 to remember Mr. Ferguson saying?

7 A. He told me to hit him. He said, "We just -- just go
8 hit him. We need to get this over with."

9 Q. You claim to remember today that Mr. Ferguson said,
10 "Just go hit him."

11 A. That's correct.

12 Q. Even though you testified under oath back at the end
13 of June of this year that he didn't say that.

14 A. That's correct.

15 Q. Now, did you tell us yesterday, about the time you
16 were doing the reenactment with Mr. Crane, that you came
17 around Ryan's right side, after having sat on the curb or the
18 parking lot block or whatever it was, and that Ryan had his
19 knee in the middle of Mr. Heitholt's back?

20 A. I can't remember if it was his knee. I want to say
21 it was his foot, though.

22 Q. Did you tell us yesterday it was the knee?

23 A. I believe I said it was the foot.

24 Q. So you deny telling us yesterday it was the knee.

25 A. I can't remember what I said, but I believe I said

1 his foot.

2 Q. Now referring again to Dallas Mallory, is it your
3 testimony today that when you saw Mr. Mallory, he was stopped
4 at the stoplight at the corner of Locust and Providence?

5 A. Let me take a look at that.

6 Q. By the Phillips station.

7 MR. CRANE: Are you talking about the intersection
8 or a red light or what are you -- what's your -- how are you
9 framing that question?

10 MR. ROGERS: The question is: Stopped at the
11 stoplight.

12 MR. CRANE: Stopped at a --

13 A. I don't know what color the light was. It was an
14 intersection. And he -- no. When he was -- he was pulling
15 up to the intersection when I first saw him. He was stopped
16 when I said something to him.

17 Q. And there is a traffic control signal there.

18 A. Sorry?

19 Q. There is a traffic control signal there.

20 A. Yes.

21 Q. Okay. Now, do you recall your deposition, once
22 again, starting at page 227?

23 Your Honor -- let me do that for you.

24 Beginning at line 19, page 227. Following question:

25 "Okay. Let me go back a minute. You say he stopped

1 at the stoplight southbound on Providence.

2 "ANSWER: Yeah.

3 "QUESTION: So the light is then red; is that
4 correct?

5 "ANSWER: Yes.

6 "QUESTION: Okay.

7 "ANSWER: Sorry. Sorry.

8 "QUESTION: That's all right."
9 A little yelling there.

10 "We can get you more coffee."
11 Can you turn the page?

12 A. Yeah.

13 Q. "ANSWER: I think I'm all right. Thank you.

14 "QUESTION: Already had enough of that. So the
15 light's red?

16 "ANSWER: Yeah.

17 "QUESTION: And that means there's a green light for
18 you and Ryan to be crossing Providence; is that accurate?

19 "ANSWER: Yes."

20 A. Yeah. Okay.

21 Q. Do you recall giving those answers to those
22 questions under oath at your deposition?

23 A. Yes. Yes, I do.

24 Q. Okay. So we're talking a red stoplight.

25 A. He was stopped. I assumed it was a stoplight. I

1 don't remember seeing a red stoplight.

2 Q. You testified under oath that not only did you see a
3 red stoplight, but you also saw the green stoplight for you
4 and Ryan to walk across, didn't you?

5 A. I don't know about all of that.

6 Q. All right. Let's read it again.

7 A. Let's see.

8 Q. Starting on page 227, line 22.

9 A. You said that that means there's a green light. I
10 was making an assumption.

11 Q. Okay. But you said "Yes."

12 A. Yeah, I said yeah.

13 Q. And at the very beginning of the deposition, on page
14 7 --

15 A. I got it.

16 All right.

17 Q. Page 7, line 1, I -- I asked you: "Now, if I ask
18 you a question or Mr. Crane asks you a question, and you're
19 not sure of the answer, would you tell us that you're not
20 sure before we -- before giving a guess or an estimate?" And
21 you answered, "Yes." And then I asked: "So are we agreed
22 then that unless you say otherwise, you have understood the
23 question and you're certain of the answers?" And your answer
24 to that was "Yes"; is that correct?

25 A. Yeah. Let me just make this clear. This was page

1 7; right?

2 Q. Right.

3 A. And the other one was 227.

4 Q. Right.

5 A. And that deposition was seven hours long?

6 Q. I don't know how long.

7 A. Somewhere in that neighborhood.

8 Q. It was long.

9 A. I just wanted to clarify that.

10 Q. Okay. But --

11 THE COURT: Mr. Rogers, at this time, I don't know
12 if you're at a stopping point, but our jurors' lunch is here.

13 And I'll let you, if you're -- have a few questions in this
14 line that you want to finish, I'll let you finish it, but --

15 MR. ROGERS: I just want to finish this one
16 stoplight topic and --

17 THE COURT: All right. You can finish that topic,
18 and then we'll break for lunch.

19 Q. So that was a -- that was at the very outset,
20 setting the ground rules for the deposition, wasn't it?

21 A. Yeah, that's right.

22 Q. And you agreed to it.

23 A. Yes.

24 Q. And you agreed that if at any time during the
25 deposition you were asked a question that you would -- were

1 not sure of your answer, you'd tell us, and we'd go from
2 there; right?

3 A. That's correct.

4 Q. And when you answered the stoplight questions, you
5 didn't say, "Well, this is just an assumption I'm making,"
6 did you?

7 A. No, I didn't say that.

8 Q. Okay. So it was fair for us to assume that you were
9 certain of your answers under oath to those --

10 MR. CRANE: Well, I'm going to object to what's fair
11 for him to assume.

12 THE COURT: Sustained. As to the form of the
13 question.

14 Q. Well, you had told us on page 7 that -- let me put
15 it this way. When you answered the stoplight questions, that
16 was subject to our agreement that you had understood the
17 question and were certain of the answer; isn't that correct?

18 A. Yes.

19 Q. Okay.

20 MR. ROGERS: That's a good time for lunch, Your
21 Honor.

22 THE COURT: All right.

23 Ladies and gentlemen, the Court again reminds you of
24 what you were told at the first recess of the Court. Until
25 you retire to consider your verdict, you must not discuss

1 this case among yourselves or with others, or permit anyone
2 to discuss it in your hearing. You should not form or
3 express any opinion about the case until it is finally given
4 to you to decide. Do not read, view, or listen to any
5 newspaper, radio, or television report of the trial.

6 Take a break of about an hour. Come back at 1:15
7 then.

8 - - -

9 The following proceedings were held out of the presence
10 of the jury:

11 THE COURT: It's come to my attention that the CBS
12 videographer may be taking pictures of at least typewritten
13 notes at counsel table.

14 DEPUTY COURT MARSHAL LANE: Yes.

15 THE COURT: We have a monitor over there.

16 DEPUTY COURT MARSHAL LANE: It's still down there.

17 THE COURT: It is there? I'd like someone to look
18 at it. And I don't see any reason to have this big screen up
19 all the time.

20 DEPUTY COURT MARSHAL BAER: Yes, Judge.

21 THE COURT: So you can have them remove it. And at
22 such time that they may need to show something, they can put
23 it up.

24 DEPUTY COURT MARSHAL LANE: I have been monitoring
25 the monitor, and I have seen --

1 (Audience becoming noisy.)

2 DEPUTY COURT MARSHAL LANE: Court is in session.

3 THE COURT: If you want to talk, you may step
4 outside.

5 DEPUTY COURT MARSHAL LANE: I've seen typewritten,
6 but I haven't noticed on the desk. I noticed it when they're
7 standing there holding it up. But I was only told about them
8 not filming the jurors. But I will make sure that doesn't
9 happen again.

10 THE COURT: Okay. And you have been looking at the
11 monitor?

12 DEPUTY COURT MARSHAL LANE: Yes, I have. That's
13 what I have been doing there, sitting down.

14 THE COURT: Okay. All right. Well, with that
15 understanding -- yes?

16 DEPUTY COURT MARSHAL BAER: Judge, they would like
17 to go out and smoke in about 30 minutes.

18 THE COURT: As long as they're in a private place, I
19 don't care if they smoke. Okay.

20 Let me just suggest that I had someone looking at a
21 monitor of our proceedings. And evidently it's been
22 photographed when you've held something up. And not when
23 it's been flat down on the table. And so we will make sure
24 that that doesn't happen.

25 MR. ROGERS: Thank you.

1 MR. ROGERS: Yes, Your Honor.

2 THE COURT: And the jury is ready to come back.

3 DEPUTY COURT MARSHAL: (Nodding head up and down.)

4 THE COURT: Bring them back, please.

5 - - -

6 The following proceedings were held in the presence of
7 the jury:

8 THE COURT: Counsel for defendant may inquire.

9 MR. ROGERS: Thank you.

10 - - -

11 CHARLES TIMOTHY ERICKSON,

12 resumed the stand and testified further:

13 RESUMED CROSS-EXAMINATION

14 BY MR. ROGERS:

15 Q. Mr. Erickson, you had told us, I believe, about a
16 big puffy Nautica coat that you say you were wearing that
17 night?

18 A. Yeah.

19 Q. And is it your testimony today that, to the best of
20 your memory, it was a chilly night that night?

21 A. That's correct. Yes.

22 Q. And when you say "a big puffy coat," is that one of
23 these insulated jackets? Not a down jacket, but filled with
24 some synthetic fiber?

25 A. I think it had down in it actually.

1 Q. Could have been actually down.

2 A. Yes.

3 Q. And nylon on the outside?

4 A. I don't know what it was.

5 Q. Okay. What did you tell us yesterday became of that
6 coat?

7 A. I believe I left it at a man named Brian Walters'
8 house.

9 Q. And do you have a memory of taking that coat from
10 Mr. Ferguson's car into your house in the early morning of
11 November 1st, 2001?

12 A. Not really, no.

13 Q. Okay. Do you recall seeing and wearing that coat
14 after November 1st, 2001?

15 A. Yes, I do.

16 Q. Okay. You're sure about that.

17 A. Yes.

18 Q. Okay. And once again, you recall giving your
19 deposition on June 30th of this year.

20 A. Yeah.

21 Q. You were under oath, in this building.

22 A. Uh-huh. Yes.

23 Q. And do you recall the following questions being
24 asked and the following answers being given at that
25 deposition, beginning on page 246.

1 A. I can look.

2 THE COURT: He seems to think he can open the
3 deposition.

4 MR. ROGERS: He seems to be capable of doing so,
5 Your Honor.

6 THE COURT: Yes.

7 A. 246.

8 Q. 246?

9 A. Yeah.

10 Q. Beginning at line 12.

11 "QUESTION: Okay. Now that you've had plenty of
12 time to think about that particular coat --

13 "ANSWER: Uh-huh.

14 "QUESTION: -- do you know where it is today?

15 "ANSWER: No.

16 "QUESTION: What happened to it?

17 "ANSWER: I'm fairly certain I left it in Ryan's car
18 the night that this happened, but I didn't -- I didn't take
19 it home with me after that."

20 Were those your answers to those questions under
21 oath June 30 of this year?

22 A. Yeah.

23 Q. Okay.

24 A. I was fairly certain that I left it in Ryan's car
25 and that I didn't take it home with me after that.

1 Q. Okay. Now --

2 THE COURT: May he sit down now? Are you still on
3 the deposition?

4 MR. ROGERS: I'm going to go to another topic, so
5 yeah, please sit down.

6 Q. I want to call your attention now to later in the
7 morning of November 1st, 2001, when you woke up, hung over,
8 to go to school --

9 A. Uh-huh.

10 Q. -- okay?

11 A. All right.

12 Q. Do you recall finding any bloody clothes in your
13 house at that time?

14 A. No.

15 Q. Do you recall seeing any blue jeans that you might
16 have been wearing that had blood stains on them?

17 A. I don't remember.

18 Q. Do you recall seeing a sweatshirt with blood stains
19 on it?

20 A. No.

21 Q. Do you recall seeing any boots with blood stains on
22 them?

23 A. No.

24 Q. Do you recall seeing any tennis shoes with blood
25 stains on them?

1 A. No.

2 Q. Do you recall seeing any blue jeans with mud or
3 water on the bottom of them from wading through a creek?

4 A. I don't remember.

5 Q. You don't remember whether or not you saw those
6 things or you don't --

7 A. I don't remember if my -- if I woke up and my pants
8 were wet in the morning. I don't remember. I didn't put the
9 same pants on when I went to school.

10 Q. As a matter of fact, do you know what you did with
11 your clothing when you got to your home early on the morning
12 of November 1st?

13 A. No.

14 Q. Did you wear it in your house?

15 A. Yeah. I believe so. Yes.

16 Q. Okay. You sure about that.

17 A. Yeah.

18 Q. Okay. Do you recall, once again, giving your
19 deposition on June 30th?

20 A. Yeah.

21 Q. And do you recall giving the following answers to
22 the following questions beginning at page 250. Question
23 beginning at line 7. Are you there?

24 A. Yeah, I'm here.

25 Q. Okay.

1 "QUESTION: Okay. And you don't remember deciding
2 that you needed -- that you need to get rid of clothing
3 that's got blood on it, do you?

4 "ANSWER: "No. I may have left the clothes in the
5 car with Ryan. I can't remember.

6 "QUESTION: Your pants?

7 "ANSWER: I might have.

8 "QUESTION: You might have left your pants in Ryan's
9 car?

10 "ANSWER: I might have. I -- I don't -- I don't
11 remember.

12 "QUESTION: Okay. I don't even want to know what
13 you're doing taking your pants off in Ryan's car, but I'm not
14 going to ask you.

15 "ANSWER: It's possible I went to my house in my
16 boxers. I mean, I can't be certain."

17 Do you recall giving those answers to those
18 questions under oath at your deposition?

19 A. Yeah.

20 Q. But now you can remember that you did, in fact, wear
21 your clothing into your house.

22 A. I told you I couldn't remember that.

23 Q. You told us today that you did remember.

24 A. No. I believe I said I couldn't remember.

25 Q. So you're telling us that -- just a minute ago you

1 told us, before I read this part from the deposition, you're
2 telling us that -- you told us you couldn't remember whether
3 you wore your clothes into your house or not.

4 A. I thought I said I couldn't remember.

5 Q. Okay.

6 A. I believe I said I might have, but, I mean, I
7 couldn't remember -- I couldn't remember whether I wore the
8 clothes in my house or whether I took them off or whether I
9 left them on the floor or whatever. I couldn't remember.
10 And I made that clear in the deposition. And I thought I
11 made it clear earlier, but I'm sorry if I didn't.

12 Q. Let me ask you this, sir. On November the 1st,
13 2001, when you got up and went to school hung over, did you
14 hear any news broadcasts about the death of Mr. Heitholt?

15 A. I don't remember.

16 Q. Did you hear anything that evening about the death
17 of Mr. Heitholt?

18 A. I believe so.

19 Q. Okay. When you saw that broadcast or read the paper
20 or whatever it was, did you have any conscious belief that
21 you had somehow been involved in that death on November the
22 1st, 2001?

23 A. No.

24 Q. The next day, November the 2nd, 2001, is the day
25 that Mr. Ferguson picked you up to take you to school.

1 A. That's correct.

2 Q. And that's the day that you had with you the paper
3 from the evening before; correct?

4 A. I don't know which paper it was.

5 Q. Let me ask you this. Is the Columbia Daily Tribune
6 an afternoon paper?

7 A. I don't know.

8 Q. You don't know whether it comes in the morning or in
9 the afternoon?

10 A. I don't know.

11 Q. Okay. In any event, you had a copy of the paper
12 that dealt with Mr. Heitholt's death. Correct?

13 A. That's correct.

14 Q. And you said to Mr. Ferguson, "This is messed up."
15 Right?

16 A. I don't know if I used those words.

17 Q. Aren't those the words you used yesterday when
18 Mr. Crane was talking to you?

19 A. I don't know if I used exactly those words.

20 Q. You said something to that effect. Is that a fair
21 statement?

22 A. Yeah, but I said more than that.

23 Q. Okay. And at that time, when you said whatever you
24 said on November the 2nd, 2001, did you have any conscious
25 belief that you had been involved in the death of Kent

1 Heitholt?

2 A. No.

3 Q. And the rest of that month, November of 2001, as you
4 went about your business, going to school, going to the
5 educational counselor, testing program, things like that, did
6 you, in fact, have any conscious belief that you had been
7 involved in the death of Kent Heitholt in any way?

8 A. No.

9 Q. And throughout the rest of that year of 2001, did
10 you have any conscious belief that you were in any way
11 involved in the death of Kent Heitholt?

12 A. No.

13 Q. And throughout the next year, 2002 -- your senior
14 year in high school?

15 A. That was part of my senior year, yeah.

16 Q. The beginning of your senior year.

17 A. Yeah.

18 Q. -- did you have any conscious belief that you were
19 in any way involved in the death of Kent Heitholt?

20 A. No.

21 Q. And throughout the spring of 2003, when you
22 graduated from high school, did you have any conscious belief
23 that you were in any way involved in the death of Kent
24 Heitholt?

25 A. No.

1 Q. Let me go back to By George's bar. It was obvious
2 that you went there with Mr. Ferguson on Halloween night,
3 didn't you?

4 A. Yes.

5 Q. And you've listed a bunch of people that you knew
6 who were there.

7 A. Yes.

8 Q. And you stated that the only person that you
9 remember talking to is somebody who is currently deceased.

10 A. No. I talked to Melissa Griggs.

11 Q. Talked to whom?

12 A. Melissa Griggs.

13 Q. And were these people there when you finally left By
14 George's for the evening and did not return?

15 A. I don't -- I don't know.

16 Q. Were any of these people there?

17 A. I don't know.

18 Q. Were these among the crowd that you waited to leave
19 at closing time with, so that you would not attract the
20 attention of the police officer outside?

21 A. I don't know.

22 Q. And it's your statement that when the bar closed and
23 everybody left at the same time because they had to, that
24 there was, in fact, a police officer still outside; correct?

25 A. That's correct.

1 Q. And that police officer had been outside for some
2 time; correct?

3 A. I don't know how long he had been outside. I didn't
4 physically see him until I left the bar.

5 Q. All right. And he was there making sure nothing
6 happened when people left the bar at closing time.

7 A. I don't know what he was doing.

8 Q. You remember, while you were at By George's, did a
9 police officer come in and say, "Hey, you guys are supposed
10 to be closed. Get out of here." Didn't he?

11 A. Not to my memory. I never saw anyone, no.

12 Q. Okay. When you left the bar at closing time, do you
13 know whether anyone whom you knew, other than Ryan Ferguson,
14 left with you?

15 A. No. Not to my memory, no. It was just --

16 Q. You don't know whether or not --

17 A. It was just Ryan and I.

18 Q. But you're leaving with a whole group of other
19 people.

20 A. Yeah. The entire building is being -- everyone's
21 leaving the building.

22 Q. And you don't know whether or not some of the people
23 that you knew were there --

24 A. There were a lot of people leaving at once. I don't
25 know. It was a pretty big club.

1 Q. Okay. Now, isn't it true that you and Ryan Ferguson
2 left the bar when it closed and he dropped you off at your
3 house?

4 A. No.

5 Q. Stopped for cigarettes, and then he dropped you off
6 at your house?

7 A. No. Oh, wait. I'm sorry. Sorry.

8 Q. Well, let me do it more step by step. You told us
9 earlier --

10 A. No. We went to his car, and we drove by the scene,
11 and then we stopped for cigarettes, and then we went to my
12 house.

13 Q. Okay. And you say you went to his car and you drove
14 by the scene. And you're talking about driving south on
15 Providence?

16 A. That's correct. First we took a right on Ash.

17 Q. And you were looking up the alley? Is that what
18 you --

19 A. Huh?

20 Q. Do you recall looking up the alley from Providence?

21 A. Well, we were -- the entire Tribune building was to
22 our left. So we had a view -- there was a lot going on.
23 There was a lot of police cars there.

24 Q. Okay. And you looked at the police cars in the
25 parking lot of the Tribune building.

1 A. Yes.

2 Q. Correct?

3 A. Yes.

4 Q. And you saw police cars.

5 A. Yes.

6 Q. And what else did you see there?

7 A. I believe I saw a white body bag.

8 Q. Okay. Now, once again, do you recall giving your
9 deposition?

10 A. What page is that?

11 Q. I'm looking for it. The question is: Did you
12 recall giving your deposition?

13 A. Yes, I recall giving it.

14 Q. And this is page 241.

15 A. All right.

16 Q. Beginning at line 18.

17 "QUESTION: Do you remember what you saw in the
18 Tribune parking lot?

19 "ANSWER: There were a lot of police cars. A lot of
20 people walking around. I think I remember seeing a news
21 thing.

22 "QUESTION: Okay.

23 "ANSWER: I might be wrong about that, but -- and I
24 thought I saw a, like, a wrecker doing something, but I could
25 be wrong about that also.

1 "QUESTION: By a wrecker, you mean a tow truck?

2 "ANSWER: Yeah. I'm not sure, though.

3 "QUESTION: Anything else you remember seeing in the
4 parking lot?

5 "ANSWER: No."

6 A. All right.

7 Q. You can sit back down. Are those the answers that
8 you gave to those questions under oath on June 30 at your
9 deposition in this building?

10 A. Yes.

11 Q. The truth of the matter, sir, is that By George's
12 closed at 1:30 in the morning on November 1st; isn't that
13 true?

14 A. That's not true.

15 Q. And the truth of the matter is, that after it
16 closed, Ryan Ferguson took you home.

17 A. No. That's not true.

18 Q. And the truth of the matter is that he dropped you
19 off in front of your house. Is that true?

20 A. After we committed a robbery and murdered Kent
21 Heitholt. After we went back to the club. After we drove by
22 the scene. After we stopped and got a pack of cigarettes.
23 Then he took me home. That's correct.

24 Q. The truth of the matter is: He dropped you off in
25 front of your house before 2:00 in the morning. Isn't that

1 true?

2 A. That's not true.

3 Q. And as a matter of fact, it was after you had been
4 dropped off that he started this series of phone calls to
5 Holly Admire.

6 MR. CRANE: Well, Judge, I'm going to object to
7 that. He's asking him, without any foundation, for
8 speculation about what Ryan Ferguson did after he dropped him
9 off?

10 THE COURT: Sustained.

11 MR. ROGERS: Your Honor --

12 THE COURT: He can't possibly know what happened
13 after --

14 MR. CRANE: Well, I mean, I guess he could be
15 talking on the phone. But I mean, there's no evidence --

16 MR. ROGERS: Let me finish my question, and you'll
17 see --

18 MR. CRANE: Uh-uh. No, Judge. I'm going to object
19 to that question. That is assuming facts not in evidence.
20 And at this point there's absolutely no foundation, and if
21 there is one, I'm all ears, how that witness could answer
22 this question. If they want to get in records, through
23 somebody else, that's another matter. He's trying to
24 bootstrap this question with this witness. That's improper.

25 MR. ROGERS: Let me do it a different way.

1 THE COURT: You may rephrase your question.

2 MR. ROGERS: Thank you.

3 Q. You told Mr. Crane yesterday about Ryan Ferguson
4 making a bunch of phone calls, which you told us yesterday
5 happened while walking from By George's to the car and then
6 sitting in the car. Is that correct?

7 A. Yes.

8 Q. The truth of the matter is, sir, you have seen phone
9 records about those phone calls which were --

10 MR. CRANE: Judge, I'm going to object to that.

11 Q. -- made at various times.

12 MR. CRANE: He's -- I don't know if he's seen the
13 phone records. But, in any event, that's hearsay. If he's
14 got another witness he wants to put down -- put on about
15 phone records, so be it, but this witness isn't appropriate
16 for that.

17 THE COURT: Do you care to respond?

18 Q. Haven't you seen phone records in the prosecutor's
19 office, in preparation for your --

20 MR. CRANE: Same objection.

21 Q. -- testimony in this case?

22 A. Actually, the first time I saw them -- I looked at
23 everything in discovery. I'm not going to lie. But I'm not
24 a liar. And I'm not going to sit here and say that man did
25 something he didn't do.

1 Q. So, have you seen the phone records?

2 A. Yeah, I have. That doesn't mean that I'm basing my
3 memories off the phone records.

4 Q. And you saw the phone records -- you have copies of
5 them. Yourself.

6 A. I don't have them -- I got rid of all my discovery
7 months ago.

8 Q. You had them for a while.

9 A. Yeah, because --

10 Q. And you've also seen them --

11 A. They were sent to me. I have a right to any
12 discovery in the case. They were sent to me after my
13 preliminary trial was waived.

14 Q. And you've gone over them. Correct?

15 A. I've read them, yes, that's correct.

16 Q. And before you saw those phone records, you said
17 nothing to anybody about Ryan Ferguson making telephone calls
18 while walking from By George's to the car; isn't that true?

19 A. I don't -- I don't know. I don't know if that's
20 true or not. I can't recall.

21 Q. Well, we saw your videotaped statements March 10th,
22 didn't we?

23 A. Yeah.

24 Q. And there's nothing in there about him making cell
25 phone calls while walking from By George's to the car, is

1 there?

2 A. I can't remember. I believe he said he was trying
3 to get a hold of people or he may have been trying to find
4 something else to do. I know I said that he was insistent on
5 not going home and not taking me home. He wanted to find
6 something else to do. I don't think I got into that much
7 detail.

8 Q. The question is: You didn't make -- you didn't say
9 anything about him making cell phone calls; correct?

10 A. I don't know. I don't know if I did or not.

11 Q. And you didn't say anything about him making cell
12 phone calls in the unrecorded conversation with Mr. Short on
13 March 10th, did you?

14 A. I don't know.

15 Q. And are you saying you have not gone over cell phone
16 records with the prosecutor and his employees in preparation
17 for your testimony all these times you've talked to --

18 A. No. I have looked at the cell phone records when I
19 was in his office.

20 Q. Okay.

21 A. But I had seen them before that.

22 Q. All right.

23 A. But it had nothing to do with preparation of this.

24 Q. All right. And so you saw them and you paid
25 attention to times and things.

1 A. I don't -- I don't -- I don't recall times.

2 Q. And what I'm now going to ask you is: Isn't it true
3 that those phone calls, which are reflected in the records
4 that you saw in preparation for your testimony here in court,
5 were in fact made --

6 MR. CRANE: Same objection. And also misstates the
7 witness's testimony. He didn't say anything about
8 preparation --

9 THE WITNESS: Yeah.

10 MR. CRANE: -- for court.

11 Wait a minute.

12 THE WITNESS: Sorry.

13 MR. CRANE: And -- number one, it's hearsay. And
14 number two, he doesn't have any factual basis for the
15 location the calls were made. If they've got a witness they
16 want to have testify about that, that does have such
17 information, fine. Not this one.

18 THE COURT: The objection is sustained, that it's
19 hearsay.

20 Q. Let me ask it this way. Is it fair to say,
21 Mr. Erickson, that you are denying -- or you are asserting
22 that those phone calls were made in your presence?

23 A. Yes.

24 Q. Okay.

25 A. Some of them were. Some of them may not have been.

1 I'm not sure.

2 Q. And are you therefore denying that they were made
3 after you were gone?

4 A. That's correct.

5 Q. All right. When you say Ryan Ferguson told you he
6 didn't want to go home, he told you that he was trying to get
7 together with Holly Admire, didn't he?

8 A. I don't re -- I don't remember if he said that or
9 not.

10 MR. ROGERS: I don't have any further questions for
11 this witness.

12 THE COURT: Mr. Crane, you may redirect.

13 MR. CRANE: Okay.

14 - - -

15 REDIRECT EXAMINATION

16 BY MR. CRANE:

17 Q. On that last question there -- we'll work backwards.
18 I know you're wore out. I'll try not to keep you up there
19 too long.

20 I believe you indicated yesterday -- boy, that seems
21 like a long time ago, yesterday -- that you recall when you
22 were -- had come out of your house, after you snuck out,
23 changed clothes and snuck out, you got to the vehicle, and at
24 that time was Mr. Ferguson on the phone?

25 A. Yes, he was.

1 Q. Okay. Now this is before you went to George's.

2 A. That's correct.

3 Q. And you indicated he was talking to whom, as far as
4 you could tell at that time?

5 A. He told me he was talking to Holly Admire on the
6 phone.

7 Q. Okay. That was prior to the time you went to
8 George's.

9 A. That's correct.

10 Q. I want to ask you, sir, you've been asked some
11 questions about what you told Nick Gilpin and Art --
12 pronounce that last name for me.

13 A. Figueroa.

14 Q. Figueroa.

15 MR. CRANE: Judge, may I have permission to ask the
16 witness what he told Nick Gilpin? This would be a -- some
17 questions that I had started to ask yesterday.

18 THE COURT: I don't know what you're going to ask.
19 Ask your question, and the witness can answer.

20 Q. Do you recall yesterday testifying that you, in late
21 February, early March of 2004 --

22 A. Yeah.

23 Q. -- after your -- the New Year's Eve incident with
24 Mr. Ferguson, talked to Nick Gilpin? Somebody by the name of
25 Nick Gilpin?

1 A. That's correct.

2 Q. Okay. And just to refresh our memory a little bit,
3 you testified that was a good buddy of yours.

4 A. Yes.

5 Q. And you were at another buddy's residence.

6 A. That's correct.

7 Q. I believe you testified that you asked Mr. Gilpin to
8 step outside, or wanted to speak to him in private.

9 A. Well, we were pulling up to the house, and I brought
10 it up as we pulled up to the house, but then --

11 Q. Well, were you and Mr. Gilpin --

12 A. Alone.

13 Q. Just the two of you?

14 A. Yeah. Yes.

15 Q. Okay. Sir, do you recall what you told Mr. Gilpin
16 regarding the incident that's the subject of this trial?

17 A. Yeah. At -- at John Alder's house, I told Nick
18 Gilpin that I thought that me and -- Ryan Ferguson and I were
19 responsible for the murder of Kent Heitholt. I explained to
20 him that we'd been at By George's that night and Ryan wanted
21 to --

22 Q. Now I can't hardly hear you.

23 A. I said that we'd been at By George's that night, and
24 Ryan wanted to --

25 MR. ROGERS: I'm going to object to this, Your

1 Honor. This is not inconsistent with anything that he was
2 questioned about on cross-examination.

3 THE COURT: The objection's overruled.

4 Q. Start over. And make sure we can all hear you.

5 A. I -- I pulled up to John Alder's house with Nick
6 Gilpin. And when we pulled up to his house, I told him there
7 was something I wanted to talk to him about. And I told him
8 that I thought that Ryan Ferguson and I were responsible for
9 the murder of Kent Heitholt. And I explained to him some of
10 the background about that night. I explained to him that we
11 were at By George's and that Ryan wanted to rob someone. And
12 I explained to him that I was having memory problems. And
13 that I was -- he was -- I was having problems trying to
14 figure out if what I remembered was an actual memory or these
15 things in my mind were memories or dreams.

16 Q. What did you tell Mr. Gilpin that you did?

17 A. Well --

18 Q. You've already testified you were both at George's?

19 A. Yeah.

20 Q. What did you tell him?

21 A. Well, later at Nick's house -- I didn't get very
22 descriptive when we were at John's, but at Nick's house I
23 told him that I hit Kent Heitholt in the head with a tire
24 tool. That I saw Ryan Ferguson on the ground strangling him.
25 That I thought that I got sick. And that I told a cleaning

1 lady to go get help.

2 Q. As we've heard on the video with Detective Short,
3 the first video that was played, you knew, when Detective
4 Short was talking to you, he told you, "Nick Gilpin's been in
5 here, and he's told us what you'd said?"

6 A. Yes, that's correct.

7 Q. Okay. And that's the same guy.

8 A. That's the same guy.

9 Q. And what do you recall about the cleaning lady; what
10 you told Mr. Gilpin about the cleaning lady?

11 A. That I told her to go get help.

12 Q. Now, Art --

13 MR. ROGERS: Your Honor, I'm going to object to that
14 as an improper rehabilitation. I didn't ask him anything
15 about telling Mr. Gilpin anything about the cleaning lady.

16 MR. CRANE: Oh, I'm not rehabilitating on that. I'm
17 talking about all this he brought up about not saying,
18 "Cleaning lady, go get help."

19 THE COURT: Your objection is overruled.

20 Q. Okay. Mr. Erickson, after you talked to Nick Gilpin
21 and told him about being at George's on Halloween of 2001,
22 and you and Mr. Ferguson decided to go rob somebody, and you
23 striking the victim and Mr. Ferguson strangling him, and the
24 cleaning lady and telling her to go get help, Art -- can I
25 just call him Art?

1 A. That's fine. Yeah. That's fine.

2 Q. Art is another buddy of yours?

3 A. That's correct.

4 Q. How did you know Art?

5 A. I worked with him. I worked with his brother. I've

6 known him for a few years. He lived across Chapel Hill from

7 me.

8 Q. Okay. Were you employed with Art for a while?

9 A. That's correct.

10 Q. Where?

11 A. At Wendy's restaurant.

12 Q. Wendy's here in Columbia?

13 A. That's correct.

14 Q. And I believe for a short period of time

15 Mr. Ferguson worked there?

16 A. That's correct.

17 Q. How did he get that job?

18 A. I believe that he got it because I knew -- I knew

19 Art's brother Nick, but I can't --

20 Q. Okay. Somehow -- Art and his family run that

21 Wendy's or something?

22 A. Yeah. Well, his dad runs a bunch of them.

23 Q. And you developed a friendship with Art through that

24 and --

25 A. Yeah --

1 Q. Okay.

2 A. Yeah. That's correct.

3 Q. Now, at some point after your conversation with Nick
4 Gilpin, do you recall a conversation with Art Figueroa?

5 A. Yes.

6 Q. And do you remember where that conversation was?

7 A. Yeah. It took place in his car.

8 Q. Okay. Do you remember where you were at -- where
9 you were located?

10 A. I was at Nick Gilpin's house before that.

11 Q. Okay. Now -- but this is another night from the
12 night you talked to Nick Gilpin?

13 A. This is a different night. This is about a week
14 later.

15 Q. Okay. You just happened to have been over at Nick
16 Gilpin's residence.

17 A. That's correct.

18 Q. And Art and you were leaving that residence in his
19 car or --

20 A. Actually I drove there, but I lost my keys. He --
21 we had a little get-together over there, and I couldn't find
22 my keys.

23 Q. Okay.

24 A. So I had to have Art give me a ride.

25 Q. So Art's driving and you're in the vehicle.

1 A. That's correct.

2 Q. And what, if anything, did you confide in Art
3 Figueroa about?

4 A. I told him that Ryan Ferguson and I had -- I thought
5 we killed Kent Heitholt. That I had hit Kent Heitholt. Ryan
6 Ferguson had strangled him. Told him that I told a cleaning
7 lady to get help. Told him that I felt bad about it. I
8 didn't know what to do. I was thinking about coming forth
9 and giving my DNA and -- I don't know. I think I told him
10 that Ryan threatened to kill me. I know I told that to Nick
11 too. I forgot to put that in there.

12 Q. Okay. Well, now, one thing I think you indicated on
13 your testimony is that, with respect to both Nick and Art,
14 while you told them you had these memories of this murder and
15 what you'd done, striking the victim, and Mr. Ferguson
16 strangling, you did admittedly express some hesitation and
17 doubt about that.

18 A. That's correct. Yes, I did.

19 Q. To both of these individuals.

20 A. Yes, I did.

21 Q. And that's what we talked about yesterday. You were
22 still wrestling with this.

23 MR. ROGERS: Objection to leading.

24 THE COURT: Sustained. As to the form of the
25 question.

1 Q. And then it was after -- am I correct it was after
2 that, within a few days, that the police came and got you,
3 and then that led to the statements that you made to them; is
4 that correct?

5 A. That's correct.

6 Q. Okay. The coat -- Mr. Rogers asked you about the
7 coat. He directed you to page 246 in the deposition. He
8 asked you questions -- do you remember him asking you --

9 A. I'm fairly certain I left it in Ryan's car the night
10 that this happened, but I didn't -- I didn't take it home
11 with me that -- after that. And his next question was, "When
12 did you" --

13 Q. Well, wait a minute. Wait a minute. I know you're
14 sick of this, but let me -- he -- I believe Mr. Rogers asked
15 you what happened to it, on line 17.

16 MR. ROGERS: What page are you on?

17 A. Yeah, that's correct.

18 MR. CRANE: 246.

19 MR. ROGERS: Thank you.

20 Q. And you answer -- you've already testified to this
21 on cross. "I'm fairly certain I left it in Ryan's car the
22 night after this happened, but I didn't -- I didn't take it
23 home with me after that." And then what's the question and
24 answer that follows that?

25 A. "When did you first come to that realization?"

1 Q. Speak up, please.

2 A. "When did you first come to that realization?"

3 Q. And your answer was?

4 A. "Just -- it was just a thought that, that since I
5 couldn't find it, I remember I thought that I had left it in
6 his car or I left it at a friend's house named Brian
7 Walters."

8 Q. Okay. And the next question is at the top of page
9 247.

10 A. "Did you remember asking Brian Walter, 'Hey, is my
11 coat over there?'" My answer: "Yeah. And he said he
12 couldn't find it."

13 Q. Okay. So you might have left it at Brian Walters'.
14 You lost the coat.

15 A. That's correct.

16 MR. ROGERS: Leading, Your Honor.

17 THE COURT: Sustained as to the form of the
18 question.

19 Q. Have a seat if you would.

20 I'm going to show you what's marked for
21 identification State's Exhibits 87 and 87B.

22 MR. ROGERS: I would object, Your Honor, as beyond
23 the scope of cross-examination.

24 THE COURT: I don't know what they are and --

25 MR. CRANE: Okay.

1 THE COURT: -- I don't know what the question is
2 going to be.

3 MR. ROGERS: Let's approach.

4 - - -

5 Counsel approached the bench and the following
6 proceedings were held:

7 MR. ROGERS: If we're just talking order of proof,
8 and you're going to have some other witness to identify it,
9 that's --

10 MR. CRANE: This is the defendant's vehicle.

11 THE COURT: And --

12 MR. CRANE: I was going to show him that.

13 THE COURT: And ask him what?

14 MR. CRANE: If he can identify it. This has got the
15 trunk and the front of it. I mean, that wasn't on there,
16 but --

17 MR. ROGERS: I haven't asked anything about the
18 defendant's vehicle that this would be relevant to. It's
19 beyond the scope. Like I say, if he's going to call some
20 other witness --

21 MR. CRANE: You didn't ask him anything about prior
22 to the time they went to the murder? You didn't ask him
23 anything about leaving in a car? You didn't ask him anything
24 about generally his memory being faulty? You didn't ask him
25 anything about who drove from the bar to home? I mean, the

1 car --

2 MR. ROGERS: I didn't ask him anything these
3 pictures have to do with. Like I said, if all we are talking
4 about is order of proof and you intend to call a witness who
5 can identify those photographs, then --

6 MR. CRANE: I've got one on the stand.

7 MR. ROGERS: But he hasn't -- he wasn't asked about
8 them in direct and he wasn't asked about these photographs in
9 cross.

10 MR. CRANE: He was asked all kinds of questions
11 about the car on direct.

12 THE COURT: He was asked questions on both direct
13 and cross about the vehicle and who was driving. And I'm
14 going to overrule your objection if it's simply to physically
15 identify what the car looked like. If he's able to.

16 - - -

17 The following proceedings were held in open court:

18 MR. CRANE: Approach the witness, Judge?

19 THE COURT: You may.

20 Q. I want to show you just these top two photographs,
21 State's Exhibit 87A and 87B for identification. Do you
22 recognize what's in 87A?

23 A. That's Ryan Ferguson's car.

24 Q. What about 87B?

25 A. That's Ryan Ferguson's trunk.

1 Q. Back of his car and then a shot of -- what is that?
2 Passenger side?

3 A. That's correct.

4 MR. CRANE: Judge --

5 Q. Are these fair and accurate depictions of the
6 vehicle as you remember it, I know there's some evidence
7 sticker on there, but back in October, November 2001?

8 A. Yes.

9 MR. CRANE: Judge, I'd offer these two photographs.
10 I've got copies of those made to put on the presenter to
11 publish to the jury.

12 MR. ROGERS: Same objection, Your Honor. Beyond the
13 scope of cross.

14 THE COURT: State's Exhibits 87A and 87B are
15 admitted, the objection being overruled.

16 - - -

17 State's Exhibits 87A and 87B admitted into evidence.

18 - - -

19 Q. Show you what's marked as 87A. I know that isn't
20 the greatest picture on that thing, but you saw what I was
21 showing you there. What is that?

22 A. That's Ryan Ferguson's Mercedes.

23 Q. And showing you 87B, what does this photograph
24 depict?

25 A. The trunk of Ryan Ferguson's Mercedes.

1 Q. And I know there's an evidence sticker on there.

2 A. Yeah.

3 Q. But is that the trunk, as far as you can tell,
4 assuming it's on that other photograph, same car --

5 A. Yeah, that's correct.

6 Q. -- that you recall the defendant getting into at
7 various times prior to and after the murder?

8 A. That's correct.

9 Q. When you took a look at -- take advantage while the
10 lights are still kind of dim. This drawing that you did at
11 the police department with Detective Nichols, of the tire
12 tool?

13 A. Yeah.

14 Q. Did you testify on cross-examination that the hook,
15 little part right here that juts out, was that the portion
16 you took off before you left? I couldn't understand your
17 testimony.

18 A. That was -- I knew that there was something that I
19 took off. And I thought that it was possible that the --
20 that it might have been something like that, but --

21 Q. Well, but the part --

22 A. That was like a handle or something. I'm not -- I'm
23 not really sure.

24 Q. Well, I -- that's what -- I'm trying to understand
25 your testimony. Was it, with respect to that with

1 Mr. Rogers, that this would be the tire tool when you
2 originally had it, before you took the piece off?

3 A. Yeah. That's correct.

4 Q. Okay. And then you pushed the button, you
5 indicated?

6 A. That's correct.

7 Q. And put the piece that came off back in the trunk?

8 A. That's correct.

9 Q. And it left you then with just a straight object?

10 A. Well, it -- it would have gone like that
11 (indicating).

12 Q. Okay. It still had an angle in it?

13 A. Yeah, that's correct.

14 Q. But this would not -- there was a portion of that
15 drawing, and I know it's just a line thing, that was not on
16 it when you struck the victim?

17 A. That's correct.

18 Q. Okay. This thing here that the defense was showing
19 you, Defendant's Exhibit D --

20 MR. ROGERS: B.

21 MR. CRANE: Oh, is it B? That looked like a D.
22 Okay.

23 MR. ROGERS: It is B. I made the same mistake.

24 Q. He was talking to you about different areas that you
25 were driven when you were with Detective Nichols. Do you

1 remember that video?

2 A. Yeah. Yes, I do.

3 Q. Now, just for clarification, there were some areas
4 that you drove by that you testified you and Ryan did pass by
5 or walk by --

6 A. Yes.

7 Q. -- that night.

8 A. Yes.

9 Q. And then there were some areas that defense counsel
10 showed you that were on the video that you didn't go to.

11 A. Yeah, that's correct.

12 Q. I believe Mr. Rogers was talking to you about a path
13 that the police dog took an officer. Do you remember him
14 talking to you about that?

15 A. Yeah, down -- down Fourth Street.

16 Q. You indicated that you read some reports on that.

17 A. Yes.

18 Q. Now, the testimony that you were giving earlier is
19 that you had read that officer's report. The police dog
20 officer's --

21 A. That's correct.

22 Q. -- report. And Mr. Rogers indicated that you did
23 recall that dog getting to the area of the diner.

24 A. That's correct. It was on the road, though, I
25 believe.

1 Q. But then the report that the police officer that had
2 the dog wrote has another path, going up away from Flat
3 Branch Creek; right?

4 A. That's correct.

5 Q. And you read that report.

6 A. Yes, I did.

7 Q. Just like you told him.

8 A. That's correct.

9 Q. But you didn't adopt that report, did you?

10 A. No, I didn't.

11 Q. You went the other way.

12 A. That's correct.

13 Q. And that's what you told this jury.

14 A. That's correct.

15 Q. Was there any report that you read or any newspaper
16 article that you read that had you going over Flat Branch, by
17 the Phillips 66, and onto Providence down in that -- at that
18 intersection?

19 A. No.

20 Q. What about any reports that you read that had you
21 going across the Osco parking lot?

22 A. No.

23 MR. CRANE: Judge, what I'm going to -- and Mr. Weis
24 has very kindly accommodated me on this. It is -- this is a
25 expansion of the conversation -- I believe the excerpt was

1 marked -- okay. There's an excerpt that was put into
2 evidence by the defense. He was talking to his mom about the
3 jail nurse. And I wanted to ask that this -- this section
4 that precedes that, and includes the section the defense
5 played for the jury, be played at this time.

6 MR. ROGERS: No objection.

7 THE COURT: All right. You may play it.

8 And hopefully let us know if you're having trouble
9 hearing.

10 (Excerpt played.)

11 Q. Talking to your mom.

12 A. Yeah.

13 Q. You're in the jail.

14 A. Yes.

15 Q. Now, your mom, in that conversation, starts talking
16 to you about -- you said something about the jail nurse.

17 A. That's correct.

18 Q. And then she starts talking to you about "Don't talk
19 about this case."

20 A. That's right.

21 Q. "It might hurt your case."

22 A. That's right.

23 Q. Right? You heard her say that?

24 A. Yes.

25 Q. And you said, "Don't -- okay. I won't. I won't."

1 You know, I'll do what I want, but I won't -- there's nothing
2 I can, you know, do to incriminate myself."

3 A. Yeah.

4 Q. Kind of getting her from worrying about it.

5 A. That's correct.

6 Q. And it sounds like, like mothers do, she kind of
7 drifted into shaving and "how's the food?" Right?

8 A. Yeah.

9 Q. And then she said, "Now back to this jail nurse."

10 A. Yeah.

11 Q. And you continued to assure her that it was, "Hey, I
12 said nothing of any consequence."

13 A. That's correct.

14 Q. And after you described that conversation to her,
15 you said, "And then it was over."

16 A. That's correct.

17 Q. What was over?

18 A. The conversation with the nurse was over.

19 Q. Is your -- strike that. The jail records that
20 Mr. Rogers was talking to you about indicate that your memory
21 is intact.

22 A. Yeah.

23 Q. Okay. Now, it's a matter of semantics here, but I
24 might forget something, you know, and go, "Golly, you know, I
25 forgot that." But that doesn't mean my memory's not

1 intact --

2 A. That's correct.

3 Q. -- just because I forgot something.

4 A. That's correct.

5 Q. Okay. This experience that you've had, this
6 terrible thing you did, has been something that has caused
7 you problems, to say the least.

8 A. Yeah.

9 MR. ROGERS: Objection. Leading.

10 THE COURT: Sustained -- well, the question has been
11 asked and answered. The objection is untimely, but well
12 taken.

13 MR. ROGERS: Your Honor, I made it as soon as the
14 question was over. It was answered before it was over.

15 MR. CRANE: Okay. I won't do that -- ask that
16 again.

17 THE COURT: And I'd ask the witness to answer the
18 questions after they're finished, because even if there's not
19 an objection, my court reporter can't write down the question
20 and the answer at the same time.

21 You may ask your next question, Mr. Crane.

22 MR. CRANE: Okay.

23 Q. Do you have any disagreement with the records that
24 indicate your memory's intact?

25 A. No.

1 Q. And Mr. Rogers talked to you a little bit about the
2 OCD thing.

3 A. Yes.

4 Q. Were you ever diagnosed with any mental disease or
5 defect that would affect your competency to testify?

6 A. No.

7 Q. The psychologist that was retained by your attorney,
8 Mark Kempton, is Dr. Delaney Dean?

9 A. That's correct.

10 Q. You spoke with her?

11 A. Yes, I did.

12 Q. In -- with respect to that, anything she's generated
13 that indicates that you're --

14 MR. ROGERS: Objection. Calls for hearsay. If
15 we're going to have Dr. Dean's conclusions, I get to
16 cross-examine.

17 THE COURT: Well, it sounds like it's asking for a
18 hearsay answer.

19 MR. CRANE: Okay.

20 THE COURT: So if you will rephrase your question.
21 I can't tell what the full question was going to be, though.

22 Q. Mr. Erickson, they're trying to suggest that you're
23 nuts.

24 MR. ROGERS: I'll object to that.

25 Q. That you got OCD.

1 MR. ROGERS: I object to his characterization of
2 what I'm trying to suggest.

3 THE COURT: Sustained.

4 Q. You've been in front of this jury now for a day and
5 a half or longer. Have you been oriented to time and place
6 while you've been with us here today?

7 A. Yes, I have.

8 Q. Have you had any hallucinations?

9 A. No, I haven't.

10 Q. Have you been obsessed with anything --

11 A. No, I haven't.

12 Q. -- while you've been in here?

13 A. No, I haven't.

14 Q. On cross-examination, Mr. Rogers asked you some
15 questions about what you remembered from John Short's report
16 of the first interview with you back on March 10th, '04?

17 A. That's correct.

18 Q. And he asked you if you remembered a section wherein
19 you were asked if you had said something to the cleaning
20 lady. And the report reads: "Before or after Ferguson had
21 strangled the victim." Do you remember him talking to you
22 about that?

23 A. Yes.

24 Q. I think maybe that was this morning.

25 What he did not read you and what I want to ask you

1 about is earlier in that report, I believe you testified to
2 this, but you weren't asked about it on cross, do you recall
3 stating that you thought it was at that point, after you saw
4 the cleaning lady, "at that point he was," you, "were saying
5 something to a cleaning lady who was at the back door of the
6 business." Do you recall, when you were first talking to
7 Mr. Short -- Detective Short, referencing saying something to
8 a cleaning lady at the back door of the Tribune?

9 A. Yes.

10 Q. And that, in the report, comes before the second
11 reference which Mr. Rogers read you, that Mr. Short --
12 Detective Short wrote: "I then asked Erickson if he had said
13 something to the cleaning lady before or after Ferguson had
14 strangled the victim." So, when you were talking to the
15 police, who brought up the
16 saying-something-to-the-cleaning-lady fact?

17 A. I did.

18 Q. Not the police.

19 A. That's correct.

20 Q. The number of times that you struck the victim, I
21 believe I asked you this on direct, are you -- can you
22 testify today as to the exact number of times that you struck
23 the victim with the weapon on the head?

24 A. No.

25 Q. Can you tell us whether or not Ryan Ferguson had the

1 weapon and struck the victim on the head?

2 A. No.

3 Q. You do not know the answer to that question?

4 A. I don't know.

5 Q. You can't say one way or the other?

6 A. No, I can't.

7 Q. After you finished -- after you had delivered your
8 last blow to the victim, and he was down on the pavement,
9 what do you recall doing with the weapon?

10 A. I dropped it.

11 Q. And then after that what did you do?

12 A. I sat down on the retaining wall.

13 Q. And then there was a period of time there where you
14 were looking down or didn't see what he was doing?

15 A. That's correct.

16 Q. What price, what cost was there for remembering and
17 articulating your memories of participating in this murder?

18 MR. ROGERS: Objection, Your Honor. That's, A,
19 vague; secondly, self-serving; and thirdly, bolstering.

20 THE COURT: I'm going to sustain that it appears to
21 be vague. If you would rephrase your question, please.

22 Q. What price, not money, what cost was it for you, in
23 your life, the more you articulated these memories to the
24 police?

25 A. My freedom. My life. My family. Everything.

1 Doing anything with myself.

2 Q. Your freedom.

3 A. Yeah.

4 MR. CRANE: I think that's all I have, Judge.

5 THE COURT: Recross.

6 MR. ROGERS: Thank you, Your Honor.

7 - - -

8 RE-CROSS-EXAMINATION

9 BY MR. ROGERS:

10 Q. Let's talk about the drawing that you made for
11 Detective Nichols?

12 A. Uh-huh.

13 MR. CRANE: You want me to turn that off?

14 MR. ROGERS: Turn that off, please.

15 Q. And you are shown in the videotape that we saw of
16 you and Nichols in the interrogation room, making this
17 drawing; correct?

18 A. That's right.

19 Q. And that's the drawing that you made.

20 A. That's right.

21 Q. And you have watched the videotape of you talking to
22 Nichols as you made the drawing. Talking with Nichols. You
23 talk, he talks; right?

24 A. That's right.

25 Q. And you didn't say anything like, "This curvy part

1 is the part I took off," did you?

2 A. No, I didn't.

3 Q. And you didn't say that when I was questioning you
4 earlier today, did you?

5 A. No, I didn't.

6 Q. And what you told Nichols at the time, describing
7 the implement that you were drawing for him, was, "I think it
8 was -- it was skinny, so, I mean, I don't think it was a
9 wrench to get the big lug nuts off a tire. I think it was
10 something for, like, the jack." His question: "Like, a
11 handle for the jack?" Your answer: "I think it had a handle
12 on it, actually. Like, it was -- looked like a question mark
13 with, like, a long -- like, the top's very small, and then it
14 went into a question mark. So you twist it like this. I can
15 draw -- I can draw --" And he says, "Like -- like a
16 ratchet?" And you said, "Can I draw you a picture?" He
17 says, "Sure." And then you draw this picture. And you say,
18 "I think it basically just looked like that." And he asked
19 you, "And it was a round piece of wrought iron or --" And
20 you said, "Yeah." And he finishes his question: "-- or
21 steel." You say, "Yes." And you say, "And you remember it
22 as being round?" Excuse me. He says, "And you described it
23 as being round." Your answer: "Yes." And then starts
24 talking about how long. Is that correct?

25 A. Yes, I believe so.

1 Q. And that's what we saw on the videotape, probably
2 more than once?

3 A. Yes.

4 Q. And so you're not saying this is the part that came
5 off. You're saying this is a part that's used to turn a
6 screw jack; right?

7 A. No. I'm saying -- I remember there was something on
8 it. There was some kind of -- some kind of extremity on it.
9 And I remember it came off.

10 Q. But in terms of what you were telling Nichols when
11 you drew this picture, you're drawing a picture of a handle
12 that would be used to turn the screws of a screw jack; right?

13 A. I don't know.

14 Q. So you can slip this through the two little holes on
15 the screw and turn it around and around and around.

16 A. I don't know.

17 Q. And you can move it up and down, so you won't have
18 to take it out and put it back in the next time you turn it
19 around if you're down low against the pavement; right?

20 A. I don't know.

21 Q. That's what you were trying to describe to him when
22 you drew it; isn't that true?

23 A. I don't know.

24 Q. Okay. And you drew that and described it to Nichols
25 before you had a chance to see any of the autopsy pictures;

1 is that a fair statement?

2 A. Yeah, I believe that's correct.

3 Q. They didn't show you autopsy pictures there at the
4 police station, did they?

5 A. No, I don't believe they did.

6 Q. Okay. Now when you talked to Nick Gilpin out in
7 front of John Alder's house and again at Nick's house, you
8 were drunk.

9 A. That's correct.

10 Q. And you told him, each time you talked to him, that
11 you didn't know whether you had real memories or whether they
12 were something that you had dreamed or dreamed up. Correct?

13 A. I don't believe I said that at every instance. No,
14 I don't believe I said that every instance. I believe that I
15 had mentioned that a couple of times, yes, throughout the
16 conversation.

17 Q. Throughout the conversation --

18 A. Yeah, that's correct.

19 Q. -- that was the -- sort of the background is: "Hey,
20 I don't know if this is real or not, but here's what I'm
21 feeling." Right?

22 A. Yeah.

23 Q. And the same is true of your conversations with Art
24 Figueroa. Correct?

25 A. Yes.

1 Q. You told Art Figueroa that you didn't know if this
2 was real or something you dreamed up. Right?

3 A. I told him I -- there were things I didn't know
4 whether they were memories or a dream.

5 Q. Memories or a dream.

6 A. Yeah.

7 Q. Okay. Now --

8 THE COURT: Can we turn the lights back on? Are you
9 still using that screen?

10 MR. ROGERS: I'm going to use it, not still, but
11 again, Your Honor.

12 THE COURT: Okay.

13 MR. ROGERS: If I might.

14 Q. Mr. Crane showed you pictures of Mr. Ferguson's car;
15 is that right?

16 A. Yes, he did.

17 MR. CRANE: Right here.

18 Q. Is that the way Mr. Ferguson's car looked in October
19 of 2001? Roughly.

20 A. Yes.

21 Q. So it wasn't a brand new kind of car.

22 A. No, it wasn't.

23 Q. It was an old car.

24 A. Yes.

25 Q. And you rode in it several times.

1 A. Yes.

2 Q. And it was the car that he was given by his father
3 that his father used to drive; correct?

4 A. Yes.

5 Q. And it was a 1993 Mercedes, wasn't it?

6 A. I believe so.

7 Q. And he was given it to him -- given it to -- it was
8 given to him on his 16th birthday, which would have been
9 October 19th, 2000; is that correct?

10 A. I'm not sure.

11 Q. You're not sure when his birthday is?

12 A. No, I'm not -- well, yeah. I'm also not sure when
13 the car was given to him.

14 Q. All right. Did you tell us earlier it was for his
15 16th birthday?

16 A. I said I thought it might have been for his 16th
17 birthday, but I wasn't sure.

18 Q. And at that time it was already seven years old.

19 A. Yeah.

20 Q. And had a lot of miles on it.

21 A. Yes, it did.

22 Q. Did you ever look at the speedometer -- odometer to
23 see how many miles it had?

24 A. I remember it had upward of maybe 150,000 miles on
25 it. It's not really --

1 Q. A couple hundred thousand perhaps?

2 A. I can't remember.

3 Q. Okay. Still not a bad car for a kid; right?

4 A. No.

5 Q. Better than yours, because you didn't have one.

6 A. Yeah. That's right.

7 Q. Now, was it your testimony on redirect examination
8 by Mr. Crane, when he played that entire portion of the
9 conversation with your mother, is it your testimony, even
10 after having heard that, both when I played it I think at
11 least twice, and now that he's played the whole extended
12 thing with the food and stuff in it, is it your testimony
13 that when you said "it was over," that you were not talking
14 about life as you knew it as a free person in society; you
15 were talking about the conversation with the nurse.

16 A. It's my testimony that I was talking about the
17 conversation with the nurse.

18 Q. And you're certain of it.

19 A. That's my testimony.

20 Q. And you're certain of it.

21 A. I am a hundred percent certain of that.

22 Q. A hundred percent certain of that.

23 A. Yes, I am.

24 Q. All right. Now, let's talk about the report that
25 Mr. Short wrote on the interview which was not recorded. And

1 now that Mr. Crane has been able to go into it in detail,
2 I'll be able to do the same. And what I'm going to focus on
3 is the issue of what the report says you said when -- to the
4 cleaning lady when. Okay? So I want to make sure you can
5 see what we're talking about.

6 First of all, you're talking with Short. And Short
7 asks you if you had seen it or not, talking about your claim
8 that you think Ryan strangled Mr. Heitholt.

9 MR. CRANE: I'm sorry. What are you talking about?

10 MR. ROGERS: I'm getting some foundation.

11 Q. Short is asking you if you had seen Ferguson
12 strangle the victim. You then said you had seen Ferguson
13 strangle him out of the corner of your eye?

14 A. That's what I said, yes.

15 Q. Okay. And then you said you thought at that point
16 you were saying something to a cleaning lady who was at the
17 back door of the business. Correct? Is that what --

18 A. Yes.

19 Q. That's when the subject of the cleaning lady is
20 first mentioned; isn't that right?

21 A. Well, let me see it.

22 MR. CRANE: Well, Judge, I didn't show him the
23 report.

24 MR. ROGERS: No, you read it.

25 MR. CRANE: Mine was redirect, based on questions

1 raised at cross. Now he's being provided the report to read,
2 as to other subjects that may have been brought up on direct,
3 cross, or may not have been.

4 MR. ROGERS: I'm only going to ask him about this
5 particular thing. He wants to see the whole thing to make
6 sure I'm putting it in the correct context.

7 A. Yeah, that's -- here you go. Thank you.

8 Q. Is that correct?

9 A. That's what it says in the report, yeah.

10 Q. Okay. And so there's nothing there, the first time
11 that the report says you mentioned it, about what was said;
12 correct?

13 A. No, there's nothing about that in the report.

14 Q. Okay. But down at the bottom of the same page he
15 goes back to the subject and he says, "I then asked Erickson
16 if he had said something to the cleaning lady before or after
17 Ferguson had strangled the victim. Erickson stated that he
18 did not know. He thought he said something to the cleaning
19 lady" -- excuse me, "to the lady at that time, but was not
20 sure." Correct?

21 A. That's what it -- that's what it says, yeah.

22 Q. And then he goes on to say, "I told Erickson that
23 the cleaning lady told the police that someone asked for
24 help. Erickson stated that was him."

25 A. That's what it says right there.

1 Q. Okay. And so according to the report that Mr. Crane
2 asked you about on redirect examination, the first person who
3 said what was said to the cleaning lady was not you, but was
4 Officer Short.

5 A. Yeah, that's what it says.

6 Q. Now, you have told Mr. Crane on redirect examination
7 about sitting on a retaining wall there at the parking lot;
8 is that correct?

9 A. Well, I believe I was sitting in between the parking
10 lot and the retaining wall. The retaining wall would have
11 been behind me.

12 Q. Now you're saying you're sitting --

13 A. Well, it was like on the edge of the retaining wall.
14 The retaining wall, it went out at an angle. So it would
15 have been hard to sit on the retaining wall itself. I was
16 sitting maybe against it, with my head like that, but I was
17 sitting down.

18 Q. Now, my question was what you told Mr. Crane on
19 redirect examination.

20 A. Against the retaining wall.

21 Q. You said "against the retaining wall." You didn't
22 say "on the retaining."

23 A. That's correct.

24 Q. And now you explained that that's because you
25 couldn't sit on the retaining wall due to the angle of it.

1 A. That's correct.

2 Q. Isn't it true that you had told the police officers
3 in your videotaped statements that you were sitting on a
4 curb?

5 A. I believe I said a curb or a parking block.

6 Q. And you also said a parking block.

7 A. Yeah, I believe that's right.

8 Q. And now you're saying against the retaining wall.

9 A. That's correct.

10 MR. ROGERS: That's all the questions I have.

11 THE COURT: Redirect?

12 - - -

13 FURTHER REDIRECT EXAMINATION

14 BY MR. CRANE:

15 Q. Hey, before you talked to Detective Short, you
16 talked to Nick Gilpin and Art Figueroa. Is that correct?

17 A. That's correct.

18 Q. What did you tell Art Figueroa -- strike that, Nick
19 Gilpin about a cleaning lady?

20 A. I told him that I told a cleaning lady to go get
21 help.

22 Q. And thereafter you talked to Art. You've already
23 testified to this earlier. Is that correct?

24 A. That's correct.

25 Q. And what did you tell Art Figueroa, if anything,

1 about a cleaning lady the night you beat the victim and
2 Ferguson strangled him?

3 A. I told him the cleaning lady -- I told him that I
4 told the cleaning lady to go get help.

5 Q. And then you talked to Short.

6 A. That's correct.

7 Q. At the police department. And you were the first
8 one to bring up something being said to the cleaning lady.

9 A. That's correct.

10 MR. CRANE: That's all the questions I have.

11 THE COURT: Recross.

12 - - -

13 FURTHER RECROSS-EXAMINATION

14 BY MR. ROGERS:

15 Q. And at the time you brought this up to Short at the
16 police department, after you supposedly said whatever you
17 supposedly said to Gilpin, and after you supposedly said
18 whatever you supposedly said to Figueroa, you didn't say to
19 Detective Short, "I told the cleaning lady to get help" until
20 after he told you that's what the cleaning lady had told the
21 police. Isn't that true?

22 A. No, I can't remember. I really was certain that I
23 had told him that I told the cleaning lady to go get help
24 before he said anything regarding the cleaning lady. But
25 that's to the best of my -- to the best of my memory, he

1 didn't say anything before I said anything about -- regarding
2 the cleaning lady or telling her to go get help.

3 Q. But you will agree that according to the report, he
4 is the one who introduced the subject of what was said to the
5 cleaning lady, "Go get help."

6 A. That's what it says in the report, yeah, that's
7 correct.

8 Q. All right.

9 MR. ROGERS: Thank you.

10 THE COURT: Redirect?

11 MR. CRANE: No.

12 THE COURT: May the witness be finally excused?

13 MR. ROGERS: From the defense, Your Honor.

14 MR. CRANE: Well, I think we know where we can find
15 him.

16 THE COURT: Well, may I excuse him for this
17 afternoon?

18 MR. CRANE: Yes, ma'am.

19 THE COURT: The defendant may step down. And he is
20 excused for the afternoon.

21 Mr. Erickson, I would ask you not to discuss your
22 testimony with any other witness who might be called in this
23 case. You are free to be returned to the custody of the
24 sheriff at this time.

25 MR. ROGERS: May we approach, Your Honor?

1 THE COURT: Yes.

2 - - -

3 Counsel approached the bench and the following
4 proceedings were held:

5 MR. ROGERS: Would this be a convenient time to
6 recess? Mr. Ferguson needs one. I know this is a little
7 earlier unusual.

8 THE COURT: Yeah, it is. I take it you don't have a
9 brief witness as your next witness.

10 MR. CRANE: I don't know that there is such a thing
11 any more, but if he needs to go to the bathroom, Judge, I
12 think that's probably --

13 THE COURT: Why don't we take a break.

14 MR. ROGERS: Thanks.

15 - - -

16 The following proceedings were held in open court:

17 THE COURT: Ladies and gentlemen, just to take a
18 short break before another witness that might be more
19 lengthy.

20 The Court again reminds you of what you were told at
21 the first recess of Court. Until you retire to consider your
22 verdict, you must not discuss this case among yourselves or
23 with others, or permit anyone to discuss it in your hearing.
24 You should not form or express any opinion about the case
25 until it is finally given to you to decide. Do not read,

1 view, or listen to any newspaper, radio, or television report
2 of the trial.

3 Take about a 15-minute break and then come back,
4 please.

5 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

6 THE COURT: Be in recess.

7 (Recess taken.)

8 - - -

9 The following proceedings were held out of the presence
10 of the jury:

11 THE COURT: I need to reiterate, we're not to have
12 any cell phones on in the courtroom. If you have a telephone
13 call that comes through, either through vibrating mode or
14 ringing mode, your phone will be checked until the end of
15 court today. There are no cameras in this courtroom, other
16 than those that have been authorized under Supreme Court
17 rule. If you have a camera in any form, whether that's a
18 film camera, a digital camera, or one in a cell phone, and
19 you take it out and take pictures, it will be checked until
20 the end of this trial. Just so we understand that.

21 You may return the jury to the courtroom. Assuming
22 the state's ready and the defense?

23 MR. CRANE: Ready, Judge.

24 MR. ROGERS: Ready, Your Honor.

25 THE COURT: All right.

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The following proceedings were held in the presence of
the jury:

THE COURT: State may call its next witness.

MR. CRANE: State calls Bill Hawes.

THE COURT: Raise your right hand.

- - -

WILLIAM HAWES,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand.

- - -

DIRECT EXAMINATION

BY MR. CRANE:

Q. Give us your name, please, sir.

A. William Hawes.

Q. Okay. And what's your occupation?

A. I am an investigator for the Boone County
prosecutor's office.

Q. How long have you been with the prosecutor's office?

A. Twelve years.

Q. And what did you do before that?

A. I was a Columbia police officer for 20.

Q. What was your position when you left the Columbia
Police Department?

A. I was a sergeant in charge of the crimes against

1 victims unit.

2 Q. How old are you?

3 A. Fifty-eight.

4 Q. Do you have any problems walking?

5 A. Well, yeah, I do have some, but I can do it.

6 Q. Okay. The reason why I'm asking you that, I'm
7 directing your attention to the morning of August 2nd, 2005.
8 What did I ask you to do?

9 A. I walked the route that Charles Erickson described
10 on the -- that related to the events of November 1st, 2001.

11 Q. What was the weather like that morning?

12 A. It was fairly warm. 85 degrees.

13 Q. Okay. What did you carry as you walked to these
14 various locations?

15 A. I took notes. Wrote down times.

16 Q. And what did you use to time how long it took to get
17 from one point to the next?

18 A. I have a stopwatch on my wrist watch.

19 Q. Okay. Can you describe for the jurors the speed or
20 pace at which you walked these routes.

21 A. Just a normal pace. I didn't hurry. I wasn't slow.
22 Just normal pace.

23 Q. All right. Let me direct your attention to what's
24 marked as State's Exhibit 9.

25 MR. CRANE: And Judge, I'd ask the witness be able

1 to step down.

2 THE COURT: He may.

3 Q. Okay. Now you got to move it up a little bit.

4 MR. CRANE: Can everybody see that okay?

5 Q. Okay. If you would, tell us where you started.

6 A. I started at the front door of By George's, which is
7 located near Number 1 on the photo.

8 Q. And from that location, where did you walk?

9 A. I walked down the street, to First and Ash, which
10 would be this intersection right here.

11 Q. Okay. And how long did it take you to walk from By
12 George bar to First and Ash Street?

13 A. 3 minutes.

14 Q. The -- from the corner of -- well, I'm looking at
15 your report --

16 A. Oh, I'm sorry.

17 Q. -- that we did -- you sent this on -- let's see.
18 You dated it August 7. August 2nd. Talked about your
19 walking times.

20 A. It was 2 minutes and 20 seconds.

21 Q. Okay. You sure about that?

22 A. Yes.

23 Q. You want to look at your report?

24 A. No. I've got it here.

25 Q. Okay.

1 (Witness referring to report.)

2 A. Let's go ahead.

3 Q. Okay. Let me ask you that again. From George's to
4 First and Ash Streets, how long did it take you to walk to
5 that destination?

6 A. 2 minutes and 20 seconds.

7 Q. From the corner then of First Street and Ash, how
8 long -- where did you go?

9 A. I walked down Ash Street, to Providence, and over
10 towards the alley right here, which is -- oh, it's just --
11 Providence and Ash is where I stopped.

12 Q. Okay. So from First and Ash to Providence and Ash,
13 how long did that take you?

14 A. That took a minute and 50 seconds.

15 Q. Okay. And let me just show you State's Exhibit 10
16 here. 10B is By George's?

17 A. Yes, it is.

18 Q. Okay. And if we look at 10C, you walked this
19 direction?

20 A. Right. That's First Street.

21 Q. Okay. And down to the corner in 10D?

22 A. That's correct.

23 Q. Okay. And then in 10E we see -- what's depicted in
24 that photograph? That's part of what street?

25 A. Ash.

1 Q. Going down to?

2 A. The Tribune.

3 Q. Okay. And what's the road in between?

4 A. Providence crosses.

5 Q. Okay. So from First and Ash to Providence and Ash

6 was how long?

7 A. 1 minute and 50 seconds.

8 Q. Okay. Now, where did you go from there?

9 A. I went south on Providence, to the alley, across the

10 street, and used the alley to go up to the Tribune building.

11 Q. Okay. Where did you stop?

12 A. At the park -- well, at the Dumpster area.

13 Q. Which isn't there any more.

14 A. It's not here. It's --

15 Q. Okay. Is it correct you stopped at the edge of the

16 parking lot?

17 A. Right.

18 Q. Where the Dumpster enclosure used to be?

19 A. It would be this location here.

20 Q. Okay. And for the record, on State's Exhibit 9, the

21 Dumpster enclosure has been removed in that photograph.

22 A. That's correct.

23 Q. By the time this was taken.

24 A. Yes.

25 Q. Okay. And so from that location on Providence up

1 the alley to the Dumpster enclosure, how long did that take
2 you?

3 A. 1 minute and 30 seconds.

4 Q. Now, where did you go from the parking lot after
5 that?

6 A. I -- from the parking lot of the Tribune, I went up
7 the alley and south on Fourth Street to the area of the
8 diner.

9 Q. Okay. You want to point out the diner? And you
10 might be blocking --

11 JUROR: You're all right.

12 Q. Right there.

13 A. (Indicating.)

14 Q. Okay. So from the parking lot to the -- that's down
15 Fourth Street, over Walnut, over Broadway, and to the diner.

16 A. That's correct.

17 Q. And how long did that take you?

18 A. 3 minutes.

19 Q. From the diner, where did you go?

20 A. From the diner, I crossed Fourth Street, into Flat
21 Branch Park, and crossed the creek, up the bank, to the north
22 entrance of the service station that's here at the corner of
23 Locust and Providence.

24 Q. Okay. And how long did that process take you?

25 A. 2 minutes and 52 seconds.

1 Q. And then from the filling station at the
2 intersection there of Providence and Locust?

3 A. Yes.

4 Q. Where did you go?

5 A. I crossed Providence, went diagonally across the
6 Osco/Office Depot parking lot, across Broadway, and I
7 returned to By George's.

8 Q. And how long did that walk --

9 A. 5 minutes and 29 seconds.

10 Q. Okay. Mr. Hawes, what's the total time it took you
11 to walk that route; basically George's, around the Tribune
12 building, down Fourth Street, diner, Flat Branch, Osco, and
13 back to George's?

14 A. 17 minutes and 1 second.

15 Q. And what is the total time it took you to walk from
16 First Street and Ash Street to the Tribune parking lot? The
17 total time it took you to get there.

18 A. 3 minutes and 20 seconds.

19 Q. Based on the route you took.

20 A. Yes.

21 Q. Okay. 3 minutes and 20 seconds from First and Ash
22 to the Tribune parking lot.

23 A. That's correct.

24 Q. What did you do regarding this case on September
25 25th of this year?

1 A. I drove from the intersection of First and Ash out
2 to Charles Erickson's residence and then over to Ryan
3 Ferguson's residence.

4 Q. What time did you -- what time of day were you
5 driving?

6 A. It was about 2:00 in the afternoon.

7 Q. You drove it two times; right?

8 A. Yes.

9 Q. The first time it was 2 in the afternoon?

10 A. Yes.

11 Q. Okay. How long did it take you to get to Erickson's
12 residence? Well, let me ask you, how did you get there?

13 A. I went from -- here's First and Ash right here. And
14 I went, from that intersection, east, to Providence, south on
15 Providence, to Broadway, went west on Broadway up to
16 Fairview, south on Fairview, west on Chapel Hill, and -- to
17 the Erickson residence, which is at 3706 Chinkapin.

18 Q. Okay. And now let me ask you: How long did it take
19 you to get there?

20 A. 6 -- well -- to Chinkapin?

21 Q. Yes. The Erickson residence.

22 A. I've got the total down to the Ferguson residence.

23 Q. Okay. All right.

24 A. I have the total down --

25 Q. We can do it that way. When you got to -- my fault.

1 When you got to the Erickson residence, what did you do?

2 A. I stopped there and paused --

3 Q. And then what did you do?

4 A. -- in front of the residence, and turned around and
5 drove to Ryan Ferguson's residence.

6 Q. Okay. How long did you pause? Three, four hours
7 or --

8 A. Less than 30 seconds. As if I were dropping
9 somebody off.

10 Q. And then you went to Ferguson's.

11 A. That's correct.

12 Q. Okay. And how did you get over there?

13 A. Got back on Chapel Hill, drove over here to
14 Martinshire, and it turns into Lloyd Drive. And 2513 Lloyd
15 Drive is the Ferguson residence.

16 Q. Okay. And how long -- now let me ask you, how long
17 did that take you?

18 A. 16 minutes and 15 seconds.

19 Q. And what was your total mileage by the time you got
20 to the Ferguson residence?

21 A. Six and a half miles.

22 Q. Okay. And then on October 6, 2005?

23 A. Yes.

24 Q. What did you do?

25 A. I drove the route again.

1 Q. Okay. At what time?

2 A. 1:45 a.m.

3 Q. A.m.

4 A. That's correct.

5 Q. Okay. And did you take that same route?

6 A. I did.

7 Q. Okay. And at that time, on the 6th of October, at
8 2 a.m., how long did it take you to get from First and Ash to
9 Mr. Ferguson's residence?

10 A. 14 minutes and 30 seconds.

11 Q. A little bit less.

12 A. A little bit less.

13 Q. Okay.

14 MR. CRANE: I don't think I have any other questions
15 of this witness.

16 THE COURT: You may resume the stand.

17 Cross-examination?

18 MS. BENSON: Thank you, Your Honor.

19 - - -

20 CROSS-EXAMINATION

21 BY MS. BENSON:

22 Q. I'd like to first talk to you about your walking
23 around downtown, Mr. Hawes. Rather than starting at By
24 George, I want us to start at the point that you're at the
25 Tribune. Okay? And for the sake of this discussion, we need

1 to discuss the approximate time of the murder. Now it's my
2 understanding that Mr. Heitholt logged out at 2:08 from the
3 computer system; is that correct?

4 A. I think that's right.

5 Q. Okay. And in addition, after logging out, he paused
6 and talked with someone in the parking lot; is that correct?

7 A. That is -- that's from police reports, yes.

8 Q. Okay. So it would have to be sometime after that
9 that the murder occurred, obviously.

10 A. That's correct.

11 Q. Okay. So, we have that at least 2:10, at the
12 earliest, probably more in the neighborhood of 2:15, is that
13 correct, that it could have occurred?

14 MR. CRANE: Judge, I'm going to object insofar as
15 this witness. He doesn't have any personal knowledge -- he
16 does have knowledge of the logoff time, but he doesn't have
17 any personal knowledge about when the crime occurred.

18 MS. BENSON: I could rephrase it somewhat.

19 Q. Would it be reasonable to assume that it occurred
20 sometime after he logged off and talked with someone in the
21 parking lot and before the 911 call was made at 2:26?

22 A. Yes.

23 Q. Okay. So let us assume for the sake of our
24 discussion here that it occurred at probably the earliest
25 time frame on that, which would be 2:10 in the morning.

1 Okay?

2 A. Okay.

3 Q. Just an assumption for our discussion.

4 A. Okay.

5 Q. It's my understanding it took you 3 minutes to go
6 from the Tribune to the diner area; is that correct?

7 A. That's correct.

8 Q. And then from the diner, through the creek, and up
9 to the gas station, the Phillips 66 there, it was 2 minutes
10 and 52 seconds?

11 A. That's correct.

12 Q. And finally, from the gas station, through the Osco
13 parking lot, the Office Depot parking lot, and to By George,
14 that was 5 minutes and 29 seconds; is that correct?

15 A. That's correct.

16 Q. So the total distance -- or total minutes involved
17 in that would have been 11 minutes and 21 seconds?

18 A. I'll agree with you.

19 Q. Trust my word on that? Trust my math?

20 A. I'll agree with your math.

21 Q. Okay. So, for the sake of our discussion, if the
22 murder occurred at 2:10, assume for the sake of argument that
23 the act itself would have taken several minutes. Let's take
24 our leave time from the Tribune parking lot at 2:15, for the
25 sake of our discussion. Okay?

1 A. Okay.

2 Q. And I understand you don't know if that's the time
3 or not, but let's assume that whoever did this left at 2:15
4 in the morning from the Tribune parking lot. Okay?

5 A. Okay.

6 Q. And I'm sorry, I said 2:10 earlier, but let's just
7 say -- let's say 2:15. With an 11 minute and 21 second
8 travel time, the earliest one could get back to By George
9 would be 2:26 in the morning; is that correct?

10 A. Well, I walked a normal pace. I'm confident that it
11 could have been shortened if you were in a hurry.

12 Q. If -- and we don't know that. We don't know if the
13 people were walking; we don't know if they were running.
14 They were described as walking briskly; is that correct? Or
15 are you familiar with that?

16 A. I mean, I -- in a hurry.

17 Q. Okay. Well, you walked.

18 A. I wasn't in a hurry.

19 Q. Okay. You also didn't add in the time it would take
20 to stop in the creek and wash someone's hands; correct?

21 A. No, I didn't. I didn't do that.

22 Q. You didn't add in time to have trouble getting up
23 the embankment.

24 A. I was able to get up the embankment all right.

25 Q. But you didn't add extra time if someone had

1 trouble.

2 A. No. I was able to climb the embankment.

3 Q. Okay. And you didn't add in extra time for stopping
4 in the intersection to talk to someone.

5 A. No. You're talking about Locust and Providence?

6 Q. Right.

7 A. Near that intersection?

8 Q. Near that --

9 A. Right. I didn't -- no.

10 Q. Okay. And you didn't add in extra time to go to the
11 car, parked two blocks down, and discard items and then head
12 back, two blocks up, to the bar.

13 A. No. I went -- stopped at the front door of By
14 George's again.

15 Q. All right. So even without adding all those extra
16 things in, the earliest that one could have gotten back, at
17 your pace, would be 2:26 in the morning. To By George.

18 A. Yes.

19 Q. Correct?

20 A. At my pace.

21 Q. And that is about one hour after the normal bar
22 closing time in Columbia, is it not?

23 A. That's correct.

24 Q. Now, I'm going to ask you about something a little
25 bit different, that was not brought up in direct. Through

1 your investigation, you have determined that a Tribune
2 employee named Michael Boyd was out in the parking lot.

3 MR. CRANE: Well, Judge, I'm going to object. This
4 calls for hearsay.

5 THE COURT: I don't know that it calls for hearsay.
6 I need to first hear what the question is.

7 MR. CRANE: Okay.

8 MS. BENSON: I'll finish the question.

9 Q. Have you determined that Michael Boyd was the person
10 who was in the parking lot at some point when Kent Heitholt
11 was in the parking lot prior to his death?

12 A. Yes.

13 Q. And it's my understanding that Michael Boyd is
14 African-American; is that correct?

15 A. Yes.

16 MS. BENSON: Thank you.

17 Oh, I have -- I'm sorry. I do have one more area,
18 Your Honor.

19 Q. You were talking about the travel time driving that
20 Mr. Erickson allegedly took from By George to Charles' house
21 and then from Charles' house to Ryan's house; is that
22 correct?

23 A. Yes.

24 Q. Okay. And you had testified both to an afternoon
25 time and to an early morning time; is that correct?

1 A. That's correct.

2 Q. And the early morning time obviously was shorter, at
3 about 14 minutes; is that correct?

4 A. That's correct.

5 Q. Okay. And in addition, with regard to your early
6 morning drive, some of the lights in Columbia were flashing
7 at that time, weren't they?

8 A. I went through one intersection that had a flashing
9 light.

10 Q. So not all of the intersections, especially the
11 major intersections, and the major thoroughfares would have
12 red lights at that time, would they?

13 A. Well, the -- more the major thoroughfares and
14 intersects, those lights never go flashing. Providence and
15 Broadway is an example. I mean, it's a major intersection.
16 That light is always cycling.

17 Q. You indicated that you were at Broadway and
18 Clinkscapes. Correct?

19 A. Yes. Uh-huh.

20 Q. And that that light was flashing yellow.

21 A. Yes. That's correct.

22 Q. And Broadway is a major thoroughfare in Columbia.

23 A. It is. Right. But --

24 Q. So basically in Columbia, if you have a major
25 thoroughfare intersecting with a more minor thoroughfare, the

1 light for a person driving on the major thoroughfare would be
2 flashing yellow at that time.

3 A. Yeah. It --

4 Q. Okay.

5 A. -- really depends on the intersection. But it was
6 at Clinkscales and Broadway, that's for sure.

7 Q. And talking about the intersection of Providence and
8 Locust, Providence is a very major thoroughfare in Columbia,
9 obviously.

10 A. That's correct.

11 Q. Locust is not.

12 A. Right. That's correct.

13 Q. That would be a situation where there might be a
14 flashing yellow at 1:45 or 2 or 2:30 in the morning, rather
15 than a red light or green light.

16 A. I didn't drive through there on the --

17 Q. I understand.

18 A. -- the night.

19 Q. But that would be the type of scenario that would
20 occur.

21 A. Yes, that's true.

22 MS. BENSON: Nothing further.

23 THE COURT: Redirect?

24 - - -

25

REDIRECT EXAMINATION

1

2 BY MR. CRANE:

3 Q. You met Mike Boyd?

4 A. Yes, I did.

5 Q. Did he show you a vehicle while you met with him?

6 A. Yes, he did.

7 Q. In connection with this case.

8 A. Yes.

9 Q. And --

10 MS. BENSON: Judge, at this point I'd object. This
11 is beyond the scope of cross-examination.

12 THE COURT: Overruled.

13 MR. CRANE: I'm sorry.

14 THE COURT: Overruled.

15 Q. Can you describe the vehicle that he showed you?

16 A. It was a red vehicle. I don't remember the make or
17 year.

18 Q. And you photographed it --

19 A. I did.

20 Q. -- is that correct? And I forgot to bring it up
21 here, didn't I? That photo.

22 A. Yes, you did.

23 MR. CRANE: Can I have this marked as State's
24 Exhibit 99?

25 Q. Show you what's been marked for identification as

1 State's Exhibit 99. Do you recognize that photograph?

2 A. Yes, I do.

3 Q. Okay. What is that?

4 A. It's a photo of Mike Boyd's Plymouth. I think it's
5 an Acclaim. Plymouth Acclaim.

6 Q. And why did he show you that car?

7 MS. BENSON: And Judge, at this point I will object,
8 with regard to hearsay.

9 MR. CRANE: Well, let me ask another question,
10 Judge. I don't want to concede that objection, but I would
11 rephrase it.

12 THE COURT: You may.

13 Q. What did you ask Mr. Boyd reference his vehicle on
14 the night of November 1, 2001 -- or the early morning hours
15 of 2001, November 1?

16 A. I asked him what car he was driving.

17 Q. And what did Mr. Boyd show you?

18 MS. BENSON: And Judge, again I'd make a hearsay
19 objection.

20 THE COURT: The objection is sustained.

21 Q. Well, why did you take a photograph of that
22 particular car in State's Exhibit 99?

23 MS. BENSON: Judge, I think that's going to call for
24 hearsay again.

25 MR. CRANE: This explains his conduct.

1 THE COURT: Well, as long as he doesn't testify as
2 to what someone else told him, he may -- he may testify.

3 MR. CRANE: I've asked Mr. Hawes what he asked
4 Mr. Boyd, and then thereafter what Mr. Boyd may have shown
5 him.

6 Q. You understand that's the question. I'm not asking
7 you to testify about what Mr. Boyd said to you.

8 A. Correct.

9 Q. After you asked him the question, "What did you
10 drive to and from work on early morning hours of November 1,
11 2001," what did Mr. Boyd show you?

12 A. He pointed out this car.

13 Q. And what did you then do?

14 A. I took a photo of it.

15 Q. Okay. And that's a fair and accurate depiction of
16 the photograph -- of the car that Mr. Boyd showed you that he
17 drove that night.

18 A. Yes.

19 MR. CRANE: Judge, I'd offer State's Exhibit 99.

20 THE COURT: Do you have an objection?

21 MS. BENSON: Judge, I don't have an objection as
22 long as it's admitted for the purpose of showing the car that
23 Mr. Boyd pointed out to Mr. Hawes.

24 THE COURT: Exhibit 99 is admitted.

25 - - -

1 State's Exhibit 99 admitted into evidence.

2 - - -

3 Q. What color's that car?

4 A. Red.

5 MR. CRANE: I believe that's all the questions I
6 have.

7 THE COURT: Recross?

8 MS. BENSON: Just briefly, Your Honor.

9 - - -

10 RECCROSS-EXAMINATION

11 BY MS. BENSON:

12 Q. Did you show that picture to anyone? The picture of
13 the car? Have you shown that to --

14 A. Well, I showed it to Kevin Crane and --

15 Q. Okay. And have you showed it to Chuck Erickson or
16 been present when someone else showed it to Chuck Erickson?

17 A. I don't know that -- I don't know that Chuck's ever
18 seen that picture.

19 Q. You're not sure?

20 A. I don't know that -- I didn't show it to him. I
21 don't know that he has ever seen that.

22 Q. Have there been meetings with Chuck Erickson that
23 you weren't present for?

24 A. I don't think so. I think I was there at all of
25 them.

1 Q. You're not sure?

2 A. Well, I mean, you know, I -- I might have gone up
3 to -- gotten up to, you know, get something out of the room.
4 I mean, left the room for a short period of time.

5 Q. And have you discussed that picture with him?

6 A. I don't think I ever talked to Chuck about that.

7 Q. Did you ever describe Michael Boyd to Chuck?

8 A. No, I never did.

9 Q. And just for the jury's sake today, could you
10 describe Mr. Boyd for the jury?

11 A. He's an African-American. He's probably about 30
12 years old. Five ten, 180.

13 Q. Okay. Fairly large man? Not extremely,
14 obviously --

15 A. Right.

16 Q. -- but a decent-sized man who was African-American.

17 A. That's correct.

18 Q. Okay.

19 MS. BENSON: Nothing further, Judge.

20 THE COURT: Redirect?

21 - - -

22 FURTHER REDIRECT EXAMINATION

23 BY MR. CRANE:

24 Q. Prior to making contact with Mr. Boyd and asking him
25 what vehicle he was driving the early morning hours there at

1 the Tribune November 1, 2001, what information had you
2 received before that from Charles Erickson?

3 MS. BENSON: Judge, again I'm going to object, on
4 the basis of hearsay.

5 MR. CRANE: Well, let me ask it this way.

6 Q. Why did you ask Mr. Boyd what vehicle he was driving
7 on the night of November 1, 2001?

8 MS. BENSON: Judge, I think that calls for hearsay
9 again, and I'd make the same objection.

10 MR. CRANE: This explains the reason why this
11 witness took this photograph.

12 THE COURT: It does call for hearsay. Yes?

13 MR. CRANE: This is to explain the conduct of this
14 witness. Further, the defense has opened up the issue of
15 what Chuck said and when he said it. With respect to showing
16 him this photograph. Those are the questions that were asked
17 on recross.

18 MS. BENSON: Judge, I didn't show him the
19 photograph. And I certainly didn't ask him questions about
20 what Chuck Erickson said. I asked him what he said to Chuck.
21 Not what Chuck necessarily said to him. And Chuck was here
22 earlier, and the state certainly could have inquired at that
23 time.

24 THE COURT: I'm going to sustain the objection,
25 Mr. Crane.

1 MR. CRANE: Well, Your Honor, just for the record, I
2 do want -- that Mr. Erickson did testify that the vehicle
3 leaving the lot was a red vehicle.

4 THE COURT: Yes. Is that a response to the
5 objection?

6 MR. CRANE: Well --

7 Q. When did you make contact with Mr. Boyd and take
8 this photograph? Do you remember?

9 A. It was in July of this year.

10 MR. CRANE: Well, that's -- no further questions.

11 THE COURT: Any recross?

12 MS. BENSON: I have nothing further, Judge.

13 THE COURT: You may step down, Mr. Hawes.

14 You may call your next witness.

15 MR. CRANE: State calls Shawna Ornt.

16 THE COURT: Raise your right hand.

17 - - -

18 SHAWNA ORNT,

19 being first duly sworn by the Court, testified as follows:

20 THE COURT: If you'd take the witness stand.

21 - - -

22 DIRECT EXAMINATION

23 BY MR. CRANE:

24 Q. Good afternoon. You doing okay?

25 A. (Nodding head up and down.)

1 Q. You nervous?

2 A. (Nodding head up and down.)

3 Q. Okay. Everything -- these are nice people.

4 Nobody's going to be mean to you. Okay?

5 A. (Nodding head up and down.)

6 Q. Can you give us your name, please?

7 A. Shawna Ornt.

8 Q. Okay. Now, can you speak up so everybody can hear?

9 A. Shawna Ornt.

10 Q. Okay. Shawna, how old are you now?

11 A. I'm 23.

12 Q. 23.

13 A. (Nodding head up and down.)

14 Q. And so back in October of 2001, that would have

15 meant you were what? 19?

16 A. Yes.

17 Q. Okay. And were you living around here back then?

18 A. Yes. I was living in Hallsville.

19 Q. Hallsville, Missouri. That's north of here; is that

20 right?

21 A. Yes.

22 Q. Okay. And how were you employed?

23 A. I was employed with CS Cleaning and Maintenance. I

24 subcontracted for them.

25 Q. Okay. Now, as a -- you were with a cleaning

1 company?

2 A. Yes.

3 Q. And what was the place that you were assigned to
4 work at during October of 2001, November 2001?

5 A. Columbia Daily Tribune.

6 Q. Okay. And that's just right down the street here;
7 right?

8 A. Yes.

9 Q. Just a couple blocks down the street?

10 A. Yes.

11 Q. Okay. What were your regular hours there at the
12 Tribune?

13 A. 10, 10:30 to usually 2, 2:30.

14 Q. Okay. Were there any other janitors that worked
15 with you, or did you work by yourself?

16 A. Jerry Trump and Mike Boyd.

17 Q. So it was a crew of three of you?

18 A. Yeah.

19 Q. Okay. What -- was Jerry -- did Jerry have any
20 additional duties? Was he -- the janitor. Did he have any
21 supervisory type?

22 A. He sort of supervised over me when Deb and Lisa
23 weren't there.

24 Q. Okay. Let me direct your attention to Halloween of
25 2001. Do you remember when you got to the Tribune that day?

1 A. Yeah. Yes.

2 Q. I mean, you said you usually got there 10:30. Were
3 you on time?

4 A. Yeah. It was about 10, 10:30, in between there.

5 Q. Okay. Did you know Kent Heitholt?

6 A. Yes.

7 Q. And let me show you State's Exhibit 1. Do you
8 recognize the guy that's in those photographs?

9 A. Yes. Kent.

10 Q. Okay. This is Kent here and here?

11 A. Yes.

12 Q. Okay. And how -- tell us how you knew him. Was
13 that anything outside of the Tribune building?

14 A. No. I just knew him from cleaning the building.

15 Q. Okay. You'd see him around. He'd be doing his job
16 and you'd be doing yours.

17 A. Yes.

18 Q. Okay. Would you guys speak on occasion or --

19 A. Yes. We'd say "hi" and just -- "how are you doing."

20 Q. Okay.

21 MS. BENSON: Judge, if I can make an objection at
22 this point. Not to be crass or anything, but I'd object to
23 him placing a picture of the victim in a position right in
24 front of the jury, with their viewing that. I think it's
25 inflammatory.

1 MR. CRANE: A picture --

2 MS. BENSON: The picture he just placed right there.

3 MR. CRANE: Okay.

4 THE COURT: If you want to remove it, you may,

5 Mr. Crane. That is a picture of him walking down the street.

6 It is not --

7 MR. CRANE: Yeah. There's no --

8 THE COURT: -- another type of picture --

9 MS. BENSON: I understand that.

10 THE COURT: -- that might be more upsetting to

11 someone. But if you want him to remove it and he's

12 agreeable, that's fine with me.

13 MR. CRANE: Proceed, Your Honor?

14 THE COURT: You may.

15 Q. Ma'am, on that night, early morning hours of

16 November 1, 2001, did you see Mr. Heitholt?

17 A. Yes.

18 Q. Okay. And again, was that during your normal

19 rounds --

20 A. Yes.

21 Q. -- cleaning up?

22 A. Yes.

23 Q. All right. Nothing unusual that night?

24 A. No.

25 Q. Can you give us your best recollection as when you

1 last saw Mr. Heitholt, what he was doing, what time it was,
2 if you remember?

3 A. It was around 2:00, because I was done cleaning the
4 upstairs. And that's about the time I go downstairs to
5 clean.

6 Q. Okay.

7 A. And --

8 Q. Tell us what you saw of Mr. Heitholt.

9 A. We both started heading out. And I told him --
10 asked him if he was leaving. And so we just said bye. And I
11 went on with my work.

12 Q. He went on out the door.

13 A. Yes.

14 Q. Now, I want to show you a diagram here we have
15 marked State's Exhibit 12. Does this look -- you recognize
16 what's drawn on here?

17 A. Yes.

18 Q. Okay. You've got kind of the back dock area of the
19 Tribune. Can you show us where that is?

20 A. Right here.

21 Q. Okay. There's three big garage type doors back
22 there?

23 A. Yes.

24 Q. Okay. And then there's two -- you want to call
25 those swinging doors?

1 A. Yes.

2 Q. Okay. And they're to the right. At least they're
3 to my right. Can you point those out for the jury?

4 A. One right there and there's one right there.

5 Q. Okay. And then can you show us the parking lot?

6 A. This thing right here.

7 Q. Okay. Now, ma'am, after Mr. Heitholt left, he -- do
8 you remember if he went out any of those doors you just
9 showed us?

10 A. He went out the one to the left. Away from the
11 dock.

12 Q. Okay. So that would be the one -- the swinging door
13 closest to Fourth Street over here?

14 A. Yes.

15 Q. Okay. He went out onto that parking lot -- across
16 the alley?

17 A. Yes.

18 Q. And then into the parking lot? That's -- I mean,
19 that was what was out there; right?

20 A. Yes.

21 Q. Okay. Now, after he left and went out onto the
22 parking lot, did you ever see Mr. Heitholt alive again?

23 A. No.

24 Q. What happened after Kent left? What -- maybe make
25 that simpler. What did you do after Kent left?

1 A. I finished my cleaning. I was getting ready to head
2 downstairs, and then I asked Jerry Trump if I could have a
3 cigarette, and he said, "Go ahead," and he was going to clean
4 the bathroom. He didn't want to come out with me right then.

5 Q. He said he wanted to clean the --

6 A. Bathroom. Finish the bathroom first.

7 Q. Okay. And you wanted to go out and smoke a
8 cigarette. You didn't want to borrow one.

9 A. No. I had one.

10 Q. Okay. And where would you normally smoke?

11 A. Right outside of the dock.

12 Q. Okay. And what did -- tell us what you did.

13 A. I just went out the door. And the door just
14 automatically shuts on you and locks.

15 Q. Okay.

16 MR. CRANE: May I have the witness step down?

17 THE COURT: You may.

18 You'll need to speak up, though, because this lady
19 sitting in front of me is taking down what you're saying.
20 And if your back is to her and you speak softly, she won't be
21 able to hear. Okay? You may step down, but you'll have to
22 raise your voice, please.

23 Q. Can you come on down?

24 Okay. Look at this diagram. Can you show us which
25 door you came out of when you went to smoke?

1 A. I came out the door right there.

2 Q. Okay. And you're pointing -- this guy's blocking.
3 You're pointing to this door closest to the garage door?

4 A. Yes.

5 Q. Okay. And then how far out from that door on the
6 lot did you get?

7 A. I came all the way out to about here. That's where
8 the ashtray is.

9 Q. And were you out on the lot -- well, let me ask you,
10 other than yourself at that point, were you expecting anybody
11 else to be out there?

12 A. No.

13 Q. Okay. You didn't go out with anybody else. Jerry
14 stayed inside. Right?

15 A. Yes.

16 Q. Okay. What happened when you got out on -- to that
17 location you've just pointed out there on State's Exhibit 12?

18 A. I got out there. And when I walked down the stairs
19 and looked up, I noticed a body duck down. And that's when I
20 just got nervous and I went back up the stairs, because that
21 door automatically locks, so I had to crawl over the railing
22 onto the dock that was open and get in.

23 Q. Okay. Now, you indicated you saw something?

24 A. (Nodding head up and down.)

25 Q. Okay. Where did you see something?

1 A. Right about there.

2 Q. Okay. Now you're indicating a box there? Victim's
3 car?

4 A. It would be the rear of the -- the rear driver's
5 side of his car.

6 Q. Okay. And what did you see?

7 A. I seen someone in a shadow duck down.

8 Q. Okay. And so you were just aware there was somebody
9 on the driver's side of the car? At that point.

10 A. Yes.

11 Q. Okay. And what did you -- tell us again, what did
12 you do after you saw that?

13 A. Got scared and went back -- went back up the stairs.
14 And I climbed up -- there's a railing right there. So I
15 climbed over the railing to get off the dock.

16 Q. Okay.

17 A. And I went into the bathroom where Jerry was and
18 told him there was something outside.

19 Q. Okay. You were scared at that point.

20 A. Yeah.

21 Q. Okay. And after you got Jerry, what happened?

22 A. We came -- he came just -- we both walked to the
23 dock that was open, and we looked out, and he yelled, "Kent,
24 do you need help?"

25 Q. Okay. Now wait a minute. Show us which door you

1 and Jerry looked out.

2 A. This one right here.

3 Q. Okay. Now you're pointing to the -- if Providence
4 Road is down this way, you're pointing to the Providence side
5 of that door.

6 A. Uh-huh.

7 Q. Okay? And is that -- that's -- you want to call
8 that just "garage door number 1"?

9 A. Okay.

10 Q. Okay. And actually, let me show you what's marked
11 as State's Exhibit 16 for identification. I don't think this
12 is -- I don't think 16 is in.

13 THE COURT: 16 has not been admitted into evidence.

14 MR. CRANE: Okay.

15 Q. Is that -- is that a fair and accurate depiction of
16 the doors -- and I mean, that down there may be different --
17 the doors, as you recall them, on the night of this homicide?

18 A. Yes.

19 MR. CRANE: Judge, I'd offer State's Exhibit 16.

20 MS. BENSON: No objection.

21 THE COURT: State's Exhibit 16 is admitted.

22 - - -

23 State's Exhibit 16 admitted into evidence.

24 - - -

25 Q. Shawna, show us -- we can move this around a little

1 bit. Which door, first of all, did you come out of?

2 A. I came out this door right here.

3 Q. And you went?

4 A. Right about where the ash -- right where the ashtray

5 is.

6 Q. Okay. Past this wall right here?

7 A. It's right at the end of the wall. It's not past it

8 exactly.

9 Q. Okay. And then you saw somebody duck behind the

10 car.

11 A. Yes.

12 Q. And you went back through this door?

13 A. Yes. I had to climb up, because it's too high for

14 me to get up, so I had climb up it and go over the railing to

15 get to that door.

16 Q. Okay. And so then you got Jerry.

17 A. Yes.

18 Q. And then where were you and Jerry standing when you

19 looked back out?

20 A. Sort of -- like we just kind of walked back. Walked

21 and kind of stood right there.

22 Q. On this Providence end of that door.

23 A. Yes.

24 Q. Garage door number 1 we'll call it. Okay? And --

25 now what was -- what did Jerry start to do at that point?

1 A. He just kind of looked out. And then when he -- he
2 just said, "Kent, do you need help?" I guess he thought Kent
3 had a flat tire or something and needed help. And then
4 that's when -- that's when that -- somebody stood up. And
5 they stood up, and then one walked around the back side of
6 the car and looked at me and said that "Somebody needs help."
7 And then that's when we ran inside and just slammed the door
8 shut.

9 Q. Okay. How many persons did you see out there on the
10 other side of the car or to the rear of the vehicle?

11 A. I seen one at the rear of the vehicle.

12 Q. How many total people did you see out there?

13 A. Two.

14 Q. Okay. And one was towards the rear of the vehicle
15 by the time you got back out -- or were back at the dock
16 looking out?

17 A. Yes.

18 Q. And the other one was located where by that time?
19 You see what I'm asking you. I'm asking you now the second
20 time you looked out.

21 A. Yes.

22 Q. Okay.

23 A. The second time, I seen two of them stand up. And
24 one was at the front driver's side -- or passenger side, and
25 the other one was at the rear driver's side.

1 Q. Okay. And prior to that, you had only seen somebody
2 at the driver's side.

3 A. Yes.

4 Q. Okay. Now, the -- one of the individuals yelled
5 back.

6 A. Yes.

7 Q. And what do you recall that person saying?

8 A. He looked at me and he said, "Somebody's hurt. Get
9 help." Along those lines.

10 Q. Okay. But that's still -- you said that still
11 scared you?

12 A. Yeah.

13 Q. Okay. Can you tell us what you remember about these
14 two individuals. Their description.

15 A. I remember they were young white males. The one
16 that I really seen really good had like dirty blond hair. He
17 was tall. He was skinny. He had a light gray shirt on. He
18 had jeans, pants, whatever. As far as I can remember right
19 now.

20 Q. Okay. What about the other one?

21 A. I didn't really see much of him. I seen that he was
22 white and young.

23 Q. And you used the word "he." I mean, you could
24 tell --

25 A. Yeah. It was a male.

1 Q. Okay.

2 A. He was a male.

3 Q. The lighting out there on the parking lot, can you
4 tell us where some of the light sources -- well, let me --
5 here. Let me show you what's in evidence as State's Exhibit
6 13. Can you get over here and look at that? Okay.

7 Let's see. First of all, if you look over here in
8 13C, what's this right here?

9 A. It's a light.

10 Q. Okay. And so to put that in perspective with the
11 diagram, that light would be over the --

12 A. Right there.

13 Q. Okay. All right. And then there's a streetlight up
14 here in 13D.

15 A. Yes.

16 Q. And then here's another photograph of the front --
17 well, the front of the dock area?

18 A. Yes.

19 Q. With that same light we see in 13C?

20 A. (Nodding head up and down.)

21 Q. Is that correct?

22 A. Yes.

23 THE COURT: Excuse me. You need to answer verbally
24 instead of just shaking your head, please.

25 Q. Underneath the -- there's kind of a roof area over

1 the garage where you could pull in there and be out of the
2 rain?

3 A. Yes.

4 Q. Is there lighting up underneath there as well?

5 A. I don't know.

6 Q. Okay. What about 13E? Right by that van.

7 A. Yes. There's lights.

8 Q. Light pole there?

9 A. Yes.

10 Q. Okay. What did you do -- well, strike that. Let me
11 ask you this. After you saw these two young white males at
12 the victim's vehicle, and this is the second time you've seen
13 them, and the guy yells at you, "Somebody's hurt, go get
14 help," or words to that effect, what did you do?

15 A. I went and called 911.

16 Q. Okay. And what happened after that?

17 A. I tried talking to them, but Jerry had to take over
18 because I was too hysterical.

19 Q. Jerry did?

20 A. Yeah.

21 Q. You were too uptight about the whole thing?

22 A. (Nodding head up and down.)

23 Q. Let me ask you this. Do you ever see, after that
24 last time when Kent left the building to go out on the
25 parking lot, what could you see of him when you looked out

1 there towards his vehicle?

2 A. I couldn't see nothing.

3 Q. You couldn't see him.

4 A. (Shaking head from side to side.)

5 Q. On either occasion.

6 A. No.

7 Q. Okay. And I should ask you too, when you last saw

8 these two young white males, what were they doing? Where

9 were they going? What were they doing?

10 A. They -- can I use this?

11 Q. Yeah. Uh-huh.

12 A. They were -- they --

13 Q. You're looking at -- just for the record, you're

14 looking there at State's Exhibit 12.

15 A. They were -- they were running up this alley. One

16 came from this way, and then the other one came from here,

17 and ran up the alleyway.

18 Q. One went around the front of the car?

19 A. Around front of the car and one went around the rear

20 of the car.

21 Q. Okay. And up what alley?

22 A. Up this alley towards Fourth Street.

23 Q. And then where? Could you see?

24 A. I couldn't see. I was inside.

25 Q. Okay. So when you last had any visual of them,

1 they're down in this area?

2 A. Yes.

3 Q. Okay. I think you can go ahead and have a seat.

4 Thank you.

5 After you called 911, who -- well, let me ask you,
6 after you called 911, do you remember anybody going out on
7 the parking lot after that? I'm talking about in the
8 building. I'm not talking about the police yet. I'm talking
9 about out of the building.

10 A. I remember all of the -- the guys from where he
11 worked in the sports editor place all went out there.

12 Q. Okay. And did they go out that -- those -- the dock
13 area or they went out a swinging door or jumped off the dock,
14 however they got out there?

15 A. I believe they went out the same way Kent went out.
16 The first --

17 Q. Okay. And they ran out on the lot. Did you go out
18 on the lot after you were calling 911?

19 A. No.

20 Q. Okay. Did -- you didn't go over and look at the --
21 at -- see Kent?

22 A. No.

23 Q. Okay. Now, after -- you called 911. Gave the phone
24 to Jerry?

25 A. (Nodding head up and down.)

1 Q. Eventually then who showed up? That wasn't from the
2 Tribune. Who showed up?

3 A. The cops.

4 Q. Okay. And a number of police officers arrived.

5 A. Yes.

6 Q. And they talked to you.

7 A. Yes, they talked to me.

8 Q. Okay. On -- do you remember specifically talking to
9 a detective down at the Columbia Police Department about a --
10 your -- what you remembered about what these guys looked
11 like?

12 A. Yes.

13 Q. Okay. And what did -- what -- well, let me just try
14 it this way. Let me show you State's Exhibit 26 for
15 identification and ask if you recognize that.

16 A. Yes.

17 Q. Okay. First of all, what is that?

18 A. It's a composite I did.

19 Q. A composite?

20 A. (Nodding head up and down.)

21 Q. You did this with a detective at the Columbia Police
22 Department?

23 A. Yes.

24 Q. And this was not too long after the events that
25 you've just described; correct?

1 A. It was the next day.

2 Q. Okay. And that looks like what the detective and
3 you came up with that night?

4 A. The best I could, yes.

5 Q. This is it; right?

6 A. Yes.

7 MR. CRANE: Judge, I'd offer State's Exhibit 26.

8 MS. BENSON: No objection, Your Honor.

9 THE COURT: State's Exhibit 26 is admitted.

10 - - -

11 State's Exhibit 26 admitted into evidence.

12 - - -

13 Q. Okay. Now, can you tell us how this composite was
14 done. How did you guys -- how did you and the detective go
15 about doing this?

16 A. We did it on a computer. I had to flip through
17 pictures and show him, like, the eyes looked like this.

18 Q. So they got a bunch of options of like eyes and ears
19 and what have you?

20 A. Yes.

21 Q. Okay. And then you select things from that. And
22 then how's he put it all together?

23 A. He did it on a computer somehow.

24 Q. Okay. All right. And this is what was the product
25 of that.

1 A. Yes.

2 Q. Okay. Now, later, a lot later, actually in 2003,
3 did you go back down to the police department?

4 A. Yes.

5 Q. Okay. And I should ask you too, had you had an
6 opportunity to look through mug shots of people that the
7 police showed you? Photographs of people?

8 A. Yes.

9 Q. Did you pick anybody out of those photographs as the
10 people that you'd seen at Kent's car that night?

11 A. No.

12 Q. Okay. You looked at a lot of photographs. It
13 wasn't them.

14 A. No.

15 Q. Okay. Let me show you what's marked as State's
16 Exhibit 27 for identification. Do you recognize this?

17 A. Yes.

18 Q. Okay. What's this?

19 A. That is the composite I did in 2003.

20 Q. Okay. I believe that was March of 2003?

21 A. Yes.

22 Q. Okay. And again, for the record, that's the next
23 day, November 2001; right?

24 A. Yes.

25 Q. Okay.

1 MR. CRANE: Your Honor, I --

2 Q. Now this is with a different detective?

3 A. Yes.

4 Q. Okay.

5 MR. CRANE: Your Honor, I'm going to offer State's
6 Exhibit 27.

7 MS. BENSON: No objection.

8 THE COURT: No -- did you say no objection?

9 MS. BENSON: Correct.

10 THE COURT: State's Exhibit 27 is admitted.

11 - - -

12 State's Exhibit 27 admitted into evidence.

13 - - -

14 Q. Now, Shawna, how come you went and did another
15 composite later?

16 A. Because it was an actual artist that drew it out,
17 where I could explain it better. Or he could make it look
18 more like the person I seen.

19 Q. Okay. And both of these are one of the two guys you
20 saw?

21 A. Yes.

22 Q. Okay. You saw two different individuals that night?

23 A. Yes.

24 Q. And both young white males?

25 A. Yes.

1 Q. Which one -- you said one was at the back of the car
2 and one was towards the front of the car? Now I'm talking
3 about the second time you came out.

4 A. Yes.

5 Q. The first time you came out, they're both on the
6 driver's side. But the second time you came out -- do you --
7 can you tell us which of these two individuals the composite
8 is of?

9 A. I can't say for sure. It was four years ago.

10 Q. Right. Well, is -- can you tell us whether it was
11 the one that yelled back? Or was it the other one you saw?
12 Or do you remember?

13 A. It was the one that looked at me and talked to me.

14 Q. Okay. Now, would that go for State's Exhibit 27?

15 A. Yes.

16 Q. And that was in 2003.

17 A. Yes.

18 Q. When you did that. And 2001 when you did those two.

19 A. Yes.

20 Q. You hadn't -- you'd never met Ryan Ferguson or Chuck
21 Erickson.

22 A. No.

23 Q. After you did the first composite, how did you feel
24 about it?

25 A. Not as satisfied as I wanted to be.

1 Q. After you did the second composite, how did you feel
2 about that one?

3 A. Better than the first one.

4 Q. You thought that was more accurate as to what the
5 individual looked like?

6 A. Yes.

7 Q. Okay.

8 MR. CRANE: I -- your witness. I don't have any
9 other questions.

10 THE COURT: You may inquire.

11 MS. BENSON: Thank you, Your Honor.

12 - - -

13 CROSS-EXAMINATION

14 BY MS. BENSON:

15 Q. You indicated that you last saw Mr. Heitholt right
16 around 2:00 in the morning; is that correct?

17 A. Yes.

18 Q. And that was when he was leaving the building?

19 A. Yes.

20 Q. All right. And did you see anyone else leave the
21 building right around that time, just before?

22 A. No.

23 Q. You don't recall seeing anyone leave?

24 A. No.

25 Q. Okay. You indicated it was about 10 to 15 minutes

1 after he left that you took your smoke break; is that
2 correct?

3 A. Yes.

4 Q. So that puts you back out onto the parking lot
5 somewhere around 2:15 or so; is that correct?

6 A. Yes.

7 Q. And you're not entirely sure about the 2 a.m. It
8 could have been a little later than that?

9 A. Yeah.

10 Q. Okay. Okay. Let me refer you to State's Exhibit
11 12. The first time that you went out that night, you went
12 out this door here, which is the first swinging door. Or I
13 guess if you want to take it on a line from east to west, it
14 would be the second swinging door; is that correct?

15 A. Yes.

16 Q. Okay. And did you come down the steps?

17 A. Yes.

18 Q. And you got to right about the end of this thing
19 here?

20 A. Yes.

21 Q. Now at that time you only saw a shadow. Is that
22 right?

23 A. I saw -- I actually saw someone duck down.

24 Q. Okay. You saw -- so they ducked down very quickly,
25 and you didn't actually get to see them at that point.

1 A. Yes.

2 Q. If that was all you had seen, you would not be able
3 to describe them at all.

4 A. No.

5 Q. Okay. Okay. So you went back in and you got Jerry,
6 who had not come out at all yet; is that correct?

7 A. Yes.

8 Q. Okay. And when you came back with Jerry, you came
9 to the first big garage door.

10 A. Yes.

11 Q. Is that right? And this is still up on the dock.
12 Is that right?

13 A. Yes.

14 Q. When you came to that area with Jerry, both you and
15 Jerry stayed up on this dock area.

16 A. Yes.

17 Q. Is that right? And it's from there that he yelled
18 at these people?

19 A. Yes.

20 Q. Okay. So Jerry did not go down to the lot. He
21 stayed up there with you.

22 A. Yes.

23 Q. All right. Now, when the person yelled back, that's
24 when you and Jerry shut the door; is that right?

25 A. Yes.

1 Q. Okay. So Jerry didn't stay outside at that point.
2 A. No.
3 Q. He shut the door and stayed inside with you.
4 A. Yes.
5 Q. All right. And then you both went to the telephone.
6 A. I know I went to the telephone. I'm not for sure --
7 Q. Okay. Well, he took over the telephone call for
8 you.
9 A. Yes.
10 Q. And that was fairly quickly, wasn't it?
11 A. Yes.
12 Q. A matter of seconds?
13 A. A little bit, yeah.
14 Q. Okay. Well, I'm not sure how many, but a matter of
15 seconds rather than minutes.
16 A. (Nodding head up and down.)
17 Q. Is that correct?
18 A. Yes.
19 Q. Okay. So he was just behind you --
20 A. Yes.
21 Q. -- when you went to make the phone call. So you did
22 not see Jerry Trump go back outside until perhaps all the
23 other guys from the sports editor -- or the sports writing
24 room went outside.
25 A. Yes.

1 Q. Okay. Now with regard to the other people going
2 outside, how is it that they knew that there was something
3 wrong outside?

4 A. I guess -- I was on the phone. I --

5 Q. Okay. So you didn't go up and tell them.

6 A. No.

7 Q. Okay. Now, when you went out the door, and I'm
8 talking about the swinging door this time, not the garage
9 door, you were just coming out to take a smoke break; right?

10 A. Yes.

11 Q. So you didn't have a vacuum cleaner or anything like
12 that --

13 A. No.

14 Q. -- in your hands? You didn't have anything with a
15 cord nearby you in your hands?

16 A. No.

17 Q. Okay. Let's go now to your descriptions. Now
18 you've indicated that you only got a look -- a good look at
19 one of those individuals; is that correct?

20 A. Yes.

21 Q. And that was the person who spoke to you. He said,
22 "Somebody needs help," or something to that effect.

23 A. Yes.

24 Q. Is that right?

25 A. Yes.

1 Q. Okay. And you've given a description of that person
2 several times, have you not?

3 A. Yes.

4 Q. And in every description that you've given thus far,
5 up 'til today, you've described the hair as blond; correct?

6 A. Yes.

7 Q. Now, today you said the hair was -- I believe you
8 said dirty blond? Is that correct?

9 A. Those are the same thing to me.

10 Q. Okay. Would you say that dirty blond's different
11 from straight blond?

12 A. I guess.

13 Q. Okay. How about: Is dirty blond different from
14 extremely blond?

15 A. Yes.

16 Q. Okay. That's a different thing, isn't it?

17 A. Yes.

18 Q. All right. Do you remember talking with Officer
19 Lloyd Simons of the Columbia Police Department on November
20 2nd, 2001, the day after the murder?

21 A. Yes.

22 Q. Okay. And he asked you for a description once
23 again.

24 A. Yes.

25 Q. This was actually probably the second or third time

1 you've given a description to officers; right?

2 A. Yes.

3 Q. And in this description, you first describe the
4 person you saw as being blond; correct?

5 A. Yes.

6 Q. And then you indicate that, in fact, his hair was
7 extremely blond, do you not?

8 A. I don't remember that.

9 Q. You don't recall that?

10 A. No.

11 MS. BENSON: Your Honor, I would offer to refresh
12 her recollection with the report. I know what the Court's
13 ruling has been thus far.

14 MR. CRANE: I'm going to object to that, Judge.
15 She -- if they want to call the officer, that's fine.

16 MS. BENSON: We can do that. I'd still make the
17 request.

18 THE COURT: Okay. What you're wanting to refresh
19 her recollection with is not a statement that --

20 MS. BENSON: I understand.

21 THE COURT: -- she wrote out; is that correct? It's
22 a police report.

23 MS. BENSON: It is a police report written by an
24 officer.

25 THE COURT: That some other officer wrote, not the

1 witness who's on the stand.

2 MS. BENSON: Uh-huh.

3 THE COURT: The objection is sustained.

4 Q. If -- you sat down with Officer Simons, I'm assuming
5 at the police department, is that correct --

6 A. Yes.

7 Q. -- when you had this interview?

8 A. Yes.

9 Q. Okay. And it's about two and a half pages of text,
10 from what you told him; is that correct? Would you think
11 that's --

12 A. Yes.

13 Q. -- fair?

14 A. Yeah.

15 Q. Okay. And he listened to what you had to say?

16 A. Yes.

17 Q. I'm assuming he took notes?

18 A. Yes.

19 Q. Okay. So he would have written down what you told
20 him?

21 A. Yes.

22 Q. Okay. And if he wrote down that you said "extremely
23 blond," would that be reasonable?

24 A. Yeah, but I don't remember saying it, so.

25 Q. Okay. All right. The other thing that you have

1 mentioned about the hair was a unique style previously; is
2 that correct?

3 A. Yes.

4 Q. I notice that you didn't mention that today. Could
5 you describe the hairstyle? What was unique about it?

6 A. It was -- it was kind of -- the bangs were pushed
7 up. Just -- it's hard to explain. Not all the hair was
8 spiked. Just the bangs were up.

9 Q. Okay. So the unusual feature of the hair was that
10 the bangs were kind of -- were they pushed forward and spiked
11 up?

12 A. Yes. They were just like --

13 Q. Kind of like curled up or something?

14 A. No. They were sticking up.

15 Q. Okay. Just the bangs.

16 A. Yeah.

17 Q. Okay. Now, you first gave a description right there
18 on the scene; is that correct?

19 A. Yes.

20 Q. And that was Mitch Baxley from the Columbia Police
21 Department; is that correct?

22 A. Yes.

23 Q. Okay. And at that time you described this unusual
24 hairstyle?

25 A. Yes.

1 Q. Okay. And at that time you described the hair as
2 blond --

3 A. Yes.

4 Q. -- is that correct? But you didn't say "dirty
5 blond" or "medium blond"; you just said "blond" at that time;
6 correct?

7 A. Yes.

8 Q. And then you had another interview with Ben White,
9 also on November 1st.

10 A. Yes.

11 Q. Okay. This was the second one, but on November 1st
12 of '01; correct?

13 A. Yes.

14 Q. Okay. And again at that time you described the hair
15 being -- the bangs being spiked in front? Correct?

16 A. Yes.

17 Q. And you described the hair being blond --

18 A. Yes.

19 Q. -- correct? And you say nothing, once again, about
20 being medium blond or dirty blond; just blond. Is that
21 correct?

22 A. Yes.

23 Q. And then in this third interview with Lloyd Simons,
24 you don't recall it, but you've described the hair as
25 extremely blond. And you described it again as being hair --

1 the bangs sticking up in front. Is that correct?

2 A. Yes.

3 Q. Okay. And then finally you did a second composite
4 sometime later; is that correct?

5 A. Yes.

6 Q. And that was also with a Columbia Police Department
7 officer; is that correct?

8 A. Yes.

9 Q. I believe that was Mr. Nichols perhaps?

10 A. Yes.

11 Q. Okay. And that was February 24th of 2003.

12 A. Yes.

13 Q. All right. And in that, you once again described
14 the hair as blond; is that correct?

15 A. Yes.

16 Q. Okay. And it's only after -- actually after being
17 deposed in this case that you have added the description of
18 dirty blond to this case, isn't it?

19 A. I didn't really add nothing. I just said it.

20 Q. Okay.

21 A. It was blond.

22 Q. Which you've admitted is different -- extremely
23 different from extremely blond; correct?

24 A. Well, yeah.

25 Q. Okay. Now, today I believe you described the person

1 that you did see as skinny? Is that what you said?

2 A. Yes.

3 Q. Okay. And in the first four descriptions that you
4 gave, you have described that person rather as muscular, but
5 not stocky.

6 A. Yes.

7 Q. Is that accurate?

8 A. Yes.

9 Q. Okay. And you've described previously the person as
10 being about six feet tall. Is that still accurate?

11 A. Yes.

12 Q. Okay. And I believe you described these individuals
13 as being in their early 20s.

14 A. Yes.

15 Q. Is that correct?

16 A. Yes.

17 Q. Okay. That's what you observed that night.

18 A. Yes.

19 Q. Okay.

20 A. It happened fast.

21 Q. All right. Now when you gave your second composite
22 description, you added some facial details that you had never
23 added before; is that correct?

24 A. Yes.

25 Q. All right. And you indicated that the head was very

1 rectangular. Is that right?

2 A. Yes.

3 Q. And that's still accurate?

4 A. Yes.

5 Q. Okay. You indicated that the head was longer than
6 an average head. Is that still true?

7 A. Yes.

8 Q. Is that still what you recollect?

9 A. I guess, yeah.

10 Q. Okay. You indicated that the chin was wider than
11 the average chin and square.

12 A. Yes.

13 Q. And that's true?

14 A. Yes.

15 Q. Okay. You indicated that the nose was very narrow
16 at the base.

17 A. Yes.

18 Q. Is that correct?

19 A. Yes.

20 Q. And you also indicated that the person had very
21 small lips. Do you recall that?

22 A. No.

23 Q. You indicated they had small -- like fin lips, I
24 guess I should say. Do you understand what I mean?

25 A. Yes.

1 Q. Okay. You don't recall telling the officer that
2 when you made your second composite?

3 A. I couldn't see the exact details of the lips and
4 stuff, you know.

5 Q. It was kind of hard to see facial details.

6 A. Yeah.

7 Q. Okay. You don't recall if they had facial hair or
8 not?

9 A. No.

10 Q. Okay. Do you recall it being a fairly warm night?

11 A. It was decent.

12 Q. You didn't need a coat, did you?

13 A. No.

14 Q. Okay. Certainly not a big puffy coat.

15 A. No.

16 Q. Now, since that time -- well, actually that night
17 the officers took you for what we call a show-up, where they
18 thought they had a suspect in custody and they asked you to
19 come look at him. Do you remember that?

20 A. Yes.

21 Q. Okay. I think Jerry Trump went with you; is that
22 correct?

23 A. Yes.

24 Q. And he didn't see anything at all, it's my
25 understanding, with regard to the suspect.

1 A. No.

2 Q. Okay. You looked at the suspect that they had;
3 correct?

4 A. Yes.

5 Q. Do you remember that?

6 A. Yes.

7 Q. Okay. And it's my understanding you were very
8 hesitant and unsure about that person being the suspect.

9 A. No, I knew it wasn't him.

10 Q. Okay.

11 A. No.

12 Q. So if the officer wrote in her report that you were
13 hesitant and unsure --

14 MR. CRANE: Well, now wait a minute, Judge.

15 Q. -- that would not be correct?

16 MR. CRANE: I got a motion in limine on this
17 business right here.

18 THE COURT: You want to approach the bench then?

19 MR. CRANE: Yeah.

20 MS. BENSON: I don't mind withdrawing the question,
21 however, Judge.

22 MR. CRANE: Okay.

23 MS. BENSON: That's okay.

24 MR. CRANE: She's already testified that -- the last
25 question along this line was: That guy wasn't one of two

1 people she'd seen out by the car.

2 THE COURT: The question is withdrawn.

3 MS. BENSON: Thank you. Okay.

4 Q. Now sometime later you were working at Pizza Hut; is
5 that correct?

6 A. Yes.

7 Q. Okay.

8 MR. CRANE: Make the same objection, Judge. And I
9 think I know where she's going with this. Can we approach?

10 - - -

11 Counsel approached the bench and the following
12 proceedings were held:

13 MS. BENSON: Judge, what I'm going to ask about is
14 an occasion wherein she was working at Pizza Hut. She had a
15 co-worker that she thought looked just like the suspect and
16 called the police and talked to them about that. I think
17 it's relevant to her certainty or lack thereof as to features
18 of this person and ability to ID.

19 MR. CRANE: This person that she talked about, he
20 was checked out. He was nowhere near there. And he is not
21 the -- in any way, shape, or form involved in this thing.
22 And Miss Benson, with all due respect, knows it, and it's
23 directly contravening the motion in limine, evidence of other
24 suspects, just like that last question was with the show-up.

25 MS. BENSON: If I could, Judge. I'm not at all

1 trying to suggest that the person --

2 THE COURT: Wait a minute. Mr. Crane is not here.

3 MR. CRANE: I can hear.

4 MS. BENSON: I'm not suggesting that this person was
5 the perpetrator. I'm talking about her ability to make an ID
6 that she thinks she sees this person and is so certain that
7 it's that person that she calls the police. It goes to the
8 credibility of her with regard to her description and
9 identification issues.

10 MR. CRANE: Well, okay. Can I go ahead and ask her
11 if she can identify the defendant then?

12 THE COURT: I assume you can.

13 MS. BENSON: Well, she can't. She can't unless she
14 is going to lie today.

15 MR. CRANE: She hasn't looked over there. I don't
16 know when she's seen him.

17 THE COURT: She's never seen him.

18 MR. CRANE: Not in person.

19 MS. BENSON: Not in person.

20 THE COURT: Well, I assume if you want to test her
21 credibility by having her say other people look like that, I
22 assume the state would be privileged to show that this person
23 had nothing to do with it, number one. And number two, she
24 could be asked to identify the defendant in this courtroom as
25 well.

1 either side.

2 MR. CRANE: No.

3 You guys aren't subpoenaed, are you?

4 SPECTATOR: No, we're not.

5 THE COURT: All right. Go ahead. You may finish
6 your examination.

7 MS. BENSON: Thank you, Judge.

8 Q. I'm going to ask you at this point about the other
9 person that was there, that you were not able to get a
10 description -- or a significant description of anyway. Okay?

11 A. Okay.

12 Q. You did get a look at that person when they stood
13 up; is that correct?

14 A. Yes.

15 Q. Okay. And it's my understanding that that person
16 was shorter than the other person? Is that correct?

17 A. Yes.

18 Q. It's also my understanding that that person was
19 fatter than the person that had spoken to you. Is that
20 correct?

21 A. He was a little bit bigger, yes.

22 Q. Okay. Do you recall using the word "fatter" before
23 in your prior interviews with police?

24 A. Yeah. I --

25 Q. Okay. Did you notice anything else about that

1 person at all?

2 A. I noticed that it was a white male. He was white
3 and he was young.

4 Q. Right. Other than being a white male.

5 A. Not really, no. No.

6 Q. Okay. You didn't notice anything about hats.

7 A. No. I -- I paid attention more to the one that was
8 talking to me.

9 Q. Okay. And you didn't see a hat on that person
10 either, did you?

11 A. No.

12 Q. Okay. And that person had on a T-shirt; is that
13 correct?

14 A. Yes.

15 Q. Okay. They didn't have a jacket on or a
16 long-sleeved shirt on, but a T-shirt; correct?

17 A. Yes.

18 Q. Okay. And just to make sure that the jury's clear
19 on that, the two composites that you did, although quite some
20 time apart, they are of the same suspect --

21 A. Yes.

22 Q. -- correct? The person that spoke to you.

23 A. Yes.

24 Q. Okay. You've never done a composite for the other
25 person.

1 A. No.

2 Q. Okay.

3 MS. BENSON: One moment, Your Honor.

4 (Discussion off the record between defense counsel.)

5 MS. BENSON: Just one more question. Sorry.

6 Q. The person that you said spoke to you was the person
7 coming around the back of the car, that walked around the
8 back toward the alley; is that correct?

9 A. Yes.

10 Q. Okay.

11 MS. BENSON: Nothing further.

12 THE COURT: Redirect?

13 MR. CRANE: I don't think I got any more questions
14 of this witness.

15 Thank you, ma'am.

16 THE COURT: May she be finally excused for the
17 state?

18 MR. CRANE: Yes.

19 THE COURT: For the defendant?

20 MS. BENSON: Yes, Your Honor.

21 THE COURT: Thank you so much for coming. You're
22 finally excused. Would ask you not to discuss your testimony
23 with any other person who is to be called as a witness, but
24 you're free to go. Thank you.

25 You may call your next witness.

1 MR. CRANE: Jerry Trump.

2 THE COURT: Would you come forward and raise your
3 right hand, sir.

4 - - -

5 JERRY TRUMP,
6 being first duly sworn by the Court, testified as follows:

7 THE COURT: Would you take the witness stand,
8 please.

9 You may inquire.

10 - - -

11 DIRECT EXAMINATION

12 BY MR. CRANE:

13 Q. Give us your name, please, sir.

14 A. Jerry Trump.

15 Q. Jerry, how old are you?

16 A. Fifty-six.

17 Q. And back in -- where are you living now?

18 A. I'm living in Kirksville, Missouri.

19 Q. Okay. Back in October of 2001, how were you
20 employed?

21 A. I was employed by the C & S Cleaning Company.

22 Q. And what was one of their places that you cleaned
23 during the -- October, November of 2001?

24 A. The Columbia Daily Tribune.

25 Q. Okay. Just a couple blocks down this way; right?

1 A. Yes, sir.

2 Q. How long had you been a janitor there by that time?

3 A. I believe it was about six months.

4 Q. And what were your regular hours there at the
5 Tribune?

6 A. We normally went in around 9 in the evening, 9 to
7 10, and worked until 2 or 3.

8 Q. And, you know, you were a janitor.

9 A. That's correct.

10 Q. Cleaned up.

11 A. That's correct.

12 Q. Did you have any supervisory responsibility?

13 A. I did. I had advanced to being their lead person
14 there. And I had two other employees that I managed.

15 Q. Was one of them Shawna Ornt, who just walked out as
16 you walked in?

17 A. Yes.

18 Q. Okay. I want to direct your attention to October
19 31st, 2001. About what time did you arrive there at the
20 Tribune?

21 A. I believe we got there about 9 that evening.

22 Q. And is that -- was that normal?

23 A. Yes.

24 Q. Okay. What were you driving that night?

25 A. A 1997 I think Astro Chevy van.

1 Q. Where did you park it?

2 A. About the fifth place down from the rear of the
3 building.

4 Q. Well --

5 A. In the employee parking lot.

6 Q. Okay. Which is right out on the other side of the
7 alley from the dock there.

8 A. Correct.

9 Q. Okay. That night and into the early morning hours
10 of 2001, normal evening?

11 A. Yes, it was.

12 Q. Cleaning up, doing your thing?

13 A. Correct.

14 Q. Did you know -- have occasion to know Kent Heitholt?

15 A. I did.

16 Q. Okay. And can you describe how you knew Kent.

17 A. Well, Kent worked late in the evenings, because
18 obviously sports events went late into the day. And he
19 worked late in the evening. And some of his staff would too.

20 Q. Okay.

21 A. And as we cleaned the building, we cleaned his
22 office.

23 Q. All right. And so they -- the sports people would
24 be there, Kent would be there, and you'd be cleaning up
25 around them, kind of.

1 A. Correct. They were always friendly and --

2 Q. Show you State's Exhibit 1, 1A and 1B. Do you
3 recognize that guy?

4 A. I sure do. Kent Heitholt.

5 Q. The big guy there?

6 A. Yes.

7 Q. Not the little one, but the big one there --

8 A. The big one.

9 Q. -- on the bottom?

10 A. Yeah.

11 Q. Okay. Kent Heitholt.

12 The night of November -- or early morning of
13 November 1, 2001, do you recall -- or did you have occasion
14 to be around when Kent left for what -- I guess you thought
15 was for the evening?

16 A. Yes. I was at -- near the back doors. We had just
17 finished mopping the stairwell that the employees usually
18 use. And he said, "Oh, you just mopped that." And I said,
19 "Yes." He said, "Well, I'll go out this other door."

20 Q. Okay.

21 A. And I held the door for him --

22 Q. All right.

23 A. -- as he went out.

24 Q. You didn't want him walking through your freshly
25 mopped floor and he didn't have a problem with it?

1 A. Well, he was that kind of a person, that he would
2 avoid those kinds of things, so that we didn't have double
3 duty. Kent was very considerate.

4 Q. After he -- and he went on out to the parking lot?

5 A. Correct.

6 Q. And after Kent left the building, what did you do?
7 Tell us what happened after that.

8 A. At that point I was cleaning the dock area. Kind of
9 a floor all by itself. But there is an employee bathroom
10 there. And I was in that bathroom cleaning. The door was
11 propped open, as normal, because it's a small room. And
12 Shawna came to me and asked about me going out to smoke with
13 her. And I said, "Shawna, I've just been out to smoke, and I
14 want to finish cleaning this bathroom so we can move
15 downstairs as soon as possible. And I'll go out with you,
16 though, in a few minutes." I said, "You can go on out by
17 yourself. Just stay on the steps." And I said, "I'm real
18 close here." I was just a few feet from the door.

19 Q. And what happened then?

20 A. I mean, she went out -- to my knowledge, at least,
21 she -- I heard the door open and close.

22 Q. Okay. And after that, what happened?

23 A. Okay. I continued to clean. But just a minute or
24 two later she came back in and said, "Somebody's outside
25 there, ducking down behind Kent's car." And I said, "Shawna,

1 that can't be. Kent's already gone." And I said, "I think
2 you just want me to go outside and have a cigarette with
3 you." And I said, "I want to finish this work." And she
4 insisted that somebody was out there. So I went out of the
5 bathroom --

6 MR. ROGERS: I'm going to object to the narrative at
7 this point, Your Honor.

8 THE COURT: I take it you're the one who's going to
9 be doing the cross-examination of this witness.

10 MR. ROGERS: Yes, Your Honor.

11 THE COURT: Okay. The objection to the form of the
12 answer is sustained. If you will ask specific questions --

13 MR. CRANE: Okay.

14 THE COURT: -- Mr. Crane.

15 Q. So, what -- after Shawna told you that, what did you
16 and she do?

17 A. We went across the hall there, to the garage doors,
18 and we -- I looked out the garage door window to see if I
19 could see anybody out there.

20 Q. Okay. Now let me stop you right there and show
21 you -- what happened to the doors here. State's Exhibit -- I
22 got it right here. State's Exhibit 16. A photograph here of
23 the -- actually that's all five doors: The three dock doors
24 and the two we'll call it swinging doors?

25 A. Yes, sir.

1 Q. You recognize what's in those?

2 A. Yes. The bath --

3 Q. Now let me ask a question --

4 A. Okay.

5 Q. -- see, and you go on with -- when you first looked
6 out on the lot, after Shawna came and got you and said
7 there's -- she's seeing people out at the car --

8 A. Uh-huh.

9 Q. -- what was the first door you looked out of?

10 A. This door here. Or the windows there. Or the
11 window.

12 Q. So that one was shut?

13 A. Yes. All of them were shut.

14 Q. And you looked out that window.

15 A. Correct.

16 Q. The little square part of the third door to the
17 left. My left.

18 A. Correct.

19 Q. And then what did you do?

20 A. When I didn't see anybody, I still -- I took her at
21 her word and I moved down to the first door.

22 Q. Okay. So that's the door closest to the swinging
23 door here? So that would be the garage door on my right; is
24 that correct?

25 A. Correct.

1 Q. Okay. And what happened at that point?

2 A. That was the door that we typically opened to remove
3 trash from the building.

4 Q. Okay. And what happened?

5 A. And I unlocked it and unlatched it and opened it and
6 raised it.

7 Q. And when you were standing there at that door, can
8 you tell us what your location --

9 A. Well, I couldn't see Kent's car from here, where I
10 had unlocked the door, so I had to move over to this side.

11 Q. Okay. So you were at the left side of -- we'll call
12 that door number 1 then. Is that correct?

13 A. That's correct.

14 Q. Okay. And the reason why you couldn't see, if you
15 were on the right side of that door, is because of this wall
16 here?

17 A. That's correct.

18 Q. It divides the two swinging doors? Okay. Now when
19 you were looking out that open door, is Shawna nearby?

20 A. Yes.

21 Q. Okay. And when you looked out there, what do you
22 recall seeing?

23 A. I still didn't see anything. I saw Kent's car, or
24 what I thought was Kent's car, and then -- but logic wanted
25 to tell me no, that Kent was gone. You know. But again, I

1 took Shawna at her word and I sort of remembered that Kent
2 had parked there usually.

3 Q. You were familiar with his car and --

4 A. Right.

5 Q. Okay.

6 A. And so I hollered. I may have called his name, but
7 I know that I hollered, "Who's out there?" And I did that
8 twice. And finally the third time I thought, Well, I'll try
9 a trick that I've done with kids before. I said, "I see you
10 out there. Who's out there?" And with that, two young men
11 raised up from behind that car and said, "Someone's hurt out
12 here, man." One of them said that.

13 Q. Okay. Yeah, they both didn't say that in unison?

14 A. No.

15 Q. Okay.

16 A. One of them said it.

17 Q. Okay. Do you know which -- well, let me ask you
18 this. These two individuals that you saw at the car, do you
19 recall how they were positioned at Mr. Heitholt's vehicle?

20 A. One was directly behind the front wheel on the
21 driver's side, and one was behind the rear wheel on the
22 driver's side.

23 Q. Okay. And so one was -- they're both on the
24 driver's side, and one was to the front of the car and --

25 A. Correct.

1 Q. -- one was to the back of the car?

2 A. That's correct.

3 Q. Okay. And what about the lighting out there on the
4 parking lot that night?

5 A. Well, it was lit from the top of the building,
6 facing Kent's car and facing the parking lot. And as close
7 as Kent was parked to the building, it was adequate for me to
8 be able to see. I could pick out my van out there as well,
9 because there's a light even further down the parking lot.

10 Q. All right. I was going to -- let me show you what's
11 State's Exhibit 13 here. And let me direct your attention
12 here to 13E.

13 A. Right.

14 Q. On -- this is -- we've got this photo here. You can
15 see it in the daylight, but is there a light there?

16 A. Absolutely.

17 Q. Okay. What about underneath the -- what do you call
18 that thing that sticks out over the garage doors?

19 A. I don't know that we called it anything.

20 Q. A roof?

21 A. A roof I guess.

22 Q. Yeah. Okay. You can drive up under there, though.

23 A. Right. Yeah. That's right.

24 Q. What about lighting up under --

25 A. There could be. And I think that was on as well.

1 Q. What about --

2 A. It wasn't very --

3 Q. -- 13F?

4 A. That -- there's a pole light here.

5 Q. And whose van's that?

6 A. That's my van.

7 Q. Okay. And so Kent's car was on this same side of

8 the lot, on down, and not visible in that photograph?

9 A. Correct.

10 Q. Okay. 13D, what do you see in that photograph?

11 A. That's Kent's car.

12 Q. Okay. That's where it was the night of the murder?

13 A. Right.

14 Q. Okay. These are some other vehicles on the lot?

15 A. Right.

16 Q. All right. Well, actually, that's your van in 13A.

17 A. Yes.

18 Q. And then another vehicle on the lot.

19 A. Right.

20 Q. Okay. What did you do after the two people stood

21 up? You said two young men thus far stood up, and you heard

22 one of them holler at you all.

23 A. Well, I was surprised that anybody was there. And I

24 immediately closed the garage door. When I heard that

25 somebody was hurt, I began to suspect that there may have

1 been foul play.

2 MR. ROGERS: I will object to that, Your Honor, as
3 narrative, not responsive. The question was what he did.

4 MR. CRANE: Okay. That's fine. We can have that be
5 stricken. I -- I think we'll all agree there was some foul
6 play that night, but if you want to have that stricken,
7 that's fine.

8 MR. ROGERS: Your Honor, I will object to
9 Mr. Crane's comments when I make a perfectly normal
10 objection.

11 MR. CRANE: Well, I mean, the answer's been given,
12 is what I'm saying.

13 THE COURT: Well, if the answer is given that is not
14 responsive or of a narrative nature, and there's an objection
15 afterwards, I don't know that the lawyer would have an
16 opportunity to make the objection before, not anticipating
17 that. And I'll sustain the objection.

18 Is there a motion to strike on the --

19 MR. ROGERS: No, Your Honor.

20 THE COURT: -- floor? No?

21 MR. ROGERS: No.

22 THE COURT: All right.

23 Q. Mr. Trump, after you -- so you've seen these two
24 individuals, and you close the garage door?

25 A. Correct.

1 Q. Okay. Just tell us what happened then. Strike
2 that. What did you do then?

3 A. Well, I latched the door first. And then I -- I
4 said to Shawna, "I think we ought to go call 911."

5 Q. Okay.

6 A. But she said, "I want to stay with you." And she --
7 and I said, "Well, I'm going to go out and see what's going
8 on." And I went out the employee door and -- while she held
9 it.

10 Q. Okay. Yeah. When you say "employee door" --

11 A. This door.

12 Q. The door closest to the overhead garage doors?

13 A. Yes.

14 Q. Okay. And let me ask you, what was Shawna's
15 emotional state as this situation progressed?

16 A. Well, Shawna was scared. But -- but Shawna usually
17 was scared about being outside there at night. You know.
18 Leery.

19 Q. Okay. And so what did you do after telling her to
20 call 911? You said you went out that door closest to the
21 garage door?

22 A. I let her hold the door for me, and I went out and I
23 went down the steps and across the parking lot to the back
24 side of Kent's car.

25 Q. Now, as you went across the alley, I'm going to show

1 you State's Exhibit 12, that divides the parking lot from the
2 building --

3 A. Correct.

4 Q. -- what did you see?

5 A. Well, yeah. As soon as you immediately go down the
6 steps and away from the building, you're in the --

7 Q. Okay. You're coming out this door?

8 A. Right.

9 Q. Okay.

10 A. And I could see two young men walking up the alley
11 towards Fourth Street.

12 Q. Could you point out where you saw those individual
13 for the jury, please?

14 A. Probably about this point.

15 Q. Okay. And they're headed which way?

16 A. East.

17 Q. Okay. Towards Fourth Street?

18 A. Towards Fourth Street.

19 Q. Okay. And at what point did you lose sight of them?

20 A. I didn't. When I walked around the other side of
21 Kent's car and found Kent laying face down in a pool of
22 blood, I assumed that he was probably dead at that point.
23 And I called -- I hollered to Shawna, "Go call 911 now."

24 Q. Again?

25 A. Yes.

1 Q. Okay.

2 A. This time I told her definitely.

3 Q. Well, wait a minute. Hold it. When did you lose

4 sight of --

5 A. Well --

6 Q. -- the two guys?

7 THE COURT: Excuse me. If you'll wait until the

8 question is finished.

9 THE WITNESS: I'm sorry.

10 THE COURT: The court reporter has to write both the

11 question and the answer.

12 THE WITNESS: Apologize.

13 THE COURT: All right. You can finish your

14 question.

15 Q. Let's just stay with that topic for the moment.

16 A. Okay.

17 Q. You walked out the door. And where did you last see

18 these individuals? What were they doing and where did you

19 last see them?

20 A. They were merely walking up the alley, towards

21 Fourth Street.

22 Q. All right. Okay. After you saw Mr. Heitholt --

23 well, let me take you now to what you saw at the victim's

24 vehicle. You crossed over the alley and went to Kent's car?

25 A. Yes.

1 Q. And what did you see at that location?

2 A. I saw Kent laying face down, very near his car, in a
3 pool of blood. It looked like the back of his head had
4 been --

5 Q. At that -- well, go ahead. What did you -- did you
6 notice anything about injuries he may have sustained to his
7 head?

8 A. I assumed he'd been shot, but at that point I, you
9 know, I didn't know. I'm not an expert on --

10 Q. You couldn't tell what had happened.

11 A. No. I knew something traumatic had happened.

12 Q. And then, once you saw that, what did you do with
13 respect to Shawna?

14 A. I told Shawna, who was holding the door, to
15 definitely go call 911.

16 Q. And then what did you do?

17 A. I turned around and walked back towards the Tribune.
18 Back to the same location that I had exited.

19 Q. Okay.

20 A. But at that point the door had been closed. So I
21 had to fumble for my keys.

22 Q. So you had a set of keys.

23 A. Oh, yes.

24 Q. Okay. And you got in that same door you had come
25 out?

1 A. Correct.

2 Q. Okay. And then what happened?

3 A. Well, I did see the individuals going back over
4 towards the door. Turning the corner at Fourth Street.

5 Q. Okay. On your way back to the building --

6 A. Correct.

7 Q. -- where did you see these individuals?

8 A. They were at the corner of the alley and Fourth
9 Street.

10 Q. Okay. Showing you State's Exhibit 12, could you
11 point that out.

12 A. Just right here.

13 Q. Okay.

14 MR. ROGERS: Excuse me. I couldn't see that. Too
15 fast for me.

16 (Mr. Crane indicating.)

17 Q. Is that right, Jerry? I should have --

18 A. Yes. Right at the corner. Uh-huh.

19 Q. Okay. And then you did what?

20 A. I went back in the building.

21 Q. Okay. And that's -- I had that fouled up. Was that
22 the last time you saw these individuals?

23 A. Yes.

24 Q. Okay. And you went on in, back in the building.

25 A. Correct.

1 Q. Now, before we talk about what happened then, can
2 you tell the jury what you can recall about the description
3 of these two individuals. Now -- and before you do that, you
4 indicated that one was towards the rear of the car?

5 A. Correct.

6 Q. And one was towards the front of the victim's car,
7 on the driver's side?

8 A. Correct.

9 Q. Okay. And at what point did you get your best look
10 at them?

11 A. When they raised up to -- and said, "Someone's hurt
12 out here, man."

13 Q. Okay.

14 A. When one of them said that.

15 Q. All right. Now, can you give us a description of
16 the guy at the back?

17 A. I believe he was the one with dark hair. Looked a
18 little older to me than the other. They were both -- it was
19 nondescript, what they were wearing, I would say. I was so
20 surprised and shocked when anybody stood up from behind there
21 that, I guess, if anybody, I expected Kent.

22 Q. And you never saw Kent until you went out there --

23 A. No.

24 Q. -- right?

25 A. No.

1 Q. What about -- what about their race?

2 A. They were white.

3 Q. What about their sex?

4 A. Male.

5 Q. And can you give an age category?

6 A. I thought they were between the ages of 19, 20.

7 Q. Okay. Which of the two individuals did you get the

8 best look at?

9 A. Probably the one to the rear. He would have been

10 most lit. As far as the lighting was concerned.

11 Q. All right. And what kind of perspective did you

12 have on them when you saw them headed up the alley and then

13 all the way up to the corner of Fourth Street?

14 A. Well, I could tell they were medium build and about

15 six feet tall.

16 Q. But that wasn't the best look you got at them?

17 A. No.

18 Q. Okay. Let me ask you what you did after you went

19 inside the building, back inside after you got the keys and

20 got back -- got your keys and got back inside --

21 A. Right.

22 Q. -- what did you do then?

23 A. When I got upstairs, Shawna had gotten to the first

24 phone available and had 911 on the phone. And they were

25 asking her where we were located. And so she gave me the

1 phone to finish the conversation. And I explained to them we
2 were in the Columbia Tribune building on Fourth Street. That
3 the incident had occurred --

4 Q. Well, hang on a minute. I'm going to --

5 A. Okay.

6 MR. CRANE: Judge, I'm sorry for the delay here.

7 Hey, do you mind if I use a CD instead of a
8 cassette?

9 MR. WEIS: No.

10 MR. CRANE: Now I've got -- I need to mark this.

11 What's that number again?

12 MR. KNIGHT: 28.

13 MR. CRANE: 28. And we represent that's the same
14 contents as what we gave you on cassette.

15 MR. ROGERS: The 911 call?

16 MR. CRANE: Yeah.

17 MR. ROGERS: No objection, Your Honor.

18 THE COURT: You're offering Exhibit 28?

19 MR. CRANE: Yeah. Once we get it marked.

20 THE COURT: State's Exhibit 28 is admitted.

21 - - -

22 State's Exhibit 28 admitted into evidence.

23 - - -

24 MR. CRANE: Judge, I'd ask leave to play this. It
25 is the 911 tape initially placed by Shawna Ornt. And then

1 the next person we hear is Mr. Trump here.

2 MR. ROGERS: No objection.

3 THE COURT: You may do that.

4 (Tape playing.)

5 Q. Is that you Jerry?

6 A. Yes.

7 (Tape playing.)

8 Q. That concludes that call?

9 A. (Nodding head up and down.)

10 (End of tape.)

11 Q. Jerry, after you got off the phone, what did you do?

12 A. Well, I continued to try to calm Shawna down a

13 little bit, and I went back outside.

14 Q. Who else was out there by the time -- who else had

15 gone out there at some point?

16 A. I believe two of Kent's sports writers. Or the

17 Tribune sports writers. But --

18 Q. Okay. On the tape, you indicate something about

19 Russ is out there?

20 A. Russ. Probably. I forgot --

21 Q. Who was Russ?

22 A. Russ was one of the writers.

23 Q. Sports guys?

24 A. Yes.

25 Q. Okay.

1 A. There were two or three there that night.

2 Q. That went on out there?

3 A. Right.

4 Q. Okay. Now, when you -- you said you went out after
5 the 911 call then?

6 A. Correct.

7 Q. When you went out there, what did you see with
8 respect to Kent Heitholt's body at that --

9 A. They had rolled him over and attempted CPR.

10 Q. From the original location you saw him, he'd been
11 rolled over?

12 A. Correct.

13 Q. So he was on his back?

14 A. Yes.

15 Q. Let me now show you what's marked for identification
16 as State's Exhibit 14.

17 This isn't in yet, is it? 14's not in, is it?

18 MR. KNIGHT: No.

19 Q. State's Exhibit 14, A, B, and C. And I'm going to
20 ask you to take a look at what's depicted in those three
21 photographs.

22 A. Yes.

23 Q. Okay.

24 A. That's Kent's car and Kent himself.

25 Q. Okay. Are these fair and accurate depictions of

1 what you saw when you went back out there, after you'd seen
2 Kent first?

3 A. Yes.

4 Q. Okay.

5 MR. CRANE: Judge, I'd offer State's Exhibit 14, 14A
6 B, and C.

7 MR. ROGERS: No objection.

8 THE COURT: State's Exhibits 14, 14A, B, and C, are
9 admitted.

10 - - -

11 State's Exhibits 14, 14A, 14B, and 14C, admitted
12 into evidence.

13 - - -

14 Q. Okay. You've already mentioned that the top
15 photograph -- actually all these photographs show the
16 victim's vehicle, and then Mr. Heitholt beside his vehicle as
17 he was after the sports -- his coworkers had rolled him over.

18 A. Correct.

19 Q. Okay. And in State's Exhibit 14B we can see the
20 building?

21 A. Yes.

22 Q. Okay. You can show -- you can make out the dock
23 doors a little bit over here?

24 A. Right.

25 Q. There's the far -- far door, next door.

1 A. Oh, yeah. Okay.

2 Q. Is that right?

3 A. That's correct.

4 Q. Okay. And then there's this Dumpster enclosure
5 here; correct?

6 A. Right. That had belonged to KFC, I think.

7 Q. All right. Okay. If you look at the top
8 photograph, can you see that from where you are?

9 A. Yes.

10 Q. That would have been somewhat your perspective,
11 other than you could not see the body --

12 A. I could not.

13 Q. -- when you looked out?

14 A. He was rolled over the other direction. I couldn't
15 see him.

16 Q. Sir, you've got a criminal record, don't you?

17 A. Yes, I do.

18 Q. What have you been convicted of?

19 A. Endangering the welfare of a child.

20 Q. And that's a felony offense.

21 A. Yes, it is.

22 Q. And actually you pled in one case to five different
23 counts in that; right?

24 A. That's correct.

25 Q. And when did you plead guilty to that?

1 A. October the 4th, 1999.

2 Q. 1999. And before -- that was before you got the job
3 at the Tribune; right?

4 A. That's correct.

5 Q. At some point did you serve prison time for that --
6 those convictions?

7 A. Yes, I did.

8 Q. And when was -- you first went to the penitentiary
9 for 120 days?

10 A. That's correct.

11 Q. And then you got out?

12 A. Correct.

13 Q. And then you got sent back.

14 A. Correct.

15 Q. And in between there is when you worked at the
16 Tribune.

17 A. That's correct.

18 Q. Where was it that you were convicted of these child
19 endangerment offenses?

20 A. In Audrain County.

21 Q. Not here.

22 A. No.

23 Q. Okay. You were sent to prison from when to when the
24 second time around?

25 A. My -- I was revoked on December the 17th, 19 -- or

1 excuse me, 2001, and was released December 13th, 2004.

2 Q. On that -- those offenses that you pled guilty to,
3 what was your sentence? What was the --

4 A. Five-year sentence.

5 Q. Okay. A five-year sentence.

6 A. Correct.

7 Q. Okay. Now, just so we got the time line correct
8 here, you were doing your thing, working at the janitor job.

9 A. That's right.

10 Q. And then the murder occurred.

11 A. Correct.

12 Q. And then later, totally unrelated case, you got
13 sent, on the charges you've talked about, to the
14 penitentiary.

15 A. Correct.

16 Q. Now --

17 MR. CRANE: This is subject to the defense motion
18 here. Do you want to approach or --

19 MR. ROGERS: It would be a good time for the final
20 recess of the day, Your Honor. It's about --

21 THE COURT: Yes. I think the jury -- it's been a
22 couple hours since the jury's been sitting. And I -- it
23 would be a good time to take a recess.

24 Ladies and gentlemen, the Court again reminds you of
25 what you were told at the first recess of the Court. Until

1 you retire to consider your verdict, you must not discuss
2 this case among yourselves or with others, or permit anyone
3 to discuss it in your hearing. You should not form or
4 express any opinion about the case until it is finally given
5 to you to decide. Do not read, view, or listen to any
6 newspaper, radio, or television report of the trial.

7 Why don't we try to make it as brief -- come back,
8 say, at 5:15 if we can. That will be enough time, if the
9 jurors need to do that.

10 And you may step down, sir.

11 THE WITNESS: Okay. May I go out to smoke or --

12 THE COURT: You may go out to smoke as long as
13 you're back in five minutes.

14 THE WITNESS: Oh.

15 THE COURT: How's that.

16 - - -

17 The following proceedings were held out of the presence
18 of the jury:

19 THE COURT: Mr. Crane, you brought up the issue of
20 the motion in limine.

21 MR. CRANE: The defense motion, yeah.

22 THE COURT: Are you going to leave the courtroom?

23 MR. CRANE: I was going to go to the bathroom and
24 come back, but if you want to do it now, we can.

25 THE COURT: If you are able to --

1 MR. CRANE: That was another reason why I raised
2 their motion.

3 MR. ROGERS: I was about to ask for a recess first.

4 THE COURT: All right. Do you wish to be heard
5 again on that motion? Or you wish to refer back to the
6 motion and arguments that you made?

7 MR. ROGERS: We would refer back to the motion and
8 argument, Your Honor, but if they are going to proffer some
9 sort of in-court identification, I think they need to develop
10 some evidentiary basis.

11 THE COURT: All right. I don't know what they're
12 going to do. Are you --

13 MR. CRANE: Well, what I was going to do is -- and,
14 you know, this the same thing we ran into at the motion
15 hearing. I was going to ask Mr. Trump -- is he out of the
16 room?

17 MR. ROGERS: He went out to smoke.

18 MR. CRANE: I was going to ask Mr. Trump about
19 receiving, from his wife, this article, with the photographs.
20 Ask him about that. Ask him whether or not -- you know, what
21 his reaction to that was, et cetera. And a lot of this we've
22 already litigated. And then what we never did -- but see,
23 that's the thing. He's never been shown that, by anybody in
24 the police department or my office or anybody in law
25 enforcement. If he is unable to recognize the individuals in

1 those photographs, then it's game over. If he is, then the
2 next question's going to be the form in which the exhibit
3 he's looking at comes in. It's the article that he's
4 described, but it's a newspaper article. So we'd have to
5 figure out a way to deal with that.

6 Then the next question would be: Whether or not he
7 sees one of the two individuals in the courtroom here today.
8 He's never been asked that. We didn't do that last time
9 because the defendant was in his jail clothing.

10 MR. ROGERS: That's my understanding also, Your
11 Honor. And that's -- I was kind of expecting them to keep
12 Mr. Trump here, to show him the newspaper article and to see
13 if that's the one he saw. I don't think that would -- I
14 mean, quite frankly, I don't think there's any question that
15 it is. So I don't think that's a problem.

16 I think it is evidence of the suggestive nature of
17 the out-of-court identification, but I don't think it's a --
18 a concern of further tainting the identification with regard
19 to the newspaper article.

20 With regard to the in-court identification, we don't
21 have a lineup arranged. And the state has filed no motion
22 for a lineup.

23 And I think the suggestive nature of the
24 out-of-court display of the photograph with the headline will
25 taint any possible in-court identification.

1 Having said that, I do agree with Mr. Crane, that
2 if, in fact, Mr. Trump were to say, "No, that's not the guy,"
3 that might solve our problem.

4 THE COURT: I don't suppose that Mr. Crane would be
5 calling him if that's what he was going to say.

6 MR. CRANE: I don't know what he's --

7 THE COURT: That's just an educated guess.

8 MR. CRANE: No, I don't know what he's going to say.
9 Nuh-uh. I don't. That's why I wanted to call him at that
10 last motion hearing. And I haven't -- and he hasn't seen the
11 article. I wanted to do that too.

12 THE COURT: All right. Well, let us -- let me just
13 suggest to you that I am not going to permit you to offer, so
14 that this jury may look at it, the entire article that we
15 have tried to go to Lincoln County to avoid anyone having
16 read that article.

17 MR. CRANE: Right.

18 THE COURT: Certainly if the photographs --

19 (Mr. Crane showing the newspaper article to Court
20 and counsel.)

21 THE COURT: There are very small photographs.

22 MR. CRANE: Well, what we were doing was: If that
23 is the article, then showing it to him in a form that it
24 would have appeared when he got it from his wife.

25 THE COURT: All right. But I do not -- I want you

1 to caution him not in any way to display this to the jury.

2 MR. CRANE: Understood. Yeah. That's understood.

3 THE COURT: And I will permit you to ask him about
4 the circumstances of having received this and --

5 MR. CRANE: Yeah, I would --

6 THE COURT: -- and whether or not he recognized
7 someone in that -- in those photographs.

8 MR. CRANE: I would have to establish that it was
9 not government action before showing him the photo.

10 THE COURT: You better.

11 MR. CRANE: Yeah.

12 THE COURT: You best do that. Now, whether or not
13 that is admitted, again, I'm telling you, I don't want that
14 Tribune article text and the headlines before this jury.

15 MR. CRANE: I understand. And I didn't -- I thought
16 that there would be objections if I didn't show it to him in
17 the form that he allegedly first saw it, is why I did that.
18 So, after that, the question becomes: The form in which it
19 may go to the jury. I -- it's understood, Judge.

20 MR. ROGERS: My only problem with that, Judge --
21 well, actually there's a couple of problems. One problem is
22 that I think the headline, even though it is highly
23 prejudicial -- because I guess it is highly prejudicial, is,
24 however, part and parcel of the suggestiveness of the
25 procedure. So, without the jury knowing what's on the

1 headline, they cannot have any chance of assessing the impact
2 this would have on the reliability of this identification.

3 THE COURT: Well, if you want it to go to that
4 jury --

5 MR. ROGERS: I don't. I don't want any of it to go
6 to the jury.

7 THE COURT: I understand that. But understanding
8 I'm going to permit Mr. Crane to show that exhibit to this
9 witness, and ask -- however he's going to get it -- ask him
10 if he's seen that or -- I don't know how he's going to lead
11 up to it. If he's going to say he received some information
12 from his wife --

13 MR. ROGERS: My -- am I incorrect here? I thought
14 we were going to let him look at that outside the presence of
15 the jury. Am I -- am I on the wrong page?

16 THE COURT: Well, I don't know that we -- at this
17 point was -- we're going to do that.

18 MR. ROGERS: Mr. Crane, were you contemplating
19 showing him the newspaper article outside the presence of the
20 jury?

21 MR. CRANE: No, but I wasn't going to -- I was going
22 to show it to him in the presence of the jury, without the
23 jury seeing the newspaper article.

24 MR. ROGERS: Okay. See, I am on the wrong page. I
25 would request, before that happens, that we find out: Is

1 that, in fact, what he saw? And then that we explore,
2 outside the presence of the jury, the suggestiveness of the
3 procedure and whatever governmental action may have been
4 involved, and we go from there.

5 MR. CRANE: That's what I tried to do at the motion
6 in limine.

7 THE COURT: Okay.

8 MR. ROGERS: But that was when Mr. Ferguson was
9 sitting there in jail clothes.

10 MR. CRANE: And that's when we offered -- that's
11 when I offered to -- him to leave during that hearing.

12 MR. ROGERS: And he didn't want to have to pick
13 between his right to be present at a critical stage --

14 MR. CRANE: Okay.

15 MR. ROGERS: -- and his right not to be displayed in
16 jail clothes.

17 MR. CRANE: All right. Well, I'm all ears, Judge.
18 I really -- I'll do whatever the Court thinks is appropriate.
19 I was prepared to do it in open court. I -- you know, I
20 guess, if Mr. Trump can't identify anybody in the photos, and
21 the jury's out of the room, I guess that's a good -- that's
22 good for me they're out of the room. You know.

23 THE COURT: Let us call him before the jury is
24 returned and ask him the questions that lead up to that. If
25 he's totally unable to do it, then you'll move on to some

1 other issue.

2 MR. CRANE: All right. And now -- then --

3 THE COURT: Assume he can then identify it.

4 MR. CRANE: Yeah. Yeah, that's fine. I'm game for
5 that. I would like to have, though, about ten minutes before
6 we get Mr. Trump in here, so I can go to the rest room, just
7 get a drink of water real quick, if that would be all right.
8 Five minutes?

9 THE COURT: We'll take a brief recess.

10 MR. ROGERS: Thank you.

11 (Recess taken.)

12 - - -

13 The following proceedings were held out of the presence
14 of the jury:

15 MR. CRANE: Judge, may we return the witness?

16 THE COURT: Yes, please.

17 - - -

18

19

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25

1 JERRY TRUMP,
2 resumed the stand and testified further:

3 THE COURT: Mr. Trump, you'll remember you're still
4 under oath.

5 THE WITNESS: Yes, ma'am.

6 THE COURT: The prosecutor has a few preliminary
7 questions to ask you before we bring the jury back into the
8 courtroom.

9 THE WITNESS: Okay.

10 - - -

11 DIRECT EXAMINATION

12 BY MR. CRANE:

13 Q. Mr. Trump, I was asking you -- you testified I
14 believe earlier that you were sent to the penitentiary and
15 were there from December of '01 until when?

16 A. Until December 13th, 2004.

17 Q. Okay. Sir, after you were released, you were
18 contacted by my office -- I believe you were contacted by
19 Bill Hawes?

20 A. Correct.

21 Q. Who left. And you were asked to come and visit with
22 us?

23 A. Yes.

24 Q. Okay. And that was the first time we'd ever met; is
25 that right?

1 A. That's correct.

2 Q. And you came to the office, and Mr. Hawes was in the
3 room with us?

4 A. Yes.

5 Q. And one of the things we were going to do that day
6 was go down here to the Tribune building, and you were going
7 to show us where you'd been and all that --

8 A. That's correct.

9 Q. -- when this happened; correct?

10 A. Correct.

11 Q. And I think we listened to the 911 tape, and I asked
12 if you remembered that and et cetera.

13 A. Right.

14 Q. And during our conversation about what you'd seen
15 out there, what did you tell me you'd received while you were
16 incarcerated?

17 A. When -- it was printed in the paper that somebody
18 had confessed to the murder and named another individual. My
19 wife sent me a copy of that article from the Columbia Daily
20 Tribune. And I didn't know she was sending that. In opening
21 my mail, I first turned to the two pictures. And my mouth
22 dropped. I didn't see the headlines or anything, because I
23 recognized --

24 Q. How did you first turn to the two pictures? I
25 mean --

1 A. That's just the way it was folded in the envelope.

2 Q. All right. And what did -- well, it was obviously
3 an article about this.

4 A. Yes.

5 Q. Those photographs, when you saw those, what was your
6 reaction?

7 A. I remembered them as the ones that I had seen behind
8 Kent's car.

9 Q. That you've described here earlier when you were --
10 the incident you described when the jury was in here.

11 A. Absolutely.

12 Q. Okay. Do you remember when you -- the date when you
13 got the article?

14 A. Well, I'm assuming, but I think it was March or
15 April.

16 Q. You don't remember the exact date?

17 A. No, I don't.

18 Q. Okay.

19 A. It would have been a week or two after the article
20 first came out in the paper, I assume.

21 Q. Okay. Was this an article generated, to your --
22 well, were these photographs in the article in a Columbia
23 Daily Tribune?

24 A. I believe they were.

25 Q. Okay. Now, since that time, when you got that

1 article from your wife -- who obviously knew you were a
2 janitor when it all happened; right?

3 A. Sure.

4 Q. -- has anybody from law enforcement, and when I say
5 "law enforcement," Columbia police, highway patrol, sheriff,
6 prosecutor's office, FBI, CIA, anybody shown you those
7 photographs?

8 A. No.

9 Q. Okay. Now, you did look at various photographs at
10 the request of the police after this crime occurred; correct?

11 A. That's correct.

12 Q. Did you pick out, as the -- as the people you'd seen
13 out at the car at that night, from any of the photographs the
14 police had provided you with?

15 A. No.

16 MR. CRANE: Judge, I'd ask leave to show the witness
17 State's Exhibit -- you want to look at it again? State's
18 Exhibit 30 for identification.

19 THE COURT: 30 is the front page of the Tribune that
20 is dated 3-11-04?

21 MR. CRANE: Correct.

22 MR. ROGERS: May I make one preliminary inquiry of
23 the witness before he's shown the exhibit, Your Honor?

24 THE COURT: Well, I would think that
25 cross-examination might come after the examination of the

1 state.

2 MR. ROGERS: This is a -- maybe a voir dire of the
3 witness kind of question.

4 THE COURT: Well, you may voir dire the witness for
5 the purpose of making an objection, but you may not conduct a
6 complete cross-examination of this witness.

7 MR. ROGERS: I don't intend to.

8 - - -

9 VOIR DIRE EXAMINATION

10 BY MR. ROGERS:

11 Q. How many pictures total were on the part that you
12 first saw?

13 A. I remember two pictures.

14 Q. One of each of two different individuals?

15 A. Correct.

16 Q. Thank you.

17 MR. ROGERS: That's my only question. I don't have
18 an objection, for the purposes of this hearing.

19 THE COURT: All right.

20 You may show him the exhibit.

21 - - -

22 RESUMED DIRECT EXAMINATION

23 BY MR. CRANE:

24 Q. Is this --

25 A. That's correct.

1 Q. -- the article?

2 A. And the part that I first saw was the top two
3 pictures. The colored pictures.

4 Q. Oh. You mean -- well, going back to his question,
5 the fold was between the two photos?

6 A. Yes.

7 Q. Well -- is this the article that your wife sent you?

8 A. Yes, it is.

9 Q. Okay. Now in that article, there's -- as far as --
10 forget the photo of Kent.

11 A. Uh-huh.

12 Q. There's two photos, and a caption, and two photos
13 below that.

14 A. That's correct.

15 Q. Did you see all of those photos when you opened --
16 well, strike that. When you first opened the article, which
17 two did you see?

18 A. The top two.

19 Q. And then did you also see the bottom two? When you
20 got it opened.

21 A. When I opened it up, yes.

22 Q. And with respect to the top two photographs, what
23 can you tell us about those photographs as they relate to the
24 individuals you saw at the victim's vehicle that night?

25 A. I thought, Wow, these two faces look very familiar.

1 And I immediately went back to the night that we've been
2 talking about, that Kent was killed.

3 Q. Now, after you saw these photographs, when was the
4 first time you told anybody in law enforcement about those?

5 A. You.

6 Q. In that meeting on December 21st --

7 A. Somewhere, yeah.

8 Q. -- after you got out --

9 A. That's correct.

10 Q. -- of prison.

11 A. That's correct.

12 Q. Okay. And since then, nobody's showed you that.

13 A. No.

14 Q. That's the first time you've seen that since prison.

15 A. That's correct.

16 Q. What did you do with the article that your wife sent
17 you?

18 A. I threw it away after a day or so.

19 Q. Okay.

20 A. We just weren't able to keep extra stuff.

21 Q. Okay.

22 MR. CRANE: Judge, I'd offer -- well, I guess it
23 doesn't make any difference now. Do you want me to offer it
24 for the purposes of this hearing, or just not offer it?

25 MR. ROGERS: I think for the purposes of this

1 hearing, it might as well be in the record.

2 MR. CRANE: Okay. Offer it for purposes of this
3 hearing outside the presence of the jury.

4 THE COURT: 30 is admitted. I assume with your
5 consent.

6 MR. ROGERS: For the purposes of this hearing,
7 that's correct.

8 MR. CRANE: Okay.

9 - - -

10 State's Exhibit 30 admitted into evidence.

11 - - -

12 Q. Now, Mr. Trump, do you see in the courtroom here
13 today one of the individuals that you saw at Mr. Heitholt's
14 vehicle on the early morning hours of November 1, 2001?

15 A. Yes, I do.

16 Q. Could you point him out for us, please?

17 A. The defendant.

18 Q. Could you describe him for us, please?

19 A. Could I describe him?

20 Q. Yeah. We got to make a record.

21 A. I assume that he's --

22 Q. What's -- what's he wearing?

23 A. Oh, he's wearing a blue sweater, I'm sorry, red tie,
24 looks like a white shirt from here --

25 A. Okay. He's seated --

1 A. -- dark hair.

2 Q. -- between the young lady and the gentleman with
3 the --

4 A. And the attorney.

5 Q. Okay.

6 A. Maybe between two attorneys. I don't know.

7 MR. CRANE: Judge, I'd ask the record reflect that
8 Mr. Trump has identified the defendant.

9 THE COURT: It will reflect that.

10 Do you have anything further to ask of this
11 witness --

12 MR. CRANE: No.

13 THE COURT: -- Mr. Crane?

14 MR. CRANE: I do not, Your Honor.

15 THE COURT: You may inquire.

16 MR. ROGERS: Thank you, Your Honor.

17 - - -

18 CROSS-EXAMINATION

19 BY MR. ROGERS:

20 Q. Mr. Trump, where were you when you were shown
21 this -- when you received this newspaper in the mail?

22 A. I didn't hear the first part of your question.

23 Q. Where were you when you received this newspaper in
24 the mail?

25 A. I was in Bonne Terre Correctional Center.

1 Q. And that's a facility of the Missouri department of
2 corrections; correct?

3 A. That's correct.

4 Q. And they have regulations concerning the mail, don't
5 they?

6 A. Yes.

7 Q. And mail which is not legal mail, from your
8 attorney, is subject to being opened and monitored before
9 being given to the inmate; is that correct?

10 A. That's correct.

11 Q. And so when you got this newspaper in the mail, some
12 correction officer had already opened it and seen what was in
13 it.

14 A. Yes.

15 Q. And people at Bonne Terre, the staff at Bonne Terre,
16 were aware of your situation as a witness in this case,
17 weren't they?

18 A. I don't think so.

19 Q. Well, they played for you a videotape prepared for
20 you and the other inmates, a videotape prepared by the
21 Columbia Police Department concerning the murder of
22 Mr. Heitholt, didn't they?

23 A. It was not played for me. It was played for the
24 general population.

25 Q. Right. But "you" in the plural sense. Our language

1 is inadequate. Second person plural and second person
2 singular are the same word, "you."

3 A. Okay.

4 Q. Right? Maybe I should say "y'all."

5 A. Okay.

6 Q. So they did play for y'all the videotape; correct?

7 A. That's correct.

8 Q. And that videotape had on it your voice from the 911
9 call.

10 A. That's correct.

11 Q. And that videotape had on it your name.

12 A. That's correct.

13 Q. And so therefore, the correctional staff knew that
14 you were a witness in the Heitholt murder.

15 A. No. I'll take that back, sir. I do not recall that
16 the videotape that we saw specified my name. And I don't
17 believe that it did. And the reason I say that is that I did
18 not see it when it first came on the prison channel. That's
19 -- I was at Pacific then. And two or three inmates that I
20 knew pretty well came up to me and said, "I think you're on
21 this video that they're showing. Your voice." And I said,
22 "I don't know what you're talking about." And then I later
23 listened to it. Or watched it. And I believe that the part
24 that stated my name was omitted from that, that was played to
25 the corrections.

1 Q. When you heard it later.

2 A. Yes. When I heard it at prison. I don't believe it
3 specified me, or I think that -- I would have found all kinds
4 of problems from other inmates. Or not all maybe, you know,
5 but it would not have been a good scene for an inmate to have
6 been identified that way. So I don't believe that anybody at
7 that prison facility, any of them, knew that I was involved
8 with this situation.

9 Q. But what you're trying to tell me is that somebody
10 in the Missouri division of adult institutions of the
11 department of corrections had realized that you were an
12 inmate and redacted your name from the videotape; is that
13 correct?

14 A. I don't know who took it out. I have no clue.

15 Q. But you're saying it was taken out because you were
16 an inmate.

17 A. No. Maybe it was taken out just to not identify me
18 to the general public.

19 Q. Okay.

20 A. I would assume that that tape maybe was played on
21 television stations or wherever. I didn't think it was
22 played just to inmates.

23 Q. But it was played once especially for inmates;
24 correct?

25 A. At least once.

1 Q. At least once. And at that time, or at least the
2 time it was played for you as an inmate, was when your name
3 was not in it.

4 A. Yes. That's true.

5 Q. And then the newspaper which had been mailed to you
6 by your wife -- does she live in Columbia, by the way?

7 A. She lived in Mexico, Missouri, at the time.

8 Q. Okay. And this newspaper mailed to you had been
9 reviewed by the corrections staff, put back in the envelope,
10 and the envelope was given to you; correct?

11 A. I -- yes. I don't know how much they reviewed it.
12 You know, as long as there was -- it was not a big -- it was
13 not the whole paper, it was a portion of a page, then I could
14 receive that.

15 Q. All right. And you did.

16 A. Yes.

17 Q. And you're saying you saw the top two photographs.

18 A. That's correct. First.

19 Q. And did you see the headline?

20 A. No, I did not see the headline until after I
21 unfolded it and opened it -- and opened the entire thing.

22 Q. And did you see the giant photo of Mr. Heitholt?

23 A. I did when I opened it, yes.

24 Q. You recognized him.

25 A. Yes, I did, immediately.

1 Q. Now, the person that you have identified in the
2 courtroom today, is that person who you say was standing at
3 the rear of the driver's side of Heitholt's vehicle or the
4 person that you saw standing at the front?

5 A. As I recall, he was standing at the front of the
6 vehicle.

7 Q. Front of the vehicle. And is that the person who
8 you describe as having dark hair or the person you describe
9 as having blond hair?

10 A. Dark hair.

11 Q. And so the other individual is the one that you
12 describe as having blond hair.

13 A. Lighter, yes.

14 Q. Lighter.

15 A. Uh-huh.

16 MR. ROGERS: I believe those are all the questions I
17 have for this witness, Your Honor.

18 THE COURT: All right.

19 MR. CRANE: Your Honor --

20 THE COURT: Any redirect on this witness?

21 MR. CRANE: I did want to ask a couple questions.

22 - - -

23 REDIRECT EXAMINATION

24 BY MR. CRANE:

25 Q. Mr. Trump, prior to today your deposition was taken

1 by the defense; is that correct?

2 A. That's correct.

3 Q. And at that deposition you met Mr. Rogers?

4 A. Yes, I did.

5 Q. And you also met -- I think Mr. Weis was present?

6 A. Yes.

7 Q. And was Ms. Benson back here present during your
8 deposition?

9 A. Not that I recall.

10 Q. Okay. But for the record, the two males at the
11 counsel table here, other than myself, Mr. Knight, and the
12 defendant, are Mr. Rogers, who you previously met, and
13 Mr. Weis, who you previously met.

14 A. That's correct.

15 MR. CRANE: That's all the questions I have.

16 THE COURT: Anything further?

17 MR. ROGERS: No, Your Honor.

18 THE COURT: All right. You may step down. If you
19 would please step outside the courtroom briefly.

20 THE WITNESS: Am I dismissed?

21 THE COURT: Oh, no.

22 THE WITNESS: Okay.

23 THE COURT: Not yet. You're not dismissed. I'll
24 let you know when you are.

25 (Witness excused from courtroom.)

1 MR. CRANE: Your Honor?

2 THE COURT: Yes.

3 MR. CRANE: I'd like to take up another matter
4 before Mr. Trump returns.

5 The defense, based on current Missouri case law,
6 would be allowed to impeach Mr. Trump with respect to his
7 prior convictions. However, such impeachment would be
8 limited to where the conviction occurred, what the name of
9 the charge that he pled guilty or was convicted of is, the
10 length of the sentence, and the date on which that
11 conviction -- well -- or -- the date he pled guilty. The
12 details, the specific elements of the offense are not
13 admissible impeachment.

14 That's my motion -- oral motion in limine.

15 THE COURT: Well, let's get to the issue first. And
16 I will take that up, Mr. Crane.

17 Do you wish to be heard again on your motion in
18 limine?

19 MR. ROGERS: Yes, Your Honor.

20 I think, if you look at the testimony, there is
21 sufficient state action to at least subject this to this
22 Court's analysis of suggestiveness. They knew or should have
23 known that he was a witness in this case. I think you can
24 infer from his testimony that they redacted his name from the
25 one that was shown to people in the department of corrections

1 that they knew it. That they opened and reviewed the
2 newspaper article, and therefore should have been on notice
3 as to the suggestive nature of the items.

4 With regard to the merits of the suggestiveness,
5 Your Honor, what you consider is not only the suggestiveness
6 of the display, which is overwhelming, overwhelmingly
7 suggestive, but you also consider the length of time between
8 the event and the identification. In this case, two and a
9 half years. You consider the opportunity for the person to
10 see and observe the person he identifies, which is certainly
11 limited. You consider the description of the person, in
12 terms of determining the reliability of the identification.
13 And in this particular case, you consider it, especially in
14 the fact that Mr. Trump is claiming that Mr. Ferguson is the
15 person with dark hair, and yet we have a photograph of
16 Charles Erickson taken that same night, where the hair was
17 much darker than Mr. Ferguson's.

18 And ultimately, once the suggestiveness or a degree
19 of suggestiveness is shown, then the Court has to decide
20 whether the suggestiveness, when balanced against the indicia
21 of reliability, is sufficient to say that this gives rise to
22 the substantial likelihood of an irreparable
23 misidentification. And I think that's been clearly shown
24 here. In fact, we've seen the irreparable misidentification
25 of Mr. Ferguson here in court.

1 So I think that, under all of the tests in the case
2 law, that this both out-of-court and in-court identification
3 should be suppressed.

4 And furthermore, Your Honor, that would merely put
5 the state in the position they were in before Mr. Trump came
6 into their office in December of 2004 and said, "Guess what I
7 saw while in prison."

8 MR. CRANE: Your Honor, I would, as I did in the
9 hearing on defense motion in limine, I would cite the Court
10 to State versus Lawrence, 700 S.W.2d 111. In that case, a
11 witness identification was from a newspaper photograph. The
12 Court held that when the source of the alleged taint, which
13 is being argued at this point by Mr. Rogers as to the
14 contents of the article, is not governmental, the balancing
15 test is not applicable. And as the Court knows, the
16 balancing test is between the likelihood of irreparable
17 misidentification versus the necessity for government to use
18 identification procedures alleged as tainted.

19 Here there was no governmental action whatsoever.
20 There has not been any governmental action from the
21 standpoint of the prison guards letting his mail go through
22 to him. There is no connection between the photographs that
23 were generated by the Columbia Daily Tribune on March 11th,
24 2004, and the prison videos -- or the video that was shown in
25 the penitentiary that we've got right here, because they

1 hadn't been caught.

2 So there is no governmental connection. That was
3 his wife sending the article. He opened it up and made his
4 identification. He should be allowed to testify to it. If
5 he can identify the defendant, he should be allowed to do
6 that too, pursuant to Missouri law.

7 MR. ROGERS: Your Honor, I would just point out one
8 more item of governmental action. Those are police
9 photographs that were provided to the Columbia Daily Tribune.
10 That's certainly governmental action.

11 THE COURT: The motion in limine to suppress the
12 in-court identification by this witness is overruled.

13 I will move to the issue of the motion in limine by
14 the state as to impeaching by prior convictions. Are you
15 intending to go into the substance of any conviction that
16 this defendant might have -- or this witness might have?

17 MR. ROGERS: I do not disagree with Mr. Crane's
18 general statement about the scope of impeachment by prior
19 conviction. However, I believe there are things which have
20 been said on direct examination which have opened the doors
21 to some cross-examination, which may or may not open the door
22 to further detail on the impeachment. Before I -- if I think
23 I've got there before I do it, I will certainly approach the
24 bench and let the Court know.

25 THE COURT: Well, there are some rare occasions, I

1 would agree. I don't -- I haven't heard anything in this
2 case yet, but I don't -- I haven't heard all his testimony.

3 MR. CRANE: Yeah, well, you're going to approach.

4 MR. ROGERS: I will approach.

5 MR. CRANE: Okay.

6 THE COURT: All right.

7 Bring the jury back into the courtroom. And get
8 Mr. Trump back in.

9 Do we have a problem?

10 MR. CRANE: Can he come in when -- after the jury's
11 been seated, Judge?

12 THE COURT: Sure.

13 (Discussion off the record between the Court and the
14 marshal.)

15 THE COURT: The jury didn't want to cut this witness
16 off today. And wouldn't mind staying a little past 6:30.
17 However, there is a baseball game tomorrow night that they
18 were aware of, and would hope that we could conclude tomorrow
19 night by 6:30. And I am instructing our marshal to tell them
20 that we'll go until this witness is concluded and that we
21 will make strong effort tomorrow night to quit at 6:30.

22 So I will tell counsel -- I will tell counsel that
23 you need to schedule your witnesses so that they might be
24 able to have that one bit of enjoyment and watch the
25 Cardinals.

1 All right.

2 MR. CRANE: This is our last witness of the evening?

3 THE COURT: Yes. I would assume -- I can't imagine
4 that it would be done in a short period of time. I assume
5 there would be substantial cross-examination, or -- I don't
6 know. If you have someone who's brief, Mr. Crane, don't let
7 them go. Maybe we'll finish --

8 MR. CRANE: No.

9 THE COURT: -- at quarter after 6.

10 MR. CRANE: Yeah. I -- we just had some people that
11 had been waiting for a while.

12 THE COURT: All right. Well, in light of the fact
13 that it's possible that you might get another witness on --

14 MR. CRANE: Yeah. I -- well, we'll --

15 THE COURT: -- don't let him --

16 MR. CRANE: -- it'd probably be better off if we let
17 him go so they can have another -- have their evening.
18 That's fine. We -- I already told my man to let him go.

19 THE COURT: Well, maybe you didn't understand. The
20 jury is willing to stay past 6:30.

21 MR. CRANE: Oh.

22 THE COURT: It's tomorrow night they don't want to
23 stay past 6:30.

24 MR. CRANE: Okay.

25 THE COURT: Bring the jury back in the courtroom,

1 please.

2 - - -

3 The following proceedings were held in the presence of
4 the jury:

5 THE COURT: I apologize for keeping you so long,
6 ladies and gentlemen. There were some legal issues that we
7 needed to take up.

8 MR. CRANE: State would recall Mr. Trump.

9 THE COURT: Yes. Mr. Trump would be called to the
10 courtroom.

11 You remember you're still under oath, Mr. Trump.

12 THE WITNESS: Yes, ma'am.

13 - - -

14 JERRY TRUMP,

15 resumed the stand and testified further:

16 RESUMED DIRECT EXAMINATION

17 BY MR. CRANE:

18 Q. Sir, while you were in the penitentiary, and I
19 believe before the jury left, you indicated that was between
20 December '01 and December '04?

21 A. That's correct.

22 Q. Okay. What did you receive in the mail, while you
23 were incarcerated, from your spouse?

24 A. I received a -- the partial front page of the
25 Columbia Tribune.

1 Q. Okay. And do you recall the time frame when you
2 received this mailing from your wife?

3 A. March or April.

4 Q. Of --

5 A. Of '04.

6 Q. Okay. And when you opened this envelope --
7 envelope?

8 A. Yes.

9 Q. -- from your wife, what was inside?

10 A. There was a newspaper article. And it was folded --

11 Q. Let me ask you: Were you aware that she was sending
12 you this before you got it?

13 A. No.

14 Q. Okay. Now you opened up the envelope, and inside
15 was what?

16 A. A newspaper article, with a letter. But the
17 newspaper article struck my attention first. I was curious
18 about what it was. And I looked at it while it was still
19 folded.

20 Q. And when you opened that article, what did you see?

21 A. I saw that it was an article about the Kent Heitholt
22 murder and the two that had come forward -- or one that had
23 come forward.

24 Q. What was the first thing that your attention was
25 drawn to when you opened up this envelope and looked at its

1 contents?

2 A. As soon as I opened the envelope is: The way the
3 paper was folded, I saw the two pictures, only. I had no
4 idea what the article was about. And I recognized the two
5 pictures --

6 MR. ROGERS: Objection, Your Honor.

7 A. -- and faces.

8 MR. ROGERS: First of all, this is a narrative. He
9 answered the question, and then he went on to say something.
10 Secondly, I would like a continuing objection based upon our
11 pretrial motion and as developed today.

12 THE COURT: You may have a continuing objection to
13 your pretrial motion. And the answer is becoming a narrative
14 one, and I'd ask the state to ask specific questions than
15 rather have a narrative.

16 MR. CRANE: Very well, Judge.

17 Q. When you looked at these photos, what was your
18 reaction?

19 A. I've seen these two faces before.

20 Q. Where?

21 A. At the Tribune, the night that Kent was killed.

22 Q. The night you've described to the jury earlier this
23 afternoon?

24 A. Right.

25 Q. Prior to the time you saw these photographs in the

1 article that your wife sent you, had you looked at, at the
2 request of law enforcement, the Columbia Police Department
3 specifically, photographs of -- been provided photographs to
4 look at of other individuals?

5 A. Yes.

6 Q. And in any of those other photographs that the
7 police asked you to look at over the course of the
8 investigation of this crime, did you ever pick out any of
9 those photographs that you were shown?

10 A. No.

11 MR. CRANE: Judge, I'd ask to show what's marked for
12 identification State's Exhibit 30.

13 THE COURT: You may show that to the witness. Do
14 not display it to the jury until it's admitted into evidence.

15 Q. You understand that directive?

16 A. Yes.

17 Q. Mr. Trump, is -- do you recognize -- don't read
18 anything off of the article; okay?

19 A. Okay.

20 Q. Do you recognize that as the same Columbia Daily
21 Tribune article that you have described to the jury that you
22 received from your wife?

23 A. Yes.

24 Q. And what's the date, just the date, of that article?

25 A. March 11th.

1 Q. Okay. And that's actually the front page of the
2 paper; correct?

3 A. That's correct.

4 Q. Now, what is -- don't turn it around or anything.
5 On that paper, when you first saw it, what did you see?

6 A. I saw the two pictures of the two individuals.

7 Q. Okay. Now there's four photographs on State's
8 Exhibit 30; correct?

9 A. That is correct.

10 Q. Two up and two down. The first two you saw were the
11 top two?

12 A. That's correct. The colored.

13 Q. And then what did you do with the paper?

14 A. I opened it up to see what it was about for sure.

15 Q. And then you saw the other two photographs.

16 A. When I saw Kent Heitholt, I put two and two
17 together, but then began in earnest to read the article.

18 Q. Okay. But what was the first thing you saw?

19 A. Was the picture of both of the people that possibly
20 had done it.

21 Q. All right. Were those the individuals that were --
22 that you saw outside on November 1, 2001, at Kent Heitholt's
23 car?

24 A. Yes.

25 MR. ROGERS: Objection. Leading.

1 THE COURT: Well, the question has been answered.

2 MR. ROGERS: I objected as soon as he finished.

3 THE COURT: Do you want to rephrase your question?

4 MR. CRANE: Yeah.

5 MR. ROGERS: I'll withdraw the objection.

6 MR. CRANE: Yeah. I mean, it's kind of tricky --

7 I'm trying to tiptoe a little bit around -- so can I ask that

8 question?

9 Q. You understood the question?

10 A. Yes.

11 Q. Okay.

12 THE COURT: He answered the question, Mr. Crane.

13 Q. Were those the -- those photographs --

14 MR. ROGERS: I'm going to object if he's going to do

15 it again as leading. But I was withdrawing my objection on

16 the basis it had already been answered.

17 THE COURT: He answered it preliminarily --

18 MR. CRANE: Okay. All right.

19 THE COURT: -- the first time you asked it,

20 Mr. Crane.

21 MR. CRANE: Okay.

22 Judge, I would offer State's Exhibit 30, without at

23 this time publishing it to the jury.

24 MR. ROGERS: Your Honor, I have no objection to this

25 being introduced for the record, but I do have an objection

1 that if at any time it get published to the jury. And I
2 would suggest that -- you're ahead of me. You picked up the
3 photograph that you referred to.

4 MR. CRANE: Right. Can I proceed, Your Honor?

5 THE COURT: 30 is admitted, but may not at this time
6 be displayed to the jury.

7 MR. CRANE: Okay. We can do that.

8 - - -

9 State's Exhibit 30 admitted into evidence.

10 - - -

11 Q. Now let me show you what's already in evidence as
12 State's Exhibits 19 and 20. 19 and 20. And are those the
13 individuals that are depicted in the top two photographs that
14 you first saw when you looked at that article?

15 A. Yes.

16 Q. Okay.

17 MR. CRANE: And those are already in evidence.

18 THE COURT: They are in evidence.

19 Q. And Mr. Trump, let me also show you what's in
20 evidence as State's Exhibits 17 and 18 and ask if those are
21 the bottom two photographs that were in the article dated
22 March 11, 2004 --

23 A. Yes.

24 Q. -- that you saw -- that you received from your wife.

25 A. That's correct.

1 Q. Okay. Now, after you saw that article and those
2 photographs, you were released from the penitentiary in
3 December -- well, when were you released?

4 A. December the 13th, '04.

5 Q. All right. And when do you recall thereafter
6 meeting in my office reference this case?

7 A. About a week later.

8 Q. Okay. And you came down to my office, and Mr. Bill
9 Hawes, back there, was present when we met; is that correct?

10 A. That's correct.

11 Q. And on that occasion, we -- it's the first time we'd
12 met; right?

13 A. That's right.

14 Q. And we were actually going to go on down to the
15 Tribune, and you were going to show us your perspective down
16 there?

17 A. Correct.

18 Q. And also I think we listened to the 911 tape
19 together?

20 A. Correct.

21 Q. When was the first time you told anybody in law
22 enforcement about seeing the photos of these two individuals
23 that you recognize as the ones that were out at Kent
24 Heitholt's car on November 1, '01?

25 A. At your office.

1 Q. Had you told anybody before that?

2 A. No.

3 Q. Mr. Trump, thereafter, were you shown State's
4 Exhibit 30, the article, or those photos, before today?

5 A. No.

6 Q. Nobody from law enforcement showed you these photos
7 until today.

8 A. That's correct.

9 Q. Okay. Sir, do you see here in the courtroom -- and
10 I'm going to ask you to do this. If you do, point to the
11 individual, if you see the either of the people that you saw
12 that night, on 11-1-01, here in the courtroom with us today,
13 please point out that individual.

14 MR. ROGERS: Your Honor, I object. And I would ask
15 that this be subject also to my continuing objection, based
16 upon the pretrial motion and the record we made earlier.

17 THE COURT: It will -- there will be a continuing
18 objection until you tell me that there will not be.

19 MR. ROGERS: All right.

20 THE COURT: So it's understood that you are
21 objecting to the witness's in-court identification, as well
22 as the other matters. And it will continue.

23 MR. ROGERS: Thank you.

24 THE COURT: It is overruled.

25 MR. CRANE: Proceed, Your Honor?

1 THE COURT: Yes.

2 Q. Mr. Trump, if you see the individual here with us
3 today, or individuals in the courtroom today that you saw on
4 11-1-01 and the events you described out at Kent Heitholt's
5 vehicle, would you point to that individual or individuals,
6 please.

7 A. Yes. (Pointing.)

8 Q. Okay. Now, would you describe for us what the
9 person you're pointing to is wearing.

10 A. He's wearing a blue sweater, it looks -- appears,
11 and a red tie, white shirt.

12 Q. Okay.

13 A. Dark-haired.

14 Q. And --

15 A. Sitting between the woman and the gentleman that is
16 challenged without hair.

17 Q. Okay.

18 MR. ROGERS: Which one?

19 A. Two men challenged.

20 Q. And that is one of the two individuals that you saw.

21 A. That's correct.

22 Q. Had you ever seen -- well, strike that.

23 MR. CRANE: Judge, I'd ask the record reflect the
24 witness has identified the defendant.

25 THE COURT: It will.

1 Q. Had you ever seen that young man before the night of
2 November 1, '01?

3 A. No.

4 Q. What about the other individual?

5 A. No.

6 MR. CRANE: No further questions of this witness,
7 Judge.

8 THE COURT: You may inquire.

9 MR. ROGERS: Thank you, Your Honor.

10 May we approach?

11 THE COURT: Yes.

12 - - -

13 Counsel approached the bench and the following
14 proceedings were held:

15 MR. ROGERS: Your Honor, it's my belief that, in
16 accordance with the local rule, that Mr. Trump's deposition
17 might become at issue, and therefore I would like to file
18 with the Court the original, which does include the signature
19 page.

20 THE COURT: Okay. I'll show that it is filed.

21 MR. ROGERS: Thank you.

22 THE COURT: Uh-huh.

23 - - -

24 The following proceedings were held in open court:

25 - - -

CROSS-EXAMINATION

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BY MR. ROGERS:

Q. Mr. Trump, it is fair to say, is it not, that these colored pictures, State's Exhibits 19 and 20, are the ones that attracted your attention when you opened the newspaper article from your wife.

A. When I opened the envelope, yes.

Q. When you opened the envelope containing the newspaper article.

A. Correct.

Q. And those leaped right out at you.

A. Yes.

Q. And then you went ahead and opened the rest of the article.

A. That's correct.

Q. And you saw a very large picture of Kent Heitholt.

A. Correct.

Q. And that was, in fact, the same picture that is shown in State's Exhibit 1A; is that correct?

A. I believe that's correct.

Q. And 1A is also in evidence. Correct?

A. Correct.

Q. And it was much larger than State's Exhibits 19 or 20.

A. Yes.

1 Q. The way you saw it displayed in the newspaper.

2 A. That's correct.

3 Q. And you, of course, immediately recognized

4 Mr. Heitholt.

5 A. That's true.

6 Q. Because you had worked there for a few months at

7 least.

8 A. Correct.

9 Q. And you knew him.

10 A. Right.

11 Q. And you talked to him.

12 A. Correct.

13 Q. And you were present the night he was killed.

14 A. That's correct.

15 Q. And you talked to the police about that.

16 A. Correct.

17 Q. And that's, when you saw the picture of

18 Mr. Heitholt, when you put two and two together, as you said.

19 A. Correct.

20 Q. And that's when you said you associated these people

21 in this picture with the night Mr. Heitholt was killed.

22 A. Well, I knew when I saw the two pictures of the two

23 boys, they were the ones I had seen on the night that he was

24 killed.

25 Q. But you told us earlier that after seeing Heitholt's

1 picture is when you put two and two together.

2 A. Right.

3 Q. Okay. Now, you also saw, when you opened the
4 newspaper article up and started reading the whole thing, the
5 other two pictures, Exhibits 17 and 18. The black and white
6 ones.

7 A. Correct.

8 Q. And those did not look as familiar to you as the
9 colored pictures; is that correct?

10 A. No, not necessarily. They looked familiar too.
11 I -- at that point I was more focused on the article itself.

12 Q. Now, you have described two individuals that you saw
13 that night; is that correct?

14 A. That's correct.

15 Q. And both of those individuals you have described as
16 being close to six feet tall.

17 A. Close, yes.

18 Q. In fact, you described them as being six feet tall
19 the night it happened, didn't you?

20 A. Right.

21 Q. And how tall do you think I am?

22 A. Five six. Five five.

23 Q. Nowhere close to six foot.

24 A. No.

25 Q. And the people you saw that night were both taller

1 than me.

2 A. Yes.

3 Q. Significantly. Significantly taller than I am.

4 A. Right.

5 MR. ROGERS: Mr. Ferguson, would you please stand
6 next to me?

7 (Defendant complying.)

8 MR. ROGERS: Thank you.

9 Q. You can't tell how tall somebody is when you see
10 their picture in the paper, can you?

11 A. No.

12 Q. But you can when you see them on the parking lot.

13 A. Well, you can if they were standing straight up.

14 Q. Yeah.

15 A. But they weren't.

16 Q. And if they're not standing straight up, they're
17 going to look shorter and not taller.

18 A. Perhaps.

19 Q. And -- let's go back to the early morning of
20 November 1st and the night of Halloween, November -- excuse
21 me, October 31st. At that time you worked for C & S
22 Maintenance Company; is that correct?

23 A. Cleaning Company.

24 Q. Cleaning Company. And that was a private company
25 that contracted with the Columbia Daily Tribune and other

1 businesses to do janitorial work.

2 A. That is correct.

3 Q. And there was a crew of three people who worked for
4 C & S who were responsible for the Tribune building that you
5 worked at.

6 A. That's correct.

7 Q. And that crew included yourself.

8 A. Correct.

9 Q. It included Shawna Ornt.

10 A. Uh-huh.

11 Q. You have to say yes or no, because --

12 A. Yes.

13 Q. -- she's trying to get --

14 A. I'm sorry. Yes.

15 Q. Okay. And that crew included another guy named Mike
16 Haynes?

17 A. I believe that's correct.

18 Q. Okay. And Mike Haynes is a Caucasian? A white guy?

19 A. No.

20 Q. He's a black guy.

21 A. He's black.

22 Q. Okay. Do you also know a guy named Mike Boyd who
23 worked there at the Tribune?

24 A. Yes.

25 Q. He didn't work for C & S Cleaning, did he?

1 A. No.

2 Q. He was a reporter for the Tribune.

3 A. That's correct.

4 Q. A sports reporter. Worked for Kent Heitholt.

5 A. Right.

6 Q. He's black.

7 A. Correct.

8 Q. Okay. And did you see him leave that night?

9 A. I don't remember seeing Mike leave, no.

10 Q. You do remember seeing Kent leave.

11 A. Yes.

12 Q. And after you saw Kent leave, you were in the dock
13 area, weren't you?

14 A. In the dock area? Did you say dock?

15 Q. Dock.

16 A. Yes.

17 Q. The -- you're not outside on the loading dock, but
18 you're --

19 A. No.

20 Q. -- in on the same level as the loading dock,
21 cleaning the hallway and then moving into the bathroom to
22 clean it; correct?

23 A. That's correct.

24 Q. And if Boyd had left afterwards, you would have seen
25 him, wouldn't you?

1 A. Not necessarily.

2 MR. CRANE: That calls --

3 A. Because there was the other exit door.

4 Q. That didn't go past where you were.

5 A. That's correct.

6 Q. All right. And I missed a couple of looks at the
7 door photos, I think. Calling your attention to Exhibit --
8 State's Exhibit 16?

9 A. Uh-huh.

10 Q. You've seen this before. This is --

11 A. Yes.

12 Q. -- what I call the door photo. It shows three
13 garage doors.

14 A. Correct.

15 Q. Overhead doors like garage doors.

16 A. Right.

17 Q. And then it shows another door that comes out and
18 down some steps, that's sort of on the same level as the
19 loading dock?

20 A. Correct.

21 Q. And that's a door that would have been where you
22 would have known it if Mr. Boyd had come out it.

23 A. Unless I had been in that bathroom or checking on
24 the other Mike that worked for us in this other area.

25 Q. Okay.

1 A. The employees at the Tribune never had a practice of
2 telling me or other of C & S employees that they were
3 leaving.

4 Q. Okay.

5 A. And --

6 Q. But if they saw you on their way out, they said
7 good-bye.

8 A. Sure.

9 Q. They were friendly.

10 A. Right. But I don't remember seeing him leave.

11 Q. And then you say the "other door." And the "other
12 door" is the door that opens independently of the indentation
13 of the loading dock; correct?

14 A. That's correct. It goes up another set of steps.

15 Q. And that is to the east or Fourth Street side of the
16 loading dock.

17 A. That's correct.

18 Q. And did you see Kent Heitholt leave that night?

19 A. Yes, I did.

20 Q. And which door did he go out?

21 A. He ended up going out the door that typically the
22 employees didn't go out, because we had -- or Mike had just
23 mopped the stairwell, where he would typically go, and he
24 said, "Well, if that's wet, then I'll go out this other
25 door."

1 Q. Okay.

2 A. And I was able to precede him just a little bit, and
3 I held the door for him.

4 Q. Now at that time do you know whether Mr. Boyd had
5 left the building or not?

6 A. No.

7 Q. Okay. And you don't know -- you weren't looking at
8 your watch to time Mr. Heitholt, were you?

9 A. Not nec -- no.

10 Q. So you don't know what time that was, exactly.

11 A. The only way I would have to reference that is that
12 I had been to smoke just previous to that, and I was still
13 hearing the music up the street.

14 Q. Wait a minute. My question was: Did you look at
15 your watch and --

16 A. No.

17 Q. -- know what time it was?

18 A. No.

19 Q. Okay. Now, what time do you think you got to work
20 that night?

21 A. Around 9.

22 Q. Do you usually get there before the other two people
23 on the crew?

24 A. No. Sometimes I did. I usually picked Mike up.

25 Q. How about Shawna?

1 A. I occasionally gave her a ride, but she usually was
2 coming from Hallsville, which would have been out of my way.
3 So she usually came a different way.

4 Q. And she usually showed up on her own.

5 A. Yes.

6 Q. She wouldn't show up an hour or an hour and a half
7 after you came.

8 A. No. Not if we had agreed to start working at 9 or
9 whatever time.

10 Q. You don't have any reason to dispute that she
11 started at 10 or 10:30?

12 A. No. She may have.

13 Q. At some point -- you and she were in the habit of
14 going out to take smoke breaks together, weren't you?

15 A. Yes.

16 Q. But you had taken a smoke break without her on --
17 during the early morning hours of November 1st.

18 A. That's correct.

19 Q. And by the way, when I say November 1st, I mean,
20 November the 1st, 2001; right?

21 A. Right.

22 Q. We're on the same page here.

23 A. Correct.

24 Q. That's the only November 1st you ever worked there,
25 isn't it?

1 A. Right.

2 Q. Okay. And when she came and told you she wanted to
3 go take a smoke break, you told her you were busy cleaning
4 the rest room, you wanted to finish the rest room before you
5 took a smoke break, because you'd just had one not too long
6 before.

7 A. That's correct.

8 Q. Okay. And that's when she went out by herself.

9 A. Yes.

10 Q. And then you heard the door close behind her.

11 A. Yes. I believe I did.

12 Q. When you say you heard the door close behind her --

13 A. She may have put a newspaper in the door, but I
14 heard it at least thud --

15 Q. Okay.

16 A. -- against that.

17 Q. You're talking about the swinging door next to the
18 garage doors.

19 A. That's correct.

20 Q. And that is a door that has a lock that you need a
21 key to get back in. It always locks when you close it behind
22 you.

23 A. All of them did, yes.

24 Q. Okay. And at that time do you know whether or not
25 one of the three garage doors was up? Open?

1 A. Absolutely not.

2 Q. Absolutely you don't know or --

3 A. No. Absolutely it was not open.

4 Q. There was not a garage door open.

5 A. No.

6 Q. Can a garage door be opened from the outside?

7 A. No.

8 Q. So there's no way, if this door, this swinging door,
9 locked behind Shawna, she could have climbed over the railing
10 onto the loading dock and gone through a garage door.

11 A. No.

12 Q. To get back into the building.

13 A. No.

14 Q. And she didn't have a key to this door, did she?

15 A. I don't know if she did or not at that time. That's
16 why the newspaper was sometimes used. We were following
17 other Tribune employees.

18 Q. If she also -- you carried a key to the outer doors.

19 A. Sure.

20 Q. And when you smoked together, you could open the
21 door with your key.

22 A. Right.

23 Q. And in fact, you used your key to open the door
24 after you went out onto the loading dock and into the parking
25 lot this night.

1 A. That's correct.

2 Q. When Shawna came back into the building, however she
3 got in, and told you that she had seen somebody behind Kent's
4 car, that's when you, after she had insisted, accompanied her
5 back outside; correct?

6 A. Well, no. First we went across the hallway from
7 that rest room on the dock and looked out that garage door.

8 Q. And couldn't see anything.

9 A. No. Couldn't see anything.

10 Q. And that's when you went --

11 A. Yes.

12 Q. -- back outside.

13 A. No. Well, I opened the first garage door and yelled
14 for -- "Who's out there."

15 Q. Okay. So you were doing that from still in the
16 building.

17 A. That's correct.

18 Q. Okay. Now at that time were you carrying anything?

19 A. Not that I recall, no.

20 Q. You weren't carrying a vacuum cleaner or a cord or
21 anything like that.

22 A. No.

23 Q. And neither was Shawna.

24 A. No.

25 Q. And so when the garage door -- did you -- was

1 opened, none of your cleaning equipment was visible from the
2 outside through the garage door, was it?

3 A. Shouldn't have been, no.

4 Q. Okay. You didn't use power equipment for doing what
5 you were doing in the bathroom, did you?

6 A. No, but I would have had a mop bucket on that floor
7 somewhere.

8 Q. But nothing with a cord.

9 A. No. No.

10 Q. And then when you looked out and yelled and got no
11 response -- correct?

12 A. That's correct.

13 Q. -- did you then walk on out and continue to yell?

14 A. No. I stayed where I was.

15 Q. And continued --

16 A. And yelled.

17 Q. And you yelled a second time and got no response.

18 A. That's correct.

19 Q. And that's when you said that you tried a trick you
20 had used with kids before.

21 A. Right. With my own.

22 Q. With your own kids before. With children who were
23 entrusted to your care.

24 A. That's correct.

25 Q. And that was telling them, falsely, "I know you -- I

1 see you there. Who are you?" Or something like that?

2 A. That's correct.

3 Q. And you'd done that to your own kids before.

4 A. That's right.

5 Q. And then that's when you say you saw two people

6 stand up.

7 A. That's correct.

8 Q. By Kent's car.

9 A. That's correct.

10 Q. And there was one person who was towards the rear of

11 the car.

12 A. That's right.

13 Q. And there was one person who was towards the front

14 of the car.

15 A. That's correct.

16 Q. And you say that they were both on the driver's side

17 of the car.

18 A. That's correct.

19 Q. And the person who was towards the rear of the car,

20 is that the person that you say is Mr. Ferguson, who you

21 identified today?

22 A. That's the way I recall it, yes.

23 Q. The person towards the rear of the car.

24 A. That's correct.

25 Q. And is that the person who said to you, "Somebody's

1 hurt here, man"?

2 A. No. I don't know who said that.

3 Q. You don't know which one said that.

4 A. No. Because I believe that was said when they were
5 still crouched down behind the car.

6 Q. And -- so nobody stood up and said that. That was
7 said before they stood up?

8 A. I think it was about the same time, but it was -- I
9 think they were still hidden from me when they said that.

10 Q. And it certainly couldn't have been somebody who
11 stood up and looked at Miss Ornt and said that to her.

12 A. Said it to Shawna?

13 Q. Yeah.

14 A. No.

15 Q. No. Couldn't have happened like that.

16 A. No.

17 Q. Okay. Now you described two people to the police;
18 correct?

19 A. Correct.

20 Q. And you described them both as white males, around
21 six feet tall; correct?

22 A. Correct.

23 Q. Thin.

24 A. Right. Or medium build. Thin I think is what I
25 first told the police.

1 Q. Okay. And was either of these men wearing a hooded
2 sweatshirt?

3 A. Not that I recall.

4 Q. And that's something you would have the opportunity
5 to see, because you saw these people from different angles.

6 A. Right.

7 Q. And neither, that you can recall, was wearing a
8 hooded sweatshirt.

9 A. Not that I recall.

10 Q. With either the hood up or the hood down.

11 A. No.

12 Q. Okay. And the person towards the rear of the car,
13 was that the person with light hair or the person with dark
14 hair?

15 A. As I recall, it was -- the person at the rear was --
16 had the darker hair.

17 Q. Had the darker hair. And that's the person that you
18 have identified today as Mr. Ferguson.

19 A. That's correct.

20 Q. And by the way, when you identified Mr. Ferguson a
21 few minutes ago -- he's sitting over here at the table;
22 right?

23 A. Correct.

24 Q. You've been in court before. You know where
25 defendants sit, don't you?

1 A. Right.

2 Q. Okay. And you know me, because we met before --

3 A. Right.

4 Q. -- back in June.

5 A. Correct.

6 Q. You know Mr. Weis, because you met him before, back
7 in June.

8 A. Right.

9 Q. And Miss Benson may be blond, but she's no male.

10 A. Right.

11 Q. Okay. And you know these guys. The prosecutors.

12 A. Right.

13 Q. So, by process of elimination, it's not too hard to
14 figure out who's the defendant, is it?

15 A. No. It's not.

16 Q. You've described these individuals as being -- to
17 the police as being 19 or 20 years old.

18 A. Yes.

19 Q. And you consider yourself a pretty good judge of the
20 age of young males.

21 A. Well, I don't know how good, but that was my guess
22 at that point.

23 Q. Okay. And would you say that the individuals
24 depicted in State's Exhibits 19 and 20 appear to be about 19,
25 20 years old?

1 A. Thereabouts, yes.

2 Q. Okay.

3 A. Maybe a little older at that point.

4 Q. All right. But they could be, at the time these
5 pictures were taken, 19 and 20?

6 A. Right. I've learned over the years, though, that
7 that can fool you, so --

8 Q. All right.

9 A. -- I don't know.

10 Q. You would agree that the people depicted in State's
11 Exhibits 17 and 18 look younger than the people in Exhibits
12 19 and 20.

13 A. Yes.

14 Q. Considerably younger.

15 A. Some younger, yes.

16 Q. And you would not mistake either of these
17 individuals --

18 A. No.

19 Q. -- for being 19 or 20 years old, would you?

20 A. I don't know. It just kind of depends. By -- at
21 that point in my life, I had worked with kids a lot, and so
22 I -- you know, I -- maybe I was -- did feel like I was a good
23 judge of that.

24 Q. You had worked with kids a lot?

25 A. Yes.

1 Q. And where have you worked with kids a lot?
2 A. Different places.
3 Q. Were you working with kids in November of 1997?
4 A. Yes.
5 Q. Where were you working with kids then?
6 A. At the Missouri Military Academy, Mexico, Missouri.
7 Q. And were you still working there in January of 1998?
8 A. Yes.
9 Q. In February 1998?
10 A. Yes.
11 Q. In April 1998?
12 A. Yes.
13 Q. And in May of 1998?
14 A. Yes.
15 Q. And is it fair to say that it was in the context of
16 your employment at the Missouri Military Academy that you
17 were charged with --
18 MR. CRANE: Judge, I'm going to object. Same reason
19 I stated earlier.
20 THE COURT: Would you approach the bench.
21 MR. ROGERS: I wasn't there yet, but I would be
22 happy to approach.
23 - - -
24 Counsel approached the bench and the following
25 proceedings were held:

1 MR. ROGERS: I was going to ask him: Were charged
2 with endangering the welfare of a child in the first degree,
3 which I think is within the scope of what you agree is proper
4 impeachment.

5 MR. CRANE: That's what you were going to ask him.

6 MR. ROGERS: That's what I was going to ask him.
7 But I'm glad we approached, because I assume he would say
8 yes, and I intend to ask him that "Isn't it true that those
9 charges involved sexual contact with a 16-year-old male and
10 you were able to get" --

11 MR. CRANE: That's not where that question was
12 going.

13 MR. ROGERS: That's exactly --

14 MR. CRANE: You were going: "And it was your
15 employment connected with" --

16 MR. ROGERS: I already established his employment on
17 the dates, and I was going to ask: "Was that employment" --
18 was it in connection with that employment that he was charged
19 with endangering the welfare of a child.

20 MR. CRANE: He can't do that.

21 THE COURT: I'm going to sustain the objection.

22 MR. ROGERS: Your Honor, excuse me. I think it's
23 been opened up. He volunteered having worked with kids. I
24 didn't ask him that. He volunteered it.

25 THE COURT: That has nothing to do with convictions.

1 MR. ROGERS: Okay.

2 - - -

3 The following proceedings were held in open court:

4 Q. And that military academy was located in Moberly,
5 Missouri; is that correct?

6 A. No.

7 Q. Where was it?

8 A. Mexico, Missouri.

9 Q. Mexico, Missouri. I'm sorry. And that's Audrain
10 County.

11 A. Correct.

12 Q. And on August 2nd, 1999, you entered pleas of guilty
13 in the Circuit Court of Audrain County, Missouri, to five
14 different counts of endangering the welfare of a child in the
15 first degree --

16 A. That's correct.

17 Q. -- a class D felony; correct?

18 A. Pardon me?

19 Q. A class D felony.

20 A. That's correct.

21 Q. And that's five different counts, that occurred on
22 five different dates, in Audrain County, Missouri.

23 A. That's correct.

24 Q. And for each of those sentences, each of those pleas
25 of guilty, you were sentenced to a term of five years in the

1 Missouri department of corrections; is that correct?

2 A. To run concurrently, yes.

3 Q. To run concurrently.

4 A. Correct.

5 Q. Five counts, five years each count, all together.

6 A. Correct.

7 Q. Total of five years. Right?

8 A. That's correct, sir.

9 Q. And you were placed on probation after having served

10 120 days of that sentence; is that correct?

11 A. That's correct.

12 Q. And where did you serve that 120 days?

13 A. Partially at Fulton Reception Diagnostic Center and

14 partially at Farmington Correctional Center.

15 Q. Farmington Correctional Center in Farmington,

16 Missouri.

17 A. Correct.

18 Q. And after that 120 days, you were released on

19 probation.

20 A. That's correct.

21 Q. And you were required, as a condition of your

22 probation, to participate in a program --

23 MR. CRANE: Well, Judge, I'm going to object to this

24 line of questioning. That's improper impeachment.

25 THE COURT: The objection is sustained.

1 Q. Why were you living in Columbia on November the 1st,
2 2001?

3 MR. CRANE: Same objection, Judge.

4 THE COURT: Are we talking about something that
5 potentially might relate to the impeachment that you were
6 going into?

7 MR. ROGERS: No. I don't think -- well, I don't
8 think so. I mean, everything -- but I'm just asking him,
9 wasn't he required as part of his --

10 MR. CRANE: Well, Judge, I'm going to object to
11 that.

12 THE COURT: The conditions of his probation are not
13 subject to inquiry as far as the impeachment --

14 MR. ROGERS: Okay.

15 THE COURT: -- in this particular area. So that you
16 understand the Court's ruling, sir.

17 MR. ROGERS: All right. Thank you.

18 Q. Let me put it this way. It was while you were on
19 that probation that you lived in Columbia.

20 A. Correct.

21 Q. And worked for C & S Cleaning Company.

22 A. That's correct.

23 Q. And after the death of Mr. Heitholt, but unrelated
24 to the death of Mr. Heitholt, your probation was revoked.

25 A. That's correct.

1 Q. And then you were ordered back into the Missouri
2 department of corrections.

3 A. That's correct.

4 Q. And where did you go then?

5 A. I went back to Fulton for about five months, to
6 Pacific for about a year or year and a half, and then to
7 Bonne Terre to complete the three years.

8 Q. And that was when Bonne Terre opened?

9 A. Well, shortly thereafter. It had been open a while.

10 Q. And it was at Bonne Terre that you received the
11 newspaper from your wife.

12 A. Correct.

13 Q. Now, let's go back to the two people you saw in the
14 parking lot. You described the person at the rear of the car
15 as the person having the darker hair. Correct?

16 A. That's what I -- that's what I said, yes.

17 Q. Okay. And that's what you told the police then.

18 A. That's correct.

19 Q. That's what you told us today.

20 A. Sure.

21 Q. And then -- you told the police then that this
22 person was wearing a baseball cap pushed back on his head.

23 A. I recall saying that, yes. And that's why -- I
24 still sort of remember that.

25 Q. So you remember that.

1 A. Right.

2 Q. Okay. And was this person wearing a shirt?

3 A. He had some kind of a top on, yes.

4 Q. Was he wearing a jacket?

5 A. I don't recall.

6 Q. Do you recall talking to Detective Lloyd Simmons the
7 day after this happened?

8 A. I don't specifically remember that name, but I
9 talked to a detective, yes.

10 Q. Do you recall describing the person who sat -- who
11 was near the rear of the car as a white male, younger,
12 possibly near the age of 20, who had dark hair?

13 A. Uh-huh.

14 THE COURT: Is that yes?

15 THE WITNESS: Yes. I'm sorry.

16 MR. ROGERS: Thank you. Thank you, Your Honor.

17 Q. You told him the individual was wearing a ball cap
18 that was somewhat sitting back on the back portion of his
19 head? Correct?

20 A. Correct.

21 Q. And that you initially looked at the suspect, and
22 you thought he looked somewhat like Kent.

23 A. Yes.

24 Q. And that you -- that the suspect had a round face.

25 A. Yes. That's what -- I may have said that, yes. If

1 that's what it said.

2 Q. You told the detective, whatever his name was, that
3 the second suspect was also a white male in his early 20s; is
4 that correct?

5 A. That's correct.

6 Q. And that the second suspect, which would have been
7 the one by the front of the car, had a thinner face than the
8 first suspect.

9 A. Yes.

10 Q. Okay.

11 A. I'll agree with you anyway that that's what that
12 says.

13 Q. Okay. And that's what you remember telling him,
14 isn't it?

15 A. Right.

16 Q. Okay. You also told him that you were not certain
17 if you could identify those people.

18 A. Correct.

19 Q. Now could you tell us now, from your memory, whether
20 either of the people that you saw was wearing a jacket?

21 A. No, I couldn't tell you that for sure.

22 Q. Could you tell us whether either of the people you
23 saw was wearing a long-sleeved shirt?

24 A. Not -- not for sure, no.

25 Q. Could you tell us whether either of the people you

1 saw was wearing a short-sleeved T-shirt?

2 A. No.

3 Q. And you did listen earlier today to the 911 tape.

4 A. Yes.

5 Q. And in the 911 tape, you heard your own voice.

6 A. Correct.

7 Q. And you heard your own voice say that these people
8 were not wearing caps or jackets.

9 A. At that time, that's correct. Um --

10 Q. Okay. You've answered. Now let me ask you this.
11 You did go -- as we say -- as I say, you and I have met
12 before; right?

13 A. Right.

14 Q. And we met in Mr. Crane's office back on June the
15 29th of this year, didn't we?

16 A. Correct.

17 Q. And you had -- gave what was called a deposition.

18 A. That's correct.

19 Q. And that is testimony under oath, with a court
20 reporter. Correct?

21 A. Correct.

22 Q. And I asked you some questions there. Correct?

23 A. Yes.

24 Q. And do you recall the following questions being
25 asked and the following answers given?

1 MR. ROGERS: Your Honor, starting on page 25.

2 THE COURT: Here. Here's the deposition that has
3 been filed.

4 THE WITNESS: Thank you.

5 Q. For your edification or help or use. Convenience.

6 And starting on page 25, at line 4.

7 A. Okay.

8 Q. "QUESTION: Okay. And could you tell what either of
9 them was wearing?

10 "ANSWER: No, not really.

11 "QUESTION: Could you tell --

12 And then you answer: "A jacket. I believe both of
13 them had jackets on. It was, you know, pretty cool, but --

14 "QUESTION: Do you remember that?

15 "ANSWER: Yes, I do. I'm not guessing that."

16 Were those your answers to those questions under
17 oath back on June the 29th, 2005?

18 A. That would be true. That's what I answered then,
19 yes.

20 Q. Okay. And so at that time you were not guessing and
21 you -- at that time your memory was that both of these people
22 were wearing jackets.

23 A. That's correct.

24 Q. Okay. But you don't remember that now.

25 A. Not necessarily.

1 Q. And in fact, you've heard on the 911 tape that you
2 that very night said they weren't wearing jackets or caps.
3 Right?

4 A. That's right. I heard, yes.

5 Q. Thank you.

6 MR. ROGERS: Those are all the questions I have.

7 THE COURT: Redirect?

8 MR. CRANE: I don't think I've got any other
9 questions of this witness, Judge.

10 THE COURT: May Mr. Trump be finally excused? For
11 the state.

12 MR. CRANE: He may.

13 MR. ROGERS: Yes for the defense, Your Honor.

14 THE COURT: For the state as well?

15 MR. CRANE: Yes.

16 THE COURT: Mr. Trump, you are finally excused now.

17 THE WITNESS: All right.

18 THE COURT: Would ask you not to discuss your
19 testimony with any other person who's to be called as a
20 witness, but you're free to go. Thank you.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Crane, do you have a very brief
23 witness to call who maybe has been waiting all day to testify
24 and will take 10 or 15 minutes to testify, or --

25 MR. CRANE: No. What I could do at this juncture is

1 offer a stipulation.

2 (Mr. Crane showing a document to Mr. Rogers.)

3 MR. ROGERS: That's fine.

4 MR. CRANE: We'll offer a stipulation entered into
5 by the state and the defense.

6 Do you have --

7 MR. ROGERS: I have no objection, and we do enter
8 into that stipulation. And what's the --

9 MR. CRANE: The other one is the log-out time of
10 2:08 a.m., Kent Heitholt. It doesn't show when he left the
11 building, but it shows that's when he logged off the
12 computer.

13 MR. ROGERS: That's Exhibit 31. And also Exhibit
14 29. And we both -- we do stipulate to both those exhibits.

15 THE COURT: And we should show those as being
16 admitted. And you're going to read them to the jury?

17 MR. CRANE: Yeah. I'll read it and describe it,
18 with any added things Mr. Rogers wants to put in.

19 THE COURT: State's Exhibits 29 and 31 are admitted.

20 - - -

21 State's Exhibits 29 and 31 admitted into evidence.

22 - - -

23 THE COURT: You may read those to the jury.

24 MR. CRANE: Ladies and gentlemen, State's Exhibit 29
25 is what's called a stipulation, meaning it's something both

1 sides agree to.

2 And it is: That the state and the defense agree
3 that on November 1, 2001, the Tribune janitor's 911 call that
4 we listened to was made at 2:26:55 a.m. 2:26 minutes and 55
5 seconds a.m. And the first police officer arrived at the
6 crime scene on the Tribune parking lot at 2:30 and 57
7 seconds a.m.

8 And that's State's Exhibit 29. And we'll have a
9 copy of that for the jury.

10 And then the other one is simply a document that
11 came from the Tribune records, that indicates in the
12 highlighted portion that Kent Heitholt logged off of his
13 computer at 2:08 a.m. on November 1, 2001.

14 And that will also be marked as an exhibit, 31.

15 THE COURT: Do you care to add anything to those
16 stipulations?

17 MR. ROGERS: I think they've heard enough from me
18 today, Judge.

19 THE COURT: Ladies and gentlemen, the Court again
20 reminds you of what you were told at the first recess of the
21 Court. Until you retire to consider your verdict, you must
22 not discuss this case among yourselves or with others, or
23 permit anyone to discuss it in your hearing. You should not
24 form or express any opinion about the case until it is
25 finally given to you to decide. Do not read, view, or listen

1 to any newspaper, radio, or television report of the trial.

2 We will resume tomorrow morning at 8:30. Ask the
3 jury be returned at that time. And have a good supper and a
4 restful night. We'll see you in the morning, ladies and
5 gentlemen.

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: How many witnesses does the state intend
10 to call tomorrow? If you know.

11 MR. CRANE: Well, we've got some more witnesses,
12 Judge.

13 THE COURT: Well, let me ask this question in a
14 different way. Do you anticipate on closing tomorrow? I'm
15 just trying to make sure that the scheduling is such so that
16 if defendant has witnesses that he wishes to present.
17 Tomorrow will be the third day of trial. Do you anticipate
18 resting tomorrow?

19 MR. CRANE: But for cross-examination. But I mean,
20 with all due respect, you know, I don't -- that's the thing.
21 I don't know how long the cross-examination would run. We've
22 got various -- we've got some crime scene evidence that may
23 take a while and I think will be the subject of some lengthy
24 cross-examination. I don't think anybody's going to be as
25 long as the Erickson witness. We'll certainly --

1 MR. ROGERS: I certainly hope not, Judge. Otherwise
2 we're going to have to put in for my retirement. Having said
3 that, depending on what they do on direct examination, I
4 believe that the crime scene kind of stuff can go quickly.

5 THE COURT: Are there expert witnesses that you're
6 intending to call, or an expert witness, Mr. Crane, tomorrow,
7 that you would intend to call?

8 MR. KNIGHT: Yes, a few.

9 THE COURT: Yes?

10 MR. KNIGHT: Yes.

11 THE COURT: Mr. Knight has answered for you here.

12 MR. CRANE: That's fine.

13 MR. KNIGHT: I'll be taking those witnesses.

14 THE COURT: All right. And that might be a lengthy
15 witness.

16 MR. ROGERS: There may be some dispute as to what
17 constitutes an expert witness. You're talking physical
18 evidence people?

19 MR. KNIGHT: Uh-huh.

20 THE COURT: Okay.

21 MR. KNIGHT: Yes.

22 MR. ROGERS: They may be lengthy from the state's
23 point of view. I don't think they'll be that lengthy in
24 cross.

25 THE COURT: All right.

1 MR. ROGERS: And I'm doing what I can to stipulate
2 and agree to some of these exhibits and stuff.

3 THE COURT: What I'm trying to get at is: I don't
4 want a period of time that either the state rests, and the
5 defense, if it cares to present evidence, will have no
6 witnesses here. I want to make sure that you communicate
7 well enough that we do not have a situation like that.
8 Because I don't want the jury sitting twirling its collective
9 thumbs while we wait for witnesses to be called.

10 MR. ROGERS: We plan to have witnesses available
11 Thursday morning. And I'm confident that the state will not
12 rest very long before 6:30 tomorrow evening.

13 MR. CRANE: You're going to let them go a little
14 early too, aren't you?

15 THE COURT: Well, I've told them that we will recess
16 no later than 6:30. So --

17 MR. ROGERS: If you guys can finish up --

18 THE COURT: But I don't mean 3:00 in the afternoon
19 either.

20 MR. ROGERS: We actually could have a witness here
21 at 3:15 if that happens, but I'm not holding my breath.

22 THE COURT: All right. Well, I'm not either. But
23 sometimes things happen differently than we anticipate. I
24 just did not want to have three hours go by and not have any
25 witnesses and have the case, heaven forbid, go into next

1 week.

2 With that understanding, we will be in recess. And

3 I'll see you in the morning.

4 (Adjourned for the evening.)

5 - - -

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P R O C E E D I N G S

October 19, 2005

- - -

The following proceedings were held out of the presence of the jury:

(Other cases heard.)

THE COURT: And we will take up 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready.

THE COURT: The defense?

MR. ROGERS: Ready, Your Honor.

THE COURT: Preliminary matters for the state?

MR. CRANE: Judge, that excerpt of the jail conversation between Mr. Erickson and his mother, that the state played, it also includes the excerpt that the defense played. I had not marked that. And I would like to now offer the segment that was played by the state, which, you know, again, includes what the defense put into evidence. That has now been marked as State's Exhibit E-1, because the original tape in its entirety that I had -- that had come into evidence without publishing to the jury is E, Defendant's E. And so I just marked this E-1. And would offer it at this time.

MR. ROGERS: And no objection, Your Honor. We agree to that marking.

1 THE COURT: All right. I'll show E-1 is admitted.

2 - - -

3 State's Exhibit E-1 admitted into evidence.

4 - - -

5 MR. ROGERS: And on behalf of the defendant, Your
6 Honor, a couple of housekeeping --

7 THE COURT: Just a minute. Let me -- is that all
8 you have, Mr. Crane?

9 MR. CRANE: Yes.

10 THE COURT: All right. For the defense.

11 MR. ROGERS: Thank you, Your Honor.

12 Just a couple of housekeeping matters. The plastic
13 overlays on Defendant's Exhibit B, which is the out-of-date
14 aerial photograph of downtown Columbia, which have been
15 written on during the examination of Mr. Ferguson -- or
16 Mr. Erickson, the first overlay, which has on it his initials
17 and the date March 10th, 2004, has been marked as Exhibit
18 B-1. And the second plastic overlay, which has on it
19 Mr. Erickson's initials and the date 10-1-04 has been marked
20 Exhibit B-2.

21 MR. CRANE: What -- there's B-1 and B-2, are the
22 transparencies?

23 MR. ROGERS: Are the transparencies so far. And
24 those were both part of the exhibit. And the markings on the
25 transparencies were created on the record during his

1 testimony.

2 THE COURT: Are you offering them?

3 MR. ROGERS: I am offering them, yes.

4 THE COURT: All right. Is there an objection?

5 Mr. Crane?

6 MR. CRANE: No. No objection.

7 THE COURT: Defendant's B-1 and B-2 are admitted.

8 - - -

9 Defendant's Exhibits B-1 and B-2 admitted into
10 evidence.

11 - - -

12 THE COURT: I assume they would not have meaning
13 except as they are placed over the aerial photograph that the
14 drawing was made from?

15 MR. ROGERS: Exactly. Exhibit B.

16 THE COURT: All right. Anything further?

17 MR. ROGERS: Not on behalf of the defendant.

18 MR. KNIGHT: One more thing, Your Honor. I'm sorry.

19 We have evidence that, at the diner that you've heard about,
20 there was some blood found and also some fingerprints there.

21 And they -- the fingerprints checked to a person named

22 Frankie Davis, and so did the blood. We've interviewed

23 Frankie Davis. And he was a person who just happened to be

24 at the diner around the time of the murder and he happened to

25 have had a nose bleed. He's totally unconnected to this

1 homicide.

2 I talked to Mr. Rogers about this a few moments ago,
3 and he said that he was not going to cross-examine Jeff
4 Nichols about this issue; finding blood, fingerprints, at the
5 diner. I'm certainly not intending to get into that
6 evidence. This would be -- this would be under the purview,
7 it seems like, of other suspects. And certainly Frankie
8 Davis is not connected to this crime. It's my understanding
9 the defense is not going to adduce any evidence on this
10 issue, and neither will we.

11 MR. ROGERS: That's my understanding, Your Honor.
12 And I did advise Mr. Knight that, at the time that we
13 submitted materials to our expert, Mr. Singer, the blood had
14 not been tested for DNA, and he I think has noted that in his
15 report that's supposedly being faxed to us this morning. But
16 we don't intend to ask him about it, and we do not intend to
17 create Frankie Davis as a phantom suspect or say anything
18 else about it. And I don't intend to ask anybody about the
19 blood found at the diner that belongs to Mr. Davis. Or the
20 vomit found when he threw up from having breakfast at the
21 diner.

22 THE COURT: It doesn't sound like a very appetizing
23 place to have breakfast.

24 MR. ROGERS: Well, we don't even have it on our map,
25 Judge.

1 MR. CRANE: Actually, Judge -- actually, Judge, the
2 cook from the diner went out and examined the vomit and
3 identified that as the diner's product.

4 (Laughter.)

5 MR. CRANE: True.

6 THE COURT: I might ask, is the cook a chemist as
7 well?

8 MR. CRANE: I don't -- yeah. He'll be called as an
9 expert.

10 THE COURT: Are you all ready then to have this jury
11 brought into the courtroom?

12 MR. ROGERS: Yes, Your Honor.

13 MR. CRANE: Yes.

14 THE COURT: All right.

15 With that understanding, we will have the jury
16 brought in, please. The jury that's very anxious to begin
17 work.

18 - - -

19 The following proceedings were held in the presence of
20 the jury:

21 THE COURT: Good morning, ladies and gentlemen.
22 Appreciate your eagerness to work so hard for our county.
23 And we will try to accommodate you in every way that we can.

24 Unfortunately we don't have an oven here for Diana
25 to bake cookies while we're in court, so we can't accommodate

1 that particular wish, but we'll try to do the best we can in
2 other areas.

3 If you would answer as the clerk calls your names,
4 please.

5 (Roll call by Eileen Moore, Deputy Clerk.)

6 THE COURT: The clerk may be excused.

7 (Clerk excused.)

8 THE COURT: State may call its next witness.

9 MR. CRANE: Your Honor, at this time the state would
10 offer into evidence State's Exhibit 23 and 24, which are
11 certified business records of the attendance of the defendant
12 and the attendance of Charles Erickson during the time frame
13 in question. They do have attached to these an explanation
14 of the codes as to how -- so they can interpret -- the jury
15 may interpret these documents.

16 THE COURT: Have you shown those --

17 MR. ROGERS: No objection.

18 THE COURT: All right. State's Exhibits 23 and 24
19 are admitted.

20 - - -

21 State's Exhibits 23 and 24 admitted into evidence.

22 - - -

23 MR. CRANE: And with that, the state calls Robert
24 Thompson.

25 THE COURT: I will say, while the witness is coming,

1 that we do not permit cell phones to be on in this courtroom,
2 not even on a vibrating mode. And no cameras, other than
3 those authorized under Supreme Court rule, are authorized to
4 be in this courtroom, out and taking pictures. If your phone
5 goes off, we will check it until the conclusion of this
6 business day.

7 Raise your right hand, sir.

8 - - -

9 ROBERT RONALD THOMPSON,

10 being first duly sworn by the Court, testified as follows:

11 THE COURT: Would you take the witness stand.

12 - - -

13 DIRECT EXAMINATION

14 BY MR. CRANE:

15 Q. Give us your name please, sir.

16 A. Robert Ronald Thompson.

17 Q. And what was your occupation back in October of
18 2001?

19 A. I was a sports writer at the Columbia Tribune.

20 Q. And that's the Tribune right here in town, down the
21 street; correct?

22 A. Yes.

23 Q. How long did you have that job?

24 A. Four years.

25 Q. And what are you doing now?

1 A. I'm working in Dallas, Texas, as a loan officer for
2 Countrywide Home Loans.

3 Q. Okay. How did you know the victim in this case,
4 Kent Heitholt?

5 A. He was my sports editor. He was a close friend and
6 kind of a mentor to me.

7 Q. Show you what's marked as State's Exhibits 1, 1A and
8 1B. Do you recognize the bigger guy in that photo -- those
9 two photographs?

10 A. Yes, sir.

11 Q. And who's this individual hugging him there?

12 A. That's Jim Robertson, our managing editor.

13 Q. Okay. What was Kent's position at the Tribune?

14 A. He was the sports editor.

15 Q. And what -- briefly could you explain to us what
16 that entailed, being a sports editor.

17 A. He -- just in charge of the sports department. He
18 oversaw, you know, all of us, handed out story assignments,
19 edited our stories, laid out the paper, laid out each page,
20 and sized the photos.

21 Q. Did he do any writing himself?

22 A. Sure. He did lots of writing as well.

23 Q. Can you tell us a little bit about what Kent's
24 normal work day, if there was a normal work day, what it
25 would have been like?

1 A. Yeah. We all -- we all worked kind of odd hours. I
2 mean, our normal work day was -- you know, we'd get in before
3 9:00 in the morning, and we would work 'til about 1, which is
4 when the afternoon paper had to be off the floor. After 1,
5 we would go eat lunch usually, and then we would -- some of
6 us either had press conferences to go to or, you know, games
7 to cover that evening. So we would kind of adjourn for the
8 day sometimes. Or other people -- other times we would just
9 go back to the office after lunch and finish up what we were
10 working on.

11 Usually Kent would go back to the office after lunch
12 and kind of get started planning the next day's paper. And
13 then he would usually knock off around 3 or so, go pick up
14 his kids from school, or, you know, wherever they were at,
15 and then he would come back in about 8, 9:00 at night and
16 stay, you know, until 1, 2:00 at night.

17 Q. The Tribune is a daily paper?

18 A. It's daily. And then we're -- afternoon, Monday
19 through Friday, and then mornings on Saturday and Sunday.

20 Q. Does the sports department have its own area in the
21 building?

22 A. Yes, sir. We kind of had our own little room there.

23 Q. And how many -- when you were employed there, back
24 at the time of this homicide, how many sports people were
25 there? How many guys did you work with? Or gals. I

1 shouldn't be sexist.

2 A. We had a sports editor, Kent; assistant sports
3 editor; then we had, like, four full-time writers like
4 myself, including myself; and then we had some part-timers
5 that just covered stories. You know, per-story basis.

6 Q. How many people -- can you estimate how many people
7 worked in the main Tribune -- in the building itself?

8 A. I'd say at least several hundred.

9 Q. Okay.

10 A. Hundred to two hundred somewhere.

11 Q. The 31st of October, 2001, when did you get to work?

12 A. I covered a game that night, and I was planning on
13 writing my story from home for the next day. I usually did
14 that, rather than to have to go in at night. And -- but on
15 this particular night I had to research a fact for one my
16 stories, so I came in about a little after midnight to use
17 the microfilm to call up an old newspaper. And so I didn't
18 even get there until a little after midnight that night.

19 Q. While you were -- well, let me ask you, what were
20 you driving that night?

21 A. A Honda Civic.

22 Q. And where did you park?

23 A. Facing Providence, in the parking lot right behind
24 the building, kind of behind where Enterprise Rental Car is
25 right now.

1 Q. Is it the same parking lot where Kent parked?

2 A. Yes.

3 Q. Okay. Do you remember who was in the sports area
4 while you were there that night?

5 A. Yes, sir. It was -- Kent was there; our high school
6 writer at the time, Russ Baer, was there; and our -- one of
7 our part-timers, Michael Boyd, was there.

8 Q. Okay. Anything unusual that night? I mean, up
9 until when Kent left?

10 A. No. It was kind of a typical night. I mean -- the
11 only thing unusual was the fact that I was in there that
12 late, you know. I'm usually --

13 Q. You usually weren't in there that late?

14 A. No. I usually tried to work from home at night.

15 Q. What time, approximately, do you remember Kent
16 leaving to go home or taking off for the night?

17 A. Usually about the same time he always did. I mean,
18 about -- a little after -- I'd say about between five and ten
19 after 2.

20 Q. And that was it. He was going home?

21 A. Yeah. He was like, "See you guys. I'm out of
22 here." He's like, you know, "Don't work too late. See you
23 in the morning."

24 Q. What about Russ Baer? What did he do at that point?

25 A. We were both sitting at our desk working.

1 Q. Okay. So you and Russ stayed where you were at?

2 A. Right.

3 Q. What about Mike Boyd?

4 A. He left -- walked out the door with Kent.

5 Q. We've got an exhibit in evidence that indicates,
6 it's State's Exhibit 31, that indicates Kent logged off of
7 his computer at 2:08 a.m. Anything unusual about that?

8 A. No. That was about the same time -- at 2:00 -- at
9 least -- I don't know if the systems still do that down
10 there, but at the time, if you log -- if you wanted to do any
11 kind of pagination, which is the layout program, you had to
12 log off at 2:00, and you couldn't, like, log back in until,
13 like, 6:00 in the morning, just while the system updated or
14 whatever it needed to do. But you could still use Word and
15 some of the basic programs. So that -- Russ and I were
16 finishing up our stories for the next day. And then Kent and
17 Mike had done all they could do, so they had to log off.

18 Q. Okay. What happened after Kent left?

19 A. It was about 15, 20 minutes later, the -- two
20 members of the cleaning crew came -- came into the sports
21 department. And they were kind of upset or excited. And the
22 girl asked -- I can't remember her name. Shawna, I think.
23 She came in and she was like, "Where's Kent? Where's Kent?"
24 And Russ and I -- and I kind of looked up from my computer,
25 and I was like, "Well, he left 15 minutes ago." And they

1 said -- or she said, "Well, his car's still out there." And
2 about -- and then Jerry walked up and he said, "There's two
3 guys standing out by his -- the car, and I think somebody's
4 hurt." And that's when I -- I grabbed my keys and just tore
5 on out the side door.

6 Q. All right. When you went outside, do you have a
7 memory of which of the doors out to the parking lot you left
8 from?

9 A. Yes, sir. The -- the side entrance to the Tribune.

10 Q. Was it a swinging door or one of the dock garage
11 type doors?

12 A. No. It was the swinging door.

13 Q. Okay. There's two of those.

14 A. Right.

15 Q. Was it the one that --

16 A. We didn't usually use the dock entrance. We used --
17 we had a key to the side door.

18 Q. Okay. It's the one that's right down on the --

19 A. Right.

20 Q. -- parking lot --

21 A. Uh-huh.

22 Q. -- floor, but you don't go down steps.

23 A. You do go down the steps, and then you're --

24 Q. You do go down steps or you don't?

25 A. You go down steps inside.

1 Q. Oh. Okay. Then you're out on the pavement when you
2 come out the door?

3 A. Right.

4 Q. Okay. And what happened? You went outside. And
5 tell us what you did.

6 A. I went outside and immediately looked at Kent's --
7 looked towards Kent's car. And I could see him laying
8 underneath the car, kind of half underneath, half -- it
9 was -- his head was by the -- kind of by the left rear tire.
10 And I just -- I mean, I just kind of locked in on him and ran
11 over to him and was, you know, yelling, you know, "Kent.
12 What happened? Kent." You know. I --

13 Q. So when you ran out the door -- well, let me
14 rephrase that. You left the sports area in a hurry, and you
15 hit the door running, if you will?

16 THE COURT: You need to speak your answer. Say yes
17 or no.

18 A. Yes.

19 Q. All right. And you're running and you see Kent.

20 A. Right.

21 Q. Okay. And I interrupted you. You said you were
22 yelling his name. Tell us what happened when you got to the
23 body.

24 A. Well, I -- I mean, I ran up to the car and I, you
25 know, I kind of knelt down beside him and I was shaking him

1 and I was saying his name and I was like, "Kent. Kent, what
2 happened? Kent." You know. "Wake up, Kent."

3 Q. Was there -- was he responsive at all?

4 A. No, sir.

5 Q. What did you note about blood?

6 A. It was everywhere. It was --

7 Q. Other than you, who else ran outside?

8 A. It seemed like 20 or 30 seconds later, the -- Jerry
9 and Shawna came back outside, at the door that -- they came
10 outside the door, and I yelled at them. I said, "Kent's hurt
11 bad. Call 911." And --

12 Q. So they weren't over at the body?

13 A. No. They were kind of -- just outside.

14 Q. Okay.

15 A. And I turned and yelled at them. I said, "Kent's
16 hurt. He's hurt really bad." I said, "Go call 911." And
17 about that time Russ Baer had come outside. And he came over
18 to, you know --

19 Q. So he came on out to you --

20 A. Right.

21 Q. -- with Kent?

22 A. Right.

23 Q. Okay. Can you describe for us how Kent's body was
24 positioned when you first found it?

25 A. He was -- his lower body -- his legs and stuff were

1 kind of underneath the back end of the car. His upper body
2 was kind of -- he was kind of slumped over on his left side,
3 on his -- not really on his stomach, but kind of halfway on
4 his side and on his stomach.

5 Q. Was he face up or face down?

6 A. He was, like, face down. Kind of (indicating).

7 Q. Was his -- was his face on the pavement?

8 A. It was either on the pavement or, like, laying on
9 his left arm, partially on the pavement.

10 Q. Okay. Now after you ran up and knelt down by him
11 and you said you yelled at him and shook him, what did you
12 do? Well, let me ask you this. And Russ came out.

13 A. Right.

14 Q. To you and Kent. What happened then?

15 A. We took his -- I took his pulse on his neck, and
16 there was no pulse. And I think -- we checked -- one of us
17 took the pulse on his wrist, and there was no pulse. The
18 whole time we were trying to talk to him, trying to get some
19 sort of response. And, you know, we weren't sure what to do.
20 One of us was like, "Well, let's -- let's roll him over. We
21 got to, you know, roll him over, you know." I don't know
22 exactly why we did it, but we rolled -- one of us
23 supported -- I think I supported his head, and Russ kind of
24 rolled his shoulder back over. So we got him on his back,
25 just to see -- I mean, I mainly wanted to just get a look at

1 him. Because I couldn't even really look at his face that
2 well, the way he was laying before us. So we rolled him
3 over. And there was no response when we rolled him over.

4 Q. Okay. Well, no response when you rolled -- did you
5 check for -- check his wrist and neck pulse again, trying to
6 get something?

7 A. Yeah.

8 Q. So you did that before and after you turned him
9 over?

10 A. Yes, sir.

11 Q. Okay. Or rolled him over, I should say.

12 A. (Nodding head up and down.)

13 Q. Did you see anyone outside, on or near the parking
14 lot when you ran out there?

15 A. No, sir.

16 Q. Okay. And in any event, where was your focus?

17 A. Yeah, I was just concerned about Kent. I mean, I
18 didn't really -- I just kind of locked in on that and I was,
19 you know, just frantic, trying to -- trying to help him.

20 Q. What happened after you'd rolled him over and you
21 and Russ checked for his pulse? Who eventually arrived?

22 A. I'd say, you know, five to ten minutes later the
23 police showed up first. And there was at least three cars, I
24 believe, and there was, like, I'd say, seven or eight police
25 officers on the scene first.

1 Q. Did it seem like a long time while you were waiting
2 for somebody to show up?

3 A. Yeah.

4 Q. Okay.

5 A. I mean --

6 Q. Did you time that?

7 A. I didn't time it, but it seemed like forever.

8 Q. You were out there with your co-worker, bleeding.
9 Police showed up.

10 A. (Nodding head up and down.)

11 Q. Initially, was it one officer, followed by others?

12 A. Yes, sir.

13 Q. Were those uniformed police officers that first
14 arrived initially?

15 A. Yes.

16 Q. And within a short period of time after the first
17 one, about how many police officers arrived at the scene? In
18 your estimate.

19 A. Seven or eight.

20 Q. Okay. A number of patrol cars, activity?

21 A. (Nodding head up and down.)

22 Q. And --

23 THE COURT: That's a yes?

24 THE WITNESS: Yes, sir.

25 Q. During --

1 MR. CRANE: I'm sorry, Judge.

2 Q. During that sequence, what other emergency personnel
3 arrived?

4 A. The paramedics showed up shortly after that.

5 Q. All right. And do you remember how many of those
6 people arrived?

7 A. Four or five.

8 Q. All right. And -- now, were you still on the
9 parking lot when all of this was going on?

10 A. Yes, sir.

11 Q. Okay. Were you there -- well, strike that. What
12 did you see the medical personnel, the ambulance people,
13 paramedics, whatever you want to call them, do with respect
14 to Kent?

15 A. You know, they were trying to revive him. They cut
16 open his shirt and, you know, tried CPR. And they did the
17 defibrillator. You know, tried to shock him. You know, we
18 were kind of standing off in the -- you know, 20 yards away,
19 so I didn't see everything that they did, but, you know, they
20 were just trying --

21 Q. You saw them --

22 A. They were trying to bring him back, yeah.

23 Q. You saw them making efforts to work with him.

24 A. Yes.

25 Q. Okay. When did you talk first with somebody with

1 the police?

2 A. Shortly after the first officer arrived. I mean,
3 she got out and immediately asked us what happened.

4 Q. How long did you stay around the scene? Well, I
5 realize you can't necessarily give me an exact estimate, but,
6 I mean, were you around for a while?

7 A. Yes, sir.

8 Q. Okay. I mean, it wasn't like you immediately left
9 after you saw the paramedics working on him?

10 A. No. I was there for 45 minutes to an hour.

11 Q. In fact, could you just drive off?

12 A. No.

13 Q. How come?

14 A. They wouldn't let -- they had our cars all taped in
15 to the crime scene. They said we'd have to get them in the
16 morning.

17 Q. The police tape went around the perimeter of the
18 parking lot?

19 A. Right.

20 Q. How did you eventually leave?

21 A. Kent's son Vince heard what happened and drove up to
22 the paper, and I met him kind of out front, because I didn't
23 want him to see his dad laying, you know, in the parking lot.
24 So I pretty much -- I rode with him home that night.

25 Q. Before you left, in addition to the uniformed police

1 officers, did you see a plainclothes -- what appeared to be
2 plainclothes or non -- you know, you know, regular police,
3 uniformed personnel?

4 A. Yes, sir.

5 Q. And you mentioned that Mr. Heitholt's son arrived
6 and drove you off? Got you out of there for a while?

7 A. Right. We went -- we went down to the major crimes
8 office.

9 Q. Do you remember any other civilians, not medical
10 personnel, not police officers, that you saw that night, at
11 the -- down at the scene?

12 A. I saw Jim Robertson, our managing editor.

13 Q. He's the guy in the lower photo there with Kent?

14 A. Right. And Jack Waters, publisher of the paper, was
15 there. And -- you know, nobody was -- this was obviously
16 outside the actual crime tape. Everybody was kind of --
17 there was a lot of people gathering by that time.

18 Q. Let me show you photographs; okay, sir?

19 A. Okay.

20 Q. These are some photographs that are in evidence
21 as -- these are some still photographs that are in evidence
22 that were taken off the videotape of the crime scene that
23 night.

24 MR. CRANE: And Judge, if I could, I'd ask the
25 witness to step down.

1 THE COURT: You may step down, sir.

2 Q. If we look up here in 13A, do you see your vehicle
3 in that photograph?

4 A. Yes, sir.

5 Q. Could you show the jury where that is?

6 A. (Indicating.)

7 Q. Okay. So that was your car?

8 A. Yes, sir.

9 Q. Okay. 13B isn't there any more, but do you
10 recognize what that was?

11 A. Yes, sir. The Dumpster for the -- I think the KFC
12 or whatever restaurant that was.

13 Q. Okay. Dumpster enclosure right by the park -- we
14 see it right by your car, is that correct, in the other
15 photo?

16 A. Yes.

17 Q. Okay. 13C is a perspective looking back at the
18 building. 13D, do you recognize this vehicle in that
19 photograph?

20 A. Yes, sir. That was Kent's car.

21 Q. And around this rock corner and up that alley you'd
22 go to Fourth Street; is that right?

23 A. Correct.

24 Q. 13E, there is a police car in the photograph?

25 A. (Nodding head up and down.)

1 Q. And you were there while a lot of that was going on?

2 A. Yes, sir.

3 Q. And over in this area are some individuals that were
4 standing around as the police worked the scene?

5 A. Right.

6 Q. Okay. And 13F then is a photograph of this van
7 that's previously been identified as Jerry Trump's. And the
8 light pole.

9 A. (Nodding head up and down.)

10 Q. All right. Now, I want to ask you if you recognize
11 what's marked for identification as State's Exhibit 11, 11A
12 and 11B. Are these fair and accurate depictions of the
13 Tribune area as it appeared on -- close in time to when this
14 crime occurred?

15 A. Yes, sir.

16 Q. Okay. You note the Dumpster --

17 A. (Nodding head up and down.)

18 Q. -- enclosure there?

19 A. Uh-huh.

20 Q. Okay.

21 MR. CRANE: Your Honor, I'd ask to admit -- or I
22 would offer State's Exhibit 11, 11A and 11B.

23 THE COURT: Is there an objection?

24 MS. BENSON: No objection, Your Honor.

25 THE COURT: State's Exhibits 11, 11A and 11B, are

1 admitted.

2

- - -

3 State's Exhibits 11, 11A and 11B, admitted into
4 evidence.

5

- - -

6 Q. Looking at 11A, Fourth Street, parking lot of the
7 Tribune. Correct?

8 A. (Nodding head up and down.)

9 Q. There's a tree right here where Kent's vehicle would
10 have been, in this area?

11 A. Yes.

12 Q. And then do you -- well, do you see Providence Road?

13 A. Yes, sir.

14 Q. Okay. Can you point it out for the jurors, please?

15 A. (Indicating.)

16 Q. Providence. And then the alley that we talked about
17 back here on the other photograph, can you show them where
18 that runs on either of these two photographs? If you look
19 down here on 11B.

20 A. (Indicating.)

21 Q. Okay. And the -- did I already have you point out
22 the Dumpster enclosure?

23 A. Yes.

24 Q. Obviously all these cars weren't on the lot.

25 A. Correct.

1 Q. But this is an accurate aerial of -- close in time
2 to whenever it was?

3 A. (Nodding head up and down.)

4 Q. Okay.

5 THE COURT: Is that a yes?

6 THE WITNESS: Yes.

7 Q. Sir, I want to show you what's marked for
8 identification as 15, 15A through 15H. Ask if you recognize
9 what's in this series of photographs.

10 A. Yes, sir.

11 Q. Are these fair and accurate depictions -- and let me
12 make sure I phrase this correctly -- fair and accurate
13 depictions of the area where you found Kent, the body, as it
14 was after you and Russ Baer turned him over?

15 A. Yes.

16 MR. CRANE: Your Honor, I would offer State's
17 Exhibit 15, 15A through 15H.

18 MS. BENSON: No objection, Your Honor.

19 THE COURT: State's Exhibits 15 and 15A through H
20 are admitted.

21 - - -

22 State's Exhibits 15, 15A through 15H, admitted into
23 evidence.

24 - - -

25 Q. Okay. Now Mr. Thompson, directing your attention to

1 15B, C, and D for the moment, the body had been in what
2 position -- and maybe you can describe it best in 15E as
3 well. If you could describe how it was when you, and I know
4 it's not pleasant, but when you first went and found it.

5 A. He was laying -- his legs were kind of under the
6 back end, kind of sticking out that way, and his head was --
7 head and arms were, like, ,right about here, and he was kind
8 of laying on his left side.

9 Q. So if he's rolled over, he would be more in that
10 position.

11 A. Correct.

12 Q. Okay. Now I want to direct your attention to 15F.
13 When you and Russ turned the victim over, you said you did
14 what with his head?

15 A. Just kind of supported it so his head didn't conk
16 back on the pavement.

17 Q. Okay. So there -- we'll have some discussion about
18 this later, but there's some spatter from this blood-pooling
19 area in 15F?

20 A. (Nodding head up and down.)

21 Q. That was not something that you created --

22 A. That's correct.

23 Q. -- when you were out there.

24 A. No, sir.

25 Q. Okay. Now also in 15F -- well, let me ask you, do

1 you remember noticing anything by the victim's head area when
2 you were out there?

3 A. I re -- I distinctly remember the belt buckle.

4 Q. Okay. And that's in 15F.

5 A. (Nodding head up and down.)

6 Q. Okay. Now the position of the belt buckle, as far
7 as you know, did not change.

8 A. Right. We didn't touch it.

9 Q. I mean, you didn't move it.

10 A. I didn't -- no. Neither one of us touched it.

11 Q. 15G and 15H show some items that were underneath the
12 car. Do you remember any -- noticing any of those with any
13 particular -- do you remember seeing those?

14 A. I remember -- I remember seeing some stuff on the
15 ground. I didn't, you know, stop to see what it was.

16 Q. Okay. You didn't handle any of that?

17 A. No.

18 Q. Okay. 15A here's obviously also after the police
19 had arrived; correct?

20 A. Right.

21 Q. And again, another shot of what?

22 A. My car.

23 Q. Okay. Also showing you State's Exhibit -- this is
24 in evidence -- State's Exhibit 14. 14A here would not be the
25 position -- this is a perspective from the building?

1 A. (Nodding head up and down.)

2 Q. But that would not be the original location of the

3 body; is that correct?

4 A. No. That is not how he was laying when I walked up

5 to him.

6 Q. And then you see these are coming from a different

7 angle --

8 A. (Nodding head up and down.)

9 Q. -- back to the building. 14B.

10 A. (Nodding head up and down.)

11 Q. 14C.

12 A. (Nodding head up and down.)

13 Q. One more thing I wanted to show you here.

14 Let me show you what's in evidence as State's

15 Exhibit 99 and ask if you recognize that vehicle. And if so,

16 what you recognize it as.

17 A. Yes, sir. That's the car of Mike Boyd, the

18 part-time --

19 Q. The guy you talked about that went out with Kent?

20 A. (Nodding head up and down.)

21 Q. Okay. Is there anything -- how is it you recognize

22 that? I don't know if you can see it with the glare or not.

23 A. Yeah. He's got the Southeast Missouri sticker and

24 the Sikeston Bull Dogs sticker.

25 Q. Little Sikeston Bull Dog thing there. And what is

1 it? It's Southeast Missouri?

2 A. (Nodding head up and down.)

3 Q. Okay. That's what you remember in particular on
4 this vehicle?

5 A. Yes. He was real proud about Sikeston.

6 Q. Okay. You can return to the stand, sir.

7 MR. CRANE: Your Honor, at this time the state would
8 offer, through Mr. Thompson, the videotape of the crime scene
9 that was taken obviously after the police arrived that night.
10 And it's State's Exhibit 32. And Mr. Weis has been kind
11 enough to let me play it on his equipment.

12 MS. BENSON: No objection, Your Honor.

13 THE COURT: No objection?

14 MR. CRANE: There's no audio.

15 THE COURT: All right. State's Exhibit 32 is
16 admitted.

17 - - -

18 State's Exhibit 32 admitted into evidence.

19 - - -

20 THE COURT: You're asking to display this to the
21 jury now? To publish it to the jury?

22 MR. CRANE: Yes, Judge.

23 THE COURT: You may do so.

24 (Videotape playing.)

25 Q. That's your car there?

1 A. Yes, sir.

2 (Videotape playing.)

3 Q. Whose white car is that?

4 A. That's Russ's car.

5 Q. Russ Baer?

6 A. Yes.

7 (Videotape playing.)

8 Q. Who's the guy on the right?

9 A. I believe that was Jerry.

10 Q. The janitor?

11 A. Yes.

12 (End of tape.)

13 Q. Do you remember if the car door was open or

14 closed -- excuse me, the driver's side -- driver's door was

15 open or closed when you went out there?

16 A. I don't remember for sure. I think it was closed.

17 Q. You were -- did you close it?

18 A. No, I didn't close it.

19 Q. Okay. Obviously, Mr. Thompson, there was a lot of

20 blood on the pavement. When you went up and -- you know,

21 first got to Kent and shook him and took his pulse -- tried

22 to take his pulse and then rolled him over and tried to take

23 his pulse again, did you step in blood?

24 A. I might have.

25 Q. I mean, there was a lot of blood there. Tough not

1 to.

2 A. Yeah.

3 Q. And Russ was right there with you?

4 A. (Nodding head up and down.)

5 THE COURT: Is that a yes?

6 THE WITNESS: Yes.

7 Q. Okay. Do you remember what kind of shoes you had
8 on?

9 A. I know I had tennis shoes on, but I'm not sure what
10 brand or --

11 Q. Did you notice what Russ had on?

12 A. No, sir.

13 MR. CRANE: No further questions of this witness.

14 Thank you, sir.

15 THE COURT: Counsel for the defendant may inquire.

16 MS. BENSON: Thank you.

17 THE COURT: And we have the lights coming back on,
18 but they don't come back immediately, because I think they're
19 halogen lights.

20 - - -

21 CROSS-EXAMINATION

22 BY MS. BENSON:

23 Q. You had known Kent Heitholt for some time; is that
24 right?

25 A. Yes, ma'am.

1 Q. You said he was your mentor?

2 A. Yes.

3 Q. You worked with him in Louisiana; is that correct?

4 A. He was my sports -- my sports editor at the
5 Shreveport Times.

6 Q. And then you followed him here?

7 A. Followed him up here, yes.

8 Q. To Missouri. Okay. And at the time you were
9 acquainted with Vince and living with Vince; is that correct?

10 A. Right. He -- Vince was renting out my -- the extra
11 room in my apartment.

12 Q. It was Kent's practice to work until 2 a.m.; is that
13 correct? That was a common known thing among Tribune
14 employees; is that right?

15 A. Right.

16 Q. Okay. And on this occasion, you said you believe
17 that he left around 2:10 in the morning; is that correct?

18 A. Correct.

19 Q. Okay. And you think he left with Michael Boyd? Or
20 close to the same time as Michael Boyd anyway.

21 A. Correct.

22 Q. Okay. Could you describe Michael Boyd, please?

23 A. He's a black guy in his I'd say early 30s. Kind of
24 short. Stocky.

25 Q. He's not a regular-looking, middle-aged white guy?

1 A. No.

2 Q. Okay. I'm unfortunately going to have to refer you
3 back to State's Exhibit 15 briefly. When you came out and
4 saw the body, it was face down; is that correct?

5 A. Kind of on his left side. Kind of halfway on his
6 side and halfway on his stomach, so.

7 Q. Okay.

8 A. It was kind of like -- kind of like that
9 (indicating).

10 Q. Okay. And you say that part of his legs were
11 sticking actually underneath the car; is that correct?

12 A. Right.

13 Q. And that would be underneath the back of the car?

14 A. Back end of the car.

15 Q. Okay. So when you rolled him over, you would have
16 rolled him from the direction of the wall over onto his back,
17 toward the building.

18 A. Right. He was kind of laying like that
19 (indicating). And one -- I think I supported his head, and
20 Russ just took his right shoulder and just kind of flipped
21 him like that, to his back.

22 Q. Okay. Just flipped his shoulder area?

23 A. Right.

24 Q. Okay. Now, when you found him, however, he was
25 partially under the back of the car. He wasn't up at the

1 driver's side area of the car.

2 A. No.

3 Q. Okay. He wasn't in the doorway of the car?

4 A. No. I mean, his legs were pretty much where they

5 are -- where they are.

6 Q. Okay. Right there at the rear of the car.

7 A. Correct.

8 Q. Okay. And you said that you couldn't remember for

9 sure, but you think that the car doors were closed. Is that

10 right?

11 A. Yes.

12 Q. Okay. Kent was a pretty big man, was he not?

13 A. Yeah.

14 Q. About how tall was he?

15 A. Six three.

16 Q. About how much did he weigh? Do you know?

17 A. 300, 310. Somewhere in that range.

18 Q. Okay. And when you turned the body, you and Russ

19 both kind of pushed him over? You held his head.

20 A. Just rolled him over, right.

21 Q. You just rolled him. Okay. You weren't -- you

22 didn't pull the body anywhere or push the body anywhere.

23 Just rolled him over.

24 A. No. We just wanted to roll him over.

25 Q. Okay. Now when you came out that night and ran to

1 the body, you didn't see anybody in the area at that time.

2 A. No. I just kind of locked in on -- I saw Kent
3 laying there, and that's --

4 Q. But nothing distracted you, like people running or
5 anything like that.

6 A. No.

7 Q. You didn't observe running in the area or down the
8 alley?

9 A. No.

10 Q. Okay. You didn't see anybody running past the
11 alley?

12 A. (Shaking head from side to side.)

13 Q. And so obviously you didn't yell at anybody --

14 THE COURT: Excuse me. You'll have to answer again.
15 I know it's normal to shake your head, but if you'd answer
16 yes or no, please.

17 A. No, ma'am. I didn't see anybody.

18 Q. Okay. And obviously, since you didn't see anyone,
19 you didn't yell at anyone running down the alley.

20 A. No, ma'am.

21 Q. Okay. And you didn't hear anything unusual that
22 night, either inside or outside, did you?

23 A. No, ma'am.

24 Q. Okay. Now you indicated that you were alerted to a
25 problem by the janitors; is that right?

1 A. That's correct.

2 Q. And that was Shawna and Jerry?

3 A. Yes.

4 Q. All right. So both of -- both Shawna and Jerry came
5 up to your sports-writing area?

6 A. Right. They -- there's kind of like two doorways to
7 where the sports department is. And Shawna came in first and
8 said, "Where's Kent?"

9 Q. And how long did it take for Jerry to get there?

10 A. I don't know. Seconds. 30 seconds later maybe.

11 Q. Okay.

12 A. She was a little bit upset, shaken up, and then he
13 walked up. She was trying to explain what, you know, what
14 was going on.

15 Q. Okay. And at that time she was asking where Kent
16 was.

17 A. Right.

18 Q. Okay. Did Jerry say anything?

19 A. He said -- we said, "Kent left about 15 minutes
20 ago." And they -- I think Jerry said, "His car's still out
21 there, and there's two guys standing there, and I think
22 somebody's hurt."

23 Q. Okay.

24 A. And then once I heard --

25 Q. So he didn't say that he had seen Kent's body at

1 that point.

2 A. No.

3 Q. He wasn't sure what had happened at that point.

4 A. Right. I don't think -- yeah, he -- they were just
5 kind of confused.

6 Q. Okay. All right. And you don't know if they had
7 called 911 at that time?

8 A. No, they hadn't.

9 Q. They had not?

10 A. Had not.

11 Q. Okay. So it was only after you and Russ went down
12 there and you turned and told them to call 911 that they did
13 that --

14 A. Yeah.

15 Q. -- is that correct?

16 A. I ran out there first; found Kent. They -- Jerry
17 and Shawna had walked back outside by that time. I screamed
18 at them to call 911. And that's about the time Russ was
19 walking out.

20 Q. Okay. You indicated when you looked at the scene,
21 that there was blood all over the place; is that correct?

22 A. Correct.

23 Q. On the car? On the ground?

24 A. It was everywhere -- it seemed like it was
25 everywhere. I mean, it was just --

1 Q. Okay. Certainly seems like whoever did that would
2 get blood on them, doesn't it?

3 MR. CRANE: Well, Judge, I'm going to --

4 MS. BENSON: I'll withdraw that.

5 MR. CRANE: -- object. That calls for speculation.

6 THE COURT: Sustained.

7 MS. BENSON: I'll withdraw that.

8 Q. Now, you had mentioned on direct that there were a
9 number of people gathering around; correct?

10 A. Correct.

11 Q. But most of those people were outside of the
12 evidence tape area; correct?

13 A. Other than the police and the medical personnel --

14 Q. Right. Police and the medical personnel were on the
15 scene, within --

16 A. Right.

17 Q. -- the tape; right?

18 A. Correct.

19 Q. But everybody else was outside the tape?

20 A. Yes.

21 Q. Okay.

22 MS. BENSON: Nothing further.

23 THE COURT: Redirect?

24 MR. CRANE: No further questions of this witness.

25 Thank you, sir.

1 THE COURT: May he be finally excused? For the
2 state.

3 MR. CRANE: He may.

4 THE COURT: For the defendant.

5 MS. BENSON: Yes, Your Honor.

6 THE COURT: Thank you for coming. You're finally
7 excused. Would ask you, Mr. Thompson, not to discuss your
8 testimony with anyone who's yet to be called as a witness.

9 THE WITNESS: Yes.

10 THE COURT: But you're free to go.

11 THE WITNESS: Thank you.

12 MR. CRANE: Your Honor, Mr. Knight will take the
13 next three witnesses.

14 THE COURT: That's fine.

15 You may call your next witness, Mr. Knight.

16 MR. KNIGHT: Jeff Nichols.

17 THE COURT: Would you raise your right hand.

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JEFF NICHOLS,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand,
please.

- - -

DIRECT EXAMINATION

BY MR. KNIGHT:

Q. Please state your name.

A. Jeff Nichols.

Q. And where are you employed?

A. Columbia Police Department.

Q. How long have you been employed at CPD?

A. Approximately 13 years.

Q. And in what capacity are you employed there?

A. I'm a detective in the major crimes division.

Q. And how long have you been a detective there?

A. Seven, eight years, roughly.

Q. All right. And before you became employed at CPD,
where were you employed?

A. University of Missouri Police Department.

Q. And what did you do there?

A. Well, I was a road officer there for a year and then
a detective there for four years.

Q. Okay. And as a detective at CPD, the Columbia
Police Department, what is your general area of expertise?

1 A. Forensics, or crime scene investigation.

2 Q. Okay. And you are a crime scene investigator;
3 right?

4 A. Yes.

5 Q. What does a crime scene investigator do?

6 A. Well, the primary purpose is to locate or identify
7 possible items of evidence at a crime scene, collect those
8 items, and preserve those for further analysis or
9 preservation of evidence.

10 Q. Okay. And approximately how many crime scenes have
11 you investigated?

12 A. Well, roughly 1,400.

13 Q. Okay. And approximately how many murder cases have
14 you testified in?

15 A. Roughly 25 to 35. I've been involved in between --
16 well, roughly 76 death and homicide investigations
17 specifically.

18 Q. All right. And what professional organizations are
19 you a member of?

20 A. Well, the Fraternal Order of Police, the
21 International Association of Identification, which is a
22 forensics-based organization, the International Association
23 of Blood Stain Pattern Analysts.

24 Q. Okay. And what's your educational background?

25 A. I have a undergraduate degree from the University of

1 Missouri and I have 18 master credit hours from Central
2 Missouri State University.

3 Q. All right. And how many hours of police training
4 have you received?

5 A. Approximately 2,000.

6 Q. All right. What is blood stain pattern analysis?

7 A. Basically boils down to interpreting blood stain
8 patterns at a crime scene.

9 Q. Okay. And we're going to describe that a little bit
10 more later on in your testimony, but in December of 2000,
11 where did you go to learn about blood stain pattern analysis?

12 A. I went to the Miami-Dade police training academy in
13 Miami, Florida.

14 Q. Okay. And can you describe that academy that you
15 went to?

16 A. It was a week-long training program. It was taught
17 by one of the criminalists that specialize in blood stain
18 pattern analysis, Toby Wilson. The course was half or
19 roughly half classroom work and then hands-on techniques and
20 field work.

21 Q. Okay. And so this class you said lasted one week.
22 You were there eight hours a day for the entire week; is that
23 correct?

24 A. Yes.

25 Q. And how was blood stain pattern analysis taught to

1 you?

2 A. Well, we started off with, you know, history. They
3 got into the different types of classifications of stains.
4 And then we would take that information, go into a laboratory
5 setting, where they would demonstrate with actual horse blood
6 the type of stain that they were -- they would recreate that
7 stain essentially. And then show us what that stain would
8 look like.

9 Q. Okay. So part of your training then was actually
10 hands-on work with blood stain pattern analysis; is that
11 correct?

12 A. Yes.

13 Q. Okay. And what were you required to do at the end
14 of this class?

15 A. Well, we had a project that we actually had to do
16 the interpretation on the stains that was -- that had been
17 set up and give a report of what our interpretation was.

18 Q. Okay. And so you did a presentation at the end; is
19 that correct?

20 A. Yes.

21 Q. And so at the end of the class pretty much -- you
22 received a certification; is that correct?

23 A. Yes.

24 Q. In what?

25 A. Having completed the class successfully in blood

1 stain pattern analysis.

2 Q. Okay. And since December 2000, when you went to
3 this class, what did you study with regard to blood stain
4 pattern analysis?

5 A. Well, I have certainly become more involved in doing
6 analysis on stains at crime scenes. I also have several
7 texts that I review frequently. I receive information from
8 the association that I'm affiliated with on information about
9 crime stain cases and often review this information during my
10 lectures that I give.

11 Q. Okay. And so you've done blood stain pattern
12 analysis at crime scenes, is that correct, since 2000.

13 A. Yes.

14 Q. Okay. And you've done that for the Columbia Police
15 Department; is that right?

16 A. Yes.

17 Q. And other police agencies; is that correct?

18 A. Yes.

19 Q. What other police agencies have retained you to do
20 blood stain pattern analysis?

21 A. Fulton Police Department, which is in Callaway
22 County, just to the east of us here in Boone; Adair County in
23 northern Missouri; the Major Case Squad; cases that stem from
24 the Boone County Sheriff's Department.

25 Q. And you actually have taught -- you've actually

1 taught classes in this area; is that correct?

2 A. Yes.

3 Q. Where?

4 A. At the -- well, at the University of Missouri I have
5 done some lectures on blood stain pattern analysis. I've
6 also done -- provided a lecture to the International
7 Association of Identification, at their international
8 conference, which was held in St. Louis. And I talked about
9 blood stain pattern there as well as luminol.

10 Q. All right. So what is blood spatter?

11 A. Well, blood spatter is essentially blood that is set
12 into motion, and that blood then comes in contact with a
13 surface, creating spatter. A spatter pattern.

14 Q. Okay. And what is the difference between low-,
15 medium-, and high-velocity spatter?

16 A. Well, low-, medium-, and high-velocity spatter stems
17 from a group of impact patterns. That refers to the object
18 or the force that is placed upon existing blood, which
19 therefore puts that blood into motion and creating a specific
20 type of pattern.

21 Q. Well, give an example then to this jury, if you can,
22 of low-velocity spatter.

23 A. Well, low-velocity spatter would be considered blood
24 that is affected only by gravity, such as blood dripping from
25 your nose if you had a nose bleed, blood flowing from a cut

1 on your hand, blood pooling on the ground as a result of
2 gravity.

3 Q. Just blood dropping straight down to the ground; is
4 that right?

5 A. Blood dropping straight down.

6 Q. Okay. Can you also explain what medium-velocity
7 spatter would come from. What would that look like?

8 A. Well, medium-velocity spatter is typically
9 associated with assault type acts; beatings, where an object
10 is used, some type of weapon is used, to set the blood into
11 motion. And certainly there's a blood-causing act which has
12 to cause a flow of blood, but then once that blood is struck
13 again, then the blood is therefore set into motion. And
14 typically we are talking about a force between 5 and 25 feet
15 per second on average and stains that are anywhere between 1
16 and 4 millimeters in size.

17 Q. Tell us about high-velocity spatter.

18 A. High-velocity spatter produces a misting pattern on
19 blood. The blood does not travel as far as a result of this
20 mist. We see high-velocity spatter associated with gunshot
21 victims, explosions, some mechanical cases. But it's where
22 that you have blood that's impacted by some type of force
23 where we're looking at a hundred feet per second or more.
24 And you get stains that are very small. Usually a
25 millimeter -- one millimeter or less.

1 Q. Pretty much a mist a lot of the times; is that
2 correct?

3 A. A mist, yes. Now, all of these stains, we have to
4 keep in mind, possibly contain stains that would fit the
5 definition of low velocity or medium velocity in the case of
6 a high-impact case. But --

7 Q. Such as this?

8 A. -- when we -- when we look at the majority of the
9 stains -- we evaluate based on the majority of the stains.
10 And if the majority of the stains meet the criteria of a
11 specific impact group, then that's what we determine caused
12 the impact.

13 Q. So now you've explained to us the different
14 velocity -- or different spatter velocities; correct?

15 A. Yes.

16 Q. But there are two types of spatter; is that correct?
17 Impact and cast-off. Is that right?

18 A. Well, there are actually three different groupings.
19 We have passive stains. And that would be your low impact,
20 low velocity. And then you have impact, a grouping of impact
21 stains, where you're talking about your gunshot, weapon
22 impacts. And then you have transfer stains, where you're
23 talking about blood being on an object which comes in contact
24 with a surface. So you have three groups, but --

25 Q. Well, okay. I know three groups, but I'm just

1 talking about spatter right now. And you've got -- you've
2 got either cast-off spatter or we have impact spatter; is
3 that correct?

4 MR. ROGERS: I'll object to this as leading, Your
5 Honor.

6 THE COURT: Sustained as to the form of the
7 question.

8 Q. What are the two different types of spatter?

9 A. Well, you have impact spatter. And there again, the
10 cast-off is usually a result of an impact. And that spatter
11 is where you have blood that comes off of an object,
12 typically a weapon, and gravitational force or centrifugal
13 force has an impact on that liquid, blood. Therefore, when
14 the weapon is in motion, the blood then comes off the weapon
15 and then trans -- it then impacts a surface.

16 Q. That's called cast-off; correct?

17 A. Cast-off, yes.

18 Q. Okay. And explain to the jury then what impact is.

19 A. Well, that would be when the object came in contact
20 with, in this case, the victim's head.

21 Q. All right. And then the blood is dispersed; is that
22 correct?

23 A. And it would set the blood in motion, and it would
24 be a random dispersion of blood.

25 Q. What are tails?

1 A. Well, tails are associated with blood stains that
2 come in contact with a surface at an angle. And you have a
3 -- sort of a wave motion of blood once the stain impacts the
4 surface. And let's say, for example, if a stain came in --
5 the flight path of the stain or drop of blood was at about a
6 45-degree angle, once that blood contacted the surface, it
7 would elongate, in sort of an eclipse. There would be a wave
8 pattern or a wave motion. The blood would roll off and
9 create a tail at the end of that stain.

10 Q. So what do tails then indicate with regard to the
11 direction of travel of a spatter?

12 A. Well, the tail points in the direction of which the
13 blood droplet was travelling.

14 Q. So it's just the opposite of what we think it would
15 be. Usually a tail's behind something. Correct?

16 A. Yes.

17 Q. The tail's actually in front, when we're talking
18 about blood spatter; right?

19 A. Yes.

20 Q. And you already I think briefly testified about
21 blood transfer. What is that?

22 A. Well, in most cases, that is where you have an
23 object that has blood on it, and that object comes in contact
24 with an object that does not have blood on it, and it
25 therefore transfers blood to that object which is clean.

1 Q. Okay. What is luminol?

2 A. Luminol is a product that is a presumptive test --
3 that we use as a presumptive test for blood.

4 Q. All right. And in March of 2000, where did you go
5 to learn about luminol?

6 A. I went to the Kansas City crime lab in Kansas City,
7 Missouri.

8 Q. And how long did you attend classes there?

9 A. I was there for I believe three days at the Kansas
10 City police crime lab.

11 Q. Do you remember who taught the classes?

12 A. Linda Netzel.

13 Q. Okay. And what was her occupation?

14 A. She was a chemist.

15 Q. Okay. And at the KCPD crime lab; is that correct?

16 A. Yes.

17 Q. What did she specialize in?

18 A. Well, her -- I believe her overall specialty was
19 serology.

20 Q. Please describe the training you received in the use
21 of luminol there.

22 A. Well, it focussed on the history of luminol; the
23 preparation of the chemical. They actually put the chemical
24 together there at the lab. They taught how to do that. They
25 took us to a remote site where, there again, we used horse

1 blood, because luminol is not human specific. It will react
2 with animal blood as well. So we studied the reactions that
3 you would typically get with luminol, so we'd understand what
4 this chemiluminescence was.

5 When I talk about chemiluminescence, I'm referring
6 to a -- kind of a light blue glow or light. The chemical,
7 once it comes in contact with blood, will produce its own
8 light. So, in a dark environment, you can see this
9 chemiluminescence occurring.

10 Once we were -- began doing this type of work, we
11 studied a number of different substrates; surfaces that had
12 been cleaned, washed. We also looked at several different
13 other types of objects and chemicals that luminol sometimes
14 reacts with and gives what we refer to as a false positive,
15 that would not be blood, which usually involve iron objects,
16 because research has shown that the luminol is reacting with
17 the heme group in blood and the iron that's found there, and
18 that it's not uncommon for it to react with, let's say, a
19 wrench or some other type of metal object. It also reacts
20 with some types -- some household cleansers or cleaners.
21 Usually bleach products. And so we used some bleach product,
22 and she demonstrated how this reaction would also occur with
23 some bleach product.

24 Q. But when you apply the luminol to something like
25 human blood, as opposed to -- well, and you would also apply

1 it -- if you apply it to maybe rust metal or household
2 cleaning products, bleach, things like that, that luminol
3 reacts with, explain the difference in the reaction to those
4 three groups of things: Blood, rust iron, bleach.

5 A. Well, if you are getting a rust iron reaction,
6 typically you can see the object that it's reacting with,
7 because it's right there in front of you. If you are getting
8 a reaction with bleach, it also provides kind of a foggy
9 appearance. Now keep in mind that the rust reaction, as well
10 as the bleach reaction, the duration of that reaction is not
11 as long as it will be with blood. So a blood reaction is
12 more intense, the reaction is more intense, and the duration
13 is longer.

14 Q. At the end of your training there at the KCPD crime
15 lab, did you receive a certification in the use of luminol?

16 A. I did.

17 Q. Okay. And also you've kept up to date studying the
18 use of luminol on your own since then; is that correct?

19 A. Yes.

20 Q. All right. And also in connection with your job at
21 CPD, you've used luminol at crime scenes since then; is that
22 right?

23 A. Yes.

24 Q. And you've been retained by other agencies to do so;
25 is that correct?

1 A. Yes.

2 Q. All right. And you've also actually taught people
3 how to use luminol; is that correct?

4 A. Yes.

5 Q. All right. And so luminol is just basically used by
6 police agencies to detect nonvisible blood; is that right?

7 A. Yes.

8 Q. All right. Let's move along then. November 1st,
9 2001, at about 2:30 a.m., somebody contacted you at home; is
10 that correct?

11 A. Yes.

12 Q. Who was that?

13 A. My supervisor, Sergeant Monticelli. Steve
14 Monticelli.

15 Q. And what did he request you to do?

16 A. He requested that I respond to the Tribune parking
17 lot, on the north side of the building.

18 Q. Okay. And to investigate a murder; is that correct?

19 A. Yes.

20 Q. All right. And you actually went to that location;
21 is that correct?

22 A. I did.

23 Q. And when you got there, was the crime scene taped
24 off?

25 A. Yes.

1 Q. All right. And you saw Kent on the ground; is that
2 right?

3 A. Yes.

4 Q. And what injuries did you notice to him?

5 A. I noticed that there was a lot of blood on the
6 ground as well as on his person. Most of the injury appeared
7 to be around the head. And upon doing a little closer
8 examination, I noticed that there were numerous defects to
9 the head of Mr. Heitholt.

10 Q. Okay. And for orientation purposes, real quickly,
11 Detective Nichols, could you please step down off the witness
12 stand?

13 A. Sure.

14 Q. I'm going to have you look at a few exhibits here.
15 Do this orientation real quickly. They've seen this is a
16 million times. But this is over -- it's an aerial
17 photograph; is that correct?

18 A. Yes.

19 Q. Okay. And where's the Tribune parking lot on this?

20 A. Just below number 2.

21 Q. All right.

22 MR. KNIGHT: And this right here I think has already
23 been admitted, number 12.

24 MR. ROGERS: It has.

25 MR. CRANE: Correct.

1 Q. Show you what's been marked as State's Exhibit
2 Number 12. This is a diagram of the crime scene; is that
3 correct?

4 A. Yes.

5 Q. So when you initially arrived at the crime scene,
6 you saw Kent's body in this area; is that correct?

7 A. Yes.

8 Q. All right. I'm going to show you what's been marked
9 as State's Exhibit 14. Can you hold that, please? These
10 photographs have already been admitted into evidence, but
11 these pretty much just show far-away shots of Kent's car and
12 Kent; is that correct?

13 A. Yes.

14 Q. From different angles.

15 A. Yes.

16 Q. All right. And you testified that you saw blood
17 around Kent; is that correct?

18 A. Yes.

19 Q. You can see it right there; is that correct?

20 A. Yes.

21 Q. We're going to talk about that a little bit more,
22 but you saw two different blood pools; is that right?

23 A. Yes.

24 Q. All right. And where were they? If you can show
25 the jury.

1 A. Well, the first area where there was a quantity of
2 blood on the pavement was right here, just to the -- next to
3 the rear wheel of the car. And the other pooling of blood
4 was right next to the victim's head.

5 Q. Okay. I'd like to show you what's been marked as
6 State's Exhibit 15. It's already in evidence. This is a
7 photo of Kent from that angle; is that correct?

8 A. Yes.

9 Q. Here he is again. Is that right?

10 A. Correct.

11 Q. We show -- in 15C, you can see that blood is
12 streaming down towards the west; is that correct?

13 A. Yes.

14 Q. The parking lot itself is sloped; is that right?

15 A. Correct.

16 Q. From which -- it's sloped down from where to where?

17 A. From east to west. It slopes downhill.

18 Q. Okay. You can see that again here in 15D.

19 15E and 15F, what did you notice about a foot north
20 of Kent's head?

21 A. A belt buckle and a partial section of the belt.

22 Q. Okay. And what did you notice about this belt?

23 A. Well --

24 Q. Or the belt buckle?

25 A. Like I said, part of the -- or the majority of the

1 belt was missing. As clearly see there, in State's Exhibit
2 15F, the buckle had blood on it. Had some blood spatter on
3 it. And closer examination of the leather stitching area,
4 where the belt had been ripped away from it, it appeared that
5 it actually had been torn, versus cut, because you could see
6 small leather strands or fibers extending out in the
7 direction which it would have been torn apart. It was not a
8 real clean cut like you would expect to see with a
9 sharp-edged instrument like a knife or a razor blade.

10 Q. Officer Nichols, if you can come back behind this,
11 this photo layout here, I'd appreciate it. I'm going to show
12 you what's been marked as State's Exhibit 35. What is this?

13 A. This is a pair of pants that Mr. Heitholt was
14 wearing the night of the murder.

15 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
16 35.

17 MR. ROGERS: No objection, Your Honor.

18 THE COURT: State's Exhibit 35 is admitted.

19 - - -

20 State's Exhibit 35 admitted into evidence.

21 - - -

22 Q. I'd like to show you, when I get over there, what's
23 also marked as State's Exhibits 36 and 37. 36, what is this?

24 A. It's Mr. Heitholt's T-shirt.

25 Q. 37, what is this?

1 A. It's Mr. Heitholt's sweater.

2 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
3 36 and 37 also.

4 MR. ROGERS: No objection, Your Honor.

5 THE COURT: 36 and 37 are admitted.

6 MR. KNIGHT: Thank you, Your Honor.

7 - - -

8 State's Exhibits 36 and 37 admitted into evidence.

9 - - -

10 Q. Detective Nichols, taking a look at the pants, first
11 of all, obviously what do we have all over the pants?

12 A. Quite a bit of blood.

13 Q. What did you notice in the right knee area?

14 A. A saturation stain.

15 Q. Okay. And the rear, what did you notice also?

16 A. There's some -- what appears to be some blood
17 clotting, blood transfer on the back.

18 Q. Now, what is this right here?

19 A. That would be a belt loop that is part of the
20 victim's pants.

21 Q. And what did you notice about the condition of this
22 belt loop?

23 A. It was torn.

24 Q. Okay. Talking about -- this is the front; right?
25 Front -- first one on the left, belt loop; is that right?

1 A. Correct.

2 Q. And then what did you notice about this belt loop
3 over here on the side?

4 A. The next belt loop is torn as well.

5 Q. Okay. The other belt loops on the back and on the
6 right, they're pretty much intact?

7 A. Those are intact.

8 Q. Okay. And 36, this is the T-shirt Kent was wearing;
9 is that correct?

10 A. Yes.

11 Q. Okay. What did you notice all over that shirt?

12 A. There again, it was saturated with blood.

13 Q. Front and back?

14 A. Yes.

15 Q. Okay. 37, this is a sweater you identified?

16 A. Yes.

17 Q. What did you notice about this?

18 A. Well, it too had a quantity of blood saturated into
19 the fabric. And there again, both of these articles had been
20 -- looked like they had been cut and opened.

21 Q. Like to show you what's been marked as State's
22 Exhibit 40. What are these?

23 A. Those are Mr. Heitholt's tennis shoes.

24 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
25 40.

1 MR. ROGERS: No objection.

2 THE COURT: State's Exhibit 40 is admitted.

3 - - -

4 State's Exhibit 40 admitted into evidence.

5 - - -

6 Q. Can you hold those for a second, please? Did you
7 notice any blood on those?

8 A. Well, there is a small amount of blood on the shoes,
9 on the sides. But we did not notice any quantity of blood on
10 the soles.

11 Q. Okay. Can you set those down, please? On the
12 ground would be good. I want to talk to you a little bit now
13 about blood stain pattern interpretation.

14 MR. KNIGHT: And this has not been admitted, to my
15 knowledge.

16 THE COURT: What exhibit are we looking --

17 MR. KNIGHT: State's Exhibit 34.

18 THE COURT: It is not admitted.

19 MR. ROGERS: I have no objection to it being

20 admitted, Your Honor. He's about to offer it, I think, so.

21 I don't -- I'm not worried about the foundation. I'm sure he
22 will explain that when he gets there.

23 THE COURT: Are you are you offering Exhibit 34?

24 MR. KNIGHT: Yes, Your Honor. 34, 34A through 34K.

25 MR. ROGERS: And no objection.

1 THE COURT: State's Exhibits 34, 34A through K, are
2 admitted.

3 - - -

4 State's Exhibits 34, 34A through 34K, admitted into
5 evidence.

6 - - -

7 Q. These are photographs basically of the inside of
8 Mr. Heitholt's car; is that correct?

9 A. Yes.

10 Q. Okay. 34A, what did you notice there? That's --
11 for the record, that is a photograph of the inside of his
12 driver's side door; is that correct?

13 A. Yes.

14 Q. Okay. What did you notice on the glass there?

15 A. There's several blood stains on the glass.

16 Q. You just put a piece of -- or somebody put a piece
17 of paper up on the outside of the glass so you could
18 photograph that; is that correct?

19 A. That's correct. The stains were on the inside of
20 the glass.

21 Q. And what kind of stains were they?

22 A. Well, those appear to be stains resulting from an
23 impact of some type.

24 Q. Okay. And can you tell the velocity?

25 A. Well, it would be -- they fall within the category

1 of medium-velocity impact.

2 Q. Okay. Something must have set these stains into
3 motion; is that correct?

4 A. That's right.

5 Q. They weren't falling straight down.

6 A. Correct.

7 Q. Okay. And once again, 34B is a close-up of A; is
8 that right?

9 A. Yes.

10 Q. And once again, it's showing the impact spatter on
11 the inside of the driver's door window; is that correct?

12 A. Yes.

13 Q. Okay. 34C, what is this right here?

14 A. That too is a blood stain.

15 Q. Okay. What kind?

16 A. There again, the stain's characteristic of
17 medium-velocity impact.

18 Q. Okay. 34D, right here, right here, what did you
19 see?

20 A. The same. A stain. Blood stain. Also
21 characteristic of a medium-velocity impact.

22 Q. And these -- all of these stains, 34C through 34F,
23 are all the driver's side door; is that correct?

24 A. Yes.

25 Q. Front driver's side door.

1 A. Yes.

2 Q. 34D, you testified about the blood there. 34B, more
3 blood on that door, inside; is that correct?

4 A. Yes.

5 Q. 34F, a particularly large stain; is that correct?

6 A. It's larger, yes.

7 Q. Okay. 34G, what is this generally?

8 A. Well, that's the floorboard.

9 Q. On the driver's side; right?

10 A. On the driver's side.

11 Q. Okay. What did you notice there?

12 A. There also appears to be a stain on the floorboard.

13 Q. Okay. Right here? It's kind of a far-away photo of
14 that; is that correct? That floorboard?

15 A. Yes.

16 Q. Stain right there; right?

17 A. Yes.

18 Q. Okay. 34I. What did you notice here? I guess you
19 can call that door frame; right?

20 A. Yes.

21 Q. Driver's side door frame?

22 A. Yes. On the lower part of the driver's side door
23 frame.

24 Q. Okay. I notice -- what did you notice there?

25 A. There were also some stains there.

1 Q. What kind of stains?

2 A. They too appeared to be impact stains.

3 Q. Low velocity?

4 A. Not necessarily up in this area, because there were
5 some stains that were up higher on the frame itself. I did
6 notice some stains along the lower edge of the frame.

7 Q. Are we talking about what's in 34J and 34K?

8 A. Yes. And this would be in the area of the rear
9 portion of the driver door frame. And along this door edge
10 of the frame there were some stains that were more
11 characteristic of blood falling in a downward direction. One
12 would say that would be characteristic of a low impact. But
13 there again, as I mentioned before, it's not uncommon to see
14 a few stains associated with a medium-impact spatter that
15 would be considered in and of itself either high impact or
16 low.

17 Q. Well, medium impact or low.

18 A. In -- well, in a medium --

19 MR. ROGERS: I'm going to object to the misleading
20 nature of the question, Judge. The witness gave a very clear
21 answer that Mr. Knight is wanting to change.

22 THE COURT: The objection is sustained.

23 Q. How is the blood information that you saw inside of
24 this car -- and you only saw blood, for that matter, inside
25 the car, in the front driver's side area; correct?

1 A. Yes.

2 Q. How is the blood information that you saw inside the
3 car consistent with Kent being in an upright position and
4 inside of his car door when he was struck?

5 A. Well, certainly you have stains that are higher on
6 the door that appear to have been travelling in that
7 direction, in a direction from, like I say, from the rear
8 portion of the door frame area toward the front. Along with
9 that, I noticed the stains at the bottom of the door frame,
10 which would suggest that the victim was standing next to that
11 door frame and blood then began to drip or fall from his head
12 or from a wound downward, striking the lower part of the door
13 frame.

14 Q. I'd like to show you what's been marked as State's
15 Exhibit 33, which is already in evidence. And now I want to
16 talk to you about blood information that you saw --

17 THE COURT: Excuse me. 33 is not in evidence.

18 MR. CRANE: Yeah, I don't think it is.

19 MR. KNIGHT: Okay. I'm sorry.

20 MR. ROGERS: If you're offering it, I have no
21 objection.

22 MR. KNIGHT: I thought it was.

23 THE COURT: You're offering it?

24 MR. KNIGHT: Yes, I am, Your Honor.

25 THE COURT: State's Exhibit 33 is admitted.

1 MR. KNIGHT: Okay.

2 - - -

3 State's Exhibit 33 admitted into evidence.

4 - - -

5 Q. And this is blood information that you saw on the
6 outside of the car; is that correct?

7 A. Yes.

8 Q. All right. And 33A, tell us what you noticed in
9 this area right here.

10 A. Well, there was a lot of blood information here,
11 but, there again, it was all consistent with this type of
12 assault. There was some blood transfer and blood pooling on
13 the ground, on the pavement, next to the rear left wheel of
14 the vehicle. There was some what appeared to be blood
15 transfer onto the hubcap of the rear left wheel. And there
16 also was blood spatter, medium-velocity spatter, resulting
17 from some type of strike to the victim, and blood therefore
18 radiated out and ran in that direction.

19 Q. All right. And over here, 33B, you can see the
20 transfer on the wheel. You can also see cast-off. Is that
21 correct? Or, more specifically, 33C. What do you see right
22 here?

23 A. Well, 33C has a unique stain pattern there next to
24 the gas cap cover. That in and of itself is consistent with
25 cast-off, which possibly occurred in very close proximity to

1 the vehicle.

2 Q. So this -- this cast-off right here, would that be
3 consistent with a weapon casting blood off in this direction?

4 A. Certainly.

5 Q. Okay. And when you looked at this closely, you
6 could tell that the tails went in this direction; is that
7 correct?

8 MR. ROGERS: Objection. That's leading.

9 THE COURT: Sustained. As to the form of the
10 question.

11 MR. KNIGHT: I'll rephrase.

12 Q. Which direction are the tails going?

13 A. Well, these blood stains were travelling in a
14 downward direction. Sort of in an angular direction toward
15 the rear tire.

16 Q. Okay. From right to left; right?

17 A. Correct.

18 Q. Okay. How is this cast-off right here consistent
19 with Kent's head being right in this area when it was struck
20 with a weapon?

21 A. Well, it was reasonable to assume, given the blood
22 information visible right here, that his head would have been
23 above the pavement, somewhere in this general vicinity,
24 depending on the angle of which the assailant was striking
25 him. Blood was on the weapon itself at that point. And as a

1 result of when it came in contact with the victim, it was
2 then set into motion and come into contact with the surface
3 of the vehicle.

4 Q. So would it be consistent with the weapon coming
5 down like this?

6 A. Certainly would, yes.

7 Q. Okay. 33F, you already testified about transfer
8 that was on this wheel; correct?

9 A. Yes.

10 Q. Okay. And how is this transfer, this big stain
11 right here, how is that consistent with Kent's head coming in
12 contact with that wheel?

13 A. Well, since Mr. Heitholt's head was the source of
14 blood in this case, blood was obviously flowing from the
15 head. There was a fairly large quantity of blood here on
16 the -- that came in contact with the wheel. As a result of
17 the quantity, you can see that blood actually began to start
18 dripping or rolling down the side of the wheel itself. In a
19 couple of places it appears that blood went all the way to
20 possibly the pavement. But that would be consistent with the
21 victim's head coming in contact with the wheel, transferring
22 a sizeable quantity of blood from the head to the hubcap.

23 Q. Okay. And back to 33C. You've already testified
24 about this cast-off you saw coming at a downward angle from
25 right to left --

1 A. Yes.

2 Q. -- correct? But besides this linear cast-off that
3 we have here, what other blood information do you see in 33C
4 and also see in the close-up of 33F, with regard to impact
5 spatter?

6 A. Well, there are stains that are also travelling in
7 an upward direction. And it can easily -- these stains can
8 easily be observed in 33C, where you note -- where you notice
9 that the tails from the elliptical stains were travelling in
10 an upward direction.

11 There are also stains that take on different shapes
12 in this particular area of the hubcap. Not all of those are
13 at a very distinctive angle here. We have some stains that
14 are probably more like 75-, 85-, to 95-degree angle. They're
15 more circular in size -- or in shape.

16 So, what this suggests to me, because some of these
17 stains are radiating out in different directions, is that
18 when the victim's head was in this area, if it --

19 Q. Now we're talking lower than in this area; correct?

20 A. Yes. Lower down --

21 Q. On the ground.

22 A. Down next to the hubcap of the wheel.

23 If the head slammed against this hubcap, that would
24 create some radial pattern to some degree, but with all the
25 blood information and the spatter information on that wheel,

1 it suggests to me that the victim was more than likely struck
2 at least once, if not maybe more, while he was right here in
3 this area. While his head was right here in this area, by
4 the hubcap of the wheel.

5 Q. All right. We haven't talked too much -- I don't
6 think we talked at all about 33H, but we have some cones here
7 on the south side -- or the north side of this vehicle; is
8 that correct?

9 A. Yes.

10 Q. And what are these cones -- why did you put those
11 cones down there?

12 A. Well, those cones just simply give a -- just a
13 reference -- they're a reference marker to the outer
14 parameter of the blood spatter that radiated northward across
15 the parking lot.

16 Q. Okay. And as you can see here, you've got a cone
17 that's about three parking spaces away from where Kent's
18 vehicle was; is that correct?

19 A. Yes.

20 Q. Okay. So we have blood spatter radiating out a
21 significant distance; is that correct?

22 A. Yes.

23 Q. All right. 33G, coming back to this, you testified
24 earlier that there were two distinct blood pools that you
25 saw; is that right?

1 A. Yes.

2 Q. And there was blood pooling right next to Kent's
3 head; correct?

4 A. Yes.

5 Q. Okay. This -- these cones, that show the outer
6 perimeter of the blood spatter that you saw in the parking
7 lot, let me ask you, how -- how are those locations, the
8 blood spatter that you found there, how is that consistent
9 with Kent's head getting slammed, one way or another, into
10 the concrete, causing the spatter to disperse that way?

11 MR. ROGERS: Objection. That's leading.

12 THE COURT: Sustained.

13 Q. Okay. Well, how is this spatter you saw consistent
14 with Kent's head getting slammed into the concrete?

15 MR. ROGERS: Same objection to the same question.

16 Q. How?

17 THE COURT: You may rephrase your question,
18 Mr. Knight. The objection is sustained.

19 Q. Explain to us, in your judgment, how this pool right
20 here, this pooling right here, this blood, could relate to
21 all this blood spatter you saw that radiated north.

22 A. Well, it was very clear, looking at the surface of
23 this parking lot, that a quantity of blood was set into
24 motion as a result of Mr. Heitholt's head striking the
25 pavement where blood existed. Therefore, with that, he

1 obviously was bleeding in that area. Blood was running from
2 his person onto the ground. His head was therefore either
3 struck with an object, his head could have been slammed onto
4 the pavement, but as a result of that impact force, blood
5 from that pool radiated out, across the pavement, and went in
6 that direction.

7 Now I can't say that every single drop, because I
8 didn't examine every single drop, came from that particular
9 event. But the majority of the blood that went in a
10 northerly direction came back, because, there again, we're
11 talking about elongated stains. And at an angle of 5 to 10
12 degrees, the stains are going to be elongated even more than
13 they would be at 35 or 40 degrees.

14 So these stains were extremely elongated, and they
15 were radiating out from the same point, what we referred to
16 as point of convergence. And that came right back to where
17 this pool of blood was right underneath the victim's head.

18 Q. Okay.

19 THE COURT: Mr. Knight, are you at a point where we
20 might take our mid-morning recess? Since it's been a couple
21 -- almost a couple hours since the jury was here.

22 MR. KNIGHT: Sure.

23 THE COURT: If you -- if there's something else you
24 need to do to finish this line of questioning --

25 MR. KNIGHT: I think this would be a good point to

1 stop.

2 THE COURT: All right.

3 Ladies and gentlemen, we will take our mid-morning
4 break.

5 The Court again reminds you of what you were told at
6 the first recess of the Court. Until you retire to consider
7 your verdict, you must not discuss this case among yourselves
8 or with others, or remain in the presence of anyone who is
9 discussing it in your hearing. You should not form or
10 express any opinion about the case until it is finally given
11 to you to decide. Do not read, view, or listen to any
12 newspaper, radio, or television report of the trial.

13 If you'll let me know when the jurors are finished
14 to come back. And I would imagine 10 or 15 minutes would
15 give them enough time.

16 The jury may be excused.

17 - - -

18 The following proceedings were held out of the presence
19 of the jury:

20 THE COURT: And I'd ask the witness to return as
21 well.

22 THE WITNESS: Thank you.

23 THE COURT: We'll see you. We'll be in recess.

24 (Recess taken.)

25 - - -

1 MR. ROGERS: I certainly will.

2 THE COURT: All right. I'd ask the prosecutor just
3 to talk to an investigator --

4 MR. KNIGHT: I will.

5 THE COURT: -- to make sure they stay downstairs.

6 MR. KNIGHT: Sure.

7 THE COURT: Even if it takes a few minutes extra to
8 get them up here.

9 MR. KNIGHT: Okay.

10 THE COURT: I don't suspect -- do you think we'll
11 finish with him before noon?

12 MR. KNIGHT: No, I don't think so.

13 THE COURT: All right. Well, then, just let your
14 investigator know.

15 MR. KNIGHT: Yeah. And I know that the witnesses
16 are down there right now.

17 THE COURT: All right. Well, just let your
18 witnesses -- or your investigator know.

19 MR. ROGERS: Thank you.

20 THE COURT: You're welcome.

21 - - -

22 The following proceedings were held in open court:

23 THE COURT: You may bring them in.

24 - - -

25 The following proceedings were held in the presence of

1 the jury:

2

- - -

3

JEFF NICHOLS,

4 resumed the stand and testified further:

5

MR. KNIGHT: May I proceed?

6

THE COURT: Yes, you may proceed.

7

MR. KNIGHT: Okay.

8

- - -

9

RESUMED DIRECT EXAMINATION

10 BY MR. KNIGHT:

11

Q. Detective Nichols, I'd like to show you what's been
12 marked as State's Exhibit 39, 39A through 39G. What are
13 those photographs of?

14

A. Those are photographs of photo markers as well as
15 footwear transfer impressions, bloody footwear tread
16 impressions, on the pavement next to Mr. Heitholt's vehicle.

17

Q. On the driver's side of the vehicle; is that
18 correct?

19

A. On the driver's side of the vehicle, yes.

20

MR. KNIGHT: And Your Honor, I'd offer State's
21 Exhibit 39, 39A through 39G.

22

MR. ROGERS: No objection, Your Honor.

23

THE COURT: State's Exhibit 39, 39A through G, are
24 admitted.

25

MR. KNIGHT: Thank you, Your Honor.

1

- - -

2

State's Exhibits 39, 39A through 39G, admitted into
3 evidence.

4

- - -

5

Q. Please step down off the stand. What's in 39A?
6 What do you see there?

7

A. Well, I see the victim's vehicle. There's a large
8 blood stain next to the rear left wheel, as well as the
9 numerical photo markers that I placed on the pavement next to
10 what appeared to me to be bloody footwear transfers.

11

Q. You got five photo markers; is that correct? 1
12 through 5?

13

A. Yes.

14

Q. All right. And then that would be depicted in 39B.
15 Defendant's C, D, E, F, G are all close-ups of 1 through 5;
16 is that right?

17

A. Yes.

18

Q. And what could you tell about these shoe prints that
19 you saw? Did you compare these shoe prints to each other?

20

A. Well, not formally. I mean, I did a -- just a
21 visual comparison right there. And I noticed that the tread
22 design was certainly different.

23

Q. How many different tread designs did you see?

24

A. Well, the visual tread patterns appeared to have
25 been generated by two different shoe tread types or styles or

1 designs.

2 Q. Okay. And of those two different tread types that
3 you saw, how do those compare to the victim's shoe tread?

4 A. They don't. They don't match the victim's shoe
5 tread.

6 Q. Okay. Stay right there for a second. Now, I'd like
7 to direct your attention to I believe it was November 3rd.
8 That evening. A couple nights after this homicide. What did
9 you and other police officers do?

10 A. We decided that it was important for us to locate a
11 trail, and we used luminol as a means to do that. And we
12 went on essentially a tracking mission, if you will.

13 Q. And where did you apply this luminol that night?

14 A. Well, I began applying luminol in the area at the
15 corner of the -- would be the northeast corner of the Tribune
16 building, right adjacent to Fourth Street, and at that point
17 traveled south on the sidewalk toward Broadway.

18 Q. I'd like to show you what's been marked as State's
19 Exhibit 42, 42A, 42B. What are these two photographs?

20 A. Aerial photographs of the Columbia Daily Tribune at
21 different angles.

22 Q. And would this help you explain where you applied
23 luminol on the 3rd and 4th of November?

24 A. Certainly.

25 Q. Okay.

1 Q. Walnut right here; is that correct?

2 A. Yes.

3 Q. Okay. So you started right here. The sidewalk, you

4 really can't see it too well right at that particular point;

5 is that correct?

6 A. Correct.

7 Q. Shaded by the trees?

8 A. Yes.

9 Q. Okay. You started there; is that right?

10 A. Yes.

11 Q. Okay. And which way did this trail go?

12 A. South, along the sidewalk, and it continued, once it

13 crossed Walnut, continued south along the sidewalk, towards

14 Broadway, which would be the next street south of Walnut.

15 Q. Okay. And so this -- this photo right here pretty

16 much gets us to Walnut; correct? And then across Walnut a

17 little ways; right?

18 A. Yes.

19 Q. And then 42B, taken from a little bit different

20 angle up there in that helicopter, because you were taking

21 the photos, weren't you?

22 A. Yes.

23 Q. All right. And we see the Tribune building again

24 right here; is that correct?

25 A. Yes.

1 Q. But we've got Providence coming at an angle like
2 this?

3 A. (Nodding head up and down.)

4 Q. Right?

5 A. Yes.

6 Q. Ash -- yeah, Ash and Walnut; is that right?

7 A. Yes.

8 Q. And this would have been Broadway, about right here
9 where this corner is; is that correct?

10 A. Correct.

11 Q. Okay. You said the luminol trail extended south on
12 Fourth, across Walnut; is that right?

13 A. Yes.

14 Q. Still on Fourth. And show us -- from here; is that
15 correct?

16 A. Yes.

17 Q. Coming down; right?

18 A. Correct.

19 Q. Where did the luminol trail end?

20 A. It ended at Broadway.

21 Q. Okay. Or trails; right? There were two trails.

22 A. Yes.

23 Q. All right. I'd like to show you what's been marked
24 as State's Exhibit 41, 41A through 41E. What are these
25 photographs of?

1 Q. It slopes downward from east to west; is that right?

2 A. That's right.

3 Q. Okay. You can actually see photo marker number 1
4 right there; is that correct?

5 A. Correct.

6 Q. Right at this corner. And what is that? What does
7 that represent?

8 A. Well, that represents a positive reaction site or
9 location.

10 Q. Okay. And you were doing this at night; is that
11 correct?

12 A. Yes.

13 Q. And why is that?

14 A. Well, luminol produces a chemiluminescence, which
15 is -- can be observed or seen best in darkness.

16 Q. Okay. Photograph 41B, what does it show?

17 A. There again, it shows the reactionary sites on the
18 sidewalk as the trail travels south on Fourth Street.

19 Q. Corresponding to this area right in here; is that
20 right?

21 A. Yes.

22 Q. Okay. 41C, what does that show?

23 A. 41C also has photo markers laid out on the sidewalk
24 at each reactionary site. And that is about halfway or so
25 down the block, almost to Walnut Street. The stop sign would

1 be at Walnut Street.

2 Q. Right in this area; is that correct?

3 A. Yes.

4 Q. Okay. Now, I see two different lines of photo
5 markers here. What does that mean --

6 MR. ROGERS: Objection, Your Honor.

7 THE COURT: I'm sorry?

8 MR. ROGERS: That's leading.

9 MR. KNIGHT: Okay. I'll rephrase it.

10 THE COURT: You may.

11 Q. How many lines of photo markers do you see in 41C?

12 A. Well, there are two.

13 Q. All right. And what did this indicate to you?

14 A. Well, it appeared that -- there appeared to be two
15 different paths of travel or two different -- possibly two
16 individuals travelling down the same direction.

17 Q. Okay. Two different shoe print paths; is that
18 correct?

19 A. Yes.

20 Q. Okay. And let's -- let's start back here at 1,
21 though. What did you notice about the distances between each
22 luminescence or each luminol reaction that you obtained,
23 starting at this point right here when you first detected
24 luminol, going south. As you went south, what did you notice
25 about the differences in the spacing between the reactions

1 you were getting?

2 A. Well, it was interesting, because at the corner of
3 the building, the spacing between the reactionary sites was
4 consistent with a casual step.

5 Q. A walk?

6 A. A walk, yes. As we traveled further down the
7 sidewalk, those spaces began to get a greater distance
8 between the two --

9 Q. Indicating --

10 A. -- between each reactionary site, which suggested to
11 me that whoever made this, this path, was walking at first
12 and then began to run.

13 Q. Okay. And you said that where number 1 is, that's
14 where you first detected what you thought was blood; is that
15 correct? Nonvisible blood. With luminol. Right?

16 A. Yes.

17 Q. Okay. Now -- and then these all, as you said,
18 they've gone -- they go south. Did you at any time apply
19 luminol to this area, this sidewalk going north of that -- of
20 photo marker number 1?

21 A. No.

22 Q. Okay. So you didn't apply luminol anywhere in this
23 area; is that correct?

24 A. That's correct.

25 Q. All right. 41D and 41E, what are these photographs

1 of?

2 A. 41D is, there again, the sidewalk, travelling south
3 along Fourth Street, right at the intersection of Walnut.

4 And 41E is further south on Fourth Street, approaching the
5 intersection of Broadway.

6 Q. Okay. And where did the luminol trail end, once
7 again?

8 A. It totally faded out by the time I got -- or I
9 reached Broadway.

10 Q. Okay. So, once again, this is Broadway, correct,
11 down here?

12 A. Yes.

13 Q. And the luminol trail faded right here.

14 A. Yes.

15 Q. And this first -- you basically applied luminol two
16 different nights; is that correct?

17 A. Yes.

18 Q. The first night was November 3rd; is that right?

19 A. Yes.

20 Q. And that's when you got to Walnut right here; is
21 that correct?

22 A. Correct.

23 Q. And then the next night, on the 4th, you applied in
24 this area between Walnut and Broadway, is that correct, on
25 the 4th.

1 A. Yes.

2 Q. All right. You can stay down here for a little bit
3 more. You collected various items of evidence at the crime
4 scene; is that correct?

5 A. Yes.

6 Q. Okay. I'm going to show you what's been marked as
7 State's Exhibit 44, 44A through 44J. What is this? Or what
8 are these?

9 THE COURT: If you'll wait just a second. I don't
10 know that defense counsel has seen the exhibit that you're
11 examining. Don't turn it towards the jury.

12 MR. ROGERS: I've seen them all. That's fine.

13 Q. What are these photographs of?

14 A. 44A through 44I are of photographs taken at the
15 crime scene, and 44J is a sketch of the crime scene.

16 Q. Okay.

17 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
18 44A through 44J.

19 MR. ROGERS: No objection.

20 THE COURT: State's Exhibits 44, 44A through J, are
21 admitted.

22 MR. KNIGHT: Thank you, Your Honor.

23 - - -

24 State's Exhibits 44, 44A through 44J, admitted into
25 evidence.

1

- - -

2 Q. What are these letter markers you have there
3 depicted on those photographs?

4 A. Well, those markers are in place as a reference,
5 visual reference.

6 Q. Okay. And what did you collect in the area that's
7 marked A?

8 A. Do you mind if I get down --

9 Q. Sure.

10 A. -- and take a closer look?

11 That would be a small pile of cat food.

12 Q. Okay. B, what did you see there?

13 A. Some coins. Primarily pennies.

14 Q. Where were those located? And right down here we've
15 got 44J, is a diagram that you made; is that correct?

16 A. Yes.

17 Q. And this shows the location of each of these items
18 pictured in these photo markers on here; is that correct?

19 A. Yes.

20 Q. So going back to A, you said that you saw cat food;
21 is that right?

22 A. Yes.

23 MR. KNIGHT: And can everybody see this little
24 diagram right here? Can you see that?

25 (Jurors nodding their heads up and down.)

1 MR. KNIGHT: Okay.

2 Q. A was where? Where did you find that again?

3 A. There was a small retaining wall right along the
4 western edge of the parking lot. And the cat food had been
5 placed on top of that small retaining wall.

6 Q. What was this area right in here?

7 A. That was a Dumpster.

8 Q. Okay. Once again, we've got Kent's car parked right
9 here; is that correct?

10 A. Yes.

11 Q. Okay. So we've got A, you collected that. B, you
12 testified about the pennies. Where were those found?

13 A. That was a small drive area just to the west of the
14 parking lot. And the pennies were in the drive.

15 Q. C, what is this?

16 A. That's the belt buckle.

17 Q. Okay. And you collected that also. And you
18 testified before that was just north of Kent's head; is that
19 correct?

20 A. Yes.

21 Q. D, that was a dime?

22 A. Dime.

23 Q. Marked "D" down here; is that right?

24 A. Yes.

25 Q. Okay. So also in close proximity to Kent. 44G,

1 right here, do you remember what that was?

2 A. I want to say that may have been a schedule. It was
3 a document, I believe.

4 Q. Could this have been a Jiffy Lube receipt? I can
5 show you, if you'd like to see.

6 A. I'm not sure. I thought that was a document
7 possibly, but it's difficult to see in that photograph.

8 There should be a log. Evidence log.

9 Q. I'd like to show you what's been marked as State's
10 Exhibit 52. Did you collect this?

11 A. Yes. And the photo marker G.

12 Q. So that would be G right there; right?

13 A. That would correspond with that item, yes.

14 Q. Okay. Then we've got H right here. What is that?
15 Well, actually let's get back to F. I skipped over that.
16 What is that?

17 A. A Snickers candy bar bag that was empty.

18 Q. E, you skipped on that too. What did you find there
19 generally? And I'm going to show you these exhibits in a
20 second.

21 A. That was sort of a collective area. That included
22 numerous documents and schedules and things, along with a
23 piece of glasses. Lens from reading glasses.

24 Q. Underneath the driver's side in Kent's car; is that
25 correct?

1 A. Yes. And his cell phone.

2 Q. Okay. And again, F up here is just south; is that
3 right?

4 A. Yes.

5 Q. H, what is this?

6 A. Well, this is a manhole cover, if you will. And
7 there was a paper bag lying on top of the manhole cover.

8 Q. And I, what is that?

9 A. A piece of Styrofoam of some type.

10 Q. Okay. If you can just dig in this box there, we're
11 going to go through -- those exhibits should be pretty much
12 in order. 45, do you see that in there?

13 A. Yes.

14 Q. Those are the pennies you collected?

15 A. They correspond --

16 MR. ROGERS: Am I to assume that, after he
17 identifies them, you're offering them?

18 MR. KNIGHT: Sure.

19 MR. ROGERS: Okay.

20 Q. Those are the pennies that you found that you just
21 testified about; is that correct?

22 A. Photo marker B.

23 Q. Okay.

24 MR. ROGERS: No objection.

25 Q. 46 --

1 THE COURT: Excuse me, Mr. Knight. Are you offering
2 that now?

3 MR. KNIGHT: No. I was going to wait until --

4 MR. ROGERS: Oh, I thought you were going to offer
5 them -- I don't care.

6 MR. KNIGHT: No. Not one at a time.

7 THE COURT: All right. I didn't understand from
8 defense counsel's statement.

9 MR. ROGERS: I didn't either.

10 Q. 46, what is that?

11 A. The cat food, which was in photo marker A.

12 Q. Okay. 47?

13 A. The belt buckle.

14 Q. Okay. 48, do you see that in there?

15 A. Yes. The lens from a pair of glasses.

16 Q. And those were found where?

17 A. Underneath the vehicle.

18 Q. Okay. 49, do you see those?

19 A. Miscellaneous documents and media guides from
20 underneath the vehicle.

21 Q. Right in here; is that correct?

22 A. Yes.

23 Q. Okay. 50?

24 A. Nokia cellular phone, which was also underneath the
25 vehicle, corresponding with photo marker E.

1 Q. Okay. 51?

2 A. Snickers candy bar bag in photo marker F.

3 Q. Okay. 52?

4 A. Jiffy Lube receipt in photo marker G.

5 Q. 53.

6 A. The black -- or the empty paper bag on the manhole
7 cover in photo marker H.

8 Q. And 54?

9 A. Piece of brown Styrofoam, photo marker I.

10 Q. 55.

11 A. Columbia College folder, corresponding to photo
12 marker E.

13 Q. And then --

14 MR. KNIGHT: Your Honor, at this time I'd offer
15 State's Exhibits -- I think it's 45 through 55.

16 THE COURT: 47 is already in evidence.

17 MR. KNIGHT: Okay.

18 MR. ROGERS: I have no objection to any of them,
19 Judge, including the one that's already in.

20 THE COURT: All right. 45, 46, 48, 49, 50, 51, 52,
21 53, 54, and 55 are admitted into evidence, 47 having already
22 been admitted.

23 MR. KNIGHT: Thank you, Your Honor.

24 - - -

25 State's Exhibits 45, 46, 48, 49, 50, 51, 52, 53,

1 54, and 55 admitted into evidence.

2 - - -

3 Q. What did you locate in front of this vehicle?

4 Parking spaces in front of Kent's car. This area.

5 A. Some cigarette butts.

6 Q. Showing you 14B, did you collect those?

7 A. Yes.

8 Q. Do you see State's Exhibit 56 in there?

9 A. Yes.

10 Q. Those are those cigarette butts and cigar butt that
11 you collected?

12 Do you want to open that up?

13 A. I need to open it because this is not -- this is a
14 container from the lab.

15 Q. Okay.

16 (Witness opening exhibit.)

17 A. Yes.

18 Q. 57, do you see that there?

19 A. Yes. Hickman girls basketball schedule.

20 Q. And where did you locate that?

21 A. That was on the ground, south of the victim's
22 vehicle.

23 Q. Somewhere in this area?

24 A. Somewhere in this area.

25 Q. 58, do you see that there?

1 him?

2 A. Yes.

3 Q. Okay. I'd like to show you what's been marked as
4 State's Exhibit 59, 59A through 59G.

5 MR. ROGERS: No objection.

6 MR. KNIGHT: Okay.

7 Q. And generally what are these photographs of?

8 A. Again, loose change that was on the pavement, some
9 of which was underneath the victim's body.

10 Q. And you found this when the body was removed; is
11 that correct?

12 A. Correct.

13 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
14 59, 59A through 59G.

15 MR. ROGERS: No objection, Your Honor.

16 THE COURT: State's Exhibits 59, 59A through G, are
17 admitted.

18 - - -

19 State's Exhibits 59, 59A through 59G, admitted into
20 evidence.

21 - - -

22 Q. 59A shows Kent, of course. But you've got photo
23 marker D that you testified about previously. And that is a
24 dime; is that right?

25 A. Yes.

1 Q. Okay. But also, what is this chalk that I see here
2 in 59C, D, E, and F? What does that represent?

3 A. It just simply represents a visual aid, to give an
4 idea -- or allow the viewer to understand that there was
5 items of evidence, potential evidence, underneath the body.
6 And so therefore that's the body location, or rough location
7 of where the body was at. And I did the chalk line to give
8 that representation.

9 Q. Okay. And so 59C, we can see three coins here. And
10 also we can see that in 59D.

11 A. Yes.

12 Q. What are those?

13 A. Three dimes.

14 Q. Okay. And they were underneath what part of Kent's
15 body before his body was removed?

16 A. It would have been the left arm.

17 Q. Okay. And then down here, 59F, this corresponds to
18 E, doesn't it?

19 A. Yes.

20 Q. E and F? And E, this outline right here, the
21 bottom, what does this show?

22 A. Well, that's where the legs were at. Actually, the
23 right leg sort of bent outward and came in. So I believe the
24 dime may have been somewhere underneath that right leg.

25 Q. So right here you got a dime that you just testified

1 about; is that correct?

2 A. Yes.

3 Q. And those were collected from the area of his feet.

4 A. Yes.

5 Q. After his body was removed; right?

6 A. Yes.

7 Q. They were seen after his body was removed; right?

8 A. Yes.

9 Q. Okay. I'd like to show you what's been marked as
10 State's Exhibit 60. What's that?

11 A. One dime on the ground north of the victim. Photo
12 marker D.

13 Q. Okay. And like to show you what's been marked as
14 State's Exhibit 61. What is that?

15 A. Four dimes and one penny. They correspond to photo
16 marker J.

17 Q. Okay.

18 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
19 60 and 61.

20 MR. ROGERS: No objection.

21 THE COURT: State's Exhibits 60 and 61 are admitted.

22 - - -

23 State's Exhibits 60 and 61 admitted into evidence.

24 - - -

25 Q. And for clarification here, what's inside of 61 is

1 really a picture in 59D, these three dimes, and 59F, this
2 dime and this penny, for a total of four dimes and one penny;
3 is that correct?

4 A. That's correct.

5 Q. Okay. And I don't know if we made this clear or
6 not. I don't think we did. 59D, these three dimes were
7 underneath what part of Kent's body?

8 A. There again, the left arm, upper arm area.

9 Q. Okay. What happened -- after you were done
10 processing the crime scene, what happened to this vehicle?

11 A. It was removed.

12 Q. Okay. And where was it taken?

13 A. Don Lake tow service.

14 Q. All right. And before it was taken there, did you
15 put seals on the car?

16 A. I did.

17 Q. Which is normal -- normal procedure.

18 A. Yes.

19 Q. Okay. And it was taken up to Don Lake's, and later
20 on that same day -- because you really got out there on the
21 morning of November 1st; right?

22 A. Yes.

23 Q. Later on that same day did you have the opportunity
24 to process that vehicle?

25 A. I did.

1 Q. I mean, you searched the vehicle for evidence; is
2 that right?

3 A. Yes.

4 Q. Okay. About what time was this crime scene cleared,
5 do you remember?

6 A. Sometime prior to 9:00.

7 Q. Okay.

8 A. 9:00 a.m.

9 Q. About what time did you start processing the
10 vehicle? Do you remember?

11 A. No --

12 Q. Approximately.

13 A. -- I don't remember --

14 Q. Okay.

15 A. -- exact time.

16 Q. All right. And did you dust the inside and the
17 outside of the car for fingerprints?

18 A. Yes.

19 Q. Okay. I'd like to show you what's been marked as
20 State's Exhibit 66. Actually I'd like to show you what's
21 been marked as State's Exhibit 72. What does this show?

22 A. Is that all-inclusive?

23 Q. Yeah. What's 72A -- or what's 72A and 72B?

24 A. The victim's vehicle.

25 Q. Just showing a shot from the driver's side and

1 passenger side; is that right?

2 A. Yes.

3 Q. And then what does 72C and D show?

4 A. That is a line diagram representing the vehicle.
5 The victim's car.

6 Q. Okay. And this also indicates where fingerprints
7 were located inside and outside of the vehicle?

8 A. That's right.

9 Q. Talking about C and D?

10 A. Yes.

11 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
12 72, A through D.

13 MR. ROGERS: May I voir dire the witness very
14 briefly, Your Honor?

15 THE COURT: You may.

16 - - -

17 VOIR DIRE EXAMINATION

18 BY MR. ROGERS:

19 Q. Did you prepare the diagrams yourself?

20 A. I did not prepare that -- those two particular
21 diagrams, no.

22 Q. Okay. But you have gone over them to make sure that
23 the indications on them are accurate with regard to what you
24 found.

25 A. Yes.

1 MR. ROGERS: No objection, Your Honor.

2 THE COURT: State's Exhibit 72, A through D, are
3 admitted.

4 MR. KNIGHT: Thank you, Your Honor.

5 - - -

6 State's Exhibits 72, 72A through 72D, admitted into
7 evidence.

8 - - -

9 RESUMED DIRECT EXAMINATION

10 BY MR. KNIGHT:

11 Q. And then this is what I was trying to show you
12 earlier, but State's Exhibit 66, what are these?

13 A. Those are fingerprints removed from the vehicle.

14 Q. Okay. These are cards; right?

15 A. Yes.

16 Q. Okay.

17 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
18 66.

19 MR. ROGERS: No objection, Your Honor.

20 THE COURT: State's Exhibit 66 is admitted.

21 - - -

22 State's Exhibit 66 admitted into evidence.

23 - - -

24 Q. How did you go about processing this vehicle for
25 fingerprints or find fingerprints on the vehicle? What did

1 you do?

2 A. Well, I did a visual inspection of the vehicle prior
3 to actually applying dust. That's simply done with a
4 flashlight. Once I did the visual inspection, then using a
5 product that's referred to as a bichromatic powder, it has
6 both dark and silver powder mixed together. It works well on
7 any surface type. Using a feather duster, which is a brush,
8 you dip the duster into the powder, and then apply that
9 powder to the surface of the vehicle. If a latent
10 fingerprint appears, then that fingerprint is eventually
11 collected using a piece of tape. Simply roll the tape across
12 the latent print, pull the tape up, and then place that tape
13 onto a white surface, allowing nice contrast with the powder,
14 and develop the print.

15 Q. Okay. So you did that in this case; right? You had
16 a whole bunch of tape lifts, and you put those on the cards
17 on State's Exhibit 66; is that right?

18 A. Yes.

19 Q. Okay. And what areas, starting with the outside of
20 the car, what areas did you dust in order to try to find
21 latent fingerprints? Meaning unknown fingerprints.

22 A. Well, I was assisted with --

23 MR. ROGERS: I object to that as misleading. I
24 don't think "latent" means unknown.

25 THE COURT: Sustained.

1 Q. Do you know the source of any of these fingerprints
2 that you found?

3 A. The source?

4 Q. Yeah. The source of any of them. Were you able to
5 determine the source of any of these fingerprints?

6 A. No.

7 Q. Okay. So to you were those fingerprints unknown?

8 A. They were, yes, unknown.

9 Q. Okay. Go ahead.

10 A. The entire exterior of the car was dusted. And then
11 the interior portions of the vehicle that the surfaces were
12 such that they would retain an identifiable print were
13 dusted.

14 Q. Okay. So for instance then the upholstery wasn't
15 dusted; correct?

16 A. Correct. That's -- that's a material that is not --

17 Q. Conducive to leaving behind fingerprints?

18 THE COURT: If you'll allow the witness to finish
19 the -- the witness was answering while you began your next
20 question, Mr. Knight.

21 MR. KNIGHT: I apologize.

22 THE COURT: And the same thing is true for the
23 witness. If you will please allow Mr. Knight to finish
24 before you start answering.

25 MR. KNIGHT: Yeah.

1 Q. Got that?

2 A. Yes.

3 THE COURT: Okay.

4 Q. Did you then -- did you dust the seats or the carpet
5 for prints?

6 A. No.

7 Q. What areas inside the car did you dust?

8 A. Interior windows, rear view mirror, the -- portions
9 of the dash, including the area where the odometer is.

10 Q. Okay. So, we have these two diagrams right here, C
11 and D, that just correspond to the ones above; is that right?
12 The photos above; is that right?

13 A. Yes.

14 Q. Okay. And on both of these diagrams, what do we
15 have written in red ink?

16 A. Those are prints or print locations discovered
17 inside the vehicle.

18 Q. As opposed to -- what did we have written in blue
19 ink on each one of these diagrams?

20 A. Prints that were discovered on the exterior of the
21 car.

22 Q. Okay. And without going through all of these
23 fingerprint cards that you lifted, a number of these, right,
24 it was I think all the way up through N; is that correct? 1A
25 through 1N? Rear view mirror.

1 A. Oh, yes.

2 Q. You've had the opportunity to look at these cards
3 and to compare them to these diagrams, as far as the
4 locations of the prints that you collected; is that right?

5 A. Yes.

6 Q. Okay. So, let's just start out here. 1A, 1B, those
7 are both in blue, indicating that they are on what part of
8 the car? Inside or outside?

9 A. Outside.

10 Q. Okay. And you recovered prints from there; is that
11 correct? From this location.

12 A. Yes.

13 Q. Which would be on the door frame of the driver's
14 side door; right?

15 A. Yes.

16 Q. Okay. And were these -- did you pretty much lift
17 the same print twice?

18 A. I did.

19 Q. Is that what 1A and 1B is?

20 A. Yes.

21 Q. The same thing, two different times.

22 A. Correct.

23 Q. Okay. Moving on to 1C in red, meaning the inside of
24 the car; right?

25 A. Yes.

1 Q. This is on what part of the inside of the vehicle?
2 A. The rear passenger, on the right side of the car.
3 The passenger side of the car.
4 Q. 1D, where was that located?
5 A. That would be on the right front door of the
6 vehicle, again on the passenger side.
7 Q. And once again, that would be inside; right?
8 A. Inside.
9 Q. Okay. And then E, 1E, where did that come from?
10 A. That was on the exterior of the same door.
11 Q. This location right there. Self-explanatory;
12 correct?
13 A. Yes.
14 Q. Okay. 1F, where did that come from?
15 A. That was on the rear door on the left side of the
16 vehicle or the driver's side of the vehicle.
17 Q. And that one --
18 A. On the inside.
19 Q. Okay. What about 1G?
20 A. In the same location.
21 Q. Okay. And then where's 1H on there? You see it
22 right there?
23 A. Yes. That would be the driver's side or left side
24 rear quarter panel.
25 Q. Okay. And what about 1I? Where did you find that?

1 A. That was the front right passenger door, on the
2 inside.

3 Q. Okay. 1J and 1L. Tell us about those two.

4 A. Again, I think that may have been a duplicate lift.
5 And that was on the rear quarter panel on the driver's side,
6 or the left side. Left rear quarter panel.

7 Q. Then what about 1K?

8 A. The exterior, on the right side, front passenger
9 door, on the top of the door frame.

10 Q. What about 1M?

11 A. The driver door, on the left side of the vehicle, on
12 the interior window.

13 Q. Okay. And then what about 1N? Is that shown here
14 on either one of these two diagrams?

15 A. This is not listed on the diagrams. And I take it
16 because that came from the rear view mirror inside the car.

17 Q. Okay. I'd like to show you what's been marked as
18 State's Exhibit 74, 74A through 74G. What are these,
19 generally? Photographs of what?

20 A. The interior of Mr. Heitholt's vehicle.

21 Q. And photo -- we can also see different items you
22 collected; is that correct?

23 A. Yes.

24 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
25 74, A through G.

1 MR. ROGERS: No objection, Your Honor.

2 THE COURT: State's Exhibits 74, 74A through G, are
3 admitted.

4 - - -

5 State's Exhibits 74, 74A through 74G, admitted into
6 evidence.

7 - - -

8 Q. You processed the inside of the vehicle and
9 collected evidence from there; is that correct?

10 A. I did.

11 Q. All right. State's Exhibit --

12 MR. ROGERS: And Your Honor, for the record, I have
13 no objection to these being laid out here on the rail of the
14 jury box, with the assumption that they're going to be
15 identified and fairly -- sometime fairly soon offered in
16 evidence.

17 MR. KNIGHT: They will be.

18 THE COURT: All right. Since they are right in
19 front of the jury and they're not admitted yet, I appreciate
20 that, Mr. Rogers.

21 Q. What do you see in State's Exhibit 75?

22 A. A pair of wire frame glasses.

23 Q. And do you see those on 74A?

24 A. Yes. In the driver's seat.

25 Q. Okay. What about 76?

1 A. Notepad planner, checkbook, miscellaneous documents,
2 driver's seat of the vehicle.

3 Q. Okay. You collected that also; is that correct?

4 A. Yes.

5 Q. Do you see that in A there?

6 A. Yes.

7 Q. 76.

8 MR. ROGERS: That was 76.

9 Q. I'm sorry. 77.

10 A. Laptop computer case, with miscellaneous papers.
11 Driver's seat of victim's vehicle.

12 Q. Okay. And before we get to the next exhibit, that
13 computer case is shown right here; is that correct?

14 A. Yes.

15 Q. Okay. And looking at this from a different angle,
16 what is this thing that's kind of lifted up, so that people
17 can see back there? What is this?

18 A. Well, that's the cushion that covers the console
19 compartment between the two front seats of the vehicle.

20 Q. Okay. We'll get to this maybe next exhibit, I don't
21 know, but what did you find here inside of this console?

22 A. The victim's wallet.

23 Q. Okay. But was this thing up or was it down when you
24 first saw the car? Did you have to lift this up to get to
25 the wallet?

1 A. We had to open it. It was closed.

2 Q. Okay. And this case right here, from this angle, if
3 you were looking in the car, from the driver's side door
4 area, would this console area have been -- or when you saw
5 the car, was it blocked or obstructed by this computer case?

6 A. Well, certainly you can see that it is in that
7 photograph. You can see part of the cushion, but not the
8 entirety of it.

9 Q. Okay. 78 then, which is what?

10 A. Brown wallet, taken from the console.

11 Q. Right here?

12 A. Yes.

13 Q. And 79.

14 A. Cat food box, found in the front passenger seat.

15 Q. Okay. And did you compare this to the cat food that
16 you found on the wall over there by the Dumpster enclosure?

17 A. I didn't do a -- I didn't take the cat food out of
18 the box and compare it, no, but I'm well familiar with cat
19 food, and it was consistent with cat food.

20 Q. Would that be the same kind that was in this
21 Friskies box here?

22 A. Yes.

23 Q. Okay. 80.

24 A. A dollar thirty-two in change. Assorted change.
25 Taken from the dash coin holder of the vehicle.

1 Q. Where is that?

2 A. I believe that was up in the -- in this area right
3 here. There was a coin -- an assorted coin holder right
4 here.

5 Q. Okay. 81?

6 A. This is a digital -- Radio Shack digital recorder.

7 Q. Where did you find that?

8 A. And that was in the center console area also, along
9 with the wallet.

10 Q. Okay. And then 82.

11 A. This is a name tag, having the name Dewayne on that.
12 And I recovered that from the left rear floorboard of the
13 victim's vehicle.

14 Q. Okay.

15 MR. KNIGHT: Your Honor, at this time I'd offer
16 State's Exhibits 75 through 82.

17 MR. ROGERS: No objection, Your Honor.

18 THE COURT: State's Exhibits 75, 76, 77, 78, 79, 80,
19 81, and 82 are admitted.

20 - - -

21 State's Exhibits 75 through 82 admitted into
22 evidence.

23 - - -

24 Q. Did you attend the autopsy in this case?

25 A. Yes.

1 THE COURT: You want to -- can the witness sit down
2 at this time?

3 MR. KNIGHT: I believe so, yes.

4 THE WITNESS: Thank you.

5 MR. KNIGHT: Yes.

6 Q. Did you attend the autopsy?

7 A. Yes.

8 Q. Okay. And where was that conducted?

9 A. Boone and Callaway County medical examiner's office.

10 Q. All right. And who performed the autopsy?

11 A. Dr. Adelstein.

12 Q. Can I set those right there for you?

13 A. Sure.

14 Q. Okay. State's Exhibit I think it's 86, what is
15 that?

16 A. Tube of the victim's blood.

17 Q. And then do you see State's Exhibit 69 in there?

18 A. Yes. I'll need to remove it from the container --

19 Q. Okay.

20 A. -- if that's okay.

21 This is the ten print card, fingerprint lifts from
22 Mr. Heitholt.

23 Q. All right.

24 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
25 86 and 69.

1 MR. ROGERS: No objection.

2 THE COURT: State's Exhibits 69 and 86 are admitted.

3 MR. KNIGHT: Thank you, Your Honor.

4 - - -

5 State's Exhibits 69 and 86 admitted into evidence.

6 - - -

7 Q. Now, back to the crime scene. You testified about
8 how you put hand bags on Kent's hands; is that correct?

9 A. Yes.

10 Q. All right. And how did you put those on?

11 A. I took a medium-sized brown paper bag, opened it up,
12 put it over his hands, and put tape around the bag.

13 Q. All right. And how many people from the Tribune
14 tried to help Mr. Heitholt at the scene?

15 MR. ROGERS: I believe it calls for hearsay, unless
16 it was --

17 Q. To your knowledge.

18 MR. ROGERS: Still calls for hearsay.

19 MR. KNIGHT: I'll rephrase.

20 Q. To your knowledge?

21 A. I didn't have exact knowledge on the number of
22 individuals that --

23 MR. ROGERS: Okay.

24 A. -- came out to help him at the scene. The only
25 information I received at the scene was --

1 MR. ROGERS: Objection to the information received.
2 That's hearsay.

3 THE COURT: That objection would be sustained,
4 unless it's something he physically looked at or saw.

5 MR. ROGERS: Right.

6 Q. When you got to the scene, how many police officers
7 were there?

8 A. I don't know exactly. There were several.

9 Q. All right. And did you also see other civilians
10 there at the scene? Were there any employees maybe from the
11 Tribune anywhere around the vicinity at any time that you
12 were at the crime scene?

13 A. I can't say that there were, but I will say, my
14 focus was on the scene. I was not taking an inventory of
15 individuals around the scene.

16 Q. Well, do you recall -- did you see any paramedics at
17 least?

18 A. No paramedics. They had already arrived and left.

19 Q. Okay. Who was inside of the crime scene perimeter,
20 processing this area?

21 A. Well, myself, Detective Jim Harmon. I know that my
22 supervisor arrived prior to me. He's the one I made contact
23 with first. He had been inside the scene. The medical
24 examiner -- assistant medical examiner, Dori Burke.
25 Personnel from I believe it was Parker Funeral Home. They

1 usually arrive -- there are usually two individuals that
2 arrive to remove the body.

3 Q. Okay. And did those individuals arrive before or
4 after you put the hand bags on Mr. Heitholt's hands?

5 A. Well, they had already arrived. I placed the hand
6 bags on the hands just prior to the body bag being secured
7 and the body being removed from the scene.

8 Q. Okay. So you had other people that were in the
9 crime scene area before the bags were put on the hands; is
10 that correct?

11 A. Yes.

12 Q. Okay. And of all these people that were in the
13 area, were any of them wearing --

14 MR. ROGERS: Your Honor, may we approach?

15 THE COURT: You may.

16 - - -

17 Counsel approached the bench and the following
18 proceedings were held:

19 MR. ROGERS: I believe we're now getting to the area
20 that is covered by our as-yet-unruled motion in limine
21 concerning the prosecution attempting to adduce evidence that
22 unknown hairs found on the decedent be attributed to some
23 person that they have not bothered to test the DNA of those
24 people. We had a motion in limine, we had hearing, we had
25 arguments, and the Court said that you would defer ruling on

1 that motion. So I'm reasserting it at this time, because I
2 think that's what we are getting at here.

3 MR. CRANE: I'm ready to argue that until the cows
4 come home. Now might be a good time to take lunch.

5 THE COURT: Well, lunch is not here. So we are not
6 having any cows coming home at this point. You may -- I
7 thought you've already argued the matter and take it with the
8 case.

9 MR. CRANE: Judge, I also wanted to point out a
10 letter that I filed with the Court, that reiterated my
11 position to Mr. Rogers, that was verbalized at the motion in
12 limine hearing, wherein I stated --

13 THE COURT: Just a minute. Let me grab the file.
14 Do you have an idea of the date?

15 MR. CRANE: I believe it was dated September 7th,
16 Judge.

17 THE COURT: Okay. Let me -- because there are other
18 letters that come after that date.

19 MR. CRANE: And I have got a copy of it, if for some
20 reason it's not in there. I don't think Mr. Rogers is going
21 to dispute he didn't receive it.

22 THE COURT: Let me see where we are. That's not to
23 say the clerk would have filed it particularly on that date,
24 but.

25 MR. CRANE: You got a copy handy?

1 MR. KNIGHT: Sure. Sure.

2 THE COURT: If you do, that would be helpful.

3 MR. CRANE: I thought maybe -- I thought I saw it.

4 I thought you flipped by it a minute ago.

5 THE COURT: On this side?

6 MR. ROGERS: I think back towards the back.

7 MR. CRANE: If you see it, it's like a one-paragraph
8 (indicating). Judge, I also wanted to say that I asked your
9 court reporter to do a transcript of the portion of the
10 argument for both sides on this particular motion in limine.

11 I believe she has provided that to the defense as well. That
12 motion. That is also my offer to provide the defense an
13 opportunity to do testing on any hairs they wanted pursuant
14 to the discovery they had received. Aside from those offers,
15 though, Judge, there is absolutely no legal basis, nor logic,
16 in precluding the state from adducing evidence that the
17 source of this hair that Mr. Rogers has talked about in his
18 opening statement could be from someone else. The -- what I
19 argued before is that defense wants to have it both ways.

20 They are using evidence-of-other-suspect argument to preclude
21 us from showing other sources. It's completely, with all due
22 respect, a specious argument. This evidence should come in.

23 MR. ROGERS: Your Honor, the analysis of evidence in
24 a criminal case is peculiarly a governmental function. It is
25 also a very expensive function for a private individual to

1 undertake. And for the state to fail or neglect or
2 deliberately abstain from testing evidence which is clearly
3 exculpatory -- for comparing evidence which is clearly not
4 that of the defendant with other people who are, for the main
5 part, state agents, state actors, state employees, does
6 not -- should not be allowed to place the burden on the
7 defense to expend that kind of effort and financial resources
8 in terms of testing all these people.

9 And I think that they are -- the gist of our
10 argument is that if the state wants to claim that this hair
11 was not somehow related to the incident that resulted in
12 Mr. Heitholt's death, or that it was somehow placed there
13 after his death, I think they have the burden of establishing
14 that before they can argue it. It's an argument based upon
15 their failure to analyze and compare the evidence that they
16 have with the evidence that is available to them, and I don't
17 think saying, "Well, we could make it available to you if you
18 want to spend \$50,000" cures that.

19 THE COURT: I'm not going to have any more argument.
20 I heard it before.

21 I'm not going to prohibit the state from asking this
22 witness whom he saw around the body prior to bagging the
23 hands. I am not going to prohibit the defendant from arguing
24 it's not his -- it's not his hair that was discovered on him
25 or no fingerprints from the defendant. That certainly I'm

1 not going to prohibit. I think you're entitled to do that
2 also. We are not talking about argument here. We're
3 talking -- I mean, you don't want him to testify that there
4 were other people that were in the location prior --

5 MR. ROGERS: I've let him testify to that.

6 THE COURT: Pardon?

7 MR. ROGERS: I've allowed him to testify to that
8 without objecting. It's only when he started to go beyond
9 that to whatever he was about to ask, which is, quite
10 frankly --

11 THE COURT: I don't know what he was about to ask.

12 MR. KNIGHT: I was going to ask about protective
13 clothes, if anybody was wearing protective clothes, hair
14 nets.

15 THE COURT: I'll permit you to ask that question.

16 MR. ROGERS: May I have a continuing objection?

17 THE COURT: You may have a continuing objection.

18 MR. CRANE: We can check that later.

19 MR. ROGERS: I don't dispute I got the letter.

20 - - -

21 The following proceedings were held in open court:

22 THE COURT: I understand that the jurors' lunches
23 are here. That was a little note that I got. So they are
24 very prompt in coming. And we will recess now.

25 The Court again reminds you of what you were told at

1 the first recess of the Court. Until you retire to consider
2 your verdict, you must not discuss this case among yourselves
3 or with others, or permit anyone to discuss it in your
4 hearing. You should not form or express any opinion about
5 the case until it is finally given to you to decide. Do not
6 read, view, or listen to any newspaper, radio, or television
7 report of the trial.

8 Ladies and gentlemen, unfortunately counsel does not
9 have the same privileges that you do to have their lunches
10 ready and delivered at a particular time, and they also work
11 during the noon hour. I would love to take a 30-minute break
12 for lunch, but I'm going to accede to their request that they
13 have an hour, so that they might do whatever preparation they
14 need, as well as eat. So we will take an hour break for
15 lunch. But we will come back exactly at 1:00.

16 And I'd ask the witness to return at 1.

17 Thank you.

18 (Recess taken.)

19 - - -

20 The following proceedings were held out of the presence
21 of the jury:

22 THE COURT: State ready to proceed?

23 MR. KNIGHT: Yes, Your Honor.

24 THE COURT: And the defendant?

25 MR. ROGERS: Yes, Your Honor.

1 THE COURT: All right. Good enough.

2 Would you have the jury brought in the courtroom?

3 DEPUTY COURT MARSHAL: Yes, Judge.

4 - - -

5 The following proceedings were held in the presence of
6 the jury:

7 THE COURT: You may continue, Mr. Knight.

8 MR. KNIGHT: Thank you, Your Honor.

9 - - -

10 JEFF NICHOLS,

11 resumed the stand and testified further:

12 RESUMED DIRECT EXAMINATION

13 BY MR. KNIGHT:

14 Q. I want to go back and I want to talk to you a little
15 bit more about luminol. After you applied this luminol to
16 this sidewalk, did you do any more tests to confirm that what
17 had luminesced was, in fact, blood?

18 A. No, I did not, other than a visual evaluation of the
19 reaction.

20 Q. Okay. And why didn't you do any further
21 confirmatory tests?

22 A. Well, it's extremely rare, in the cases that I've
23 been involved in, where I've been able to get any kind of
24 positive follow-up test using any type of presumptive blood
25 testing device. Now, the secondary type of testing device I

1 would have used in this case would have been leucomalachite
2 green.

3 MR. ROGERS: Excuse me?

4 THE WITNESS: Leucomalachite green. Commonly
5 referred to as LMG in the laboratory.

6 A. But it typically gives you a 1 part per 250,000,
7 whereas luminol being sensitive up to 1 part per 5 million.
8 So oftentimes when you cannot visually see the blood, it is
9 surpassing the threshold of the 1 part in 250,000. And you
10 simply cannot get any type of reaction with leucomalachite
11 green.

12 Q. And that's the situation that we had here, because
13 you couldn't see any of this blood that was luminescing
14 without the aid of the luminol; correct?

15 A. Correct.

16 Q. All right. And also, what was your -- what was your
17 mission? What were you doing there, I mean on the 3rd, when
18 you started to apply this luminol?

19 A. It was simply a tracking effort. Our interest at
20 that point was to try and confirm that the police canine that
21 was used to track on the night of the incident was, in fact,
22 going in the right direction and whether or not we could find
23 evidence of that. And I found evidence of that going down
24 Fourth Street.

25 Q. So your priority then wasn't to confirm that we had

1 human blood there, was it? By using LMG.

2 A. It was -- correct. We -- my mission there and my
3 purpose there was to confirm that, number one, the dog was
4 going in the right direction. And therefore, I was relying
5 on the luminol to give me that information, based on the
6 nonvisible blood.

7 Q. You testified earlier that luminol will react with
8 human and animal blood, that it will react with rust iron,
9 and also bleach products. Is that correct?

10 A. Yes.

11 Q. Okay. And you also testified earlier that reactions
12 for those three categories of evidence differ; correct?

13 A. Yes.

14 Q. And the luminescence that you observed going on this
15 sidewalk south, how did that compare with the luminescence
16 you've seen in the past for blood?

17 A. It was -- had all the characteristics. And the --
18 the chemiluminescence is what I'm going to refer to this as.
19 More -- some people refer to it as just a luminescence, but
20 technically it's a chemiluminescence, because it's a chemical
21 reaction. And the reaction that I observed was consistent,
22 totally consistent with what I see when I have a blood
23 reaction. So I was confident that what I was observing was,
24 in fact, blood.

25 Q. Is it because blood has a more brilliant reaction

1 than the other two things that we talked about formerly? Is
2 that correct?

3 A. Yes. It gives off more of an intense glow.

4 Q. More of an intense glow?

5 A. Yes.

6 Q. Okay. And this first impression, starting out with
7 placard number 1, that was in the shape of what?

8 A. It was actually in the shape of a shoe. And so that
9 further confirmed, in my own mind, that what I was looking at
10 was blood and it had been placed there by a human foot.

11 Q. And this shoe print, as you testified before, was
12 pointing south; correct?

13 A. Well, the trail that I followed, yes, was heading
14 south down Fourth Street.

15 Q. And these shoe prints that you saw that were
16 luminescing there, was there enough detail for you to make
17 out any type of tread pattern?

18 A. No.

19 Q. Okay. And you testified about this earlier. I want
20 to make this very clear. You testified about seeing two
21 trails.

22 A. Yes.

23 Q. Two luminol trails. Two blood trails. Right?

24 A. Yes.

25 Q. Okay. Back to 41C. What is -- we've got how many

1 different rows of cards here?

2 A. Two.

3 Q. Okay. Point to the first row, please.

4 A. 24, 26, 28, 30, 32, et cetera.

5 Q. Okay. And that indicated to you one set of
6 footprints; is that correct?

7 A. That appeared to be one path of travel, yes.

8 Q. Okay. And then tell the -- show us where the other
9 set of footprints was that you saw.

10 A. Photo marker 23, 25, 27, 29, 31 represented a second
11 path of travel.

12 Q. Okay. And back to this aerial photograph. Can you
13 please point to the jury the area on this sidewalk, on Fourth
14 Street, where you saw two sets of footprints. Or shoe
15 prints.

16 A. In the area right along the sidewalk, south of the
17 northeast corner of the building, just before you reached the
18 intersection of Walnut. So it would be --

19 Q. Why don't you point to where you saw two sets of
20 shoe prints develop. Right there.

21 A. Right here on the photograph would be the area where
22 the two sets became very obvious.

23 Q. Okay. And the first -- you applied luminol two
24 different nights; is that correct?

25 A. Yes.

1 Q. You testified about that before. The first night,
2 we're talking about between -- or going up to Walnut. That
3 was on the 3rd. Is that right?

4 A. Correct.

5 Q. And then you went back on the 4th. And you went
6 between Walnut and Broadway on the 4th; is that correct?

7 A. That's correct.

8 Q. And why is it that you stopped that night?

9 A. Well --

10 Q. That -- I'm talking about the 3rd.

11 A. On the 3rd? Well, I had applied luminol to that
12 area and then in some other areas to try to get a reaction,
13 and simply I ran out of product.

14 Q. Okay. So you just got some more and came back the
15 next night; is that right?

16 A. We got some more the next day and came back and
17 finished up the next evening, yes.

18 Q. And then also, 41E here, you've got these photo
19 markers or placards, whatever you want to call them, going
20 from 46 to 50, and then we're starting again, 1 through
21 whatever; is that right?

22 A. That's right.

23 Q. And why is that? Why did you -- why did you end
24 there at 50 and not continue on with 51 through 70 or
25 something?

1 A. Well, we only have an X number of these markers that
2 we carry with us. So, it's not uncommon to use markers over
3 and over again. I don't think that we really need to get
4 focussed in so much on the numbers, as we use the markers as
5 only a visual tool, to give us a visual reference.

6 Q. Okay. And I'm not going to point this out for you
7 now, but you've got, on the pavement there, you drew
8 arrows --

9 A. Yes.

10 Q. -- pointing to the areas --

11 A. Reactionary.

12 Q. -- is that correct? Okay. Back to the crime scene.
13 We were talking about this a little earlier. But you said
14 that you saw other people there besides you. Other police
15 officers. Is that correct?

16 A. Yes.

17 Q. In the crime scene. Who else did you see in there?
18 When you got there.

19 A. Well, I know my supervisor, Steve Monticelli,
20 Sergeant Monticelli, was there. Specifically I -- I mean, I
21 did not take an inventory and I cannot provide you with
22 individual names of officers that I saw, although I can tell
23 you that there were other officers there. Certainly we had
24 officers protecting the perimeter. There again, I had -- I
25 was assisted by Detective Jim Harmon, who arrived. The

1 medical examiner assistant, Dori Burke, arrived. One,
2 possibly two people from the Parker Funeral Home eventually
3 arrived to take -- remove the body from the scene. I know
4 that Sergeant --

5 Q. And all of these people were there before you placed
6 the hand bags on the hands; is that correct?

7 A. Everyone except for the Parker Funeral Home people.
8 They may have been there as I was placing them on -- the bags
9 on the hands, but we -- I usually do this right before we zip
10 up and seal the body bag. So it's the last thing that I do.

11 Q. So the Parker Funeral Home people got there about
12 the time that you were putting hand bags on. Maybe they were
13 there while you were putting them on. Is that correct?

14 A. They usually help actually get the body, put it in
15 the body bag. So they would have been there around that same
16 time.

17 Q. Who else was there? There was firemen there?

18 A. Well, prior to my arrival there was -- there were
19 medics; there were fire --

20 MR. ROGERS: I'm going to object to this as being
21 hearsay, Your Honor.

22 THE COURT: Sustained.

23 Q. Well, right around Kent's body, what -- what kind of
24 paraphernalia did you notice?

25 A. Well, there was medical paraphernalia there, where

1 he obviously had -- attempts had been made to resuscitate the
2 victim, so -- by medical personnel.

3 Q. Okay. And all the people that you saw at the crime
4 scene, this also includes yourself, how many people were
5 wearing hairnets or other protection or other things on their
6 heads to guard against maybe hairs falling out?

7 MR. ROGERS: Your Honor, for the record, is this
8 subject to my continuing objection?

9 THE COURT: It is subject to your continuing
10 objection.

11 MR. ROGERS: Thank you.

12 Q. What's the answer?

13 A. I had a ball cap on. And I know of no one wearing a
14 head net, per se.

15 Q. Nobody was wearing shower cap type things or
16 anything like that?

17 A. No.

18 Q. Okay. And of all the people, including yourself,
19 who were at the crime scene, how many people did you see
20 clothed in protective suits, to protect against maybe hairs
21 falling off or other evidence falling off into the crime
22 scene?

23 A. There was no one.

24 Q. All right. Now at the crime scene, before you put
25 these bags on the victim's hands, on Kent Heitholt's hands,

1 did you look on his hands to see if there were any hairs at
2 all on there?

3 A. No. I did not do any close examination of his hands
4 at that point.

5 Q. And before you put these hand -- where did you get
6 these hand bags that you put on his hands?

7 A. Out of our stock bag supply.

8 Q. Do you know how many people handled those hand bags
9 before you?

10 A. Detective Harmon may have obtained the bags for me
11 to use. I don't remember specifically how they were obtained
12 from our vehicle. But other than him, it would stem back to
13 the manufacturer.

14 Q. Did you -- before you put these hand bags on, did
15 you check inside the hand bags to see if there were any hairs
16 inside of there?

17 A. No.

18 Q. And then you taped those hand bags onto -- onto
19 Kent's hands; correct?

20 A. Yes. Around the top of the bag, around the wrist.

21 Q. Okay. And then he was transported to -- to
22 Parker -- well, where was the autopsy conducted again?

23 A. At the medical examiner's office.

24 Q. Okay. And at the autopsy you collected those bags
25 again; right?

1 A. Yes.

2 Q. All right. Do you have State's Exhibit 98 there? I
3 think it's a photograph.

4 A. I don't believe.

5 Q. Here we go. Right here.

6 A. Oh.

7 THE COURT: That is not admitted in evidence.

8 MR. KNIGHT: I know.

9 Q. I'd like to show you what's been marked as State's
10 Exhibit 98. What's this a photograph of?

11 A. That's Mr. Heitholt at the medical examiner's
12 office, with his hands still bagged.

13 Q. Okay.

14 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
15 98.

16 MR. ROGERS: No objection.

17 THE COURT: State's Exhibit 98 is admitted.

18 - - -

19 State's Exhibit 98 admitted into evidence.

20 - - -

21 Q. Okay. So that the jury can see here, these are the
22 hand bags you put on the hands at the crime scene; is that
23 correct?

24 A. That's correct.

25 Q. And this right hand bag looks like it's kind of

1 coming off in that photograph; don't you agree?

2 A. It could have slipped down, yes. I mean, it's not
3 uncommon.

4 Q. The left hand bag looks a little bit more secure; is
5 that correct?

6 A. Yes.

7 Q. Okay. Or securely fastened around the left wrist;
8 is that correct?

9 A. Yes.

10 Q. Do you see State's Exhibit 83 in that box?

11 A. Yes.

12 Q. And also 84?

13 A. Yes.

14 Q. Are these the hand bags that are photographed in 98?
15 Pictured in 98?

16 A. Yes.

17 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
18 83 and 84.

19 MR. ROGERS: No objection.

20 THE COURT: State's Exhibits 83 and 84 are admitted.

21 - - -

22 State's Exhibits 83 and 84 admitted into evidence.

23 - - -

24 Q. Okay. Let's start out -- 83, this hand bag right
25 here, this is from the victim's left hand; is that correct?

1 A. Yes.

2 Q. Okay. I'm taking it out of the bag.

3 But when you took these hand bags off of his hands,
4 how did you get them off?

5 A. I'm not sure if I removed those or if the medical
6 examiner did. Typically they're just cut. A pair of
7 scissors is used to cut the seal, and then that bag is
8 automatically placed into its own individual bag, which would
9 be this one right here.

10 Q. We'll get to that. So this bag right here was then
11 cut off his wrist; is that correct?

12 A. It appears to have been --

13 Q. Or ripped off.

14 A. -- possibly -- yeah. Partially cut and then ripped.
15 Torn.

16 Q. And this was done by who? You or somebody else?
17 Who was that?

18 A. Either myself or the medical examiner.

19 Q. Dr. Adelstein?

20 A. Yes.

21 Q. And was he wearing a hairnet at all? Do you recall?
22 Or any type of protection on his hair to protect against
23 hairs falling out?

24 A. No.

25 Q. Okay. But -- so one of you all removed that bag

1 right there. And then State's Exhibit 84, was the same thing
2 done pretty much with that? Talking about this right one
3 that's kind of falling off the wrist; right?

4 A. Correct.

5 Q. All right. Is that kind of where it was ripped
6 right there?

7 A. Yes.

8 Q. And this -- this is, again, the hand bag that came
9 from the right hand; right?

10 A. Yes.

11 Q. All right. And this was done by either you or
12 Dr. Adelstein; correct?

13 A. Correct.

14 Q. Okay. Now you said that you placed both of these
15 bags right here inside of other bags; is that correct?

16 A. Yes.

17 Q. And you placed them in this -- this would have been
18 the right -- bag for the left hand, and the bag for the right
19 hand over here; is that correct?

20 A. Yes.

21 Q. All right. Before you placed the actual hand bags
22 into these other bags, did you check inside of those hand
23 bags to see if there were any hairs in there?

24 A. No.

25 Q. And these bags right here, these bigger bags, did

1 you check to see if there were any hairs in these?

2 A. No.

3 Q. That you put these smaller bags in. You didn't.

4 A. No.

5 Q. Okay. So those hand bags, big one, small one, big
6 one, small one, were both -- they were eventually sent over
7 to the highway patrol; is that correct?

8 A. Correct.

9 Q. You don't know of any hairs being in any of those
10 bags before they were sent; is that right?

11 A. That's right.

12 Q. Okay. Now, also, is State's Exhibit 85 in front of
13 you? Do you see that? It's actually beneath you I think in
14 that big box to the right. Yeah.

15 What is that?

16 A. Fingernail scrapings and hair collected from the
17 victim's hands.

18 Q. Okay. So we've got how many different boxes inside
19 of here?

20 A. Four.

21 Q. Okay. Do you want to hand those to me?

22 MR. KNIGHT: Well, Your Honor, first of all, I'd
23 offer State's Exhibit 85.

24 MR. ROGERS: No objection.

25 THE COURT: State's Exhibit 85 is admitted.

1

- - -

2

State's Exhibit 85 admitted into evidence.

3

- - -

4

Q. Okay. These have been labeled by the highway patrol
5 as 10A through 10D; is that right? Can you see on there?
6 Let me turn them around for you.

7

A. Yes.

8

Q. And 10A and 10B are fingernail scrapings; is that
9 correct? Can you see that?

10

A. Yes.

11

Q. Okay. Let's talk about -- let's talk about 10C and
12 10D. 10C, this -- this would be hairs that were collected
13 from where?

14

A. From the right hand.

15

Q. Okay. And who collected these hairs --

16

A. I did.

17

Q. -- from Kent's right hand?

18

A. I did.

19

Q. Did you count how many hairs you collected from his
20 right hand?

21

A. I didn't note the number of hairs, no.

22

Q. Okay. And once you collected these hairs from
23 Kent's right hand, what did you do with them?

24

A. I put them in the container, being that one, and
25 sealed the container.

1 Q. So right now you don't have any idea how many hairs
2 are in here; is that right? Because it's sealed up.

3 A. That's correct.

4 Q. Okay. And then this box right here, 10D, what's
5 that? What's inside of there?

6 A. Hairs from left hand.

7 Q. Okay. And once again, did you put hairs that you
8 found directly on his hands -- his left hand in this box?

9 A. I did.

10 Q. And do you have any idea how many hairs are in
11 there?

12 A. No.

13 Q. Okay. But these boxes represent hairs that were
14 collected directly from his hands. That you saw on his
15 hands. Correct?

16 A. Yes.

17 Q. Okay. And they were packaged up and sent down to
18 the highway patrol; right?

19 A. Yes.

20 Q. And do you remember -- well, strike that. That's
21 pretty much all I have on that topic.

22 Now, on the 4th of November, what creek did you
23 search?

24 A. The Flat Branch.

25 Q. Okay. And on State's Exhibit 9, where is the Flat

1 Branch Creek?

2 A. It would be just south -- or I'm sorry, just north
3 of number 3, north being the bottom of the photo. You can
4 actually see the stream bed right here in that city block.

5 Q. And on November 4th, when you searched this creek,
6 it had water in it; right?

7 A. It did.

8 Q. Okay. I'd like to show you what's been marked as
9 State's Exhibit 21A -- or 21, 21A through 21C. What are
10 those photographs of?

11 A. Flat Branch Creek.

12 Q. Okay.

13 MR. ROGERS: No objection, Your Honor.

14 MR. KNIGHT: I'd offer State's Exhibits 21, 21A
15 through 21C, Your Honor.

16 MR. ROGERS: Once again, no objection.

17 THE COURT: State's Exhibits 21, 21A through C, are
18 admitted.

19 MR. KNIGHT: Thank you, Your Honor.

20 - - -

21 State's Exhibits 21, 21A through 21C, admitted into
22 evidence.

23 - - -

24 Q. So you searched this creek bed on the 4th; is that
25 right?

1 A. Yes.

2 Q. Right here, this shows we got water in the creek.

3 All three photographs. Correct?

4 A. Yes.

5 Q. Okay. And what did you collect from that creek?

6 A. I believe we recovered a -- like a metal stake. I

7 referred to it as a form stake.

8 Q. Okay. And what did you notice was on that stake?

9 A. Well, the stake had visible algae growth on it.

10 Q. All right. And what did that indicate to you?

11 A. That it had been in the water for some time.

12 Q. Okay. For how long, would you imagine? Long enough

13 to grow algae, obviously.

14 A. Yes. Depending on -- I mean, there's a lot of

15 variables, but long enough for algae to grow on it. More

16 than two weeks, three weeks.

17 Q. Okay. And did you determine that that stake was

18 unconnected to this homicide?

19 A. Yes.

20 MR. ROGERS: I'm going to object to that. That

21 calls for speculation.

22 THE COURT: Sustained.

23 MR. KNIGHT: I'll strike that -- I won't even go

24 into that, Your Honor. That's fine.

25 Q. Now on February 2003, what class did you attend in

1 Quantico, Virginia?

2 A. It was a facial reconstruction, facial imaging
3 class.

4 Q. Okay. What did you learn how to do there?

5 A. Well, several different techniques were instructed.
6 Primarily facial composite drawing, as well as 3D facial
7 reconstruction.

8 Q. Okay. And up to that point -- well, just tell the
9 jury about your artistic background very briefly, if you can.

10 A. I was, early in my college career, an art major. My
11 parents both being artistic, mother being an art teacher,
12 encouraged me to go into that field. So I took undergraduate
13 classes and courses in art. I transferred to the University
14 of Missouri, changed my major, simply because I didn't think
15 I could make a living drawing pictures. And so, with that,
16 I -- when I got more into the law enforcement field, I
17 decided to use that as an opportunity as a secondary source
18 of employment and opened my own custom business in 1993,
19 doing a whole entire variety of different artistic
20 applications. I use graphite to draw pictures of children.
21 Portraits. Animals. I do landscape fine art. Recently been
22 recognized as -- nationally recognized as a watercolor
23 artist. My work's been published. And I use acrylic,
24 watercolor, graphite as a medium to do that.

25 Q. Okay. And when you went to this training in

1 Quantico, Virginia, in 2003, how long did that last?

2 A. That was a three-week course.

3 Q. Okay. And can you briefly describe the training
4 that you got there?

5 A. The first part of the course was geared more toward
6 3D facial reconstruction and sculpture. Actually applying
7 clay to an unidentified human skull to the point of creating
8 a facial image that could aid in the identification of that
9 person. We worked on aging techniques using clay. We also
10 went -- took that one step further into a 2D. Now that would
11 be referred to as a 3D process. But in a 2D process, simple
12 drawing of a human face or composite from someone's memory
13 was focussed on in the second part of the course. Karen T.
14 Taylor, probably one of the leading composite artists in the
15 nation, taught that. And that was an area that we typically
16 now experience more demand for.

17 Q. Okay. March 26, 2003, after you got done with that
18 class, who did you contact?

19 A. Well, I contacted one of the witnesses in this case,
20 Miss Ornt.

21 Q. Okay. First name Shawna?

22 A. Shawna.

23 Q. Okay. And what did you -- what information did you
24 ask her to provide to you?

25 A. Well, we -- I took her to the -- to the scene, the

1 actual scene, and allowed her to walk through the scene the
2 way she did on the night of the incident. And once we did
3 that, we went back to my office. We sat down. I asked her
4 if she could provide me with detailed description -- or
5 descriptions of the individuals that she saw the night of the
6 incident, that she recalled seeing. And she had always
7 complained about the original composite, which was created on
8 a computer software program, not being accurate enough. And
9 specifically the hairstyle.

10 Q. Okay. And did you ask her to provide descriptions
11 to you, head, facial descriptions, of one of the two suspects
12 she saw?

13 A. Yes, because she didn't see the other person well
14 enough to provide detailed information about.

15 Q. And how did she describe this person's head?

16 A. She said that it was rectangular. And I also would
17 have to say that I documented this, and I may need to refer
18 to my report or notes for an accurate overall description,
19 but she said that face -- their head was rectangular. She
20 said the eyes were a little bit closer than most. And keep
21 in mind that this was of a young white Caucasian, late teens,
22 early 20s, I believe. The ears I recall she said were
23 extended out from the head at the top just a little bit
24 further than normal. The ear lobes were in a little bit
25 closer. The hair was combed forward and flipped up in the

1 front, which was a popular hairstyle at that time. The lips
2 were fairly uniform in width. The top and bottom lip. Fair
3 complexion. No facial hair.

4 Q. And after she provided this information to you, you
5 at some point started to sketch this person; is that correct?

6 A. Yes.

7 Q. Before you started to sketch this person, what did
8 you have her look through?

9 A. Well, I was provided in the -- during the training
10 an FBI facial catalog, which is a catalog of faces. It's
11 like -- similar to mug shots, if you will, but they're all
12 different types of faces. Head styles, shapes; eye shapes;
13 nose shapes. So I gave her the catalog to look through, and
14 I asked her, if she would, provide me with the number, and
15 there is a unique number under each photograph, with the
16 number of the photograph, or a photograph, if she found one,
17 that reminded her of a specific or unique feature on the
18 face. So we went through that. And I began to sketch the
19 image. And eventually we were able to sketch an image that
20 she felt closely resembled the person she saw.

21 Q. Okay. And so how -- she said it closely resembled
22 the person that she saw?

23 A. Yes.

24 Q. That's what she told you? Okay. And then you did
25 some more work on it after that; is that correct?

1 A. Right. I added in just some simple shading, to give
2 it more of a three-dimensional look, and then recontacted her
3 and had her evaluate that, and -- because sometimes you need
4 to make some changes. But she was very satisfied with the
5 composite.

6 Q. So that was a number of days later you did the
7 shading; is that correct?

8 A. It was -- yeah. It was afterward. I don't remember
9 how many days later.

10 Q. But then you took that back to her and showed it to
11 her; is that correct?

12 A. Yes.

13 Q. And what did she give it on a scale of one to ten?

14 A. Well, a scale of one to ten, ten being very the
15 best, essentially the best that she can remember and be able
16 to articulate, she rated that on about an eight and a half.

17 Q. Okay. And this is the finished product; is that
18 correct?

19 A. That's correct.

20 Q. All right. State's Exhibit 27.

21 A. Yes.

22 THE COURT: Excuse me. 22?

23 MR. KNIGHT: Seven. And it's in.

24 THE COURT: 27. Okay.

25 You're correct. It is 27.

1 Q. So that composite that I just showed you, that was
2 -- the finished product, you came up with that in April of
3 '03; right?

4 A. That would be the approximate day, yes. I don't
5 recall the exact date.

6 Q. All right. Now, skipping ahead almost a full year,
7 to March 10th, 2004, what did Steve Monticelli ask you to do?
8 And he's your sergeant over there at major crimes; correct?

9 A. Yes.

10 Q. What did he ask you to do with regard to processing
11 a vehicle? Searching a vehicle.

12 A. Okay. He said that the detectives had applied for a
13 search warrant on a vehicle, and he asked me if I would
14 process the car.

15 Q. Okay. And where did you go to do this?

16 A. Police garage. The vehicle had been either towed or
17 it had been driven to the police garage. So it was right
18 across from my office.

19 Q. Okay. And when you got to the vehicle, did it have
20 security seals intact?

21 A. Yes.

22 Q. Okay. And do you see State's Exhibit 87; and I
23 think it's A, B, C, D, E, F, G; A through G up there?

24 A. Yes.

25 Q. What are those photographs of?

1 A. The vehicle which I searched.

2 Q. Okay. And you determined that this was -- this
3 vehicle was owned by who?

4 MR. ROGERS: I'll object to that. That calls for
5 hearsay.

6 THE COURT: Sustained.

7 MR. KNIGHT: Okay.

8 THE COURT: A and B are already admitted,
9 Mr. Knight. I didn't mark it on the exhibit, but I have it
10 in my notes.

11 MR. KNIGHT: Thanks.

12 MR. ROGERS: They are, in fact, exhibit -- are, in
13 fact, admitted, Your Honor. I would object to the rest of
14 the photographs on the grounds that there's no showing of any
15 kind that what he observed was in any way similar to the
16 condition of the vehicle back in November of 2001. It's
17 changed hands. It's been years.

18 MR. KNIGHT: He processed this.

19 MR. ROGERS: So there's no relevance.

20 THE COURT: The objection is that it doesn't have
21 relevancy?

22 MR. ROGERS: Yes.

23 THE COURT: That objection would be overruled, with
24 the understanding that we know this car was processed in
25 April of '04.

1 MR. KNIGHT: So I'd offer these exhibits --

2 MR. ROGERS: With regard to -- if I can maybe make
3 my objection more explicit. There are items depicted in the
4 photograph. There's no ghost of a showing that those items
5 were in any way in that vehicle in 2001. And therefore to
6 show the photographs of those -- of those items now is not
7 relevant to --

8 THE COURT: Let me take a look at what you -- let me
9 look at the photographs, please.

10 Please don't display them to the jury.

11 (Court viewing photographs.)

12 - - -

13 Counsel approached the bench and the following
14 proceedings were held:

15 (Court viewing photographs.)

16 THE COURT: All right. I've looked at the exhibit.

17 MR. ROGERS: My objection is, Your Honor, that the
18 items shown in specifically D, E, F, and G are -- that
19 they're photographs of various things I assume on the
20 interior of the vehicle. There is no showing of any sort
21 that those items were there or that the interior of the
22 vehicle had that appearance back in November of 2001.

23 MR. KNIGHT: Your Honor, I think that would go to
24 the weight and not the admissibility. And by the way, I
25 think we have had witnesses here testifying to --

1 MR. ROGERS: Right.

2 (Counsel talking at the same time.)

3 MR. KNIGHT: The other thing is, as far as this car
4 being in the exact condition that it was maybe in 2001, I
5 don't think the state should be penalized for the fact that
6 the defendant wasn't arrested in this case until March of
7 '04. I think that -- is there a problem?

8 MR. ROGERS: No. I'm choking back laughter.

9 MR. KNIGHT: Oh. Okay.

10 Also, as far as establishing that this is the
11 defendant's car, that we need to lay a foundation for that,
12 that's already been done, via the top two photographs, and C,
13 which shows the registration to William Ferguson -- that
14 shows the registration to William Ferguson, which was also
15 still in the car. And I can establish that through
16 witnesses.

17 THE COURT: Is there going to be any evidence
18 relating to the items pictured in F and G?

19 MR. KNIGHT: Your Honor, the tire tool, to my
20 knowledge, this large tool right here, is already in
21 evidence. And those other items will become relevant later,
22 Your Honor.

23 MR. ROGERS: Your Honor, my understanding is the
24 tire tool is not in evidence. And in fact, my explicit
25 memory is that when something that looked like that, that's

1 in that cardboard box on counsel table, was shown to
2 Mr. Erickson, he said that's not it, and the state
3 represented that they would introduce that evidence through
4 another witness.

5 MR. CRANE: It's been shown.

6 MR. ROGERS: It's been shown to Mr. Erickson, and he
7 said that's not what he was talking about.

8 MR. KNIGHT: Your Honor, it will become relevant.
9 It's relevant right now.

10 THE COURT: I will show that the objection to 87C,
11 D, and E, that objection is overruled, and those are
12 admitted.

13 - - -
14 State's Exhibits 87C, 87D, and 87E admitted into
15 evidence.

16 - - -
17 THE COURT: Somehow you're going to have to connect
18 up this to something that you're doing here today before I
19 will admit 87F and G. Although you may ask the witness about
20 those photographs, I don't want you to display those
21 photographs to this witness at this time. And I don't know
22 that this item, which I'm pointing at, which appears to be in
23 87G, is in any way relevant to this case at this particular
24 time.

25 MR. CRANE: Judge --

1 A. The tire storage area in the trunk.

2 Q. Okay. And I'm going to ask you a leading question.

3 MR. KNIGHT: Mr. Rogers, is that all right? With
4 regard to --

5 MR. ROGERS: It depends on what it is.

6 Q. 87F and 87G. I don't want you to testify about what
7 you see in 87F and 87G, but are these photographs accurate
8 representations of what you actually photographed?

9 A. Yes.

10 Q. With respect to this car.

11 A. Yes.

12 Q. And the contents of this car.

13 A. Yes, they are.

14 Q. And more specifically, with regard to the contents
15 of the trunk of this car.

16 A. Yes, they are.

17 Q. Okay.

18 MR. KNIGHT: Your Honor, I'd offer 87, 87A and I'll
19 go ahead and -- all the way up to 87G.

20 THE COURT: Well --

21 MR. ROGERS: I'll renew my objections to 87F and G.
22 And Your Honor, I think the Court has already ruled
23 admissible 87A, B, C, D, and E, over objections at different
24 times.

25 THE COURT: All right. A and B were admitted

1 previously. 87A and B were previously admitted. The
2 objections to 87C, D, and E are overruled. At this time the
3 objection to 87F and G are sustained.

4

- - -

5 State's Exhibits 87C, 87D, and 87E admitted into
6 evidence.

7

- - -

8 Q. State's Exhibit 88, what was that? Can you see it
9 there in the box? To your right. Down.

10 A. Yes. That's an empty pack of Marlboro cigarettes.

11 Q. And where did you find those cigarettes or that
12 pack?

13 A. That was in the vehicle. The Mercedes.
14 Specifically located in a pouch that was directly behind or
15 attached to the back side of the passenger -- front passenger
16 seat.

17 Q. And then State's Exhibit 89, do you see that in
18 there?

19 A. Exhibit 89 is the vehicle registration paper.

20 Q. Okay. And that's what was in photograph I believe
21 C; is that correct?

22 A. Yes.

23 Q. Okay.

24 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
25 88 and 89.

1 MR. ROGERS: Excuse me. That's, A, a leading
2 question. There's no showing that's the defendant's vehicle.
3 And we all know it's not the defendant's vehicle at the time
4 it's being collected.

5 MR. KNIGHT: Well, I'm sorry.

6 Q. From William Ferguson's vehicle?

7 A. Yes.

8 Q. That's trace evidence that was collected from there;
9 is that correct?

10 A. Yes.

11 Q. Okay. And how did you collect that trace evidence
12 there?

13 A. A fairly simple technique. And that is: I wrap
14 tape around my hand and apply that to the areas I'm taking a
15 sample from. And it picks up trace evidence in the same
16 fashion that you would clean lint off of an article of
17 clothing.

18 Q. And so did you just pick up trace evidence from
19 front seat, back seat of this vehicle?

20 A. Yes.

21 Q. Okay. And put it in four different packages; is
22 that correct?

23 A. Yes.

24 Q. Did you divide the car into quadrants? Is that why
25 you have four packages?

1 A. Yes.

2 Q. So it would it would be left front, right front,
3 left rear, back rear; is that correct?

4 A. Yes.

5 Q. Okay. And what was done with that trace evidence
6 there? State's Exhibit 91.

7 A. Well, I submitted it to our evidence custodian, and
8 I believe it was sent to the Missouri State Highway Patrol
9 lab for further analysis.

10 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
11 91.

12 MR. ROGERS: No objection, Your Honor.

13 THE COURT: State's Exhibit 91 is admitted.

14 - - -

15 State's Exhibit 91 admitted into evidence.

16 - - -

17 Q. On March 10th, 2004, who did you make contact with?
18 Did you make contact with a person by the name of Ryan
19 Ferguson?

20 A. Yes.

21 Q. Do you see him in court today?

22 A. I do.

23 Q. Can you please point him out?

24 A. He's the defendant in this case, sitting at the
25 counsel table, wearing a dark blue jacket and a light --

1 lighter blue shirt and tie.

2 Q. And what did you collect from him?

3 A. A buccal swab, DNA sample from his mouth, as well as
4 hair standards from his head.

5 Q. Do you see State's Exhibit 92 in there?

6 A. Yes.

7 Q. What is that?

8 A. Hair standards and buccal swab from Ryan Ferguson.

9 Q. On that same day did you contact Charles Erickson?

10 A. Yes.

11 Q. For the same reason?

12 A. Yes.

13 Q. And did you also obtain buccal swabs and hair from
14 Charles Erickson?

15 A. Yes.

16 Q. Okay. And that's State's Exhibit what? 93; is that
17 right?

18 A. Yes.

19 Q. And were both State's Exhibits 92 and 93 sent to the
20 Missouri State Highway Patrol crime lab?

21 A. Yes.

22 MR. KNIGHT: Your Honor, I'd offer 92 and 93.

23 MR. ROGERS: No objection.

24 THE COURT: State's Exhibits 92 and 93 are admitted.

25 - - -

1 State's Exhibits 92 and 93 admitted into evidence.

2 - - -

3 MR. KNIGHT: Your Honor, may we approach?

4 THE COURT: You may.

5 - - -

6 Counsel approached the bench and the following

7 proceedings were held:

8 MR. KNIGHT: Can I now publish this to the jury?

9 THE COURT: You've covered up the ones that were not
10 admitted.

11 MR. ROGERS: That seems to be correct.

12 THE COURT: Yes, you may publish that.

13 MR. ROGERS: Subject to our prior objections,
14 obviously.

15 THE COURT: All right. You may publish it.

16 MR. KNIGHT: Thank you, Your Honor.

17 - - -

18 The following proceedings were held in open court:

19 THE COURT: And for the record, those photographs
20 are 87A, B, C, D, and E.

21 MR. KNIGHT: That's correct, Your Honor.

22 THE COURT: You may publish those to the jury.

23 MR. KNIGHT: Thank you, Your Honor.

24 Q. Show you what's been marked again as 87A, 87B.

25 Those two photographs. Those are photographs of the Mercedes

1 that had this registration to William Ferguson that you
2 processed in March of 2004; is that correct?

3 A. Yes.

4 Q. Okay. 87D, what is this a photograph of?

5 A. Floor mats in the trunk.

6 Q. All right. And then when you took away these floor
7 mats and took away this carpet, what did you then wind up
8 with in 87E?

9 A. Well, that's a photograph of what was left in the
10 trunk bed area. It's a cover over the spare tire
11 compartment.

12 Q. Okay. Last set of questions. I'm going to show you
13 what's been marked State's Exhibit 1, 1A and 1B. These are
14 already in evidence. Photograph of Kent Heitholt. During
15 this investigation, did you ever find -- we've got the belt
16 buckle right there, but did you ever find the rest of Kent's
17 belt?

18 A. No.

19 Q. Right here, in 1B, you can see his watch. Did
20 anybody from the Columbia Police Department, including
21 yourself, ever at any time find Kent's watch?

22 A. No.

23 Q. And his car keys. Did anybody ever find car keys?

24 A. No.

25 MR. KNIGHT: We're almost done.

1 THE COURT: All right.

2 MR. KNIGHT: May we approach?

3 THE COURT: Yeah, you may. And it's easy -- you can
4 approach.

5 - - -

6 Counsel approached the bench and the following
7 proceedings were held:

8 MR. KNIGHT: There is a tire tool that was depicted
9 in one of those bottom photographs.

10 THE COURT: Yes. Is it on the right or the left as
11 you're looking at the photograph?

12 MR. KNIGHT: It's on the right, I'm sure. It might
13 be on the left too. But I know -- I know it's on the right.
14 And I would like to just be able to show the witness this --
15 the actual tire tool that's already been testified about.
16 Another witness has already looked at that tire tool earlier.
17 Charles Erickson. And I'd like to just show him that tire
18 tool. He doesn't need to say it's a tire tool. I won't have
19 him do that. I'll lead him through it. He just needs to say
20 that that piece of evidence was collected from the trunk.
21 That's it. That's all I want to do. And I'm not going to
22 talk about what it was. And I'll lead him. I need to lead
23 him on that.

24 MR. ROGERS: I would still object to it, Your Honor.
25 My concern is that if it's identified there, and then they

1 have some witness come in and say, "Well, that has parts off
2 it and it looks similar to wounds on the decedent," or
3 something like that, then they will try and say they
4 established relevance, when they haven't shown any connection
5 between that tool and this defendant.

6 MR. KNIGHT: I don't think we are going to claim
7 that the wounds are consistent with that particular object.
8 I don't think that's -- that's going to happen.

9 THE COURT: What you're approaching about is to see
10 if you can ask him if he took this particular item out of the
11 trunk.

12 MR. KNIGHT: That's it.

13 THE COURT: And you're not going to offer the item.

14 MR. KNIGHT: I won't offer it. That's fine. No.

15 THE COURT: I will permit you just to ask him if he
16 took it out of the trunk.

17 MR. KNIGHT: Okay. Okay.

18 THE COURT: I assume it's marked and identified as
19 an exhibit.

20 MR. KNIGHT: It is. I can't remember what number.

21 MR. ROGERS: Like I said, it was shown to
22 Mr. Erickson before. Please have the record reflect this is
23 over my objection. And I'd like a continuing objection
24 through it.

25 THE COURT: It is over your objection. It is not

1 being offered, nor is it admitted at this time. I'm just
2 permitting him to ask if this was taken out of the trunk.

3 MR. ROGERS: Thank you.

4 THE COURT: You're welcome.

5 - - -

6 The following proceedings were held in open court:

7 Q. This is going to be a yes/no question. Okay? I'd
8 like to show you what's been marked as State's Exhibit 90.
9 Did you take this particular item -- you can open that down
10 here if you need to. Did you take this --

11 THE COURT: And do not display it to the jury.

12 Q. Yeah. That cannot be displayed.

13 Did you take that from the trunk of that blue
14 Mercedes?

15 A. Yes.

16 Q. Okay. Officer Nichols, do you remember what was
17 depicted in State's Exhibits 84F and 84G?

18 THE COURT: Those are 87, I believe.

19 MR. KNIGHT: I'm sorry.

20 Q. 87F and G before those photographs were covered up?

21 A. Yes.

22 Q. Okay. And were all of those items collected and
23 taken into evidence, that were depicted?

24 A. I'm not sure if all the items were. It may have
25 been. I know one item was.

1 Q. Okay.

2 MR. KNIGHT: Nothing further. Thanks.

3 THE COURT: Are you looking at 90?

4 MR. ROGERS: Yes.

5 THE COURT: I will note that was not displayed to
6 the jury. It was retained in a box.

7 MR. ROGERS: And I was looking for the exhibit
8 number, because I didn't hear it.

9 THE COURT: It is 90.

10 MR. ROGERS: Thank you.

11 - - -

12 CROSS-EXAMINATION

13 BY MR. ROGERS:

14 Q. Detective Nichols, you've told us about luminol; is
15 that correct?

16 A. Yes.

17 Q. And the chemiluminescence you have described is not
18 dependent upon the freshness of the blood, is it?

19 A. No.

20 Q. The chemical reaction which creates that
21 luminescence, chemiluminescence, when luminol comes in
22 contact with blood, is with substances in the blood which do
23 not evaporate or degrade; is that correct?

24 A. Correct.

25 Q. And therefore, if a fabric type material, for

1 example, State's Exhibit -- if you were to treat State's
2 Exhibit 36, this bloody T-shirt, with luminol now, you would
3 observe a very strong chemiluminescence, wouldn't you?

4 A. Yes.

5 Q. Assuming those were blood stains. Which we already
6 talked about. Right?

7 A. Yes.

8 Q. Okay. And for that reason, when you looked at the
9 Mercedes in March of 2004 -- by the way, you found a
10 registration paper with Bill Ferguson, William Ferguson's
11 name on it; right?

12 A. Yes.

13 Q. But you knew that that was not his vehicle at the
14 time you examined it, didn't you?

15 A. Yes.

16 Q. That vehicle had been acquired from another
17 individual who had bought it from him the year before.
18 Correct?

19 A. I knew that -- I was told it had been purchased by
20 someone, yes.

21 Q. And -- in any event, when you examined that vehicle,
22 you also performed a luminol test on the vehicle as well,
23 didn't you?

24 A. I did.

25 Q. And what areas of the vehicle did you treat with

1 luminol?

2 A. The interior and -- as well as the trunk.

3 Q. You said "the interior." Meaning the passenger
4 compartment.

5 A. Exactly.

6 Q. And then would you have treated with luminol the
7 place where the front seat passenger would have been sitting?

8 A. Yes.

9 Q. And did you treat with luminol the place where the
10 driver would have been sitting?

11 A. Yes.

12 Q. And were there floor mats in the vehicle in the
13 passenger compartment when you examined it?

14 A. I think there was.

15 Q. And did you also treat them?

16 A. Yes.

17 Q. And did you treat the carpet underneath the floor
18 mats?

19 A. Yes.

20 Q. Okay. And did you treat the floor mats that were in
21 the trunk, underneath the -- or over the spare tire
22 compartment cover?

23 A. Yes.

24 Q. And did you treat with luminol the rest of the
25 interior of the trunk?

1 A. Yes. Once I removed the floor mats, I treated the
2 rest of the trunk.

3 Q. Okay. And at any place in that vehicle did you
4 observe any chemiluminescence, indicative of blood?

5 A. No.

6 Q. With regard to your search of the vehicle, was that
7 done before or after your conversation with Charles Erickson
8 on videotape in the interview room of the police department?

9 A. I think that was after.

10 Q. Okay. So you had already talked to Erickson.

11 A. I believe that's correct.

12 Q. And Erickson had drawn for you a picture of what he
13 said the implement that he used looked like. Correct?

14 A. Yes.

15 Q. And that is the implement depicted on State's
16 Exhibit 22. Is that correct?

17 A. Yes.

18 Q. Okay. And he described that to you during that
19 tape-recorded interview. Videotaped interview.

20 A. Yes, sir.

21 Q. Did you find at anyplace inside the trunk of the
22 Mercedes that you examined on March 10th anything that looked
23 like the picture Erickson had drawn?

24 A. No.

25 Q. You have seen implements which look like that other

1 places, haven't you?

2 A. Of the photograph or the one that I recovered?

3 Q. The one that he drew. Let me ask it in a leading
4 fashion. Have you seen a handle used to turn a screw jack,
5 which looks sort of like he was trying to draw?

6 A. Yes. But it's not -- that -- the drawing is not
7 quite accurate.

8 Q. Okay. But that was what you had in mind when he
9 drew it that he was trying to perceive; isn't that correct?

10 A. It seemed reasonable.

11 Q. Okay. And do you know what kind of jack was in the
12 Mercedes when you got it? When you looked at it.

13 A. I don't recall if it was a screw-up jack or a
14 scissors jack. I'd have to refer to my photographs.

15 Q. Okay. And --

16 MR. CRANE: Judge, can we approach? Or can
17 Mr. Knight approach? I guess I can't do it.

18 THE COURT: If Mr. Knight wishes to approach, he may
19 ask the Court to approach.

20 MR. KNIGHT: Yes, I do.

21 - - -

22 Counsel approached the bench and the following
23 proceedings were held:

24 MR. KNIGHT: Your Honor, I think by that line of
25 questioning, he has now opened the door wide for us to get

1 into the contents of this trunk. He's asked about what was
2 tested with luminol. He's asked this witness to compare what
3 was found in the trunk with a drawing that Charles Erickson
4 did. I think that we're clearly now going to be entitled on
5 redirect to ask about those.

6 THE COURT: Well, I think this is the middle of
7 defense counsel's --

8 MR. ROGERS: I agree.

9 THE COURT: It's the beginning of defense counsel's
10 cross-examination.

11 MR. ROGERS: Early beginning.

12 THE COURT: I was going to say, I think you are --

13 MR. KNIGHT: Premature.

14 THE COURT: -- premature in asking this. I think
15 it's premature at this time to discuss this issue.

16 MR. KNIGHT: Okay.

17 - - -

18 The following proceedings were held in open court:

19 Q. Going back to 2001, you testified I believe on
20 direct examination that you performed the luminol -- what do
21 you call it? Processing? Testing? Examination? What?

22 A. Testing.

23 Q. Testing?

24 A. Processing. Examination.

25 Q. Okay. All of the above. -- to sort of check the

1 work of the canine handled by Officer Todd Albers; is that
2 correct?

3 A. Yes.

4 Q. Alber, singular.

5 A. Alber.

6 Q. And so you knew at that time where that canine had
7 gone.

8 A. Yes.

9 Q. And you wanted to make sure that the trail the
10 canine followed appeared to be somehow related to the
11 offense.

12 A. Yes.

13 Q. And so that's why you did the luminol testing,
14 processing, examination a couple nights later; is that
15 correct?

16 A. Yes.

17 Q. Now, you said that you did that luminol examination
18 at night because it's easier to see the chemiluminescence at
19 night.

20 A. Yes.

21 Q. And it would also be easier to see the
22 chemiluminescence if there were no street lights or other
23 artificial lighting; correct?

24 A. Exactly. Yes.

25 Q. And did you have a structure or device that you

1 would use to shield the area that you were processing with
2 luminol from street light or ambient light while you did the
3 processing and the evaluation?

4 A. I did.

5 Q. Okay. And I assume that you didn't tent the whole
6 street.

7 A. No. It was difficult to do. The downtown ambient
8 light is such that it makes it impossible, even with street
9 lights off, to be able to see the chemiluminescence when
10 you're talking about a small reaction. Therefore, I took a
11 refrigerator box, cardboard box, lined it with black plastic,
12 cut out a hole with a hood so I could put it over my head. I
13 inserted the -- I use a mist bottle. And inserted the bottle
14 to where I could look down inside it, mist the -- an area the
15 size of a refrigerator box, until I could see the reaction.
16 At that point I took a piece of highway chalk and just made
17 an arrow pointer to or at the reactionary site. And then
18 we'd move the box down one more step and then one more step.

19 Q. Okay. And that's how you knew where to put the --
20 Mr. Knight called them cones, but they're photo markers,
21 whatever?

22 A. Photo markers.

23 Q. Kind of A-shaped items?

24 A. Yes.

25 Q. And so you went back, after you were done, what you

1 did in the box, and had the chalk marks, and by the chalk
2 marks you put the photo markers?

3 A. I moved down the street. Detective Lederle, who put
4 the photo markers in place and also did the photography in
5 that particular application, followed behind us.

6 Q. Okay. And let me first of all --

7 MR. ROGERS: Are you going to need the clothes any
8 more?

9 MR. KNIGHT: Probably not.

10 MR. ROGERS: Let's get them out of my way.

11 Q. Mr. Nichols, I'm going to call your attention to
12 what has been marked and admitted in evidence as Defendant's
13 Exhibit B, which I will tell you is a somewhat-out-of-date
14 aerial photograph of a portion of downtown Columbia. And
15 then I will also tell you I've put over the front of it a
16 sheet of acetate, which is marked Defendant's Exhibit B-3.
17 Okay?

18 A. Okay.

19 Q. Now, could you, with the Court's permission, come
20 down here and orient yourself with regard to this aerial
21 photograph?

22 A. (Complying.)

23 Q. Do you see where the Columbia Tribune is?

24 A. Yes.

25 Q. Okay. Do you see where the police station is?

1 It doesn't show it here.

2 A. No. It stops at the post office.

3 Q. Okay. But you now know where we're located;
4 correct?

5 A. Yes.

6 Q. And with regard to the area that you processed with
7 luminol, is that an accurate depiction of the streets that
8 you processed? And like I say, I'm telling you this is out
9 of date.

10 A. Well, there's a lot that's changed on here --

11 Q. Right.

12 A. -- I can see. But as far as Fourth Street still
13 being Fourth Street, Walnut still being Walnut, et cetera,
14 it's still accurate, yes.

15 Q. All right. And does it show the parking lot of the
16 Columbia Tribune building accurately?

17 A. Yes.

18 Q. Okay. Would you then, taking this -- did you tell
19 us that luminol, when it chemiluminesces, is -- it's a blue
20 color?

21 A. A light blue color.

22 Q. We have a dark blue kind of grease pencil. Would
23 you sketch on here the pattern of the luminol trails that you
24 were able to follow on November the 3rd, 2001. That you were
25 able to process with luminol and follow the trail like you

1 described on direct examination?

2 A. Well, I can certainly draw you the direction --

3 Q. Okay.

4 A. -- that we went here. And we ended at Broadway.

5 Q. Okay.

6 (Witness drawing on exhibit.)

7 A. Now we didn't -- I did not search the street.

8 Q. Okay.

9 A. On -- because of traffic. But what we did is: We
10 certainly would have picked up the track and continued on
11 south of Broadway until the track completely ran out.

12 Q. Okay. And let me make this part darker.

13 I believe you testified on direct examination that
14 you started just at the edge of the -- the south edge of the
15 driveway; is that correct?

16 A. Northeast corner of the building, which would be the
17 same location I believe you're describing.

18 Q. Okay. And when you say that you did not process the
19 street because of the traffic, that's not because you were
20 afraid of being run over in your refrigerator box; that's
21 because traffic would have removed any trace evidence.

22 A. Certainly with a refrigerator box, we were trying to
23 be resourceful. But the thing is: The traffic was coming up
24 and down street. That was a hazard. And we did not want to
25 subject any of our detectives to getting run over. So that's

1 why we did not process the center of the street.

2 Q. And just to make -- to memorialize whose testimony
3 this is during, I'm going to put your initials here. Jeffrey
4 Nichols; is that correct?

5 A. Jeff.

6 Q. Same initial.

7 A. J.

8 Q. J?

9 A. Yes.

10 Q. N?

11 A. I-C-H --

12 Q. I just put the N.

13 A. Okay.

14 Q. You're the only "JN" we got. And this is the
15 investigation you did on 11-3-01 and 11-4-01. Now, where did
16 you run out of luminol the first night?

17 A. I want to say that we ended at Walnut. And I was
18 then instructed to go to McDavid Hall, which you can't see on
19 this.

20 Q. Up here someplace?

21 A. It's up there. At Elm and Fifth. And search that
22 area up there. And then I went back to the Flat Branch
23 Brewery area, which would be this building I believe right
24 here, and searched in this area. And I ran --

25 MR. KNIGHT: I'm sorry. I'm sorry. That's Flat

1 Branch Brewery right here? Walnut --

2 THE WITNESS: Let's see. Wait a minute.

3 Q. These are -- I don't know if Flat Branch Brewery was
4 there when this thing was taken.

5 MR. KNIGHT: Wait a minute. Do you even have the
6 Flat Branch --

7 THE COURT: Excuse me, Mr. Knight.

8 MR. KNIGHT: Okay.

9 THE COURT: It's not your examination. If you have
10 an objection to make, I'll hear your objection.

11 MR. KNIGHT: Well, I'll object right now, because it
12 doesn't appear this is a fair and accurate representation of
13 the way this entire crime scene looked on November 1st
14 through 4th, 2001.

15 MR. ROGERS: We've already said that several times.

16 Q. Let me -- and I didn't ask anything about Flat
17 Branch Brewery, did I?

18 A. No.

19 Q. Okay. And I did tell you this was an out-of-date
20 picture; right?

21 A. Yes.

22 Q. Okay. Now, let me show you State's Exhibit --
23 whatever this is. 9. Okay? That's a more contemporaneous
24 picture, also in color. But it's at an angle. Does it show
25 where the Flat Branch Brewery is?

1 A. It does.

2 Q. Where's that?

3 A. This building right here.

4 Q. And that would be at --

5 A. It would be between Fourth Street and Fifth, to the
6 south of Cherry, to the north of Locust.

7 Q. Okay. So between Cherry and Locust and between
8 Fourth and Fifth would be over here someplace.

9 A. Yes.

10 Q. Okay. And do you see where it is -- is it on that
11 picture?

12 A. It looks like this building right in here.

13 Q. Okay. Would you just circle that and put a "FBB"
14 for Flat Branch Brewery? That that at least is the location
15 where it would have been.

16 A. (Complying.)

17 Q. Okay. So -- you can resume your seat if you want.

18 A. Okay.

19 Q. Now, we were -- you didn't tell us on direct
20 examination, but you are now telling us that you didn't just
21 process as far as Walnut Street and then run out of luminol;
22 you had processed as far as Walnut Street and were asked to
23 go process someplace else?

24 A. That's correct.

25 Q. And the first place you were asked to process was

1 McDavid Hall?

2 A. Yes. In the area of McDavid Hall.

3 Q. And that is in the area of Fifth and --

4 A. Elm.

5 Q. -- Elm. So that's -- you're right over here.

6 A. Yes.

7 Q. And that's a residential facility of the University
8 of Missouri.

9 A. Yes.

10 Q. And the reason that you were asked to process there
11 was because that is where --

12 MR. KNIGHT: Your Honor, I'd object on the basis of
13 hearsay. I'm pretty sure that's where he's going with this.

14 MR. ROGERS: It probably is, Your Honor.

15 MR. KNIGHT: May we approach?

16 MR. ROGERS: I think it's already been dealt with
17 before. And we will hopefully have Officer Alber here, if
18 they don't call him.

19 - - -

20 Counsel approached the bench and the following
21 proceedings were held:

22 MR. KNIGHT: I think where he's going with this: He
23 is asking why they went to this location. And that's because
24 Todd Alber's dog had tracked in this area. And the only way
25 that he would have this information is through hearsay. My

1 objection will be hearsay.

2 That's where you're going with that, isn't it? And
3 if you want to call Todd Alber to testify about it, that's
4 fine. But not through this witness.

5 MR. ROGERS: I do intend to call Todd Alber. He is
6 under subpoena and we will call him. And I hadn't intended
7 to ask this witness that until he started volunteering it,
8 and in response to other questions, but.

9 MR. KNIGHT: Then what's the purpose of you talking
10 about the break in the action that night? I think you were
11 pretty much getting into that, weren't you?

12 MR. ROGERS: I think he said on direct examination
13 that he broke and ran out of --

14 MR. KNIGHT: Right.

15 MR. ROGERS: Then I was asking him --

16 MR. KNIGHT: Yeah.

17 MR. ROGERS: -- questions about the map. He said,
18 "Then I was sent to such and such a place and I was sent to
19 such and such a place. And by the time I got back, I had run
20 out of luminol."

21 MR. KNIGHT: So the only reason --

22 MR. ROGERS: I was exploring it, sure.

23 MR. KNIGHT: The only reason --

24 MR. ROGERS: Actually, quite frankly, it's to
25 explain the officer's conduct, and not for the truth of the

1 matters asserted by the dog.

2 THE COURT: It is my recollection that on direct
3 examination he said the whole purpose of his using the
4 luminol was to test whether or not the dog track was accurate
5 or not.

6 MR. KNIGHT: No, he didn't say "dog track."

7 THE COURT: I have to feel that --

8 MR. KNIGHT: Did he say track -- he said he was
9 using this to track the suspect. He never said anything
10 about dog track.

11 THE COURT: Oh, he certainly talked about it.

12 MR. ROGERS: He said the canine officer --

13 THE COURT: He certainly talked about the dog. And
14 he was doing it to verify whatever that is. And I have to
15 feel that he didn't go along with the dog. I don't know. He
16 didn't testify that he did. He is not the handler of the
17 dog. And I assume that he was told where the dog went. And
18 that is why he put the luminol down the street and where he
19 was going. I am going to overrule your objection. I think
20 it was opened up on direct examination.

21 - - -

22 The following proceedings were held in open court:

23 Q. Let me make sure we're on the same page. Did you
24 tell us on direct examination that your purpose in doing the
25 luminol processing, examination, testing, was to verify the

1 route taken by the canine handled by Officer Alber?

2 A. Yes. That was the initial reason for doing that.

3 And then it became obviously a tracking venture at that

4 point.

5 Q. All right. And while you were in the midst of the
6 tracking venture, you were instructed to go to Fifth and Elm.

7 A. Yes.

8 Q. And that was the southeast terminus of the canine
9 tracking that you were there to verify. Correct?

10 A. I believe the dog wound up down in that area.

11 Q. Okay.

12 A. So, yes.

13 Q. All right. And so you went down there to see if you
14 could find evidence of blood at that end. Correct?

15 A. Yes.

16 Q. And that's what you used your luminol for in that
17 area.

18 A. Yes.

19 Q. And you used it on the sidewalk and steps outside of
20 this campus residential facility.

21 A. Yes. And inside.

22 Q. And inside.

23 A. Yes.

24 Q. Okay. And calling your attention to Exhibit 9,
25 State's Exhibit 9, can you see McDavid Hall there?

1 A. I believe that it is -- you can see the rooftop in
2 the front of the building right here, which would be the
3 northwest corner, for the most part, of the university
4 campus, in terms of residential area.

5 Q. Okay. And it is on the photograph Exhibit 9, right
6 above the word "store" --

7 A. Yes.

8 Q. -- right? Okay. And when you observed that
9 building and its environs with the aid of luminol, did you
10 observe any chemiluminescence?

11 A. No.

12 Q. Okay. So that was a negative conclusion.

13 A. Yes.

14 Q. All right. And then from there, where did you go?

15 A. I believe I went up to the Flat Branch area. Flat
16 Branch Brewery.

17 Q. Area. Okay.

18 A. The building I marked on the --

19 Q. And that's the one --

20 A. -- map.

21 Q. -- circled in blue, with "FBB," here on Exhibit B-3.

22 Correct?

23 A. Yes.

24 Q. And were you in the front or the rear or both parts
25 of that building?

1 A. Southwest of the building.

2 Q. Okay. Southwest corner. So that would be the
3 corner closest to Fourth Street and the corner closest to
4 Locust Street.

5 A. That would be -- yeah. Yes. Locust Street being to
6 the south --

7 Q. And --

8 A. -- Fifth Street being to the east, Fourth Street
9 being to the west. I was almost in between Fourth and Fifth,
10 directly north of Locust.

11 Q. Okay. And south of Cherry.

12 A. South of Cherry.

13 Q. Okay. And that, once again, related to what you had
14 been told regarding the path taken by Officer Alber's canine.

15 A. Yes.

16 Q. Okay. And you processed that area with the little
17 bit of luminol you had left?

18 A. Yes.

19 Q. And did you observe any chemiluminescence in that
20 area?

21 A. I did observe a very, very minute reaction at one
22 location that I did not take very seriously. It did not
23 look like a -- it looked more like a false positive reaction
24 of some sort. And I'm talking about a pinhead size reaction.
25 So to be able to confirm that it was any type of blood

1 reaction, it looked -- I ruled it as a false positive.

2 Q. Okay. And that could be accounted for by being a
3 tiny fleck of rust or something?

4 A. It could have been.

5 Q. Or -- it's hard to think that a pinhead size drop of
6 bleach would show up outside someplace, but maybe that --

7 A. Well, sometimes rocks have iron deposits in them.
8 So it's not uncommon, if you get a rock that has some iron
9 that's exposed, to get a reaction.

10 Q. And was this in some kind of gravelly area?

11 A. Yes. It was at the edge of a parking area.

12 Q. Okay. And you could find nothing around that that
13 would be part of a pattern or trail or, I guess pattern's the
14 best word, of chemiluminescence.

15 A. No.

16 Q. All right. And did that end your work with luminol
17 on the night of November 3rd?

18 A. Yes.

19 Q. And then you came back November 4th and resumed
20 where you had been interrupted at --

21 A. Walnut.

22 Q. -- Fourth and Walnut. Correct?

23 A. Yes.

24 Q. And you went down Fourth Street as far as Broadway.

25 A. Yes.

1 Q. And by the time you got to Broadway, was the size of
2 the luminescent particle or luminescent things you were
3 seeing diminishing?

4 A. Yes. To the point that I could no longer get any
5 reaction at all.

6 Q. By the time you got to Broadway.

7 A. Yes.

8 Q. And so there would have been no point to attempt to
9 pick up anything on the other side of Broadway. As far as
10 you were --

11 A. Logically, there would not be, although I did
12 attempt to do that. And I was not successful.

13 Q. Okay. So you even went across Broadway and tried to
14 find something and you couldn't.

15 A. That's correct.

16 Q. Okay. Now, when was it that you went to Flat Branch
17 Creek? Or is this just named Flat Branch?

18 A. Well, it's Flat Branch Creek.

19 Q. Okay.

20 A. I don't recall if that was November 3rd or 4th.
21 Sometime in there, I believe.

22 Q. During the daytime.

23 A. Yes.

24 Q. And that's when you observed and recovered this --
25 you called it a form stake?

1 A. It's a form stake that's commonly used by
2 contractors to form up sidewalks.

3 Q. Sidewalks or curbs.

4 A. Curbs, yes.

5 Q. It's like a long metal spike kind of thing with a
6 hook on the end to hold the form; right?

7 A. Well, no, not exactly. Yes and no. It is a stake
8 that's about this long, but there are holes in the top of it.
9 So you can actually put a nail through that and drive into a
10 form board.

11 Q. Oh, to a wooden form.

12 A. Yes.

13 Q. Okay. And it had a growth of algae on it.

14 A. Yes.

15 Q. Which means either it had been removed with algae on
16 it and then put back in, or that it had been there
17 continuously for some time.

18 A. Yes.

19 Q. Now, when you began your luminol processing by the
20 Tribune building, did you also process the area across the
21 driveway north of the corner of the building?

22 A. North of the corner of the Tribune building?

23 Q. Yeah.

24 A. No.

25 Q. The area -- the driveway itself where it crosses the

1 sidewalk.

2 A. No.

3 Q. And why not?

4 A. Well, my instructions were that witnesses had
5 seen -- I'm sorry, had observed or they had seen two
6 individuals running up to that part of the building, and it
7 appeared that they had turned and gone down Fourth Street.
8 So we went to the point that where we last -- any last known
9 visual contact had been made, and we started at that point
10 and went on.

11 Q. And nobody had told you that someone might have
12 started to go north and turned and went south.

13 A. I didn't have information suggesting that, no.

14 Q. Okay. Now, the first items that you observed there
15 actually revealed a footprint, although not a whole lot of
16 detail; is that correct?

17 A. Yeah. It was in the shape of a shoe.

18 Q. Okay. And did you make any attempt to photograph
19 that footprint?

20 A. No, I did not.

21 Q. And you could have photographed it, photographed the
22 luminescence, the chemiluminescence, inside the box, couldn't
23 you?

24 A. That's a good question, because I've never tried to
25 do that before. And the -- the refrigerator box, I think I'd

1 probably need to get an awful small tripod with someone that
2 could fit inside the refrigerator box. And so, being that it
3 was a tracking mission, I was satisfied with what I saw. And
4 so I decided to go ahead and continue our trek on south,
5 along Fourth Street, with the information we were observing.

6 Q. And did you also see more areas of chemiluminescence
7 which looked like they could be shoe prints?

8 A. Well, if -- as the track continued south, certainly
9 the reaction took on a different shape. And it's much the
10 same as you walking through a puddle of water. And the
11 further you go down the sidewalk, certainly your wet
12 footprint takes on a different shape, as different parts of
13 the shoe tends to dry and -- or all the blood's transferred
14 off and cleansed. So for some distance you could tell that
15 it was a shoe print or partial shoe print; heel. But no
16 specific detail. And the reason being that it -- I think
17 because it had showered the night before. Lightly. We had
18 received a light shower. And it probably distorted the
19 blood.

20 Q. And as you testified earlier, I believe that you saw
21 two parallel tracks of chemiluminescence? Is that a fair
22 statement?

23 A. Yes.

24 Q. And did you observe at any point what could have
25 been footprints on both of those tracks?

1 A. Well, sitting here now thinking back four years ago,
2 I don't recall specifically what I saw in terms of the exact
3 tread design or shoe shape. What I do recall seeing was two
4 separate paths of travel, if you will; the reactions being
5 far enough apart, and at this point in time it appeared as if
6 they were running. And for someone to physically make a
7 pattern like that, if it was one person, I don't see how they
8 would do it. But there were two distinct paths. And it
9 appeared as if both individuals were running at that point.

10 Q. And the point being that if you had photographed at
11 least the initial areas that you had seen, we could look at
12 them or somebody else could look at them and perhaps make a
13 determination in the calm of the office or laboratory as to
14 tread patterns or whether there's two different kinds of
15 shoes or things like that; correct? Is that --

16 A. No.

17 Q. -- a fair statement?

18 A. No, it's not, because there was absolutely no
19 visible tread pattern at all in the reaction. I get very
20 excited when I see tread pattern in a luminol reaction,
21 because there are certain substrates, carpet being one, that
22 retains detail very well. But out on the sidewalk, and
23 after, like I said, it had showered the night before,
24 slightly, we didn't get a downpour, but it had rained enough
25 that I figured the only reason that I could not see a tread

1 pattern was as a result of the rain distorting the blood.
2 But it still had the shape -- the first reactions that I
3 began to get were still in the shape of a shoe. But as far
4 as a tread pattern, there was none.

5 Q. But now what we're relying on is your admittedly
6 less-than-perfect memory of what you saw; right?

7 A. Yes.

8 Q. Instead of photographs of the phenomenon which you
9 actually observed.

10 A. Yes. You'll have to take my word for that.

11 Q. Now, let's talk about the blood spatter. When you
12 got there, about what time was it?

13 A. I was notified around 2:30 a.m. I arrived I would
14 say somewhere around the ballpark of 3.

15 Q. And at that time the scene had already been taped
16 off, had it not?

17 A. Yes, it had.

18 Q. And there were uniformed officers there.

19 A. Yes.

20 Q. And their function was to protect the scene.

21 A. Yes, sir.

22 Q. And that means: Don't let other people come and
23 mess up the clues. Right?

24 A. Yes.

25 Q. And did you see Officer McGeorge there?

1 A. I know that she was there, because I believe she
2 filed a police report. May have been the first officer to
3 arrive.

4 Q. Okay.

5 A. But I don't specifically -- I mean, I can't sit here
6 and tell you exactly, you know, who was there. I can tell
7 you, as I testified earlier, the individuals that I recall
8 being there.

9 Q. Okay. And I don't want to spend all day having you
10 say the same thing over and over again. Based on your
11 training and experience as a police officer, the function of
12 the initial officer to arrive at the crime scene, if there is
13 no hope of aiding the victim, is to -- and there's nobody to
14 promptly pursue, is to protect the crime scene; right?

15 A. That's usually the function of the first officer,
16 yes.

17 Q. Okay. And the way -- one of the ways that's done is
18 by putting up the yellow crime scene tape; right?

19 A. Yes.

20 Q. And then people who don't have any business at the
21 crime scene don't get to come walk through it; right?

22 A. It doesn't always work that way.

23 Q. That's what it's for.

24 A. That's the purpose.

25 Q. Okay.

1 A. But administrators like to see what they're up
2 against as well.

3 Q. And I'm not claiming administrators don't have any
4 purpose to be there. I won't report your conversation to
5 Sergeant Monticelli.

6 A. That's fine.

7 Q. The people that are inside the crime scene, after
8 the emergency medical types leave, are trained police
9 officers.

10 A. Yes.

11 Q. And they are people who have been trained not to
12 disturb the crime scene unnecessarily. Correct?

13 A. Yes.

14 Q. And they're people who are trained to watch what
15 they're doing.

16 A. In most cases, yes.

17 Q. Okay. I mean, they may not be doing it, but they're
18 trained to. Right?

19 A. Yes.

20 Q. Okay. The photographs that you took of footprints,
21 shoe prints, sole patterns, on Exhibits 39E, 39F, and 39G; is
22 that correct?

23 A. Yes.

24 Q. They were away from where the body was, weren't
25 they?

1 A. Away -- I'm having I guess a difficult time with
2 "away," because "away" could mean --

3 Q. I'll be more specific.

4 A. -- two city blocks away. But they were within close
5 proximity, yet they were -- yes. Just to the east of the
6 body.

7 Q. Okay. And calling your attention to Exhibit 39A up
8 here in this corner, this is the chalk outline that shows the
9 leg, the extremity nearest the rear driver's side wheel; is
10 that correct? Can you see that from there?

11 A. That would be the left arm.

12 Q. Left arm. Okay.

13 Okay. That's the left arm. And the legs go
14 underneath the car here? Is that right?

15 A. Yes.

16 Q. And placard number 1 shows what appears to be a shoe
17 pattern; is that correct?

18 A. Yes.

19 Q. And is that up here?

20 A. Yes. I believe -- I can't -- can I approach that?

21 Q. Yes, please. Because I can't see this. Well --
22 there's one.

23 A. This is one.

24 Q. Okay. So that's --

25 A. That's another one.

1 Q. That's a different one.

2 A. That's not a marker I placed there.

3 Q. Okay. So you're saying that the markers on the
4 actual parking blocks or bumpers or whatever they are, have
5 their own numbers. That's parking space number 1, here's
6 parking space number 2.

7 A. Correct.

8 Q. And there is your photo marker number 1, which
9 corresponds to State's Exhibit 39C? Correct?

10 A. Yes.

11 Q. And there's another kind of photo marker, which has
12 a built-in ruler.

13 A. Yes.

14 Q. And that's what you've taken a photograph, looking
15 straight down at that particular shoe impression.

16 A. Yes.

17 Q. And that's up here, so you know that if there's
18 medical personnel working down around here by the head,
19 they're not going to be likely to have made that impression.

20 A. If that's where they're at, I would say that's
21 reasonable.

22 Q. Okay. Now, while I've got you here, marker 2 is
23 another partial shoe impression?

24 A. Yes.

25 Q. And that is right here --

1 A. Yes.

2 Q. -- towards -- towards number 1, from the pool of
3 blood at the base of the driver's side rear tire?

4 A. Yes.

5 Q. And marker number 3 is on the stripe between the
6 parking meters, just to the southeast of marker 2?

7 A. Now you said "parking meters."

8 Q. Parking spaces.

9 A. You're talking parking bumpers or parking spaces?

10 Q. Parking space -- the stripe between the parking
11 space.

12 A. It's on the parking stripe. The space stripe.

13 Q. Okay. And that's shown here.

14 A. Yes.

15 Q. You can see the stripe and you can see where there's
16 a little jog there in the stripe. And that you can see in
17 the picture up there as well.

18 A. Yes.

19 Q. Okay. And number 4 is to the east of number 3 on
20 the same stripe?

21 A. Yes, sir, it would be.

22 Q. And that would be near the front of the vehicle.

23 A. Yes.

24 Q. And that's another shoe impression.

25 A. Yes.

1 Q. And number 5 is near the same stripe or on the same
2 stripe, closer to the large pool of blood.

3 A. Yes.

4 Q. Okay. Thank you. And calling your attention to
5 State's Exhibit 14, just to put things in perspective,
6 State's Exhibit 14 shows this parking space stripe that
7 the -- some of the footprints are on or near; is that
8 correct?

9 A. Yes, sir.

10 Q. And it also shows some debris of medical
11 resuscitation items?

12 A. Yes.

13 Q. And they are removed in area from where the
14 footprints were, aren't they?

15 A. Yes.

16 Q. Now, you stated that you bagged the hands -- bagged
17 Mr. Heitholt's hands; is that correct?

18 A. Yes.

19 Q. And you used the bags that you had brought with you
20 for that purpose.

21 A. Yes.

22 Q. And those bags are maintained in the police supply
23 room, whatever you call it?

24 A. Yes.

25 Q. And you buy them from a company which produces bags

1 for the purpose of collecting evidence.

2 A. Yes. I'm not sure if this batch had been
3 purchased -- sometimes, depending on the low bid, they'll get
4 those from another manufacturer, but same type.

5 Q. The point being: That the reason that you bag the
6 hands is to preserve trace evidence; right?

7 A. Yes.

8 Q. And it wouldn't make a whole lot of sense to tape
9 dirty, old, used bags full of hair to bag hands with, would
10 it?

11 A. Well, no, it would not.

12 Q. And you don't do that. You're a professional.
13 Right?

14 A. Yes.

15 Q. Okay. And so you did what you do in every case, to
16 attempt to preserve the evidence; right?

17 A. Yes.

18 Q. And the people who were there at the scene before
19 you bagged the hands, I'm not talking about the medical
20 personnel who were there before you got there and gone by the
21 time you got there, but the other people who were there at
22 the scene, who were inside the security perimeter, were
23 people who were helping process the scene; right?

24 A. Yes.

25 Q. And they were trying to collect evidence; right?

1 A. Yes.

2 Q. They weren't trying to deposit evidence.

3 A. Correct.

4 Q. And when you bagged the hands, you were not trying
5 to deposit any of your own hair there, were you?

6 A. No.

7 Q. Okay. And when -- the other officer who helped
8 process the scene? I forgot his name.

9 A. Detective Harmon.

10 Q. Hermon?

11 A. Harmon. H-a-r-m-o-n.

12 Q. When Detective Harmon was doing his part of
13 processing the scene, he wasn't depositing hairs on
14 Mr. Heitholt's hand, was he?

15 MR. KNIGHT: Your Honor, that calls -- that calls
16 for speculation, Your Honor.

17 THE COURT: Sustained.

18 Q. Was he acting in accordance with proper evidentiary
19 preservation procedures?

20 A. As far as I knew.

21 Q. Okay. And you've never known him not to on purpose,
22 have you?

23 A. No. Not on purpose.

24 Q. Okay. And you were not on purpose disregarding
25 procedures either.

1 A. No.

2 Q. And the whole idea of the procedure is to make sure
3 that the crime scene is not tainted; correct?

4 A. That's correct.

5 Q. And it would taint a crime scene to have trace
6 evidence which was not there at the time of the offense show
7 up there later on, wouldn't it?

8 A. It happens. And it does make things confusing.
9 Evidence is deposited. It's not on purpose. But it's not
10 uncommon to get an officer leaving a fingerprint behind at a
11 scene, and it turns out when we get the evidence back we've
12 got an officer's fingerprint.

13 Q. Okay. We'll talk about that in a while, but let me
14 ask you this. Does the police department maintain DNA
15 profiles of its officers?

16 A. I want to say -- well, we don't. The Missouri State
17 Highway Patrol lab I believe does. And I know that all the
18 officers' fingerprints are on file.

19 Q. All right. Now you started to talk about blood
20 stain. I'm looking for their diagram of the scene. The one
21 that's taken from the drawing that you made. Lo and behold.
22 Calling your attention to State's Exhibit 12 --

23 MR. ROGERS: Can you see that back there too?

24 JUROR: (Nodding head up and down.)

25 Q. Is that a blow-up of a drawing you made?

1 A. Yes, sir.

2 Q. Okay. So that does demonstrate your artistic
3 talent.

4 A. To some degree, yes.

5 Q. Okay. I'm not claiming it's the kind of work that
6 you would attempt to sell on some artistic merit or to have
7 it published, but it is -- certainly depicts the relationship
8 of items to each other and shows the stone retaining wall,
9 shows shrubbery at the top, things like that; right?

10 A. Yes.

11 Q. Okay. Now, you observed two main areas of pooled
12 blood; is that correct?

13 A. Yes.

14 Q. And they would be, on State's Exhibit 14B, they
15 would be: One by the rear wheel, on the driver's side?

16 A. Yes.

17 Q. And then another by where Mr. Heitholt's head came
18 to rest.

19 A. Yes.

20 Q. So that would be one here and one over here sort of.
21 Is that a fair statement?

22 A. Fairly close.

23 Q. Okay. Now, you also indicated that you observed
24 blood spatter. By the way, is spatter a particular kind of
25 blood stain?

1 A. Blood spatter is blood set into motion, that creates
2 a stain pattern.

3 Q. So the blood in motion impacts a surface, and then
4 there is a stain which reflects the pattern from which the
5 direction and perhaps velocity of the motion may be inferred?

6 A. Yes.

7 Q. Okay. And you -- let's first of all talk about
8 State's Exhibit 34A. There's spatter on the inside of the
9 window?

10 A. Yes.

11 Q. And 34B is a blow-up of that spatter?

12 A. Yes.

13 Q. And there's somebody's holding up a white surface,
14 piece of paper, cardboard or something outside?

15 A. It's a plain print backing card. It's white. On
16 the back side --

17 Q. Okay.

18 A. -- of the window.

19 Q. And that's to provide contrast for the red spots.

20 A. Yes.

21 Q. And this is towards the bottom of the driver's side,
22 left door, front door window.

23 A. Yes.

24 Q. Okay. And how would you characterize that
25 particular spatter?

1 A. Medium velocity.

2 Q. Medium velocity? And how would you characterize it
3 in terms of the direction with reference to the door? Or the
4 window. Surface.

5 A. Can I approach?

6 Q. Yes, please.

7 A. There, on this particular stain right here, and you
8 can see several stains on there as well, on the window as
9 well, but on one stain, if you -- and there again, it's
10 fairly difficult. There's not a lot of information here from
11 these -- these stains aren't providing a lot of information
12 in terms of directionality.

13 There's one stain that, if you look at, in and of
14 itself, and I typically do not do that, but if -- to try to
15 answer your question, this, what looks like a partial tail
16 starting come off of this stain right here. And that tail is
17 going in that direction.

18 Q. It's going from rear to front?

19 A. So it would be going from -- if you're looking at
20 the inside of the door, and you're -- and the back part of
21 the door would be on the left and the front part of the door
22 would be on the right, it appears as if it is travelling from
23 left to right, and I'm not sure if it's directly horizontal
24 or maybe at a little bit of an upward angle.

25 Q. Okay. That answers -- and that is not inconsistent

1 with what you see on the other stains. They're just not as,
2 A, not as big, and B, don't display any of those
3 characteristics?

4 A. Yeah. It is certainly more difficult to make any
5 kind of --

6 Q. Okay.

7 A. -- opinion, or draw an opinion from those other
8 stains.

9 Q. Now, with regard to the other stains on the inside
10 of the door, those were all lower than the ones in the
11 window; is that correct?

12 A. Yes.

13 Q. Okay. So there's nothing about the stains on the
14 window which would indicate that the source of those stains
15 was three to four feet above the window when the blood began
16 to travel.

17 A. Now you're asking me to make an opinion based on
18 this limited information?

19 Q. I'm just saying: There's nothing there to conclude
20 that the source of the stains was two, three feet higher than
21 the window at the time the blood left the source and headed
22 towards the window.

23 A. I will say that based on such a very small amount of
24 blood information, it's difficult to make any kind of
25 determination.

1 Q. Right.

2 A. Now if you want me to look at just one stain, or two
3 stains, there are three, which is -- it's impossible to say.
4 And the reason I say that is because we know the door was
5 open when blood was flying. Blood doesn't get deposited on
6 the inside of the door if the door's closed and the assault's
7 occurring outside the car. So -- that's just reasonable.

8 Q. Uh-huh.

9 A. So we've got blood stains here on the inside of the
10 car. Now, when blood's set in motion, if I strike you here,
11 I'm setting blood into motion that may, depending on the
12 impact, strike that wall over there.

13 Q. Right.

14 A. So it's tough to say, and I can't say, exactly where
15 the victim was when he was struck, based on this limited
16 information.

17 Q. And based on any of the blood stains on the inside
18 of the door.

19 A. No, that's not quite true. Because the stains at
20 the bottom of the door are interesting. And the reason I say
21 that is because the stains are circular. Can you see this?
22 Right here? We have circular stains here. There's one right
23 there. Circular. It's -- this one's probably deformed just
24 a little bit because wet blood came in contact with an
25 irregular surface. So -- but these stains -- and there's a

1 number of stains here. This is -- this is tough right here.
2 But this -- this information back here, back by the back part
3 of the door -- so we've got one, two, three, four, five, six,
4 seven, eight, nine. That one may be -- this one here. We
5 have a number of stains back here by the back door that could
6 easily suggest -- there, because that blood's dropping
7 straight down -- that the victim was in this area, bleeding,
8 and blood was coming off of their -- of his person and was
9 falling straight down. Now to tell you exactly where his
10 head was in height, I don't know.

11 Q. Okay. And that was the point. Thank you. You've
12 been instructional and saved some time too. And as a matter
13 of fact, he could have been falling down or he could have
14 been bending down when he was first hit, and then that blood
15 would have dropped straight down, although there could have
16 been other spatter going out towards the window. There's no
17 way to really tell from this limited information; is that
18 correct?

19 A. Well, I know he was next to the car here. In an
20 upright position. And when I say "an upright position," that
21 may be hard to define. Because upright could mean standing
22 upright; it could mean just slightly bent over. Now, he was
23 next to the vehicle. And keep in mind, we talked about
24 this -- I think I explained this to you in deposition. That,
25 when you first struck, that's the blood-causing event. What

1 position you're in the first time I strike you is impossible
2 to be able to tell, based on the blood information.

3 Q. All right.

4 A. Because --

5 Q. Let me ask the questions here.

6 A. I just wanted to elaborate.

7 Q. I understand. And I was going to get there. But
8 basically -- and you can sit back down if you want to --

9 A. Sure.

10 Q. -- or you can stay here.

11 A. Thank you.

12 THE COURT: Mr. Rogers, it's over two hours since we
13 returned from lunch. I don't know if the jury needs to take
14 a short break now, but it seems like it might be a reasonable
15 time to do that.

16 MR. ROGERS: It's a good time. Yes, Your Honor.

17 THE COURT: If it's at a time when you've concluded
18 your line of questions or can break in your questioning. Is
19 that agreeable?

20 MR. ROGERS: That's fine.

21 THE COURT: All right.

22 Ladies and gentlemen, the Court again reminds you of
23 what you were told at the first recess of the Court. Until
24 you retire to consider your verdict, you must not discuss
25 this case among yourselves or with others, or permit anyone

1 to discuss it in your hearing. You should not form or
2 express any opinion about the case until it is finally given
3 to you to decide. Do not read, view, or listen to any
4 newspaper, radio, or television report of the trial.

5 If our marshal will let us know when the jury is
6 ready to come back, 10 or 15 minutes, we'll be back.

7 We'll be in recess.

8 (Recess taken.)

9 - - -

10 The following proceedings were held out of the presence
11 of the jury:

12 THE COURT: State ready to proceed, Mr. Knight?

13 MR. KNIGHT: Yes, Your Honor.

14 THE COURT: And the defendant?

15 MR. ROGERS: Yes, Your Honor.

16 THE COURT: All right.

17 You may return the jury to the courtroom.

18 - - -

19 The following proceedings were held in the presence of
20 the jury:

21 THE COURT: You may proceed.

22 - - -

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JEFF NICHOLS,

resumed the stand and testified further:

RESUMED CROSS-EXAMINATION

BY MR. ROGERS:

Q. I'm going to switch pictures, Mr. Nichols. You told us a little bit about a belt buckle, which I believe is contained in State's Exhibit 47; is that correct?

A. Yes.

Q. And you recall observing that buckle at the scene, and in fact, you observed it there with some blood spatter on that buckle when you saw it at the scene.

A. Yes.

Q. I'm going to call your attention to State's Exhibit 44. And in particular, 44C. And coincidentally or otherwise, 44C also has a photo marker C; right?

A. Yes.

Q. And does that show the buckle?

A. Yes.

Q. And can you see that well enough to tell us whether or not that shows spatter?

A. Not from here.

Q. All right. Bring Mohammed to the mountain. Okay. Let me give you a laser pointer, in case you need it.

A. Yes, there certainly appears to be some blood on the brass portion of the buckle. Right here, some spatter.

1 Right there. Maybe a little on the edge.

2 Q. Okay. And does that spatter seem to be
3 directionally related to this spatter here?

4 A. Well, it's sort of difficult right here to tell a
5 lot of -- there's not a lot of spatter that's giving you
6 directional information, but there does appear to be some
7 elongated stains.

8 Q. Okay.

9 A. And the only thing I can tell is that one small
10 stain on the outer edge of the buckle does appear to have a
11 small tail, which would indicate that blood was travelling in
12 that direction.

13 Q. And do we have a different picture that could show
14 us where that was in relation to the rest of these events?
15 Let me see. I'm sure we do. The question is: Can I find
16 it? And the answer is yes.

17 Calling your attention to Exhibit 59A, does that
18 show photo marker C?

19 A. It does.

20 Q. And does that show the buckle right there by photo
21 marker C?

22 A. Yes.

23 Q. Okay. And that shows that that is near where
24 Mr. Heitholt's head is resting.

25 A. Yes.

1 Q. Can you conclude from that, with any sort of
2 professional certainty, whether or not that spatter may have
3 been deposited there when Mr. Heitholt was turned over?

4 A. Well, I can't tell you if that event -- at what
5 point in time that event occurred. And the reason I say that
6 is because there's -- there is certainly some pooling right
7 in this area, and there's -- there's blood that is radiating
8 outward from that area. And I can't say, I mean, if there
9 were multiple events occurring at that location or if this
10 was a single event that caused that blood to disperse out in
11 a random pattern.

12 Q. Okay. So you can't say whether or not that blood
13 got on the buckle as a result of Mr. Heitholt being hit while
14 his head was close to where he ended up or whether it got
15 there as a result of him being rolled over by coworkers after
16 the assault was over.

17 A. That's correct.

18 Q. Okay. And I believe before the recess you were
19 telling us that the initial blow doesn't cause the blood
20 spatter. And that would be because the spatter is not, with
21 the exception of a severed artery or something, blood leaving
22 the body. Spatter is blood which leaves the body and soaks
23 into the hair or clothing or pools on the skin or something
24 and is then impacted again. Is that a fair statement?

25 A. Well, certainly the first impact is what is referred

1 to as a blood-causing event --

2 Q. Right.

3 A. -- which would then lead up to, if multiple events
4 occurred of striking the victim, then blood being dispersed,
5 creating the spatter patterns.

6 Q. Of course, we're now talking about medium-velocity
7 spatter. Obviously high-velocity spatter caused by gunshot
8 wounds, it may be more than one event, from a blood spatter
9 point of view, but it's one bullet -- gunshot perhaps.
10 Right?

11 A. Well, high velocity is characteristic of gunshot.
12 And there again, like I testified earlier, you get a misting
13 pattern.

14 Q. Right.

15 A. And so based on the totality of the stains here,
16 they are all certainly consistent with this type of assault.

17 Q. Okay. Now, you also processed Mr. Heitholt's
18 vehicle for fingerprints.

19 A. Yes.

20 Q. And you recovered all those cards of latent prints;
21 correct?

22 A. Yes, sir.

23 Q. Now, when we say "a latent print," that doesn't
24 refer to whether or not you know whose print it is, does it?

25 A. A latent print has more to do with actually not

1 being able to see the print. Visually see the print. So it
2 doesn't have anything to do with the identification of that
3 print in and of itself.

4 Q. So if I touch this surface, I may have left
5 fingerprints there; right?

6 A. You may have.

7 Q. You can't see whether or not I did; right?

8 A. That's correct.

9 Q. If I did, then they would be latent prints.

10 A. Yes.

11 Q. And then if you develop the latent prints, by
12 putting powder on them, or by using some chemical method, or
13 however that's done, then you can see that there's a print
14 there. Correct?

15 A. Yes.

16 Q. And then you lift the print.

17 A. Yes, sir.

18 Q. With the tape or, if it's done chemically, you
19 photograph it or whatever.

20 A. Yes, sir.

21 Q. And then you use it to compare with known prints.

22 A. Yes.

23 Q. And known prints are the inked fingerprints which
24 are used by law enforcement and other agencies for
25 identification.

1 A. Yes.

2 Q. And that's -- when you talk about all the police
3 officers in Columbia having their prints on file, that meant
4 known inked prints.

5 A. Yes.

6 Q. And you obtained known ink prints of Mr. Heitholt at
7 the autopsy.

8 A. Yes.

9 Q. Okay. Now when you were at the autopsy and you
10 removed the bags from Mr. Heitholt's hands, you did that in a
11 way that would preserve anything which was inside the bag;
12 right?

13 A. Well --

14 Q. That was the purpose.

15 A. Yes. The bags were removed and then immediately
16 placed into a separate, individual bag.

17 Q. And when the bags were removed, they were not torn
18 off the bottom; they were cut open and torn open along the
19 top.

20 A. Yes.

21 Q. So that gravity would draw things down onto the bag.

22 A. Yes.

23 Q. Right? And then you lifted the limb and slid the
24 bag out so that it wouldn't tip over and lose anything;
25 right?

1 A. I don't recall exactly how we did that. We cut it
2 off, put it in the bag. The hand was -- typically the hands
3 are down, and so the bag is slid off and then put into
4 another bag.

5 Q. After you cut it.

6 A. After you cut it.

7 Q. But you're not going to try and deposit anything
8 there on the sheet or the gurney. You're trying to keep
9 things in the bag; right?

10 A. Doing the best we can.

11 Q. Okay. And that's the way you've been trained to do
12 it. And the whole idea is to preserve evidence that might be
13 on the hands; right?

14 A. Yes.

15 Q. And you also do it in a manner so that if you were
16 to somehow drop a hair of your own head onto the bag,
17 wouldn't you see that happening? Because you're watching
18 what you're doing. Right?

19 A. We're trying not to drop a hair off of our own head,
20 yes.

21 Q. Okay. Because your primary job there at the police
22 department is that of a crime scenes investigator who's
23 responsible for identifying, recovering, and preserving
24 evidence; right?

25 A. Yes, sir.

1 Q. And so you don't want your head hairs in the crime
2 scene evidence; right?

3 A. That's correct.

4 Q. Okay. Now, when you bagged Mr. Heitholt's hands and
5 put the tape on them, did you make a notation on the evidence
6 tape which secured the bags to indicate that you're the one
7 who did the bagging?

8 A. Yes.

9 Q. And did you, in fact, note the time of that?

10 A. I believe I did.

11 Q. Would you take a look and see?

12 A. (Witness complying.) It's dated November 1st.
13 Looks like 5:18 a.m.

14 Q. And then what exhibit number is that? It's got a
15 red sticker with an exhibit number. It's on the back here.

16 A. Well, they've kind of gotten out of order here. 84.

17 Q. State's Exhibit 84. And did you make that notation?
18 Does that look like what you wrote?

19 A. That appears to be my writing, yes.

20 Q. Okay. And that was 5:18 a.m.

21 A. Yes.

22 Q. And that was done as sort of the last step before
23 the body was put into the white bag.

24 A. Yes.

25 Q. So before 5:00 in the morning, the body would not

1 have been in the white bag. Correct?

2 A. That's correct.

3 Q. Okay. Now, from where you were working the crime
4 scene and where the body was at the rear of the car, is it
5 possible to have an unobstructed view down this alley, all
6 the way to Providence Road?

7 A. Well, I think that would depend on the time, because
8 as I remember, when I got there, there were police cars that
9 were in those alleyways. And I want to say that they were
10 put there -- or there was -- they had blocked entry for
11 protection of the scene. So to Providence Road, I'm not sure
12 if you could have made a clear view shot up through there.

13 Q. And in fact, this Dumpster enclosure was quite high,
14 wasn't it? Seven or eight feet?

15 A. It was -- it was tall, yes. And I would say that --
16 that six to seven feet, that range is probably accurate.

17 Q. And it would also tend to obstruct the view
18 between -- I mean, you could see straight up the alley from
19 Providence, but you couldn't see over here where the car was,
20 could you?

21 A. Well, there again, I would say if you -- you know,
22 if the patrol cars were still in the alley, it depends on
23 what time. And if there were police cars there, certainly
24 you wouldn't be able to see up to that location. If the
25 police cars were not there, it would be -- you may be able

1 to, but you'd have to look at a -- you'd -- I mean, just an
2 exact angle. I don't think --

3 Q. Okay.

4 A. I mean, it would be difficult.

5 Q. And do you know whether or not, when the body was
6 removed, whether there were TV news crews videotaping that?

7 A. I just don't remember.

8 Q. You testified earlier that there was water in Flat
9 Branch Creek when you saw it a couple of days later? Or
10 later that same day, or whenever it was.

11 A. Yes.

12 Q. Do you know how deep that water was?

13 A. It's a shallow creek. Below knee-deep. I'd say
14 maybe ten inches deep. Eight to ten.

15 Q. Would it vary from place to place?

16 A. Well, as certainly most streams do, yes. But
17 overall it's a fairly shallow creek.

18 Q. Now, calling your attention to State's Exhibit 27,
19 that is the composite that you drew in April of 2003; is that
20 correct?

21 A. March, I thought, but it was, yes, following
22 February.

23 Q. Okay.

24 A. And I thought March.

25 Q. And you were -- February is when you went to the

1 class.

2 A. Yes.

3 Q. And then sometime after you got back from the class,
4 and not too long, you got with Miss Ornt to apply what you'd
5 learned in the class.

6 A. Yes.

7 Q. As well as your innate artistic talent and your
8 training.

9 A. Yes.

10 Q. Okay. And that was the best that you could do,
11 having consulted with her, done this in her presence, worked
12 on it again to sort of polish it off, polish it up, I should
13 say, and then bringing it back to her.

14 A. Well, that certainly -- in doing composite work, we
15 like to say that really that's the best that the witness
16 could do. Because we are just a tool for the witness. But
17 that was the best that she said that she was able to do in
18 terms of her memory capability.

19 Q. Okay. And in particular, I'm noting the appearance
20 of the hair. And that -- was it fair to describe that as
21 what would be quite light blond hair, and you're showing the
22 flipped up in front, with the shading there?

23 A. Yes. A lighter hair color; the hair flipped up in
24 front.

25 Q. Now, you also participated in questioning, I guess

1 is the term, of Charles Erickson on March the 10th, didn't
2 you?

3 A. Yes.

4 Q. And you did that twice.

5 A. Yes.

6 Q. And the first time you rode in a police car driven
7 by another officer?

8 A. Yes.

9 Q. And there was also a third officer who was operating
10 a video camera.

11 A. Yes.

12 Q. And you drove around the downtown area; right?

13 A. We -- well, I refer -- I think of downtown as being
14 downtown Broadway. But in terms of the area which we
15 traveled, was from By George nightclub down to the Tribune
16 building.

17 Q. Okay. And you don't consider By George's as being
18 downtown.

19 A. It's close to downtown.

20 Q. Okay.

21 A. But --

22 Q. Fair enough. I'm not --

23 A. -- it's not really downtown.

24 Q. -- from here.

25 And the purpose of that trip was to learn from

1 Mr. Erickson where he believed or thought he remembered or
2 might think he remembered going on the night of November 1st,
3 2001; is that correct?

4 A. Yes.

5 Q. And he told you that he remembered -- or thought he
6 remembered leaving By George's and going north on First
7 Street to Ash; correct? To the vicinity of Ash.

8 A. Yes. As I recall, he was trying to remember
9 exactly. And it was in that block. I noted in my report
10 that he mentioned that he could see the victim. And I wasn't
11 real clear if it was where he was at parked, because if you
12 look down the alleyway, that particular alley ended right at
13 the Tribune parking lot. So there was a clear visual all the
14 way to the Tribune.

15 Q. Okay. So you're --

16 A. So we were trying to figure out exactly where the
17 car was parked.

18 Q. Where --

19 A. Where Mr. Ferguson had his car parked.

20 Q. Okay. But are you saying that during the video --
21 or during the drive-around -- well, I think it's called on
22 the label the "vehicular interview."

23 A. Yes.

24 Q. That up here at the intersection of Ash and the
25 alley -- or excuse me, First Street and the alley between Ash

1 and Walnut, Mr. Erickson said, "I may have seen him from
2 here"?

3 A. Well, he did -- he did state that he recalls seeing
4 the victim, because we were going to the area of where the
5 car was parked. But we were -- I think that conversation
6 took place on the trip over there. And that is noted -- I
7 don't believe it was on the video, because the video wasn't
8 running at that point. But I did note that in my report. So
9 you would be able to see that statement.

10 And so the best that I could tell from what he was
11 trying to explain is that they -- they were parked there on
12 First Street, someplace between Walnut and Ash. And it just
13 made sense to me, Well, if he thought he saw the victim from
14 that location, they may have been next to that -- or close to
15 that alley.

16 Q. But you're telling us now, even though that that --
17 that that particular part of the interview is not on
18 videotape.

19 A. No, it's not. It's just documented in my report.

20 Q. But that he indicated that from way over here on
21 First Street, at the time that he went there, he could -- he
22 believed he could see Mr. Heitholt up here in the alley
23 behind the Tribune.

24 A. Well, let me clarify that a little bit more, because
25 he said he recalled -- and I don't remember asking him a

1 specific question, but he recalled -- he just mentioned to me
2 that he recalled, while we were in route over to that area,
3 that he recalled seeing the victim. So I'm thinking, Well,
4 the only place that he could have been to have been able to
5 have seen the victim would have been somewhere in the
6 vicinity of that alleyway. If he was looking down the alley,
7 you can see all the way to the Tribune building.

8 Q. Right. And if he had done that on the way to the
9 car which was parked up by Ash, then he couldn't have sat
10 outside the car for 15 or 20 minutes making cell phone calls,
11 could he?

12 A. Mr. Erickson making cell phone calls?

13 Q. Yes. Or anybody.

14 A. Well, I don't know. I did not do a time line --

15 Q. Okay.

16 A. -- so I'm not clear on the times, but.

17 Q. Fair enough. Anyway, when you started the video, it
18 was up here at First and Ash?

19 A. Well, it was in front of By George. I believe that
20 would be represented by number 1.

21 Q. Right.

22 A. That's where the video was started.

23 Q. Okay. So he had, before that, had told you about
24 having seen Heitholt, and then once you started the video and
25 drove by there, you were able to look up the alley yourself.

1 A. Yes.

2 Q. That's what you're telling us.

3 A. Yes.

4 Q. Okay. I'm clear now. And then you went down Ash to
5 Providence; correct?

6 A. Yes.

7 Q. And he called or you -- somebody called somebody's
8 attention to the Break Time Convenience Store there?

9 A. I -- I believe there was mention of that. He may
10 have mentioned it. But I know there was a discussion about
11 where he had observed a fellow by the name of Dallas Mallory.
12 And he wasn't sure which intersection. I mean, there's a
13 number of intersections down Broadway. And they -- I mean,
14 they do look somewhat similar. But he thought that it was
15 possibly at Ash and Providence. And then he said, "Well, no,
16 it may have been down at that other intersection of Walnut
17 and Providence."

18 Q. Okay. Now Ash and Providence is here where the
19 Break Time is. Right?

20 A. Yes. Yes.

21 Q. And Walnut and Providence is a block down.

22 A. Yes. There's a Jiffy Lube right there. With the
23 red top.

24 Q. But a Jiffy Lube is not a service station open in
25 the middle of the night.

1 A. I don't believe they are. I don't think you can get
2 service there at 2 or 3.

3 Q. Okay. And both Ash and Providence and Walnut and
4 Providence are intersections controlled by traffic signals.

5 A. Yes.

6 Q. Okay. When you're driving with Mr. Erickson, you
7 stopped and went south on Providence, halfway down the block;
8 correct?

9 A. No.

10 Q. Okay. You're right. Mr. Erickson told you that's
11 what he'd done.

12 A. Well, Mr. Erickson was explaining to me that he
13 observed Dallas Mallory at the intersection. And this was --
14 there again, this was on his way back.

15 Q. Right. I'm talking --

16 A. He had already crossed apparently Providence. And
17 this was on his way back. But he said that he -- he brought
18 that up. He said, "I remember seeing Dallas at that
19 intersection." Then he said, "No, no." He said, "I think"
20 -- and he pointed down Providence Road. So that may be where
21 the confusion is coming in. He pointed down Providence Road
22 to the next intersection down and said, "No. That may be the
23 intersection I saw Dallas at."

24 Q. Talking the intersection of Walnut and Providence.

25 A. Yes.

1 Q. All right. Then you drove around Fourth Street and
2 then back up Walnut?

3 A. Yes.

4 Q. To that intersection.

5 A. Yes.

6 Q. And did he at that point say, "This is the
7 intersection" or anything like that?

8 A. I don't -- I don't believe he did.

9 Q. But then you drove north on Providence, to the
10 alley.

11 A. Yes.

12 Q. And east into the alley.

13 A. Yes.

14 Q. At that point Mr. Erickson did not tell you where
15 the crime occurred; he asked you where the crime occurred,
16 didn't he?

17 A. Yes, he did. He -- well, specifically. It was -- I
18 was under the impression that it was a given that we knew
19 exactly what location, being the parking lot. But then he
20 did ask me specifically on the parking lot.

21 Q. There's no question you knew what location. You had
22 been there two and a half years before processing the scene;
23 right?

24 A. Yes.

25 Q. There's no question in your mind where the crime

1 occurred.

2 A. Correct.

3 Q. But Mr. Erickson did not appear to know that, did
4 he?

5 A. Well, he didn't know -- or didn't seem to know
6 specifically where it occurred, and so I did show him. I did
7 tell him. I pointed out the specific location.

8 Q. By that light-colored jeep with the black flat top.

9 A. Yes.

10 Q. Which was parked actually in the same parking space
11 as Mr. Heitholt's car had been on the night in question.

12 A. Well, and that actually changed, because I think a
13 parking spot had been added.

14 Q. Okay. Then Mr. Erickson told you that he left the
15 scene, going straight back towards By George's; correct?

16 A. Well, he was having a hard time. Even -- even with
17 me telling him about the parking space, he never -- it wasn't
18 like he said, "Oh, yeah. That -- you're right. That's where
19 it happened." He was really -- he was having a hard time
20 recalling exactly where this location was. And he was having
21 a hard time or seemed to be having a hard time figuring out
22 exactly what his route of travel was from the parking lot.
23 He did mention that -- and I believe it was more of a, "Well,
24 it seems reasonable that I went in this direction," because
25 that is back in the direction of the club.

1 Q. Did he tell you that Mallory saw them leaving the
2 Tribune parking lot?

3 A. I don't recall that ever being mentioned.

4 Q. That wasn't one of your evidence.

5 A. No.

6 Q. Okay. Did he -- did you tell him, "Well, hey, the
7 luminol trail went south. Did you maybe go around the
8 building and go back there?" Do you remember telling him
9 that?

10 A. Well, I asked him if it was possible, because he
11 was, there again, seemed to be somewhat confused about what
12 direction of travel they may have taken. I asked him if it
13 was possible if they traveled south on Fourth Street, because
14 I -- I may have mentioned that we had found a trail or
15 because the dog went that way or whatever. But he said,
16 "Well, you know," he said, "that's possible."

17 Q. But he didn't say he had a memory of that.

18 A. Pardon me?

19 Q. He didn't say he had any memory of that.

20 A. Specifically did he say, "Oh, yeah, I remember I
21 went down that sidewalk"? No.

22 Q. Okay. And you then drove with him -- and I'm using
23 "you" in the plural. Y'all. Y'all then drove with him --

24 A. That's acceptable here.

25 Q. It's probably mandatory. I got in trouble

1 yesterday. -- south on Fourth Street. Correct?

2 A. Yes.

3 Q. Across Broadway. Correct?

4 A. Yes.

5 Q. And past Flat Branch Park?

6 A. Yes.

7 Q. Over to Fifth Street?

8 A. Yes.

9 Q. What street did you take over to Fifth? Locust?

10 Cherry?

11 A. I'm not sure. We may have driven through the

12 parking lot of Flat Branch. You can access Fifth Street from

13 Fourth that way.

14 Q. Okay.

15 A. I just don't remember. But I do -- I do remember

16 going down to Elm.

17 Q. This would be the Flat Branch there?

18 A. Yes.

19 Q. And that's a microbrewery kind of place?

20 A. It is. And you can drive through their parking lot.

21 Q. Okay. And then you went over to Fifth and down to

22 Elm to this dormitory place.

23 A. Well, Elm would be at the -- Fifth and Elm would be

24 right at that intersection of where the dormitory is located.

25 Q. It would be kind of under the "R" in store?

1 A. Yes.

2 Q. And during this time you're asking him, "Does this
3 look familiar?" And --

4 A. Yes.

5 Q. Referring to the night of Mr. Heitholt's death.
6 Right?

7 A. Yes. And there again --

8 Q. And he's saying, "No."

9 A. Right. And it was daylight too, so.

10 Q. He's saying, "No, this doesn't look familiar." And
11 you said, "Not at all?" And he says, "Not at all." Right?

12 A. I don't remember him saying "Not at all," but I'm
13 sure at some point maybe he did.

14 Q. Okay.

15 A. But he did say it did not look familiar.

16 Q. Then you drove up here to Providence and Locust;
17 correct?

18 A. Yes.

19 Q. And there is where there is a filling station called
20 Phillips 66 Express Lane; correct?

21 A. It -- I think that Phillips 66 is up at the next
22 intersection. Possibly at Elm.

23 Q. I thought --

24 A. It -- I'm sorry. Lo -- you said Locust?

25 Q. I said Locust.

1 A. I'm sorry. Yes. You're right.

2 Q. Fifth and Locust. Did you drive all the way out Elm
3 or did you --

4 A. Yes. As I recall, we went down Elm Street to
5 Providence Road.

6 Q. And then turned right?

7 A. And then turned north, which would have been a right
8 turn, and traveled north on Providence Road.

9 Q. To the Phillips 66 -- or passed the Phillips 66.

10 A. Oh, we would have passed the Phillips 66 station.

11 Q. And you would also pass the Osco parking lot.

12 A. I'm sorry?

13 Q. The Osco parking lot across the street?

14 A. Osco, yes.

15 Q. Was Osco open back then?

16 A. Yes.

17 Q. Is it open now?

18 A. No.

19 Q. When did it close?

20 A. Within the past year. I believe.

21 Q. Okay. And he saw those locations. And once again,
22 he did not say that anything looked familiar to him from the
23 night of Mr. Heitholt's death; isn't that correct?

24 A. Well, we certainly passed through those
25 intersections. There again, they are controlled by traffic

1 lights. And there again, you know, it's one right after
2 another. But the entire trip, up through -- all the way back
3 up to Ash, you know, he really never mentioned anything about
4 any specific intersection.

5 Q. By the way, you don't work regular nine-to-five
6 hours much as a detective, do you? You spend a lot of time
7 out in the middle of the night.

8 A. Well, I -- yes, I do spend time out at night.

9 Q. And the police station is not that far from the
10 Tribune building and -- is that downtown Columbia?

11 A. It's getting close.

12 Q. Okay. And you drive up and down Providence Road at
13 night, don't you?

14 A. I have.

15 Q. And after a certain period at night, and certainly
16 before midnight, the traffic signals on Providence and Ash,
17 Providence and Walnut, Providence and Locust, for example,
18 are no longer red/green alternating stop-and-go signals, are
19 they?

20 A. Well, there are some that turn to a flash.

21 Q. Right.

22 A. But --

23 Q. Flashing --

24 A. -- I don't know which intersection lights do that
25 and at what time.

1 Q. Okay.

2 A. So I can't tell you for sure.

3 Q. All right. You do know that the one at Broadway and
4 Providence always stays stop/go.

5 A. On a normal rotation cycle?

6 Q. Right. Right.

7 A. There again, I -- I really don't know. And to kind
8 of go back on your question about being out at night a lot,
9 no, I'm not out at night to the point that I can tell you the
10 intersection lights. The folks on third shift patrol can,
11 but I can't.

12 Q. Okay. We'll have some records. Don't worry about
13 it.

14 Mr. Erickson was very explicit with you about a
15 wooden retaining wall between Providence and First Street and
16 between Ash and Walnut, wasn't he?

17 A. Well, there was, there again, a little bit of
18 confusion, because there's a wooden fence of sort that's to
19 the west of an insurance company located at the intersection
20 of Ash and Providence. And just to the south of that is a
21 Boone County motor bank. And just due west of the motor
22 bank, along the western edge of the parking lot, is also a
23 wooden structure. It's a wooden retaining wall built out of
24 railroad ties.

25 Q. And on the videotape, Mr. Erickson refers to the

1 wooden fence at first and says, "I think I climbed that."
2 But then when he sees the retaining wall, he says, "No, no,
3 that's where I climbed." And you asked him, "Did you climb
4 up that?" And he says, "Oh, yes, I remember climbing up
5 that. I had to struggle to get up that." And you had the
6 videotape take a picture of the brush at the top of it, to
7 show it would be difficult to get up and through the brush.
8 Right?

9 A. Well, he was -- seemed to be more satisfied with the
10 retaining wall next to the bank. I think at that point he
11 felt that that probably looked more like the structure that
12 he remembered going up and over, versus the upright fence.

13 Q. Okay. And that would be kind of on a line between
14 the Break Time and By George's; right? Break Time
15 (indicating). By George's (indicating).

16 A. Yes, it would be.

17 Q. Now, Erickson never during that trip made any claim
18 to have crossed a stream, did he?

19 A. Not to me.

20 Q. Okay. And you were there for the whole trip.

21 A. During this trip, yes.

22 Q. Okay. Fair enough. Now, after returning to the
23 police station, you did some further interrogation of
24 Mr. Erickson; is that correct?

25 A. Yes.

1 Q. And at that time -- excuse me.

2 MR. ROGERS: Can you get this queued up?

3 Q. At that time the interrogation took place in an
4 interrogation room there at the police station.

5 A. Yes.

6 Q. And that room was equipped with a video camera.

7 A. Yes.

8 Q. And that interrogation was videotaped.

9 A. Yes.

10 Q. And you knew it was being videotaped.

11 A. I did.

12 Q. And Mr. Erickson knew it was being videotaped.

13 A. I assume he did.

14 Q. Okay. He could see the camera there; right?

15 A. Well, it's much like the camera behind you. It
16 certainly isn't right in your face, but it's present. If you
17 look, you can see it.

18 Q. I had to smile for it.

19 During that videotaped interview, Mr. Erickson
20 attempted to tell you that he was not sure that he had been
21 involved in Mr. Heitholt's homicide, didn't he?

22 A. He -- I don't recall exact verbiage.

23 Q. We got the videotape.

24 A. Yeah. Certainly -- I mean, that would be the way to
25 review it, because -- because I know that he had -- he seemed

1 like he had a hard time recalling details. And it came to a
2 point where I felt like it was time, Let's just get -- get
3 down to business, and we need to talk about this. And --

4 Q. We'll show you that in a minute.

5 A. -- that seemed to help him a bit.

6 Q. I'm before that.

7 A. Oh. Okay.

8 Q. Before that, very early on in the interview, like
9 about seven minutes, he told you, "I don't know. I mean, I
10 don't even -- it's just so foggy. Like, I could just be
11 sitting here and fabricating all of it and not know. Like, I
12 don't know. I don't." Do you remember him saying that?

13 A. If it's on the tape, yes, I'm sure he said that.

14 Q. Okay. And that was fairly early on in the
15 interview. And then --

16 THE COURT: You need to speak verbally.

17 THE WITNESS: Well, I didn't get a chance, Your
18 Honor.

19 Q. I'm sorry.

20 A. Yes, it was.

21 Q. And then later, a minute or two later, he told you,
22 "And this is" -- he told you, "This is -- all right. This is
23 after reading the newspaper article in October." Do you
24 remember that?

25 A. I recall him saying something to that effect, yes.

1 Q. Okay. And he's talking about a newspaper article
2 that was published in October of 2003, which was the
3 anniversary of Mr. Heitholt's death; correct?

4 A. Well, there again, I'm not sure which article you're
5 referring to. And I don't recall questioning him about
6 that --

7 Q. Okay.

8 A. -- so --

9 Q. He says -- you say, "Uh-uh," in response to that
10 comment by Mr. Erickson. And he says, "And this is kind of
11 put together with -- I mean, I don't know if I'm just
12 flipping out or whatever. But, I mean, this is kind of what
13 I put together with what could have happened. I remember we
14 were at the club, we ran out of money. Like, he had been
15 asking his sister to borrow money. And from there on, I'm
16 just kind of presuming what happened. I'm making
17 presumptions based on what I read in the newspaper." Do you
18 remember him saying that?

19 A. That sounds accurate.

20 Q. And your response to that was: You were -- "Well,
21 you're making accurate presumptions that, like I said, you
22 would only know if you were there." Do you remember that?

23 A. Yes.

24 Q. And he asked you, "Like what? The lady, the
25 cleaning lady?" And your answer was, "That's one."

1 A. Yes.

2 Q. And he says to you, "That was in the newspaper."

3 A. Yes.

4 Q. And then your response to him was, "Well, no. About
5 what was specifically said to the lady"? Correct?

6 A. I'm sorry again.

7 Q. Your response to him was, "Well, no, about what was
8 specifically said to the lady."

9 A. Yes.

10 MR. KNIGHT: Your Honor, I'd object at this point.
11 He's just -- he hasn't asked the witness a question. He
12 hasn't asked the witness if he denies statements were said.
13 He's just merely reading from this transcript. I mean,
14 there's really not even a question out there.

15 MR. ROGERS: I'm getting there. And the question
16 each time is: Do you remember saying that?

17 MR. KNIGHT: Well, maybe he should be asked if you
18 remember saying something, and then if he doesn't, then the
19 transcript could be read. I think that would be the proper
20 way to maybe impeach him.

21 THE COURT: You'll need to ask -- I'm going to
22 sustain an objection to the form of the question. You may
23 ask him a question, as opposed to just reading.

24 Q. Let me ask you this question. When you were talking
25 to Mr. Erickson in the interview room, you knew that he had

1 been interviewed once by Detective Short in an interview
2 which was not videotaped; is that correct?

3 A. Well, I had not been aware of a lot of the work that
4 had been done regarding Mr. Erickson. And the reason I say
5 that is because my focus usually is more on handling
6 evidence. So, I had been asked to interview him. And I had
7 been told by my supervisor that he possessed information that
8 no one else would know if they hadn't been at the scene.

9 Q. But -- and you don't know where your supervisor
10 Monticelli got that notion?

11 A. Monticelli?

12 Q. Monticelli. I'm sorry.

13 A. He -- he was privy to all of the --

14 MR. KNIGHT: Your Honor, I'd object to this. This
15 is just speculation. It's also hearsay.

16 Q. My question was: Did you know that Mr. Erickson had
17 previously been interviewed by Detective Short in a
18 nonvideotaped interview?

19 A. Well, I knew that he had been interviewed by
20 Detective Short. Now as far as the video recording of that
21 interview, I did not have knowledge of, one way or the other.

22 Q. Okay. Did you know that -- you may have already
23 answered this, but I want to be explicit. Did you know that
24 there had been a second interview with Detective Short, which
25 had been videotaped?

1 A. There again, in terms of videotaping of interviews,
2 being that I was not a part of that, I didn't -- did not know
3 which interviews were being taped.

4 Q. Is it fair to say that --

5 A. I think --

6 Q. Excuse me. I didn't want to interrupt you, but I
7 think you've answered my question. Is it fair to say that
8 you were not sure at that time how many times Detective Short
9 had interviewed Mr. Erickson?

10 A. I did not know the number of times that he had
11 visited with him, interviewed him, interrogated, whatever you
12 want to -- however you want to say it.

13 Q. And you don't know which of those interviews,
14 assuming there were more than one, had been videotaped.

15 A. I had no knowledge of the videotaping.

16 Q. And you had not seen any reports of those
17 interviews.

18 A. No.

19 Q. And you had not seen any videotapes of those
20 interviews.

21 A. No.

22 Q. And so at that time, when you say, "You know stuff
23 only somebody who was there could know," you're basically
24 repeating the assertion you heard from Mr. Monticelli.

25 A. Yes.

1 Q. And then when he came up with the specific of the
2 cleaning lady, and you said, "That's one," and he said, "That
3 was in the newspaper," your response was, "Well, no. About
4 what was specifically said to that lady." Correct"?

5 A. Right.

6 Q. Is that something that Monticelli had told you?

7 A. I want to say that he -- he articulated to me before
8 the interview that he had made statements regarding a
9 conversation that he had with a cleaning lady that was never
10 put in the newspaper. And that -- that only he would know --
11 or someone would know if they were there.

12 Q. And at that time you did not know that, in fact,
13 Detective Short told him that, in the first interview, which
14 was not videotaped, and that, again, Detective Short told
15 him, Erickson, that in the second videotaped interview, did
16 you?

17 MR. KNIGHT: Your Honor, I'd object. I believe he's
18 misstating the evidence about what Detective Short said.

19 THE COURT: The objection is sustained.

20 MR. ROGERS: Your Honor, we've heard the second
21 videotape -- the videotape of Detective Short. So that is in
22 evidence.

23 THE COURT: That certainly is in evidence. And the
24 sequence of the statements is not as it was on the tape. So
25 if you will rephrase your question, you may ask it.

1 MR. ROGERS: Well, I think we may have to replay the
2 tape, because I think I asked it right. And I don't want to
3 replay the tape now with this witness.

4 Q. I'm just saying -- you didn't know anything about
5 that statement having been made by Detective Short once,
6 twice, however many times, did you?

7 A. No.

8 Q. Okay.

9 MR. ROGERS: How's that? We'll get to Detective
10 Short later.

11 Q. It was shortly after that that you decided that
12 Mr. Erickson was not giving you the information you were sent
13 in there to get; correct?

14 A. That's -- that's right. Yes.

15 Q. And Mr. Erickson was being very equivocal about
16 whether he was really involved or whether it was something
17 that was dreamed up in his mind, wasn't he?

18 A. Well, I needed to check with my boss to find out if
19 he thought there was any need for me to continue the
20 interview. Was there information that was being developed
21 that was new, or was this just a rehashing of information
22 that he had already provided. And so he said, "No." He
23 said, "I think that this is the same information."

24 Q. But you didn't stop and go talk to your boss then,
25 did you?

1 A. Well, once I -- when I concluded my interview with
2 Mr. Erickson, I went and talked to my supervisor.

3 Q. Right. But I'm talking about during the interview,
4 when Mr. Erickson was not giving you the information you
5 think you're there to get, your first reaction was not, "Oh,
6 let me go see if I need to get this information." Your first
7 reaction was to take control of the interview, wasn't it?

8 A. Oh. Yes. I felt like it was time for Mr. Erickson
9 to essentially get control of his thoughts and explain those
10 to me in a very clear, precise manner. The best he could.

11 Q. And it wasn't a matter of him getting control of his
12 thoughts; it was a matter of you getting control of his
13 thoughts and making sure he did not explain to you his
14 ambivalence, his uncertainty, his ambiguity. Isn't that
15 true?

16 A. Well, we don't -- understand, we don't have people
17 that walk in off the street and say, "I can't live with
18 myself any more. I want to tell you about a crime that I
19 committed." That just doesn't really happen. In my 18 years
20 of experience anyway.

21 Q. Well --

22 A. And so --

23 Q. Let me stop you there, first of all.

24 MR. KNIGHT: Your Honor, I'd object. He gets to
25 answer the question.

1 MR. ROGERS: I don't think he's answering the
2 question, first of all. But if that was responsive, the
3 responsive part is way over. I didn't ask why he wanted to
4 take control of the interview. I asked him: Didn't he?

5 THE COURT: And is there an objection?

6 MR. KNIGHT: My objection is: He wasn't allowed to
7 finish his answer. He got cut off.

8 THE COURT: He may answer the question that's been
9 asked. How's that?

10 Q. Have you answered the question that was asked?

11 A. I don't believe so. Although I'm a little foggy on
12 what I was trying to say. The --

13 Q. Do you know what the question was?

14 A. Restate your question, please.

15 Q. I was afraid you'd say that. The question is: You
16 did not want to help Mr. Erickson express his thoughts. You
17 wanted him to -- you wanted to keep him from expressing his
18 ambivalence, his ambiguity, and his certainty about the
19 things he was telling you concerning Mr. Heitholt's death;
20 isn't that true?

21 A. That is true, because -- and to the end of my
22 statement --

23 Q. Did I ask a "because"?

24 A. Well, you didn't ask a "because" --

25 Q. Okay. You've answered the question.

1 A. -- but I just thought -- figured I could get you
2 one.

3 Q. I didn't ask for a volunteered "because" either.

4 A. Okay. That would be fine.

5 Q. As a matter of fact, what you told Mr. Erickson was,
6 "No, no, no, no. Wait. Wait. Wait. Wait. Wait. Now,
7 listen. I'm going to start talking." Mr. Erickson: "I'm
8 sorry." "And you're going to start listening. Okay? All
9 right?" Isn't that what you told him?

10 A. Well, I don't remember saying, "Wait, wait, whoa,
11 whoa, whoa" or whatever that many times. But I'm sure I did.
12 Because I stopped him right there in his tracks and I told
13 him, "It's time for you to start telling me what you
14 remember. And let's get" -- just much the same as me kind of
15 direct questioning. So, that's what I did.

16 Q. And you also did a very, very direct, pointed
17 questioning of him after you moved your chair right up and
18 got in his face; right?

19 A. You bet.

20 Q. On purpose.

21 A. You bet.

22 Q. As a tactic.

23 A. You bet.

24 Q. And you're a big guy. Compared to Chuck Erickson.

25 A. I'm getting bigger by the day, but it's not because

1 of lifting weights.

2 Q. And you have been trained on how to be forceful in
3 interrogations if you feel the situation calls for it.

4 A. I've been trained in interview and interrogation,
5 yes. And that is certainly a tactic we use every day to try
6 to get at the truth, when we're trying to interview someone,
7 because people don't like to tell you the truth.

8 Q. But if the truth was that Mr. Erickson was
9 uncertain, you weren't trying to get at that truth, were you?

10 A. Well, to answer that question completely, you take a
11 fella that has been doing drugs and drinking alcohol, and
12 then who goes out and kills someone, which is not a routine
13 action on their part, I would totally suspect that they
14 wouldn't remember exactly what they did. I couldn't tell you
15 what I did, I am sure, if I was in their place. So I needed
16 to try to pick out facts that they could -- he could
17 remember. And that's the way I went about doing it.

18 Q. If the truth was that Mr. Erickson was uncertain and
19 didn't know whether or not he dreamed this up or whether he
20 was really there, you were not interested in getting that
21 truth, were you?

22 A. I was interested in documenting whatever he told me.
23 And it was documented. It was videotaped.

24 Q. And you were not interested in hearing from him
25 about his ambiguities, because you didn't want that

1 documented and videotaped, did you?

2 A. I was interested in finding out if there was more
3 information specifically about the defendant and his actions
4 that occurred the night of this murder. And so therefore I
5 had to get up and consult my supervisor, because he knew what
6 information had been obtained.

7 Q. We haven't left to consult your supervisor yet.
8 We're talking about your interactions with Erickson. And
9 we're talking about your assertion that you were after the
10 truth. And you still haven't answered my question, which is:
11 If the truth was Chuck Erickson wasn't even there and he
12 dreamed it all up and it was a fantasy, which is why he
13 doesn't know the details, you weren't interested in hearing
14 that truth, were you?

15 A. I, again, told you, we documented everything. And,
16 you know, I'll also remind you, it is not every day that you
17 have someone coming into the office saying, "I committed a
18 murder, I can't live with myself now, and I need to tell you
19 about it. And I understand that I might get arrested and go
20 to prison." So, you know, when somebody comes in telling me
21 that, I'm going to assume up front they're crazy or they're
22 lying. But it has to come out. And we did the best we could
23 to get to the truth of the matter. And it's all documented.
24 So I don't know how to better answer your question.

25 Q. And your search for the truth, whatever it might be,

1 including the possibility that it was made up by Erickson,
2 out of some dream and things he's read in the newspaper,
3 stuff like that, that's why you told him: "And I don't want
4 to hear, 'Oh, all of a sudden I just think I maybe fabricated
5 all this." Do you remember telling him that?

6 A. Yes, I do.

7 Q. And that's not part of the search for the truth, is
8 it? That's a part of keeping that part out of it, isn't it?

9 A. Well, you could say that that is a part of trying to
10 keep information out. I mean, that -- from the direction
11 you're coming at. But from the direction I'm coming at is
12 that we'd already heard that, and we already had that
13 information documented. Now, if there was truth to be known,
14 I wanted to get to the bottom of that. And there again, I
15 was searching for truth, not so much relating to him, as
16 relating to Ryan Ferguson.

17 Q. And so that's why you told him, "Look, Ryan says he
18 didn't do it. You're the only guy who said he did. And if
19 you don't tell us things about Ryan, you're the one hanging
20 out there. You've got your head on the chopping block."

21 A. This was a tactic, exactly. And I wanted to let him
22 know that, "You know, now's the time to get to the bottom of
23 it. Now's the time you need to tell us what you know. And I
24 understand" --

25 Q. And you didn't --

1 A. -- "and I understand that part of this is probably
2 foggy. I mean, there's -- you know, that's reasonable to
3 believe and assume. But now we need to know the facts of
4 this, and you need to start telling me what those facts are."

5 Q. And you didn't tell him, "Look, we've got
6 fingerprints. We'll check yours. Look, we've got DNA.
7 We'll check yours." Did you?

8 A. Well, I think we did tell him, "We -- we need your
9 DNA," because we collected his DNA. I didn't tell him
10 specifically that, so no.

11 Q. You didn't tell him, "We want to find out what you
12 know." You told him, "You know this; you know this. Tell us
13 about Ryan; tell us about Ryan. Your ass is on the chopping
14 block." Right?

15 A. Sure.

16 Q. "And don't tell us if you're not sure. Don't tell
17 us if you dreamed it up. Don't tell us if you read it in the
18 paper." Correct?

19 A. I went at that line of questioning. And I will not
20 deny that. And it's -- like I said, it's all on videotape
21 for all to see.

22 Q. All right.

23 A. And I did not keep badgering him. I directly asked
24 him: "We need to know what you know. And now's the time to
25 tell us." And so that was -- that was my line of

1 questioning. And once that was concluded, I got up and there
2 again made contact with my boss.

3 Q. Then did you go back and look at the Short report or
4 the Short videotape?

5 A. No.

6 Q. So you didn't know to this day whether Short told
7 Erickson exactly what the cleaning lady said was said to her?

8 A. To this day --

9 Q. Or whether Erickson told Short.

10 A. To this day, my knowledge is that Chuck Erickson
11 possesses information that only someone at the scene would
12 know and be familiar with. And that's my understanding of
13 it.

14 Q. And it's your understanding that he knew that
15 information and possessed that information and disclosed that
16 information on March the 10th, 2004.

17 A. Yes. That -- apparently he did.

18 Q. And what information are you talking about? Do you
19 know? Or just in general.

20 A. Well, the information being that he made comments --
21 I'm telling you what my boss told me. So, there again --

22 Q. Your boss told you --

23 A. Yes.

24 Q. -- that he said --

25 MR. KNIGHT: Your Honor, I have to object at this

1 point. Hearsay.

2 THE COURT: That objection is sustained.

3 MR. ROGERS: That's all. Thank you.

4 THE COURT: Redirect?

5 MR. KNIGHT: Yes.

6 - - -

7 REDIRECT EXAMINATION

8 BY MR. KNIGHT:

9 Q. The crime occurred November 1st, 2001. You took
10 Chuck Erickson around in this vehicle on March 10th, 2004; is
11 that correct?

12 A. Yes.

13 Q. The parking lot, when you -- when you went -- you've
14 already testified about the crime scene obviously, but you
15 testified earlier that at the crime scene on the 1st of
16 November, 2001, there was a Dumpster enclosure. And I'm
17 going to show you what's marked as State's Exhibit 14B. Do
18 you see the Dumpster enclosure there?

19 A. Yes.

20 Q. Okay. And when we get to -- when we get to March
21 10th, 2004, when you took Chuck Erickson up that alley and
22 into the parking lot, was there a Dumpster enclosure there?

23 A. I believe the Dumpster enclosure had been removed.
24 They were preparing to do some reconstruction on the area.

25 Q. So this is gone. Right?

1 A. I believe that's right.

2 Q. Okay. And also, looking at 14B again, you can see
3 that we've got these parking spaces. And Kent's car was
4 parked in number 1. And here's number 2 right here; is that
5 correct?

6 A. Yes.

7 Q. Okay. Let's keep this. I'd like to show you what's
8 been marked as State's Exhibit 100. And --

9 THE COURT: Do you want to see that? Have you seen
10 100?

11 MR. ROGERS: I don't know what it is. I can't see
12 that far.

13 (Mr. Knight showing a photograph to Mr. Rogers.)

14 Q. And this is a photograph that was taken in 2004;
15 correct?

16 A. Well, I'm not sure when that photograph was taken,
17 but that is an accurate representation of the parking lot I
18 believe as the way it is -- looks now, except for the
19 construction that's taken place out there.

20 Q. Okay. And if you can look here, you can see parking
21 block number 2. You can see that pictured in State's Exhibit
22 100; is that correct?

23 A. Yes.

24 Q. And then how many spots do you see south of number
25 2?

1 Counsel approached the bench and the following
2 proceedings were held:

3 MR. KNIGHT: I'm going to now ask him to admit the
4 tire tool that was found in the trunk and also the two
5 photographs at the bottom of that photo layout there, 87F and
6 87J. The tire tool, for the record, again, is Number 90.

7 Is there going to be an objection at this point?

8 MR. ROGERS: Yes. I renew my objections.

9 MR. KNIGHT: I believe we should be able to get this
10 in for a couple of different reasons. On cross-examination,
11 defense attorney asked Mr. Nichols if he tested everything in
12 the trunk with luminol. So now we've gotten into this. He's
13 asking everything that was tested, and I believe I should be
14 able to ask him about these items, because these would
15 encompass everything that was in the trunk. But, more
16 importantly than that, my best point here is that the defense
17 attorney asked if Jeff Nichols ever showed Charles Erickson
18 the tire tool. If he was ever shown the tire tool. And he
19 said he was.

20 THE COURT: Pardon?

21 MR. KNIGHT: He said he was. He said he was shown
22 the tire tool from the trunk, is my understanding.

23 MR. ROGERS: Did I ask him that? I didn't ask him
24 that.

25 MR. KNIGHT: And then -- and then -- and then he was

1 asking --

2 MR. CRANE: You didn't say that.

3 MR. ROGERS: No.

4 MR. CRANE: You asked him on cross, and he showed

5 you -- you showed him the tire tool, and he said yes.

6 MR. KNIGHT: Okay.

7 MR. ROGERS: I have --

8 THE COURT: The statement was made at the bench,

9 that Erickson was shown the tire tool, here in the courtroom.

10 MR. ROGERS: In the courtroom.

11 THE COURT: In the courtroom. And was said that

12 that wasn't the one.

13 MR. CRANE: He asked him.

14 THE COURT: I don't know who asked him. But the

15 witness was asked. Not this witness.

16 MR. KNIGHT: But this is my most important --

17 THE COURT: All right.

18 MR. KNIGHT: He asked if anything in the trunk. He

19 asked -- I know he asked if anything in the trunk looked like

20 the tire tool that Charles Erickson drew.

21 MR. ROGERS: That I did ask.

22 MR. KNIGHT: And now I should be able to ask him

23 questions about these photographs.

24 MR. CRANE: Here's --

25 THE COURT: Mr. Crane, only one attorney per side,

1 please. I'm not allowing multiple attorneys on each side to
2 argue.

3 MR. KNIGHT: At this point now, because the door's
4 been opened up, I think I should be able to ask Detective
5 Nichols about the tire tool taken from the trunk, the
6 photographs of the trunk certainly. He asked specifically,
7 he asked this witness if anything in the trunk looked like
8 the tire tool Chuck Erickson drew. And I'm going to show
9 this witness photographs. I'd like to show him some
10 photographs of items that were in this trunk and have
11 those -- those photographs come into evidence.

12 THE COURT: Well, you may certainly show him the
13 photographs. I'm not going to prohibit you from showing him
14 the photographs. And you certainly may ask him, in reference
15 to the luminol testing, whether any of the items were tested,
16 because that was gone into on cross-examination. I can't say
17 what he's going to say or whether something might become
18 admissible because of the statements, but I am -- I
19 appreciate that defense counsel is objecting to these being
20 admitted.

21 MR. ROGERS: And for the record, Your Honor, with
22 regard to the items being tested for luminol, this witness
23 has already testified at the very outset of his direct
24 examination that iron and -- iron products, which includes
25 steel, react with luminol by themselves, so you can't test

1 State's Exhibit 101. What is this a photograph of?

2 A. That's a photograph of the tools that was in the
3 trunk of his vehicle, the Mercedes, that I did the search
4 warrant on. Those were the tire tools.

5 MR. ROGERS: Objection to further descriptions, Your
6 Honor. He's identified it sufficiently I believe.

7 THE COURT: He may -- he may identify them as tools.

8 MR. KNIGHT: Okay.

9 Q. And if you can lean up here a little closer.

10 MR. ROGERS: And I'd also ask that that be not
11 displayed where the jury could see it.

12 MR. KNIGHT: I don't think they can see it from
13 there.

14 Q. This is what you collected; is that correct?

15 A. Yes.

16 Q. This right here is also -- I'd like to show you
17 what's been marked as State's Exhibit 102 -- is also pictured
18 in 102; is that correct?

19 A. Yes.

20 Q. Okay.

21 THE COURT: There is a mic that's live there that
22 you're -- when you put those things on -- it's the small
23 black one that's flat. That one is loud if you hit things
24 against it.

25 Q. So, of these tools that you have, that you found in

1 the back of the trunk, you only collected this one tire tool;
2 is that correct?

3 A. Yes.

4 Q. This other tire tool right here that's in 101 and
5 102, meaning this, do you see that? Do you see this right
6 here I'm pointing to?

7 A. Yes.

8 Q. You did not collect that, did you?

9 A. No.

10 Q. Okay. How does that compare with the drawing that
11 Chuck Erickson did for you when he was describing the tire
12 tool?

13 A. Well, it's small. It would be smaller than the tool
14 that he described. And it does not curve up on the end.

15 There's a pair of hand pliers here. And it's -- you
16 can see, compared to the size of the hand pliers, that's not
17 a very big tool.

18 Q. Did he tell you anything about this -- this tool
19 having an attachment and taking the attachment off before he
20 went over with the defendant and committed this murder?

21 A. I don't have knowledge of that.

22 Q. Okay. Well, what do you see on -- in 101, what do
23 you see at the head of this tool?

24 MR. ROGERS: I'm going to object, Your Honor. It is
25 certainly improper to have this witness describe in detail

1 items which have not been offered in evidence. Or received
2 in evidence. I believe the Court's last ruling is he could
3 describe them as tools.

4 THE COURT: That is correct.

5 Please don't display that to the jury.

6 MR. KNIGHT: Okay. I won't.

7 Well, Your Honor, at this time I'm going to offer
8 State's Exhibits 101, 102, so that the jury can take a look
9 at this and determine how these -- these things in the back
10 of the trunk compare with the drawing that Chuck Erickson
11 did. I think this is up -- this is -- this is something that
12 the jury should decide.

13 MR. ROGERS: Your Honor --

14 MR. KNIGHT: This is a jury issue.

15 MR. ROGERS: Excuse me.

16 First of all, I renew my objections. Secondly, I
17 thought the Court clearly instructed us that if an offer were
18 to be made, it be made at the bench, rather than a speech for
19 the jury. I think that's totally improper. I think it's
20 prosecutorial misconduct. And I would ask that the Court
21 reprimand the assistant prosecuting attorney.

22 THE COURT: Would you please approach. And you may
23 bring the -- you may bring 101 and 102.

24 - - -

25 Counsel approached the bench and the following

1 proceedings were held:

2 MR. KNIGHT: Would you like to look at these?

3 THE COURT: Sure. And you're offering 101 and 102?

4 MR. KNIGHT: Yes, Your Honor.

5 (Court looking at the exhibits.)

6 MR. KNIGHT: And 87F and 87G.

7 THE COURT: And they are the same as -- is 87 --
8 don't point that at the jury. 87F and G, are they the same
9 as these two, or are these two additional?

10 MR. CRANE: Those are additional photographs.

11 THE COURT: Well, this one looks like G.

12 MR. CRANE: I can't see it from here.

13 THE COURT: 102 looks like F to me.

14 MR. CRANE: Yeah, it's a little bit different, but
15 okay, fine. For simplicity's sake, forget 102.

16 MR. KNIGHT: We'll take 102 out.

17 THE COURT: And on what basis were you wanting to
18 offer these exhibits?

19 MR. KNIGHT: Because, first of all, I believe that
20 it was opened up by the defense on cross-examination by
21 asking if there was anything in the trunk that looked similar
22 to what Charles Erickson drew. Number one. Number two, I
23 think it should be up to the jury to decide also whether or
24 not any of these tools back here, this one that was collected
25 or the other ones, look like the tool that Charles Erickson

1 drew. I think that should go to the weight and not the
2 admissibility.

3 THE COURT: Well, I would agree that if this witness
4 said, you know, "This looks pretty much like the one that he
5 drew," I would certainly let that come in. But he said none
6 of these look like the ones that he drew for him. And these
7 are tools that were found in a vehicle, what, two and a half
8 years later? Some --

9 MR. KNIGHT: Yes.

10 THE COURT: Some years after this. After the car
11 had changed -- a year after the car had changed ownership.

12 MR. KNIGHT: That's correct, Your Honor.

13 THE COURT: I mean, if there is -- there is
14 absolutely no evidence to show that these tools were actually
15 in the car at the time Erickson was driving it. I mean --
16 yeah, at the time Ferguson was driving this vehicle.

17 MR. KNIGHT: Well, I believe that Charles Erickson
18 testified that they got a tool out of the trunk.

19 THE COURT: That's true.

20 MR. KNIGHT: This vehicle. I mean, I don't know how
21 common it is for people to constantly take tools out, put
22 them back in, even if they change hands. It just seems -- it
23 isn't like a piece of luggage or something. It seems like
24 that's something that usually kind of just stays in the car.
25 And no, I can't say with any certainty and we can't establish

1 that that -- that this trunk condition is in the same
2 condition it was back in 2001 when the crime was committed.
3 No, I can't do that. But I think it should go to the weight
4 and not to the admissibility.

5 MR. ROGERS: Your Honor --

6 THE COURT: You may be heard.

7 MR. ROGERS: I don't think -- and I'll talk about
8 first this proffered exhibit. Nothing I said opened that up.
9 There is an item there which was taken by the witness which
10 did not resemble the tool -- or the drawing by Mr. Erickson.
11 By all accounts. And which Mr. Erickson already said does
12 not look like the thing he was talking about. It's mere
13 prejudice. It's got nothing to do with the case. It's
14 irrelevant. There certainly has been no questioning about
15 luminol like we heard before. But certainly hasn't been
16 opened up on grounds -- at least not through the further
17 redirect examination. And he reasserted his
18 cross-examination testimony that nothing that he saw in the
19 trunk resembled the drawing by Mr. Erickson, including those
20 items. So I don't see where it's in any way, shape, or form
21 admissible.

22 MR. KNIGHT: I think it should be -- once again, I
23 think this goes to the weight and not the admissibility. I
24 think the jury should be able to decide whether or not that
25 looks like the tire tool or not.

1 MR. ROGERS: None, Your Honor. Thank you.

2 THE COURT: May Detective Nichols be excused at this
3 time? For the state?

4 MR. KNIGHT: Not finally.

5 MR. CRANE: Not finally, Judge.

6 THE COURT: All right. You -- may he be excused
7 this evening?

8 MR. CRANE: Not by -- yes.

9 THE COURT: This evening?

10 MR. CRANE: Yeah, for this evening, yes.

11 THE COURT: Would ask you not to discuss your
12 testimony with anyone who's to be called as a witness.
13 You're free to do whatever you need to do. And you're
14 subject to recall.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: And I'm sure the prosecutor probably has
17 a number to reach you.

18 THE WITNESS: Yes.

19 THE COURT: All right. You may step down.

20 Do you have a witness that is not terribly lengthy
21 before -- because I'm intending, because this jury has asked
22 to work hard, go until 7:30. And we've been here since,
23 what, about 3:30. So it's not quite an hour and a half. I'd
24 be willing to go on, if you have someone you can do a direct
25 exam on, and then take a recess, so that they wouldn't have

1 to go from 3:30 to 7:30. Four hours is a long time to sit.

2 MR. KNIGHT: Your Honor, if we could, if we could
3 take a five-minute break, we'd be ready to go after that.
4 We've got to get a couple of exhibits in order. I think it
5 will be more efficient if we did that. And then we'll go
6 pretty quickly, hopefully, with this witness. But I can't
7 assure you that she'd be done within an hour.

8 THE COURT: Yeah, I have a --

9 JUROR: Can we just stay here for five minutes and
10 just wait?

11 THE COURT: If you choose to stay here for five
12 minutes, you may.

13 But you think your direct will be lengthy?

14 MR. KNIGHT: Hopefully pretty short, pretty short
15 direct, I hope.

16 THE COURT: Well, we might take a longer recess
17 after, if the jurors need to take a break.

18 But if you want to stand up and stretch, you can do
19 that.

20 We'll take a brief recess.

21 (Recess taken.)

22 - - -

23 The following proceedings were held in the presence of
24 the jury:

25 (Mr. Rogers and Mr. Weis not present.)

1 THE COURT: With the understanding that after direct
2 of the next witness, we'll take a little longer break, ladies
3 and gentlemen.

4 Do we have defense counsel? We have one attorney
5 here.

6 MS. BENSON: I can go check on them real quick.

7 THE COURT: Don't leave. We don't want to have
8 people -- you have someone else check who's here.

9 At least we can get the witness up that you intend
10 to call.

11 You want to let us know -- is a witness coming,
12 Mr. Knight?

13 MR. KNIGHT: Should be, yes.

14 THE COURT: Okay.

15 MR. KNIGHT: Dawn Kliethermes.

16 (Mr. Rogers and Mr. Weis now present.)

17 THE COURT: Would you come forward and be sworn,
18 please.

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DAWN KLIETHERMES,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand,
please.

- - -

DIRECT EXAMINATION

BY MR. KNIGHT:

Q. Please state your name.

A. Dawn Kliethermes.

Q. All right. And where are you employed?

A. I'm employed with the Missouri State Highway Patrol
Crime Laboratory.

Q. Okay. And how long have you been employed there?

A. Approximately nine years.

Q. And what do you do there?

A. I'm a Criminalist III, latent print examiner.

Q. All right. So what are your official duties?

A. I process, examine, and conduct comparisons of
evidence for latent prints.

Q. And how long have you been performing latent print
examinations in conjunction with your job?

A. Approximately nine years.

Q. What is your educational background?

A. I have a Bachelor's in science and criminal justice.

Q. Okay. And what specialized training do you have?

1 A. I have attended numerous ridgeology comparison
2 techniques and fingerprints and palm prints. I have also
3 attended several International Association for Identification
4 educational conferences to further my training and knowledge
5 in the area of latent prints. I've also each year
6 successfully passed a proficiency test in the area of latent
7 prints.

8 Q. And what professional organizations are you a member
9 of?

10 A. I am a member of the Missouri division of the
11 International Association for Identification, as well as the
12 International Association for Identification, and the
13 Midwestern Association of Forensic Scientists.

14 Q. What is a friction ridge?

15 A. Friction ridge skin are the raised portions of skin
16 located on your hands and the soles of your feet.

17 Q. What is a latent fingerprint?

18 A. A latent print is a recording of these friction
19 ridges that are left on an item or an object that has been
20 touched by an individual.

21 Q. Okay. And what's a known fingerprint?

22 A. A known fingerprint is a recording of these friction
23 ridges of a known individual. It is usually taken for record
24 purposes, and is taken by either live scan or rolling the
25 hands or palms in black printer's ink.

1 Q. Okay. And how are latent fingerprints and known
2 fingerprints compared to each other?

3 A. Latent prints are compared by first examining the
4 ridge detail within the print. And this is done -- we look
5 at levels of detail. We look at the ridge flow or pattern.
6 Within the ridge flow and pattern, we look at ridge
7 characteristics. We also look at the edges and pores of
8 these ridges. And we determine then whether -- if there is a
9 sufficient amount of this ridge detail present in the unknown
10 latent print, then we will conduct a side-by-side comparison
11 of the unknown latent print to the known inked print.

12 Q. Okay. And so what are the basic factors then used
13 in fingerprints as a means of identification?

14 A. Fingerprints are permanent and unique. Fingerprints
15 are permanent, in that they are formed before birth, and they
16 do not change throughout one's life, except for scarring or
17 growing larger in size. And fingerprints are unique, in that
18 no two fingerprints have ever been found to be the same, not
19 even in identical twins.

20 Q. Okay. And explain how fingerprints are left on a
21 surface, please.

22 A. There are certain factors that have to exist in
23 order to leave a latent fingerprint, such as the person must
24 have sweat, oil, grease, something on their hands in order to
25 transfer onto that surface. It also depends on the surface;

1 whether the surface is clean or dirty, smooth or rough. The
2 surface could be flat or curved. The environment is also a
3 factor; if it's hot or cold; whether the person is sweating.

4 Q. All right. Okay. So can a positive identification
5 be made where you have just a partial fingerprint?

6 A. Yes.

7 Q. Okay. How can that be done?

8 A. Basically we look at the levels of detail within the
9 print, and then do our side-by-side comparison.

10 Q. All right. What is smudging?

11 A. Smudging basically is: If somebody would take their
12 fingerprint and drag it or rub it, or it could -- it could
13 actually be rubbed by, you know, something that comes in
14 contact with the latent print, because they're very fragile.

15 Q. Okay. And so how can smudging affect whether or not
16 a useable fingerprint is left behind?

17 A. Because if it's -- if it's smudged, it may be very
18 difficult to look at the ridge detail within that print and
19 make that comparison.

20 Q. What is streaking?

21 A. Streaking basically would be somewhat the same --
22 same thing as smudging --

23 Q. Well --

24 A. -- where your ridges would be just dragged. I mean,
25 you may see one or two ridges, but not a sufficient amount.

1 Q. And so that would mean, if we have too much
2 streaking, we're not going to have enough ridge detail to
3 have a -- for a useable fingerprint; is that correct?

4 A. That could be, yes.

5 Q. Okay. What is overlap?

6 A. Overlap, that is just whenever the ridges are -- a
7 person may, you know, leave their recording of their ridges,
8 and then basically touch over the ridges again in a certain
9 way.

10 Q. And so how can overlap affect whether a useable
11 fingerprint is left behind?

12 A. Basically with the ridges being on top of each
13 other, it would make it very difficult to make a comparison.

14 Q. And earlier you talked a little bit about things
15 that must be on fingers or surfaces in order to leave a
16 fingerprint behind; is that right?

17 A. That's correct.

18 Q. Explain that again. What are you talking about
19 there? What must either be on fingers or on the surface in
20 order to leave a finger -- a useable fingerprint behind?

21 A. Sweat, grease, oil, dirt. There must be -- or there
22 could possibly be something on the surface, such as dust. If
23 a person touches the dust on the surface, it would leave a
24 recording of your -- of friction ridges. Could be blood on
25 the surface; could be grease, oil; anything.

1 Q. Okay. And why are some surfaces less conducive than
2 other surfaces to leaving fingerprints behind?

3 A. If the surface is rough, then the texture of the
4 roughness would make it difficult to leave a print. If
5 the -- and some examples of a rough surface would be like
6 concrete or basically human skin, a vinyl dashboard in the
7 car, carpet. And then if a surface is smooth, such as glass,
8 plastic bags, cans, then it's much easier to leave a latent
9 print on that surface.

10 Q. How can the width of a surface affect whether or not
11 a useable fingerprint can be left behind?

12 A. The smaller the surface, the more difficult it would
13 be to leave a print behind. Therefore -- you know, you may
14 have -- you know, you may not have a sufficient amount of
15 ridge detail on -- the smaller the surface.

16 Q. Is that because all the ridges might not fit on a
17 surface that is too narrow; is that correct?

18 A. That could be.

19 Q. Okay. And generally how conducive is clothing to
20 leaving a useable fingerprint behind?

21 A. It's one of the more difficult things to develop a
22 print on.

23 Q. Okay. What about maybe vinyl, such as maybe a
24 dashboard? How conducive is that surface to leaving a
25 useable fingerprint behind?

1 A. That's a, yeah, more difficult surface, again.

2 Q. What about maybe upholstery?

3 A. That would be a difficult surface as well.

4 Q. Carpet?

5 A. Carpet as well.

6 Q. What about concrete?

7 A. Yes.

8 Q. Okay. What about maybe leather items? Are those --

9 are leather items generally conducive to leaving behind

10 useable fingerprints?

11 A. Yeah. I mean, it depends on how textured the

12 leather would be, but it's more difficult.

13 Q. What about coins? Are those types of items,

14 American penny, nickle, dime, those types of things, are they

15 generally conducive to leaving useable fingerprints behind?

16 A. No, not generally.

17 Q. Okay. And in the nine years that you've been

18 employed at the Missouri State Highway Patrol as a latent

19 fingerprint examiner, how many times have you testified with

20 regard -- testified as an expert witness with regard to

21 fingerprint testing?

22 A. Approximately 20 times.

23 Q. That's in nine years. Right?

24 A. Correct.

25 Q. Testified only 20 times; correct?

1 A. That's correct. Approximately.

2 Q. And in those 20 times that you've testified, about
3 how many times have you testified where there was a positive
4 identification of a fingerprint?

5 A. Approximately 8 times.

6 Q. So you testified -- in those other 11, 12 times,
7 what have you testified about in those cases?

8 A. Whether -- it could have been the comparison was
9 negative or there were no prints developed at all. Or no
10 value -- prints that could not be used as well.

11 Q. You were testifying about why useable fingerprints
12 were not left behind; is that correct?

13 A. Yes.

14 Q. At a crime scene.

15 A. Yes.

16 Q. Or at crime scenes.

17 A. Right.

18 Q. All right. You performed testing in this case; is
19 that correct?

20 A. Yes, I did.

21 Q. And I think you were going to bring this with you,
22 but do you have Chuck Erickson's fingerprint card?

23 A. Yes, I do.

24 Q. And do you also have the defendant's fingerprint
25 card with you?

1 A. Yes.

2 Q. Okay. And 69 has already been admitted into
3 evidence. That's -- those are the fingerprints from Kent
4 Heitholt. Let me lay this up here for you. I'd like to show
5 you what's been marked as State's Exhibit 70. What is this?

6 A. This is a ten print card bearing the name of Kali
7 Heitholt.

8 Q. Okay. And did you use this to make fingerprint
9 comparisons in this case?

10 A. Yes, I did.

11 Q. Okay.

12 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
13 70.

14 MR. ROGERS: No objection.

15 THE COURT: State's Exhibit 70 is admitted.

16 - - -

17 State's Exhibit 70 admitted into evidence.

18 - - -

19 Q. So you had some known fingerprints that you used for
20 comparison purposes; is that correct?

21 A. Yes, that is correct.

22 Q. Chuck Erickson's fingerprints, the defendant's
23 fingerprints, Kent Heitholt's fingerprints, and also Kali
24 Heitholt's fingerprints; is that correct?

25 A. That's correct.

1 Q. Okay. And before we get into the results of your
2 tests, let's talk about four different types of results you
3 might have in -- when you're making comparisons. First of
4 all, you have a match. You could have a match. Is that
5 correct?

6 A. That's correct.

7 Q. Pretty self-explanatory. What is that?

8 A. When an identification is effected with the latent
9 print and the known print.

10 Q. Second of all, what are -- the second category,
11 useable and unknown fingerprints, what are those?

12 A. Useable is the term that we would also use, would be
13 an unknown latent print that does not -- that we have not
14 made an identification with, or the comparisons would be
15 negative.

16 Q. Okay. So -- but the fingerprint itself would be
17 useable. You could use that for comparison if you found
18 other prints to compare it to; is that correct?

19 A. That is correct.

20 Q. Third category: Unuseable. What does that mean?
21 Pretty self-explanatory. What is it?

22 A. Un -- well, yeah, it would be: Not able to use it
23 for comparison purposes.

24 Q. And what are negative fingerprints? The fourth
25 category.

1 A. No ridge detail detected on the item or evidence at
2 all.

3 Q. Do you see State's Exhibit 66 in front of you?
4 Fingerprints that were taken from Kent Heitholt's car?

5 A. Yes.

6 Q. Okay. Those have already been admitted into
7 evidence. Did you perform certain comparisons on those
8 fingerprints in 66?

9 A. Yes.

10 Q. All right. And I'd like to show you what's been
11 marked as State's Exhibit 73.

12 MR. KNIGHT: And I showed this to defense counsel
13 yesterday.

14 MR. ROGERS: That's correct.

15 MR. KNIGHT: The results of the fingerprint testing.

16 Q. What is this?

17 A. This is the -- your exhibit of the fingerprints on
18 the victim's car and basically the results.

19 Q. Okay. And you've had a chance to look this over
20 before coming to court today; is that correct?

21 A. Yes.

22 Q. Okay.

23 MR. KNIGHT: Your Honor, I'd offer State's Exhibit
24 73.

25 MR. ROGERS: No objection.

1 THE COURT: State's Exhibit 73 is admitted.

2 - - -

3 State's Exhibit 73 admitted into evidence.

4 - - -

5 Q. Okay. Dawn, please come down off the witness stand.

6 We also need to keep our voices up if we can.

7 Okay. 1A, do you see this up here? We got the
8 results of the fingerprint testing. 1A. You looked at these
9 cards in here; is that correct?

10 A. Yes.

11 Q. And one of those is actually labeled 1A; right?

12 A. That's correct.

13 Q. Okay. And what were your results of your
14 fingerprint comparisons when you looked at 1A?

15 A. There was four identifications made with Kent
16 Heitholt.

17 Q. Okay. And once again, 1A is on this location on the
18 outside of the car; is that correct?

19 MR. ROGERS: I'm sorry. I can't see through you.

20 A. That's correct.

21 MR. ROGERS: Thank you.

22 Q. Fingerprint -- the fingerprint card itself indicates
23 that the fingerprint was lifted from this area of the car; is
24 that correct?

25 A. Yeah. It's indicated on the card, on the back of

1 the card. Yes.

2 THE COURT: You're not -- the reporter is not able
3 to hear.

4 THE WITNESS: Okay.

5 THE COURT: So you're either going to have to talk
6 from a mic and put the board over there so she can see it,
7 or --

8 THE WITNESS: I can speak up.

9 THE COURT: -- in some way that the reporter can
10 hear.

11 THE WITNESS: Okay.

12 THE COURT: Thank you.

13 THE COURT REPORTER: Could you repeat your answer?

14 THE COURT: You need to repeat your question.

15 MR. KNIGHT: Well, I'll tell you what, I'll withdraw
16 that question. It's all right.

17 Q. Now, testing 1B -- and for the record, that is the
18 fingerprint that was located close to 1A, on the outside
19 driver's side door frame. What were your results of your
20 tests on 1B?

21 A. The report indicates that there was one
22 identification effected with Kent Heitholt and then one
23 unuseable fingerprint.

24 Q. Okay. And 1A and 1B, compare those to each other.
25 Are these different prints or not? 1A and 1B.

1 A. Yes.

2 Q. They're different? Do you want to look at those
3 cards?

4 A. Where they were lifted from?

5 MR. ROGERS: I'm going to object to this.
6 Obviously -- he's attempting to impeach his own witness.

7 MR. KNIGHT: No, I'm not. I'm just going to ask her
8 another question. I'm going to ask her to look at these
9 cards, 1A and 1B.

10 THE COURT: The objection's overruled, if that is an
11 objection.

12 A. Okay. The back of the card indicates that it's from
13 the driver's door.

14 Q. Okay. That's 1A --

15 A. Correct.

16 Q. -- down here. And 1B right there; is that correct?

17 A. Right.

18 Q. When you turn these over and you actually look at
19 these lists, 1A has three tape lifts; is that correct?

20 A. Right.

21 Q. And 1B has one tape lift; is that right?

22 A. That's right.

23 Q. Okay. How does this one tape lift on B compare with
24 the middle tape lift on 1A?

25 A. It appears to be the same lift.

1 Q. Okay. So in your opinion, how -- how -- well, in
2 your opinion, do we have the same lift then? 1A and the
3 middle of 1 -- the middle of 1A and 1B? Is that right?

4 A. Yeah -- that's what it appears to be to me.

5 Q. Okay. But whatever the case, 1A and 1B, you
6 effected identification with Kent Heitholt; is that correct?

7 A. That's correct.

8 Q. Okay. 1C, which, for the record, was a print taken
9 from the passenger side -- rear passenger inside window of
10 this vehicle. Inside the vehicle. What were your results on
11 1C?

12 A. Two identifications were effected from Kali Heitholt
13 and one useable and unknown fingerprint.

14 Q. 1D, which was passenger side front door, the window,
15 on the inside. What are the results there? 1D.

16 A. One identification with Kali Heitholt and one
17 useable and unknown fingerprint and unuseable fingerprints.

18 Q. 1E, which would be a print on the outside of the
19 vehicle, on the passenger side, passenger side door window,
20 what were the results of 1E?

21 A. Two identifications with Kali Heitholt and unuseable
22 fingerprints.

23 Q. Then coming back to 1F, which was on the driver's
24 side of the vehicle, back seats, back -- back rear door
25 window, inside, 1F, what are the results?

1 A. Three useable and unknown fingerprints and unuseable
2 fingerprints.

3 Q. Okay. Three useable and unknown fingerprints and
4 unuseable fingerprints on the inside. And then 1G, which was
5 pretty much the same location, just a little bit above 1F,
6 what are the results there?

7 A. Unuseable fingerprints.

8 Q. Okay. 1H, which was prints on the outside of the
9 vehicle, right around the gas cap area, what's the result of
10 that?

11 A. One unuseable palm print.

12 Q. Okay. And 1J and 1L, prints in that same area as
13 1H, on the outside of the vehicle. What are the results with
14 1J and 1L?

15 A. Unuseable palm print. One unuseable. Excuse me.

16 Q. 1K, prints on the outside of the passenger --
17 passenger side door frame, top, what was the result there?
18 1-K.

19 A. One unuseable palm print.

20 Q. All right. And then 1M, driver's side, driver's
21 side door, inside driver's side door window, what was the
22 result with 1M?

23 A. Unuseable fingerprints.

24 Q. Okay. And then 1N was the rear view mirror; is that
25 correct?

1 A. Yes. I'd have to refer to the back of the card.

2 (Pause.)

3 Q. You know what, we've had a witness that's already
4 testified about the location of 1N. What was the result of
5 the tests done on 1N?

6 A. One useable and unknown fingerprint and one
7 unuseable fingerprint.

8 Q. Okay. Take the stand again.

9 Real quickly, without showing you these exhibits,
10 I'd like to ask what the results were with regard to
11 different evidence that was collected in this case. And our
12 State's Exhibit 38 -- well, actually it wasn't admitted, but
13 the rear tire, you did tests on the driver's side rear tire;
14 is that correct?

15 A. That's correct.

16 Q. Okay. And what were the results of your tests on
17 that item?

18 A. Negative.

19 Q. Okay. The belt buckle, our State's Exhibit 47,
20 highway patrol number 48, what were your results?

21 A. The results on the belt buckle was -- it was either
22 negative or no value.

23 Q. Okay. Well, do you want to look at your notes on
24 that?

25 A. I will look.

1 Yeah. Derese's notes mean there's no prints.

2 Q. Okay. Well, talking about Derese, who's Derese?

3 A. She was the previous examiner that had started the

4 case.

5 Q. Okay. And did she do testing back in 2001?

6 A. Yes, she did.

7 Q. And did you basically start doing testing I think

8 2004?

9 A. After that.

10 Q. All right. You've had the opportunity to review her

11 notes and review what she did with respect to her testing in

12 this case; is that correct?

13 A. I've reviewed her notes, yes.

14 Q. Okay. And to your knowledge, her -- the methods

15 that she used to arrive at her conclusions were all

16 satisfactory?

17 A. That's correct.

18 Q. Okay. But she tested this belt buckle; correct?

19 A. That's correct.

20 Q. And you said that the result was negative; right?

21 A. That's correct.

22 Q. Meaning -- again, what does a negative mean?

23 A. No ridge detail detected.

24 Q. No ridge detail at all.

25 A. Yes.

1 Q. So it's negative. I mean, can we even tell if there
2 is a fingerprint at all?

3 A. No.

4 Q. Okay. As opposed to this other -- other category
5 that we have here, that we can see on State's Exhibit 73,
6 "unuseable." Well, when we've got an unuseable print, we can
7 tell that there's fingerprints maybe there, but it's so
8 small, it's such a partial -- it's such a small fraction --

9 MR. ROGERS: Object. This is leading, Your Honor.
10 Plus it's asked and answered I think.

11 THE COURT: It appears to be a leading question. I
12 don't know what he's going to end up asking. You may
13 rephrase, Mr. Knight.

14 MR. KNIGHT: That's fine, Your Honor. I'll just
15 move on.

16 Q. But with regard to that belt buckle, Derese's
17 finding was negative; right?

18 A. That's correct.

19 Q. Like to show you what's been marked as State's
20 Exhibit 47. Okay. Can you handle that? When you're done,
21 can you put it back in here for me, please.

22 That particular item, just focusing right now on the
23 leather part of that item, would that be conducive to leaving
24 a fingerprint behind?

25 A. Yes.

1 Q. You think so?

2 A. (Nodding head up and down.)

3 Q. Okay.

4 A. It's a smooth surface.

5 Q. The entire -- this entire belt buckle area on the
6 back you think would be conducive or --

7 A. Well, the actual metal piece. I would say this very
8 small area. The leather piece is a larger, smoother area.

9 Q. Okay. But metal itself would not be conducive,
10 would it?

11 A. Yes. It would be difficult to leave a print --

12 Q. Okay.

13 A. -- on the metal piece.

14 Q. And then certainly the front part of this leather
15 would not be conducive, would it, to leaving a fingerprint
16 behind?

17 A. It would be more difficult as well.

18 Q. Okay. But, once again, as you testified before,
19 it's very rare that you testify in other cases where you have
20 positive --

21 MR. ROGERS: I'm going to object to this, Your
22 Honor. First of all, it's been asked and answered.

23 THE COURT: The objection is sustained. It is asked
24 and answered.

25 MR. KNIGHT: Okay.

1 Q. Number 48, which was the lens underneath Kent's car,
2 which is your number 60, what were the results of the tests
3 on that item?

4 A. Okay. No value. Or unuseable.

5 Q. Missouri State Highway Patrol number 59, which is
6 our number 49. State's Exhibit 49. Miscellaneous documents
7 under the vehicle. What were the results of the tests on
8 those documents?

9 A. Did you say 59?

10 Q. Yes.

11 A. One of the pieces of paper, I developed latent
12 prints on that, and then the other papers were no value.

13 Q. Okay. And 59A, Missouri State Highway Patrol number
14 59A, what were the results of the tests on that item?

15 A. That was the particular piece of paper I did develop
16 a latent print on.

17 Q. Okay. And what the results of those tests, when you
18 did the comparisons?

19 A. Two identifications were effected with the left
20 thumbprint from that piece of paper, it's specimen 59A, with
21 Kent Heitholt.

22 Q. Okay. Your number 56, which was the cell phone
23 underneath the victim's car, tell us about the tests on that.

24 A. That was negative.

25 Q. The Snickers wrapper, number 47, your number 47, our

1 51.

2 A. That was negative as well.

3 Q. Okay. The Jiffy Lube receipt, number 73, the
4 results on that?

5 A. Negative.

6 Q. Your number 64, which is a paper bag located just
7 west of Kent. The results?

8 A. Negative.

9 Q. There was some Styrofoam, which is your number 65,
10 our number 54. The results on that?

11 A. Negative.

12 Q. And then we had a Columbia College folder that was
13 underneath Kent's car. It's your number 67, state's number
14 55.

15 A. No value.

16 Q. Okay. Then we had a Hickman High School basketball
17 schedule, which was located a little bit south of Kent's car.
18 That's your number 68. Our number 57.

19 A. No value.

20 Q. We had a dime, which was located pretty close to the
21 victim. Your number 63. Our number 60.

22 A. Negative.

23 Q. Four dimes and a penny located underneath -- pretty
24 close to Kent's body. Your number 66; our number 61.

25 A. Negative.

1 Q. There were some glasses with a missing lens, located
2 in the driver's seat. Your number 69; our number 75.

3 A. Negative.

4 Q. There was a yellow notepad on the driver's seat.
5 Your number 57A; our number 76.

6 A. Latent prints of value were developed on the yellow
7 notebook.

8 Q. And what were the results?

9 A. The results with the yellow notepad was one
10 identification, with the right ring finger, bearing the name
11 of Kent Heitholt.

12 Q. Okay. Green checkbook, your number 57B, our number
13 67.

14 A. Negative.

15 Q. Miscellaneous papers in the driver's seat, your
16 number 57C, our number 76, what did you find?

17 A. One latent print of value.

18 Q. Okay. And that was unknown; is that correct?

19 A. It's unknown.

20 Q. All right. So it's a useable and unknown
21 fingerprint; is that right?

22 A. That is correct.

23 Q. Okay. Then we've got, moving along, almost done
24 here, the computer case, which was on the driver's seat, your
25 number 58, our number 77. The results?

1 A. No value with the folder.

2 Q. Then we've got highway patrol number 62, which was a
3 wallet, quarters, coin roll from the center console, all
4 together, and that's our number 78. What were the results?

5 A. There was one latent print of value developed on a
6 business card in 62A. The remaining receipts, quarters -- or
7 excuse me, the paper wrapper rolled with quarters, as well as
8 the quarters, were negative.

9 Q. Okay. Your number 61, which is a cat food box
10 located on the front passenger seat. Our number 79. What
11 were your results there?

12 A. What specimen number did you say? I'm sorry.

13 Q. It was 61. The cat food box.

14 A. 61?

15 Negative. I'm sorry.

16 Q. Then your number 70, which was the digital recorder
17 from the center console area of the vehicle. Our number 81.

18 A. No value.

19 Q. One more. It's your number 71, which was the name
20 tag with the name Dewayne on it. It's our number 82. What
21 were your results with regard to that piece of evidence?

22 A. No value.

23 Q. Okay.

24 MR. KNIGHT: Nothing further.

25 THE COURT: Let me ask you if you're going to have a

1 lengthy cross on this witness.

2 MR. ROGERS: Not lengthy. Certainly not by my
3 standard, and I don't think by anybody else's.

4 THE COURT: Well, are you going -- is it going to be
5 more than five or ten minutes?

6 MR. ROGERS: Shouldn't be.

7 THE COURT: Because otherwise I'll let the jury take
8 its break and then come back and finish with your cross.

9 MR. ROGERS: I think I'll be done in five or ten
10 minutes.

11 THE COURT: All right.

12 - - -

13 CROSS-EXAMINATION

14 BY MR. ROGERS:

15 Q. I'm just a little bit confused about terminology,
16 because we started off I think with four terms for latent
17 fingerprints which you examined. Positive or a match, that
18 means the same thing; right?

19 A. That's the same thing, correct.

20 Q. Okay. And -- or --

21 A. Or identification as well.

22 Q. And that's one category. You look at it and you
23 compare it and effect an identification; right?

24 A. That's right.

25 Q. Okay. And then the next one was useable? Is that

1 correct?

2 A. That's correct.

3 Q. And useable means there's enough detail to make a
4 comparison and determine whether or not a match could be
5 effected.

6 A. That's correct.

7 Q. Is that also what's called a print of value?

8 A. Yes.

9 Q. Okay. So useable equals print of value.

10 A. That's right.

11 Q. All right.

12 A. That's what my notes reflect, so.

13 Q. Okay. Some examiners use one term, some use the
14 other, some use them both?

15 A. Yes.

16 Q. And you're a both person?

17 A. Basically we use no value, negative.

18 Q. Okay.

19 A. But it means the same thing.

20 Q. All right. Well, let's go back -- that's -- and I
21 guess to another category. When a print is a print of no
22 value, that means there's something there that looks like
23 it's a print, but you can't discern enough detail to make a
24 comparison? Is that accurate?

25 A. That's correct.

1 Q. Okay. And that could be because it gets smudged or
2 it's streaked or there's insufficient size.

3 A. A variety of reasons, yes.

4 Q. A variety of reasons. And that you say is no value.
5 Is that the same as negative?

6 A. Negative basically -- that's when we indicate that
7 we do not see any ridge detail at all.

8 Q. But you're still seeing something that might be a
9 print.

10 A. No. I mean, basically no ridges at all. We would
11 not see anything.

12 Q. Okay. So, if you see what looks like it might be a
13 print, but there's not enough ridge detail to make an
14 identification, that's a print of no value.

15 A. Right.

16 Q. And if there's no prints at all, or if what are
17 there can't be discerned to be prints, that's negative.

18 A. Right.

19 Q. Okay. I think I'm straight now.

20 And you indicated that there were useable and
21 unknown. And once you have a useable print, then you can
22 divide it into identifications and unknown; right?

23 A. Right.

24 Q. Because until you make the identifications, it's
25 unknown. And there might be some which are question, which

1 look like they may well match up with somebody, but there's
2 just not quite enough there? Is that a fair statement?

3 A. That would basically -- we would actually refer to
4 that as a no value print. It cannot be used for comparison.
5 If -- there wouldn't be enough there to effect that.

6 Q. Well, what if there are enough -- we don't need to
7 go there. You don't have anything in that category in this
8 case, do we?

9 A. Right. No.

10 Q. All right. So useable and unknown is one where
11 there's enough detail to compare, but it hasn't matched with
12 anything you compared it with.

13 A. That's correct.

14 Q. And you found one of those at location 1C, one of
15 those at location 1D. Those are -- speaking of the latent
16 lift cards --

17 A. Yes.

18 Q. -- that you got from the Columbia Police Department;
19 right?

20 A. That's right.

21 Q. Okay. One of those on -- three of those on card 1F.
22 Right?

23 A. That's correct.

24 Q. That's a total of five so far. And one on card 1N.
25 Correct?

1 A. That is correct.

2 Q. So we have a total of six from the vehicle.

3 A. That's correct.

4 Q. Of prints of value, useable, unknown. Correct?

5 A. That is correct.

6 Q. And that means they were not Ryan Ferguson's.

7 Right?

8 A. That is correct.

9 Q. And they're not Charles Erickson's.

10 A. That is correct.

11 Q. And they're not Kent Heitholt's.

12 A. That is correct.

13 Q. And they're not Kali Heitholt's.

14 A. That is correct.

15 Q. And they're not anybody else's whose prints you've

16 been given in connection with this case.

17 A. That is correct.

18 Q. And you've been given other prints in this case,

19 over the years.

20 A. Yes.

21 Q. Several. Maybe even many. Is that a fair

22 statement?

23 A. Yes.

24 Q. Okay. You've also compared -- or processed these

25 prints through an automated fingerprint identification

1 system.

2 A. Yes.

3 Q. AFIS? Is that its name?

4 A. AFIS.

5 Q. AFIS.

6 A. That is correct.

7 Q. Okay. And AFIS would be an acronym for Automated
8 Fingerprint Identification System.

9 A. That's right.

10 Q. Okay. And those prints have not been identified
11 through that system as well.

12 A. That's correct.

13 Q. And those -- that system has in it the fingerprints
14 of every law enforcement in the State of Missouri, for
15 example.

16 A. Yes.

17 Q. It also has everybody who's ever been arrested for a
18 felony in the State of Missouri.

19 A. Correct.

20 Q. And in the United States in general, if the cards
21 made it to the FBI.

22 A. That is correct.

23 Q. Okay. You also found an unuse -- or you found a
24 print of value someplace. An unknown print of value on the
25 papers of the seat, the driver's seat of the car.

1 A. That's correct.

2 Q. And you developed that yourself through a chemical
3 process?

4 A. Right.

5 Q. And did you try and compare it?

6 A. Yes, I did.

7 Q. And it is?

8 A. It was negative. No match.

9 Q. No match. Useable and unknown?

10 A. That's correct.

11 Q. Okay. And you also developed a print of value on a
12 business card in the lot.

13 A. That's correct.

14 Q. And what was the result on it?

15 A. There was no match.

16 Q. Useable, but unknown.

17 A. That's correct.

18 Q. Okay. Now, the only other thing I want to ask you
19 about is the notion that one of the fingerprint lifts on card
20 1A is the same lift as the card on 1B?

21 A. I said it appears to be. I did not make the lift.

22 Q. Okay. When you say "appears to be," you mean it
23 looks like it might be the same -- a print from the same
24 finger, like when I do that (indicating)?

25 A. Yes.

1 Q. Okay. You don't mean it's the same object lifted
2 from the car. In other words, take this print, lift it, lift
3 it again?

4 A. Oh, yeah. No.

5 Q. That couldn't be happening, could it?

6 A. (Shaking head from side to side.)

7 Q. There's no way to do that.

8 A. You can -- you could actually make two lifts, which
9 is what I'm indicating, yes. That there was possibly two
10 lifts made from that same area.

11 Q. From that same area, but not from the same latent
12 print. Can the same latent print be lifted twice?

13 A. Yes.

14 Q. How?

15 A. Because if there's still residue left on the
16 vehicle, fingerprint residue or whatever it might be, that
17 the print was left in, then it will lift twice.

18 Q. And why would you do that? If it lifts once --

19 A. Because basically the first time maybe you may not
20 get a print that is as dark as what you might like it to be,
21 and then so you might try and make another lift, to see if
22 maybe you could get a little bit darker or maybe it was too
23 light the first time.

24 Q. So you put the powder on the surface, you develop
25 the latent print, you put on the tape, it takes off the

1 powder, you put that on the card, and then the latent print's
2 still there to be developed again perhaps?

3 A. It could be.

4 Q. Okay. That's what I didn't understand.

5 MR. ROGERS: Thank you.

6 THE COURT: Is there anything further for this
7 witness, or may she be excused, Mr. Knight?

8 MR. KNIGHT: Oh, I didn't know he was done. I will
9 redirect. Just two questions.

10 THE COURT: I'm counting. Two?

11 MR. KNIGHT: I think so. Hopefully. Try to. If I
12 can make them really long.

13 - - -

14 REDIRECT EXAMINATION

15 BY MR. KNIGHT:

16 Q. Do you have Charles Erickson's fingerprint card in
17 front of you?

18 A. Yes.

19 Q. Okay. Do you mind if I put an exhibit sticker on
20 there? Can I see -- can I see the defendant's fingerprint
21 card also?

22 So -- show you what's been marked as State's Exhibit
23 67. That's Chuck Erickson's fingerprint card; correct?

24 A. That's correct.

25 Q. And State's Exhibit 68 is the defendant's

1 fingerprint card; is that correct?

2 A. That's correct.

3 MR. KNIGHT: Your Honor, I'd offer State's Exhibits
4 67 and 68.

5 MR. ROGERS: No objection.

6 THE COURT: State's Exhibits 67 and 68 are admitted.

7 - - -

8 State's Exhibits 67 and 68 admitted into evidence.

9 - - -

10 MR. KNIGHT: Nothing further, Your Honor.

11 THE COURT: Anything further --

12 MR. ROGERS: No redirect -- no recross.

13 THE COURT: May we release Miss Kliethermes?

14 MR. KNIGHT: Yes, Your Honor.

15 THE COURT: May I release her?

16 MR. ROGERS: Yes, Your Honor.

17 THE COURT: Thank you so much for coming. You may
18 be excused. Do not take any of the Court's exhibits, but you
19 may take your paperwork along with you.

20 THE WITNESS: Okay.

21 THE COURT: Do not discuss your testimony with
22 anyone who's yet to be called as a witness.

23 THE WITNESS: Okay.

24 THE COURT: You may step down.

25 Ladies and gentlemen, the Court again reminds you of

1 what you were told at the first recess of the Court. Until
2 you retire to consider your verdict, you must not discuss
3 this case among yourselves or with others, or permit anyone
4 to discuss it in your hearing. You should not form or
5 express any opinion about the case until it is finally given
6 to you to decide. Do not read, view, or listen to any
7 newspaper, radio, or television report of the trial.

8 Take a 10- or 15-minute break. If you'll let me
9 know when the jurors are ready to come back. I will be in
10 chambers over here. I need to take up another matter, not
11 related to this case. And so you'll let me know in there.

12 We'll be in recess.

13 (Recess taken.)

14 - - -

15 The following proceedings were held out of the presence
16 of the jury:

17 THE COURT: Have you had your witness coming -- is
18 the state ready to go?

19 MR. KNIGHT: Bill, can you get Cary, please?

20 THE COURT: You've instructed a witness to come
21 upstairs?

22 MR. KNIGHT: It should have been done.

23 THE COURT: All right. What is the name of the
24 witness, so that we can have Mr. Hawes get the witness if --

25 MR. KNIGHT: It's Cary Maloney.

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CARY MALONEY,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand. And there is a microphone that is live, which is a little small black -- no. On -- yeah. On the bench. If you just sit relatively close to it, we'd appreciate that. Thank you.

You may inquire.

MR. KNIGHT: Thank you, Your Honor.

- - -

DIRECT EXAMINATION

BY MR. KNIGHT:

Q. Please state your name.

A. My name is Cary Maloney.

Q. And how are you employed?

A. I'm employed as the DNA technical leader at the Missouri State Highway Patrol Crime Laboratory in Jefferson City.

Q. Okay. How long total have you been employed there?

A. I've been employed there for over 20 years.

Q. Okay. And what's your title again?

A. I'm the DNA technical leader.

Q. Okay. And how many criminalists do you supervise in your unit?

A. There are I believe seven criminalists in the case-working section and four criminalists in our data-basing

1 section, that all do DNA analysis.

2 Q. Okay. And what are your duties there?

3 A. My duties now have a lot to do with administration.
4 I administer the two sections of the laboratory, and I'm
5 responsible for quality assurance of the procedures, and
6 validation, safety, and training. I also continue with my
7 duties as a criminalist and will actually work cases myself.

8 Q. What is your educational background?

9 A. I have a Bachelor of Science degree in biology from
10 Missouri Southern State University. And I've also taken
11 various science courses in biology and chemistry from such
12 institutions as Lincoln University, University of Virginia,
13 and University of Missouri in Columbia.

14 Q. And what professional training do you have?

15 A. I have attended -- first of all, I'm a member of the
16 Midwestern Academy of Forensic Scientists and the American
17 Association of Forensic Science. And I have attended various
18 schools, workshops, and seminars put on both by those
19 organizations and by organizations such as the FBI.

20 Q. What professional or scientific organizations are
21 you a member of?

22 A. The ones I mentioned before: The Midwestern
23 Association of Forensic Scientists and the American Academy
24 of Forensic Science.

25 Q. Okay. And you also do training there; is that

1 right?

2 A. Yes. Training that they put on.

3 Q. So how many times have you testified as an expert
4 witness with regard to DNA evidence?

5 A. Strictly DNA, I'm not sure. In my field, I've
6 testified approximately a hundred times.

7 Q. Okay. And your field would be serology; is that
8 correct?

9 A. Yes. Serology, stain identification, DNA.

10 Q. Okay. What does serology mean?

11 A. Serology is a brand of science that we previously
12 did in the laboratory, where we would identify and type and
13 compare polymorphic enzymes that were present in the stain
14 material that we look at.

15 Q. And then you moved on to DNA, in addition to
16 serology, from there; is that correct?

17 A. Yes. DNA had -- were further enhancements of the
18 typing techniques that we used and are much more
19 discriminating and sensitive.

20 Q. What is DNA?

21 A. DNA is a molecule that's found in all nucleated
22 cells of the body. And that molecule generally codes for the
23 characteristic of the individual. But there are parts of
24 that molecule that we like to look at in order to
25 discriminate between individuals in our work.

1 Q. What is DNA PCR-STR?

2 A. PCR is a general technique of amplifying certain
3 parts of the DNA for testing. And STR is the specific sites
4 that are amplified by PCR that we use currently in the
5 laboratory to do our testing.

6 Q. And how long has the Missouri State Highway Patrol
7 crime lab been doing or conducting DNA analysis? Or
8 analyses.

9 A. We've been conducting DNA analysis in some form
10 since 1990.

11 Q. Okay. And how long have you all been doing DNA
12 PCR-STR?

13 A. We have been using the STR technique of DNA typing
14 since about 1999.

15 Q. Okay. And is DNA PCR-STR a generally accepted
16 technique in the forensic scientific community and medical
17 community?

18 A. Yes, it is.

19 Q. Okay. Were you present or did you participate in
20 the validation of STR analysis at the Missouri State Highway
21 Patrol crime lab?

22 A. Yes, I was present and I did participate in that.

23 Q. Okay. And briefly, what is validation?

24 A. Validation is simply testing a procedure in your
25 laboratory to make sure that it gives you reliable data, so

1 that you can use it on case work reliably and competent.

2 Q. And does the Missouri State Highway Patrol crime lab
3 have protocols which are used to ensure the accuracy of its
4 testing?

5 A. Yes. We have a standard protocol that we use in all
6 of our case work.

7 Q. And is the Missouri State Highway Patrol crime lab
8 an accredited lab?

9 A. Yes, we are.

10 Q. Okay. And what does that mean?

11 A. The forensic laboratories throughout the country
12 have the option of obtaining accreditation through the
13 American Society of Crime Lab Directors' lab accreditation
14 board. And our laboratory has been accredited by that agency
15 since 1984.

16 Q. What is proficiency testing?

17 A. Proficiency testing is regular testing that each
18 criminalist undergoes to test or measure the proficiency of
19 that individual using the techniques that we use in the
20 laboratory.

21 Q. And is proficiency testing a part of your
22 accreditation?

23 A. Proficiency testing is required by accreditation,
24 yes. It's part of our quality assurance program at the
25 laboratory.

1 Q. Okay. And once again, what is serology, very
2 briefly?

3 A. Serology is, in the strict sense, by accreditation
4 standards, is the typing of polymorphic enzymes, but it also
5 included the location, identification, and subsequent typing
6 of body fluid stains that are found on any evidence that's
7 sent to the laboratory.

8 Q. How can a person's DNA be deposited on a piece of
9 evidence?

10 A. The most common ways that we deal with is through
11 body fluids. Most of the evidence that we test in the
12 laboratory has blood or semen stains on it. However, DNA can
13 also be transferred through other body fluids, such as nasal
14 mucus or sweat. It can come along with sweat or it can come
15 along with saliva.

16 Q. Okay. And what happens with regard to DNA when skin
17 touches something?

18 A. Skin itself is cellular material of the body. And
19 skin does have DNA in it. Any skin that is rubbed off or
20 sloughed off from contact with an object has potential to
21 give a DNA type.

22 Q. So what are the two main difficulties you encounter
23 when you're looking for DNA on a piece of evidence?

24 A. Well, the first thing we have to do is locate the
25 DNA. If we are zeroing in on a stain material, then we know

1 that that's the area that we want to test. If we see an
2 obvious blood stain or a semen stain, that's the area that we
3 want to examine for the presence of DNA.

4 The second problem that we have is: There has to be
5 a sufficient amount of DNA to be able to get a conclusive
6 type that we can use for comparisons. And generally in the
7 case of stain material, that's not a problem. But when we're
8 talking about just the transfer of skin material, that can be
9 a problem, because there's usually a limited amount of
10 transfer under those circumstances.

11 Q. And when you have a limited amount of transfer, does
12 that mean that you, even if you went directly to the area
13 where maybe DNA skin cells rubbed off on an item, went
14 directly to that area and tested that area, are you saying
15 that you would not have enough for a useable profile? DNA
16 profile.

17 A. Yes, that's very possible that, even if DNA is
18 present on that item, it may be at a level that is below our
19 threshold of detectability, with the current technology that
20 we use.

21 Q. Okay. So let's -- I want to break this down a
22 little bit more. You're talking about the two problems that
23 you encounter when you're trying to find DNA on a piece of
24 evidence; correct?

25 A. Okay.

1 Q. When you're looking for DNA.

2 A. Okay. Yes.

3 Q. Right? And the first thing -- the first problem you
4 talked about was finding DNA. When you get a piece of
5 evidence in a case, how do you decide what areas on a given
6 piece of evidence to test?

7 A. Generally we will use information that we may know
8 about the test. If -- or excuse me. About the case. If
9 it's an assault case where an individual's been stabbed or
10 shot, we may look for blood stains. That may be the most
11 probative evidence in that case. If it's a sexual assault
12 case, we're obviously looking for semen stains. And/or blood
13 stains. It just depends on the information we have as to
14 whether the victim or suspect was injured in the act of the
15 crime.

16 Q. Okay. Well, let's just take an assault case for
17 instance. If you're looking for blood on a piece of
18 evidence, it could be probative in the case, connecting
19 either defendant to victim or victim to defendant. If you're
20 looking for blood under those circumstances, wouldn't you --
21 let's just talk about maybe a shirt. If you see that shirt,
22 are you going to examine the entire surface area of a
23 particular shirt, assuming you don't see maybe blood on it,
24 for the recovery of DNA?

25 A. No. We would most likely zero in on the stained

1 material, where we're more likely to find the DNA that we're
2 looking for. Without any further direction, we simply just
3 don't know where to look for the DNA --

4 Q. Well --

5 A. -- that may be present on an item.

6 Q. I didn't mean to cut you off there, but why wouldn't
7 you just go ahead and examine the entire surface area of a
8 shirt that was presented to you for DNA? Why couldn't you
9 just go ahead and, every square millimeter on a shirt, for
10 instance, examine that and try to recover DNA? Why wouldn't
11 you do that?

12 A. Well, two reasons mainly. The first is resources.
13 Time and funding. We simply don't have the time or the
14 funding to do that type of testing. More importantly, the --
15 and the second problem is that, unless we know that there is
16 a particular area that we want to look at, that may be
17 involved in this particular crime, we may be picking up DNA
18 from any individual that has had contact with that shirt.
19 And it may not have anything to do with the crime. And by
20 doing that, we may actually cloud the issue, rather than shed
21 more light on what's going on.

22 Q. The second problem that you encounter is actually
23 finding enough DNA, you testified about this, to develop a
24 useable DNA profile; is that correct?

25 A. Yes.

1 Q. And when we're talking about profiles, we're talking
2 about electropherograms? Do you still use those? With DNA
3 PCR-STR?

4 A. Yes.

5 Q. Okay. And we're talking about the alleles and all
6 these things that you have to do to make comparisons between
7 maybe a known substance and an unknown substance; is that
8 correct?

9 A. Correct.

10 Q. Okay. But this second problem of finding enough DNA
11 to develop a useable profile -- let me give you an example.
12 If you know exactly where somebody touches -- let's just use
13 a shirt example. You know that I'm touching my shirt right
14 here, and you go to this exact spot, and with all the
15 resources available to you at the highway patrol, you try to
16 collect my skin cells which are maybe rubbed off on my shirt.
17 What is the likelihood that you will find enough of my skin
18 cells under those circumstances, this is a first time
19 touching, for instance, that you would be able to develop a
20 profile that would be useable for comparative analysis?

21 A. Under the circumstances that you've described and
22 demonstrated, I would think it would be very unlikely that I
23 would be able to obtain enough DNA, there would be enough DNA
24 transfer for me to obtain a profile for comparison.

25 Q. And what would your answer be if I told you that I

1 maybe grabbed my shirt, for the first time, never touched my
2 shirt, I guess maybe that's not the best example, but I
3 grabbed an article of clothing, hard, and you tried your best
4 to collect enough of my skin cells from that area that I had
5 grasped, do you think that you'd be able to find enough of my
6 skin cells to develop a useable DNA profile under those
7 circumstances?

8 A. Well, I definitely think that there would be more
9 DNA transfer under those circumstances than the first.
10 However, with a single touch like that, again, I think that
11 the transfer would be minimal. And there's a very good
12 likelihood that we would not obtain a profile from that type
13 of situation.

14 Q. What about if I grabbed something, a substance like
15 carpet? Would your answer be the same?

16 A. Yes.

17 Q. And if I maybe touched concrete, would your answer
18 be the same?

19 A. Yes.

20 Q. And your answer would still be that, if you knew
21 exactly where I touched, assuming this is concrete, under the
22 methods that you have available to you, the technology that
23 you have available to you at the highway patrol, you would
24 not be able to develop a useable DNA profile; is that
25 correct?

1 A. I would think that, no, we wouldn't be able to under
2 most circumstances.

3 Q. How about if I grabbed a piece of leather?

4 A. I would think the same thing. The leather even
5 itself generally has a smoother surface and may not even pick
6 up as much cells as, say, a piece of cloth.

7 Q. And what about maybe coins?

8 A. Coins, again, similar thing. The surface of the
9 coin is smooth. Possibly the edge could be a little rougher.
10 May pick up some more cellular material. However, on that
11 surface, I would think it would be unlikely that I would be
12 able to get a profile from a single contact like that.

13 Q. You performed DNA testing in this case; is that
14 correct?

15 A. Yes.

16 Q. I'd like to show you what's been marked as State's
17 Exhibits 86, 92, and 93. I believe that these are already in
18 evidence. Can you take those, please?

19 MR. ROGERS: What are the numbers again?

20 MR. KNIGHT: 86, 92, and 93.

21 Q. 86, that's the victim's blood standard; is that
22 correct?

23 A. Yes. That's correct.

24 Q. 92 is labeled as Ryan Ferguson's saliva; is that
25 right?

1 A. Yes. That's correct.

2 Q. 93 is labeled as Chuck Erickson's saliva; is that
3 right?

4 A. Yes.

5 Q. Okay. I'd like to pretty quickly go through your
6 tests that you did on some of these items that were submitted
7 to you. Your number -- Missouri State Highway Patrol number
8 13A, which is State's Exhibit 35, did you test the victim's
9 pants?

10 A. Yes.

11 Q. Okay. And what were the results of your tests on
12 Kent's pants?

13 A. I detected blood on those pants, and upon further
14 DNA analysis obtained a profile for comparison.

15 Q. Okay. And what were the results of the comparisons,
16 or the profiles in this case?

17 A. The profile that I obtained from that particular
18 piece of evidence was consistent with the profile from the
19 victim, Kent Heitholt.

20 Q. You also tested 15A, the victim's T-shirt, which is
21 State's Exhibit 36. And what were the results of the tests
22 on that item?

23 A. I also obtained a DNA profile from that piece of
24 evidence that was -- could be used for comparisons. And once
25 again, the comparisons were consistent with the victim from

1 Kent -- the blood from the victim, Kent Heitholt.

2 Q. Now are you maybe looking right now at 15B by any
3 chance?

4 A. Oh, I'm sorry.

5 Q. And that would have been Kent Heitholt's sweater; is
6 that correct?

7 A. That's correct.

8 Q. Okay. And you found that the victim's blood -- or
9 the profile of the blood that you found there was consistent
10 with Kent Heitholt's DNA profile; is that right?

11 A. Yes, that's correct.

12 Q. Okay. Let's back up then to number 3 -- our number
13 36, your number 15A.

14 A. Okay.

15 Q. T-shirt. What were the results of those tests?

16 A. The T-shirt, I did a preliminary test for blood that
17 was positive. And took that no further at that point.

18 Q. Didn't see any need to; right?

19 A. No. At that point it was clothing that was an
20 undergarment basically. We assumed that the sweater was on
21 top. And I was looking for transfer between the victim and
22 his assailant.

23 Q. Your number 72, State's Exhibit 38, which was the
24 left rear tire and wheel, you did an exam on that; is that
25 correct?

1 A. Yes, I did.

2 Q. What were the results? Or what was the results?

3 A. On number 72?

4 Q. I'm sorry to mislead you on that one. You didn't do
5 any DNA tests on that, did you?

6 A. No, I didn't.

7 Q. Okay. Number 40, our State's Exhibit 40, your
8 Number 14. Kent's shoes. Did you do tests on those items?

9 A. Yes, I did.

10 Q. Okay. What were the results?

11 A. I detected blood on those shoes and extracted and
12 typed DNA from that sample.

13 Q. Okay. And what was the results?

14 A. That sample -- the profile was also consistent with
15 the profile from Kent Heitholt.

16 Q. Moving on to the belt buckle, which is State's
17 Exhibit 47, your number 48, you did tests on that item;
18 correct?

19 A. Yes.

20 Q. And did you find that -- did you -- were you able to
21 get a DNA type from that item?

22 A. Yes. I obtained a DNA type from that.

23 Q. Okay.

24 A. And upon comparisons, it was consistent with the
25 victim's blood.

1 Q. And you did serology on that item also? That was
2 the victim's blood, is what you said; is that correct?

3 A. Consistent with, yes.

4 Q. Okay.

5 A. And I -- what you mentioned before, I detected human
6 blood on that item, before I went to DNA.

7 Q. State's Exhibit 56, which is your number 26, four
8 cigarette butts and one plastic cigar tip, you did tests on
9 those items; is that correct?

10 A. Yes.

11 Q. And 26A through 26D, is it true that no conclusive
12 DNA profile was developed?

13 A. Yes. That's correct.

14 Q. But the tan cigarette butt, which is 26E, what was
15 the result of your tests -- your tests on that?

16 A. I was able to obtain a DNA type that, when compared
17 with the blood standards that I had, did not match any of
18 them.

19 Q. Then number -- your number 66, State's Exhibit 61,
20 four dimes and a penny that were found under Kent's body, or
21 close proximity to his body, did you do tests on that? Or
22 those items?

23 A. No. I didn't test those items.

24 Q. Okay. State's Exhibit 85, which was your number 10.
25 Fingernail scrapings from Kent?

1 A. Yes.

2 Q. You did tests on that; is that correct? Or those?

3 A. Yes, I did.

4 Q. And what were the results?

5 A. I obtained a full DNA profile from one of the
6 fingernail scrapings and a partial from the other, but both
7 profiles, when compared with the standards I had, were
8 consistent with the blood of Kent Heitholt.

9 MR. KNIGHT: Nothing further, Your Honor.

10 THE COURT: You may inquire.

11 MR. ROGERS: Thank you, Your Honor.

12 - - -

13 CROSS-EXAMINATION

14 BY MR. ROGERS:

15 Q. Good evening, Mr. Maloney.

16 A. Good evening.

17 Q. You told us a little bit about PCR and STR in the
18 context of DNA testing. Is there also something called RFLP?

19 A. Yes.

20 Q. What does that stand for?

21 A. It stands for restriction fragment length
22 polymorphism. And it is the initial type of DNA testing that
23 we started with in our laboratory in 1990.

24 Q. So that was what they were doing to start with. You
25 were already there.

1 A. Pardon me?

2 Q. You were there doing serology when the highway
3 patrol lab started doing RFLP in the lab?

4 A. That's correct. Yes.

5 Q. And then PCR techniques were developed. And PCR
6 stands for polymerase chain reaction? Is that right?

7 A. Yes.

8 Q. And that is not a way of examining DNA; it's a
9 manner of replicating DNA to facilitate examination, isn't
10 it?

11 A. Yes. Correct.

12 Q. And it's sort of like making a bunch of copies on
13 the Xerox machine.

14 A. Yes, it's been compared to that, and favorably, yes.

15 Q. Unfavorably?

16 A. No. Favorably.

17 Q. Favorably.

18 A. It's a favorable comparison, I should say.

19 Q. And what that does, they can take a very small
20 amount of DNA, one that was too minute to be reliably tested
21 under the RFLP technique, and make it susceptible to testing.

22 A. Correct. It increased the sensitivity of our
23 ability to test DNA.

24 Q. And it basically, if you had, I don't know about
25 nanograms and stuff, but if you had a little tiny bit of DNA

1 that you couldn't test before, you can sort of replicate it
2 and get hopefully enough to test.

3 A. Yes, that's the idea, with PCR, correct.

4 Q. And the limitation, of course, is that, like even a
5 Xerox machine, if you make a copy of a copy of a copy of a
6 copy of a copy of a copy, it's going to be blurry; right?

7 A. The -- in the techniques that are used, generally
8 they've been optimized for the type of work that we do, so
9 that, as long as you start out with a pristine sample and
10 there's no problems as far as inhibitors, you can reliably
11 type or copy those fragments of DNA we're most interested in
12 accurately.

13 Q. Okay. And when you say "those fragments we're most
14 interested in," that brings us to the STR thing, doesn't it?

15 A. Yes. The STR are the actual locations of the DNA
16 molecule that we are interested in amplifying.

17 Q. And STR stands for short tandem repeat.

18 A. Correct.

19 Q. And that means that -- I don't want to get into all
20 the molecular stuff, but there are different molecules that
21 occur in sequence, and the short tandem repeat are a sequence
22 of these recurrences? Is that a fair description?

23 A. Yes. I would say so.

24 Q. And if there has been technology developed, that's
25 commercially available to laboratories such as yours, that

1 can look for particular identifying things which can be
2 reliably put together to make a profile which would be pretty
3 unique for a given individual's DNA.

4 A. Yes. The profiles that we develop in STR testing
5 are very discriminating. In other words, we can tell with a
6 high degree of accuracy the differences between individuals.

7 Q. And you, of course, keep up with the literature in
8 DNA testing and how it's being used forensically, don't you?

9 A. As best I can. There is a lot of literature out
10 there. But I do try to maintain currency on that.

11 Q. Now, you have heard then of what are called DNA
12 exonerations.

13 A. Yes.

14 Q. Where somebody is in jail based upon an eyewitness's
15 identification or some jailhouse snitch or something, for
16 years, and then DNA, which was available, but not -- the
17 technology wasn't available perhaps at the time of the trial,
18 is tested, and it turns out it wasn't them; right?

19 A. Correct.

20 Q. Okay. And some of those exonerations refer to DNA
21 that is from what are called latent fingerprints. Correct?

22 A. That's possible. I'm not sure of the exact cases
23 that you're talking about.

24 Q. Okay. And I'm not talking about exact cases --

25 A. Okay.

1 Q. -- but --

2 MR. KNIGHT: Your Honor, at this point I'm going to
3 object to this line of questioning. I don't see how it's
4 relevant to our case at all.

5 MR. ROGERS: Well, I think it's certainly relevant
6 to the direct examination. Let me put it that way.

7 MR. KNIGHT: We're talking about exonerations, which
8 are determinations by some other board or --

9 MR. ROGERS: That part's already asked and answered.

10 MR. KNIGHT: -- some other group. I mean, how can
11 that possibly be relevant?

12 THE COURT: Only one person at a time can talk. I
13 don't think the reporter can take you down while Mr. Knight
14 is making his objection. I'll let him --

15 MR. ROGERS: Sorry.

16 THE COURT: -- speak, and then you may respond.

17 MR. KNIGHT: I mean, we're talking about
18 determinations that boards -- you know, I don't even know
19 what the composition of any of these boards out there might
20 be, under different circumstances, maybe arrive at results
21 that -- I mean, they're just so convoluted. There's no way
22 we can get into all those things right now. I don't see how
23 this line of questioning is relevant to this case. If he
24 wants to talk to him about negative evidence, that's fine.
25 If he wants to talk to him about things that I -- areas that

1 I examined the witness on, that's fine. But as far as
2 exonerations, I don't think we need to go down that path at
3 all. It's just not relevant to this case.

4 MR. ROGERS: I think my question regarding
5 exonerations has been asked and answered two questions ago.
6 Without objection. I'm not planning to ask another. The one
7 I'm asking now doesn't have to do with exonerations.

8 THE COURT: Well --

9 MR. ROGERS: It has to do with fingerprints.

10 MR. KNIGHT: Well -- and also, I think that's beyond
11 the scope of this witness's expertise anyway. He's a
12 forensic --

13 THE COURT: Well, if it is beyond his expertise, I
14 assume the witness will let us know that, since he -- because
15 of his experience that you've put in the record.

16 MR. KNIGHT: If you want me to, can I voir dire him?
17 I don't mean to cut you off. Sorry.

18 THE COURT: If you wish to voir dire him for the
19 purpose of making an objection as to his competency in the
20 area of fingerprint DNA analysis, you may. If that's what I
21 understand you're saying, that he's not competent to testify
22 in that area?

23 MR. KNIGHT: That's correct.

24 - - -

25

VOIR DIRE EXAMINATION

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BY MR. KNIGHT:

Q. Mr. Maloney, do you do fingerprint analysis?

A. Fingerprint analysis? No.

Q. Okay.

A. I don't perform fingerprint analysis.

MR. KNIGHT: Now were you talking about DNA fingerprints? Or are you talking about latent fingerprints that are left behind at crime scenes?

MR. ROGERS: Well, if I could ask the question, you would know what I was talking about.

MR. KNIGHT: It sounds to me like you were talking about latent fingerprint analysis.

MR. ROGERS: I'm not talking about what Miss Kliethermes just told us about. No. I'm not talking about latent fingerprint comparison. I'm --

MR. KNIGHT: Well, are you talking about fingerprint exoneration? What are you talking?

MR. ROGERS: May I ask the question? And then if you want to object, object.

MR. KNIGHT: I guess so.

THE COURT: Is there an objection?

MR. KNIGHT: I'll let him ask the question.

- - -

1 RESUMED CROSS-EXAMINATION

2 BY MR. ROGERS:

3 Q. Let me put it this way. And don't answer the
4 question until Mr. Knight has a chance to object.

5 A. Okay.

6 Q. And I'll do a series of questions. You testified on
7 direct examination that skin cells, like many other cells in
8 the body, have nuclei. Right? There's a nucleus in each
9 cell. Is that correct?

10 A. Yes.

11 Q. Okay. And when a fingerprint is left on a surface,
12 sometimes that fingerprint consists of skin oils, which
13 contain skin cells. Correct?

14 A. I believe that's correct, yes.

15 Q. And if there are sufficient skin cells deposited in
16 the fingerprint, they will contain DNA. Correct?

17 A. If -- if any cells are deposited in a fingerprint, I
18 would expect them to contain DNA.

19 Q. Okay. And it would be unusual for a fingerprint to
20 be left on a surface, unless it's like a fingerprinted ink,
21 which would not contain skin cells; correct?

22 A. Well, I can testify to skin being left by touch, but
23 I can't specifically testify to fingerprint ridge patterns
24 and how -- what DNA would be available in that.

25 Q. And I'm not talking about whether there were ridge

1 patterns or not. The skin cells would be there, whether it
2 was smudged or streaked or whatever, without regard to the
3 ridge pattern, because the cells don't have to be arranged in
4 a pattern for the DNA to be discernable; correct?

5 A. Well, in a rubbing or scraping manner, I would
6 expect more cells to be abraded off.

7 Q. Okay.

8 A. In a fingerprint, I'm thinking, in my mind, that
9 it's a touch -- a single touch down and back up again.

10 Q. In any event, there may be skin cells there.

11 A. That's possible, yes.

12 Q. And if the skin cell were -- if the fingerprint were
13 developed by police techniques in terms of dusting with
14 powder and then lifting it off with tape and putting it on a
15 card, some of those skin cells could easily be put on the
16 card, couldn't they?

17 A. That's possible, yes.

18 Q. And it's possible for, even years later, for those
19 skin cells to be extracted from that fingerprint card and
20 tested for DNA.

21 A. An attempt could be made on that material, yes.

22 Q. And aren't you familiar in the literature of
23 situations where DNA material from fingerprint cards
24 containing latent fingerprint lifts have been tested?

25 A. I don't know specifically about latent print cards

1 lifts, but I have read literature where some people have been
2 successful at times of obtaining DNA types from fingerprints.

3 Q. Okay. And if there were a larger friction ridge
4 impression, such as a palm print, would it be fair to assume
5 there's more likelihood of having more DNA?

6 A. I would think, just by common sense, that's a
7 possibility.

8 Q. Okay. And with regard to this particular case, you
9 have not been asked to nor have you tested any unidentifiable
10 friction ridge prints for DNA, have you?

11 A. No.

12 Q. Okay. Now, with regard to the materials you tested,
13 has anything other than the known buccal swab or the saliva
14 swab or whatever you call it. Both, I guess. Is that right?

15 A. Buccal or buccal swab is what we like to call it.

16 Q. Okay. Aside from that, from Ryan Ferguson, has any
17 of the other DNA that you have tested been in any way
18 consistent with that of Ryan Ferguson?

19 A. No. None of the DNA that I've tested has compared
20 consistently with that profile.

21 Q. Okay. And has any of the DNA you've tested, other
22 than the known swab of Charles Erickson, been consistent with
23 that of Charles Erickson?

24 A. No. None of the other profiles I've developed have
25 been consistent with Charles Erickson's profile.

1 Q. And when you tested the DNA on the buckle, State's
2 Exhibit 47 -- and I don't know what your laboratory number
3 is.

4 A. That I don't know. What is that sample?

5 Q. It's a belt buckle.

6 A. I believe it's our number 48, if I remember right.

7 Q. Maybe item number 53?

8 A. 53?

9 Q. Well, I'm not sure whose number that is. It looks
10 like the Columbia police report -- department's number. I'll
11 show you the --

12 A. I don't have that as 53.

13 Q. See if you can figure out what that is on your list.

14 A. Yeah. I believe that's our number 48.

15 Q. Okay. That's the only belt buckle you got there?

16 A. Yes.

17 Q. Okay. You tested it and found DNA consistent with
18 the decedent, Mr. Heitholt; correct?

19 A. I believe that's correct. And let me -- yes. That
20 is correct.

21 Q. And was that, in fact, the blood spatter that was
22 present on that that you tested for DNA?

23 A. I can't testify as to whether it was spatter or not.
24 I just know that there was a stain that identified as human
25 blood, that I tested.

1 Q. Okay. And that's where you got the DNA from.

2 A. Correct.

3 Q. You didn't try and swab the leather part for other
4 DNA.

5 A. No, I didn't.

6 Q. Okay. Thank you.

7 MR. ROGERS: That's all the questions I have.

8 THE COURT: Redirect?

9 MR. KNIGHT: Thank you, Your Honor. Just a few more
10 questions.

11 - - -

12 REDIRECT EXAMINATION

13 BY MR. KNIGHT:

14 Q. Where's that belt buckle?

15 Now, you -- you tested this and found that we had
16 blood on it, and you got DNA from the blood; is that correct?

17 A. Yes.

18 Q. And that DNA profile wound up being consistent with
19 Kent Heitholt; is that correct?

20 A. That's correct.

21 Q. Okay. Now opening this belt buckle up, where did
22 you obtain this sample for testing? From that buckle.

23 A. There's a small part on the back side here that has
24 my initials on it. And you can kind of see outlines of the
25 stain that I used for my testing.

1 Q. Can you kind of hold that up a little bit so that
2 all the jurors can see? Are you talking about just one
3 little area on this -- on the actual buckle part of the belt?

4 A. Yes.

5 Q. Okay. On the metal part; right?

6 A. Correct.

7 Q. So did you even attempt on any other part of this
8 belt buckle and partial belt to obtain -- to obtain a
9 substance that you could maybe use for comparative purposes?
10 For DNA analysis.

11 A. No. For my testing, I concentrated on the blood
12 stain, or the stained area that ended up being human blood,
13 and went further with my tests on that.

14 Q. Because, as you testified about before, what you
15 have to do is: The first thing you do is you eyeball a piece
16 of evidence, and you have to determine what of that evidence
17 might have some probative value. And that's why you tested
18 it right there; is that correct?

19 A. Correct.

20 Q. Okay. And not the entire surface area of the belt.

21 A. Correct.

22 Q. Okay. The belt buckle and the belt that are still
23 intact.

24 A. Yes.

25 Q. Now, you were asked some questions on

1 cross-examination about DNA that might be found. There may
2 be fingerprints or palm prints. Correct?

3 A. Yes.

4 Q. Okay. And you and I discussed this issue a week or
5 two ago; isn't that correct?

6 A. Yes.

7 Q. Okay. And in your judgment, let's just say that I
8 touch this wood right here and I leave behind a useable
9 fingerprint. Or maybe I touch a piece of glass and I leave
10 behind a useable thumbprint. Under the technology that you
11 have at the Missouri State Highway Patrol, what would be --
12 what would you -- do you think that you would be able to
13 obtain a useable DNA profile from just touching either wood
14 or a piece of glass?

15 A. I think that, even though it is possible and has
16 been done occasionally, I think it would be very unlikely
17 that I would get a DNA profile from that contact.

18 Q. And if I maybe touched my palm up to wood or touched
19 my palm up to a piece of glass, would you predict the same
20 thing? That it would be unlikely that you'd be able to
21 obtain a DNA profile, despite the fact there might be more
22 surface area from my hand on either one of those two items.

23 A. I would, as you say, expect there to be more
24 cellular material to test. However, I still think that it
25 would most likely be under the threshold of our testing

1 ability to detect that DNA in a profile.

2 Q. Okay.

3 MR. KNIGHT: Nothing further.

4 THE COURT: Recross?

5 MR. ROGERS: Yes. Just a little bit.

6 - - -

7 RE-CROSS-EXAMINATION

8 BY MR. ROGERS:

9 Q. Calling your attention, sir, to this -- I was having
10 trouble seeing what you were indicating on the buckle. So
11 I'm going to call your attention to a photograph which is in
12 evidence as Defendant -- or excuse me, State's Exhibit 44C,
13 which is a photograph of the buckle. And we see some blood
14 stains there. And there appear to be a smaller one towards
15 the top of the picture and a larger one towards the bottom of
16 the picture, right at the end of the tongue of the buckle?

17 A. I see those, yes.

18 Q. Is one of those the ones that you tested?

19 A. I suspect that it is.

20 Q. And which one do you think it was?

21 A. Well, I'm not sure. I mean, I know for sure on the
22 buckle, because I've labeled that as such, but I -- just
23 looking at the photograph, I'm not sure which one that might
24 be.

25 Q. Okay. You mentioned I think on direct examination

1 that you're a member of the American Academy of Forensic
2 Sciences? Is that correct?

3 A. Yes.

4 Q. Is there a difference between being a member and
5 being a fellow, or is that the same thing?

6 A. A fellow is actually another membership designation.
7 And normally a fellow is someone that has been in the
8 organization for quite a while, maybe has been -- has
9 published papers or things of that nature.

10 Q. Okay. And in 2004, 2005, who was the president of
11 that organization?

12 A. I'm not exactly sure who that -- who the president
13 is offhand.

14 Q. Do you know a man named Ron Singer? Ronald L.
15 Singer?

16 A. I've heard that name, yeah.

17 Q. In fact, wasn't he the president? Or isn't he the
18 outgoing? I don't know when they change the terms.

19 A. I don't know. It's possible that it could be. I've
20 never met Ron Singer, but I have heard his name.

21 MR. ROGERS: Okay. Thank you.

22 THE COURT: Redirect?

23 MR. KNIGHT: No. That's fine. None.

24 THE COURT: May this witness be finally excused for
25 the state?

1 MR. KNIGHT: Not finally, but for tonight certainly.

2 THE COURT: All right. Would ask you to step down.
3 You are subject to being recalled, but you're free to leave
4 this evening.

5 THE WITNESS: Thank you.

6 THE COURT: Would ask you not to discuss your
7 testimony with any other witness who's yet to be called. But
8 you may step down and be excused.

9 THE WITNESS: Okay. Thank you.

10 THE COURT: State may call its next witness.

11 MR. CRANE: Dr. Eddie Adelstein.

12 THE COURT: Would you raise your right hand, sir.

13 - - -

14 EDWARD ADELSTEIN,
15 being first duly sworn by the Court, testified as follows:

16 THE COURT: Would you take the witness stand,
17 please.

18 - - -

19 DIRECT EXAMINATION

20 BY MR. CRANE:

21 Q. Good evening. Give us your name, sir.

22 A. Edward Adelstein.

23 Q. And what's your occupation?

24 A. I'm a pathologist and physician.

25 Q. Specifically, what's your -- one of the positions

1 you function in here in Boone County?

2 A. I'm the deputy medical examiner of Boone and
3 Callaway County. I'm also a chief pathologist at the VA
4 hospital and work for the university.

5 Q. You said over at the VA?

6 A. Right.

7 Q. And over at MU?

8 A. That's correct.

9 Q. And you're the deputy medical examiner.

10 A. That's correct.

11 Q. And how long have you -- can you go over -- and I'm
12 not looking for something that goes on too awful long, but in
13 terms of your tenure with the medical examiner's office,
14 could you tell the jury a little bit about how long you've
15 been there?

16 A. Yes. Since 1988 until the present I have served
17 often as the deputy medical examiner, and during that time,
18 for about four and a half years, I was the chief medical
19 examiner of Boone and Callaway County.

20 Q. What's your post high school education?

21 A. Post high school education, I have a veterinary
22 degree, a medical degree, a Master's in comparative
23 pathology, graduated from medical school, and am board
24 certified in clinical and anatomical pathology.

25 Q. Are you licensed to practice medicine in the State

1 of Missouri?

2 A. That's correct.

3 Q. Are you an MD?

4 A. Yes, I am.

5 Q. Specifically, what is your specialty, Doctor?

6 A. My specialty actually would be considered more like
7 immunology. And I'm a general pathologist. More of a
8 general pathologist.

9 Q. Pathologist?

10 A. Pathologist, yes, sir.

11 Q. Could you tell the jurors what is meant by the term
12 "pathology."

13 A. Sure. A question asked me by my children all the
14 time.

15 Pathologists basically do two things. One part of
16 our life is what we would call anatomical pathology. This is
17 where we're trained to do autopsies and determine the cause
18 of death. We also look at tissues that are taken from people
19 during surgery, examine them under microscopes, and attempt
20 to tell what we see. The other part of our life is what we
21 would call clinical pathology. And this is the area where we
22 actually look at fluids, to measure; we look at hematology;
23 we run the blood bank. And we cover those other services
24 that do not directly involve examination of tissues.

25 Q. What -- what is forensic pathology?

1 A. Forensic pathology would be a separate branch of
2 pathology where, if you are board certified in forensic
3 pathology, you do an additional year of training, and then
4 pass your boards in forensic pathology. That's an experience
5 which I have not had.

6 Q. What does the medical examiner do?

7 A. The medical examiner is involved in the
8 determination of the cause of death under certain
9 circumstances: Where the person who died has not seen a
10 physician for 24 to 36 hours; in all children under 15
11 months; and any suspicious death that occurs in this county;
12 and any death that might involve public health information.

13 Q. Doctor, how many autopsies have you performed?

14 A. Probably over about 600.

15 Q. I want to direct your attention to one of those that
16 you performed on November 1st, 2001. What was your position
17 with the medical examiner's office on that day?

18 A. I was the deputy medical examiner at that time.

19 Q. Okay. And who did you perform an autopsy on
20 November 1, 2001, in the early afternoon? I think it was
21 about 1:30.

22 A. Right. On Mr. Heitholt.

23 Q. Where was that conducted?

24 A. That was conducted at the medical examiner's
25 facility on St. Charles Road.

1 Q. And do you recall who else was present besides
2 yourself when you conducted the autopsy?

3 A. There was Dori Burke. And I'm reading this. There
4 was Jeff Nichols, who I remember, and Jeff Harmon, and Ruby
5 Marsden, who is an investigator from the prosecuting, was
6 there at the time we did the autopsy.

7 Q. When the body was first presented to you, some basic
8 questions for you. What did you determine Kent Heitholt's
9 height and weight to be?

10 A. Six foot four and 315 pounds.

11 Q. And when you -- hang on a minute now. 75 inches in
12 length, looking at your autopsy.

13 A. We'll back up a little to six foot three.

14 Q. Yeah. I did -- did I do the math wrong on that?

15 A. I think you did -- you're correct.

16 Q. Divided by 12?

17 A. Right. You're right.

18 Q. Well, Mr. Rogers is only five foot six. That makes
19 me five two. Kent was six three; is that right?

20 A. That's correct.

21 Q. Okay. And how much did you say he weighed?

22 A. We estimated his weight at 315 pounds.

23 Q. When you first viewed the body, can you tell us what
24 he was wearing?

25 A. Yeah. When we first viewed the body, one of the

1 first things we do to document these autopsies, he was
2 wearing tennis shoes, brown socks, gray underwear, tan pants,
3 a white T-shirt, and a green sweater.

4 Q. During the course of your examination, what did you
5 do as you progressed through the steps that you took with
6 those clothing items and various other items that were on the
7 body?

8 A. The clothes were removed and bagged individually, to
9 be examined later by the investigator or by the police
10 laboratory.

11 Q. So the detectives that were present that you've
12 already mentioned took custody of the items as you performed
13 the autopsy?

14 A. That's correct.

15 Q. Can you tell us also some initial observations?
16 What signs did you observe with respect to any emergency
17 measures, life-saving efforts with respect to Mr. Heitholt?

18 A. The signs that there was resuscitation attempts:
19 There was a tube that had been placed into his trachea;
20 attempt to breathe. He had EKG patches for EKG readings. He
21 had defibrillation pads that been placed on him. So there
22 was an attempt probably to start his heart. He had an
23 oximeter on his finger, to determine what his oxygen
24 saturation was. And we noticed that he had a needle puncture
25 in his right antecubital fossa, where someone attempted to

1 probably -- probably to get some blood.

2 Q. Okay. Now we don't know what antecubital fossa is.

3 A. Antecubital is this little area right here.

4 Q. Okay. Inside your elbow.

5 A. That's correct.

6 Q. Okay. That was the right elbow?

7 A. Right.

8 Q. That was a needle puncture?

9 A. Right.

10 Q. Also consistent with life-saving measures?

11 A. That's correct.

12 Q. Okay. Doctor, I want to first ask you, in terms of
13 injuries, what generally did you observe with respect to the
14 victim's head?

15 A. We observed multiple injuries on the victim's head.
16 Initially, of course, there was a great deal of blood, which,
17 when that was all removed so we would get a better idea, we
18 were able to document the kinds of injuries, the location of
19 injuries.

20 Q. Okay. So when he first came to you -- we didn't
21 realize it was raining out there. When the body was first
22 presented to you, he was as he had been found at the scene.

23 A. That's correct.

24 Q. Okay. And so one of the things that you did after
25 making initial observations was to wash, clean up?

1 A. That's correct. We first, of course, document
2 photographically what he looked like originally. And then,
3 in order to get a better idea of the lesions and the
4 injuries, we then, of course, have to wash him, so we can see
5 where they are.

6 Q. Okay. Doctor, I'm going to show you what's marked
7 as State's Exhibit 94, 94A through 94F, and generally ask you
8 if these are fair and accurate depictions of Mr. Heitholt, at
9 various angles, as you saw him during your autopsy.

10 A. That is correct.

11 Q. Okay.

12 MR. CRANE: Judge, I would offer State's Exhibit 94,
13 after defense counsel's had a chance to look at it.

14 MR. ROGERS: No objection.

15 THE COURT: State's Exhibit 94, 94A through F, are
16 admitted.

17 - - -

18 State's Exhibits 94, 94A through 94F, admitted into
19 evidence.

20 - - -

21 Q. Doctor, I'm going to ask you to step down, if you
22 would, with the Court's leave.

23 THE COURT: You may step down.

24 MR. CRANE: Ladies and gentlemen, I'm going to try
25 and angle this a little bit this way. Okay? If you can't

1 see it, just let us know.

2 Q. Doctor, let's just -- and remember, you got people
3 that got to see.

4 A. Okay.

5 Q. Again, just getting oriented, the top two
6 photographs, without getting into specifics at this point,
7 indicate the top right side, in 94A, of the victim's head?
8 Is that correct?

9 A. That's correct.

10 Q. And then over here we've got a shot to the top of
11 the head?

12 A. That's correct.

13 Q. Okay. And then this is both sides.

14 A. Right. This is the left. Right.

15 Q. You're referring to 94C.

16 A. Right.

17 Q. 94D.

18 A. Right.

19 Q. Left side?

20 A. That's correct.

21 Q. Right?

22 A. Yes.

23 Q. And down here are photographs of the body, the
24 entire view there. If you look down here at the bottom of
25 94F, you mentioned, when the body was first presented to you,

1 Mr. Heitholt had not been -- the blood hadn't been washed
2 off?

3 A. Right.

4 Q. Is that fair and accurate with respect to that?

5 A. That's correct.

6 Q. When he initially came in?

7 A. Yes.

8 Q. And it's after obviously some of the clothing items
9 you had mentioned had been removed.

10 A. That's correct.

11 Q. Okay. Now, Doctor, I'd like to talk to you first of
12 all about the, as you got in your autopsy, your observations
13 with respect to injuries. Before we do that, and as we do
14 that, referencing the top four photographs, would -- would a
15 mannequin head that you've already marked on facilitate
16 explaining the injuries to the jury?

17 A. I believe it would, more schematically than these
18 pictures.

19 MR. CRANE: Charlie, would you like to look there?
20 That's what I'm talking about. I can't really hold that up
21 without the jurors seeing it.

22 MR. ROGERS: Are you offering it now?

23 MR. CRANE: Yeah.

24 MR. ROGERS: What's its number?

25 MR. CRANE: With your approval. It's Number 95 for

1 identification.

2 MR. ROGERS: No objection, Your Honor. I'm assuming
3 that, since the doctor prepared it, he'll be able to verify
4 the marks on it.

5 THE WITNESS: That's correct.

6 THE COURT: 95 is admitted.

7 - - -

8 State's Exhibit 95 admitted into evidence.

9 - - -

10 Q. Okay. Doctor, in conjunction with the photographs
11 here, and obviously I'm referring to the top four, and
12 State's Exhibit 95, so using 94 and 95, I want to ask you
13 some questions. Is that fair?

14 A. Fair.

15 Q. Okay. First of all, can you just discuss for us,
16 and remaining with the head area at this point, the injuries
17 that you observed.

18 A. There were multiple injuries, which we'll divide
19 them into really two kinds: Abrasions, which we think of as
20 a scraping, and contusions or bruises; and lacerations,
21 which, by the word laceration, we mean that the skin has
22 actually separated. So that the skin has come apart and
23 reveal underlying subcutaneous tissue or tissue underneath
24 where the skin was, and sometimes actually the bone. And so
25 an example of a laceration, which you might be able to see

1 something like that.

2 What I've done on this -- on this -- on this
3 facsimile of a human head is to make the lacerations in solid
4 red and to make the abrasions and the contusions in dots. So
5 you can get some idea of the position of these without
6 necessarily referring to the pictures.

7 So what we see here are three abrasions on the right
8 side of the cheek, such as you see here. And again,
9 abrasions are linear, superficial, gliding-like injuries.
10 The kind that you would just like rub your hand on a rough
11 surface, you can get an abrasion. Doesn't involve deep
12 tissue usually. And then we see there are these three
13 abrasions. Then there were these three really more like
14 abrasions, like contusions, that did not break the skin. And
15 they were round. About a centimeter. And they formed sort
16 of a pattern of a round-like injury. And then there was one
17 that was actually a laceration that was round. And in this
18 case, the skin was actually broken.

19 Q. Let me stop you right there. Those contusions to
20 the front of the head there -- and I'm referring to the ones
21 you got -- those circles --

22 A. Right.

23 Q. -- is that what you're talking about?

24 A. Yes.

25 Q. What are those consistent with?

1 A. Well, those are consistent with being hit with an
2 object that's of about that size, that's fairly focused,
3 where the energy -- I mean, an example might be if you used a
4 hammer. Could produce that kind of an injury on a head.

5 Q. Okay. Now, those other injuries that you've
6 indicated with more linear marks on them --

7 A. Right.

8 Q. -- and also, for instance, this, looking at State's
9 Exhibit 95, this line here --

10 A. Right.

11 Q. -- is that consistent with anything we see here in
12 94A?

13 A. Could be consistent with that.

14 Q. Okay. That was the one you were --

15 A. Right.

16 Q. -- marking here?

17 A. Right.

18 Q. Okay. That appears in various locations on the
19 victim's head. What would that be consistent with? That
20 linear --

21 A. These are usually consistent with being hit by some
22 kind of a very substantial object. It could be a pipe. It
23 could be a piece of metal. It could even be a board. You
24 know, it's -- it's usually a linear object. And it doesn't
25 have be linear, but it's usually some object that does not

1 bend.

2 When the skin is hit, on the head, it actually is a
3 logical thing that the skin is different on the head than the
4 rest of your body, that it comes apart. And it takes a
5 substantial force to make the skin come apart. In fact, it
6 -- it is -- if you can strike a blow hard enough to split the
7 skin, you often can induce a situation of physical -- of
8 confusion, disorientation, and unconsciousness.

9 Q. Well, we'll talk about that in a minute. Okay?

10 A. Sure.

11 Q. The -- I wanted you to go ahead and talk about any
12 other head injuries you haven't already mentioned.

13 A. Okay. Well, we -- to note, there is a head injury
14 on the posterior aspect of the head.

15 Q. Is that the back?

16 A. That's the back.

17 Q. Okay.

18 A. That would be analogous to perhaps this injury here.

19 Q. 94B?

20 A. 94B.

21 Q. Well, when you say "perhaps," now when you're doing
22 that, is that off your autopsy and also off --

23 A. Off my autopsy, off of my drawing, and off of these
24 pictures.

25 Q. Okay. And again, that injury to the back of the

1 head there would be consistent with what?

2 A. Being hit by an object that's very dense, and often
3 a linear object. But not necessarily. But often a linear
4 object.

5 Q. So there's lacerations. There's -- oh. I forgot to
6 ask you this. What about the eye area? And you may need to
7 refer down here to 94C and 94D.

8 A. He has some bruising around the eye, that may have
9 come about from -- these are really more like a small
10 collection of blood, that are not really extensive as far as
11 injuries go. What we did notice in the eye -- I didn't know
12 if you wanted me -- we did notice, when we looked in the eye,
13 the white part of the eye, we do see hemorrhages.

14 Q. Right. And I was going to ask you that. I promise.

15 A. Okay.

16 Q. Let me ask you this. Have you been able to
17 determine the number of times the victim was struck with the
18 item that produced these injuries? Now I'm talking about the
19 injuries that you defined as something that was blunt trauma.

20 A. The injuries, minus the three abrasions on the
21 cheek, would represent 11 strikes to the head.

22 Q. Is there any way to determine, with respect to those
23 injuries, if one injury, depending on the object, may look
24 like two?

25 A. These were all separate. These were all separate.

1 They didn't run together. They were separate strikes.

2 Q. So you believe that there were seven separate blows
3 struck.

4 MR. ROGERS: Excuse me. 11.

5 Q. I'm sorry. 11 separate blows struck. And you're
6 taking out the scrapes.

7 A. I'm taking out the scrapes, yes, which probably are
8 just an abrasion, maybe; not blows. But I'm counting the
9 other ones.

10 Q. Now, during the autopsy, did you also conduct a
11 subscapular examination? And tell us what that means.

12 A. One of the things we do when we -- after we make
13 these observations, we then make an incision and we peel back
14 the skin. We look underneath the skin. And what we saw was
15 diffuse subscapular hemorrhage. Just like if you would have
16 bumped your head many, many times. Only there was diffuse
17 hemorrhage. Because every one of those strikes would cause
18 some bleeding under the skin.

19 Q. Yeah. That's what I was going to say. Hemorrhage
20 means what?

21 A. Hemorrhage means blood.

22 Q. Okay. So there was bleeding under the skin.

23 A. Yes.

24 Q. Okay. Now, what about the skull, though?

25 A. There were no fractures of the skull.

1 Q. All right. So Mr. Heitholt, between his skin and
2 his skull, there was hemorrhaging, subscapular, under the
3 skin.

4 A. That's correct.

5 Q. However, his skull was not fractured.

6 A. That is correct.

7 Q. In your opinion, Doctor, were the injuries inflicted
8 by the blunt trauma fatal to the victim?

9 A. That is not actually an easy question to answer.
10 More than likely they were not fatal at the time to cause
11 immediate death. As I said before, a single injury to the
12 head can produce unconsciousness, and sometimes later on the
13 brain can swell up and produce death. But at this time when
14 I examined him, there was no evidence of injury to his brain.
15 So, it may have been that later, if he -- if this was the
16 extent of his injuries, the total extent of his injuries, it
17 would have been difficult to determine if he would have lived
18 or died.

19 Q. Okay. And also, probably another difficult
20 question: What is your opinion as to the effect these
21 injuries being inflicted on him -- and I'm just talking about
22 the head injuries at this point.

23 A. Right.

24 Q. -- would have had to Mr. Heitholt from the time they
25 started, through their duration.

1 A. These injuries would have rendered him initially
2 disoriented, confused. And eventually he would have been
3 unconscious. In other words, the word we can understand, if
4 you were struck like this, you would become stunned, which
5 could lead to unconsciousness.

6 Q. Okay. Doctor, regarding -- we've got the actual
7 pants over there. I wanted to show you, in State's Exhibit
8 94E, on the victim's right leg, when his pants are still on,
9 there is bleeding around the knee area?

10 A. Right.

11 Q. Okay. And did you also look at the victim's knee
12 without the pants covering it?

13 A. That's true.

14 Q. Okay. Let me ask you for identification here if you
15 recognize State's Exhibit 96, 96A, B, and C.

16 A. That's his right arm. Right hand.

17 Q. Okay. Well, 96 -- you don't have -- are these --

18 A. Right. These are the marks on his hand.

19 Q. Right and left hands, 96A and 96B?

20 A. Right.

21 Q. And then at 96C, do you recognize what's in that
22 photograph?

23 A. Yeah. That's his -- that is his -- that's his leg.
24 I recognize his kneecap. And there is a big abrasion there
25 and some blood there.

1 Q. Okay. Actually I may have the --

2 MR. CRANE: Well, Judge, I'll offer State's Exhibit
3 96, 96A, 96B, 96C.

4 MR. ROGERS: No objection.

5 THE COURT: State's Exhibit 96, 96A through C, are
6 admitted.

7 - - -

8 State's Exhibits 96, 96A through 96C, admitted into
9 evidence.

10 - - -

11 Q. Now, why don't we start, since we left off with the
12 knee, Doctor, 96C. And I don't know -- this is a picture
13 that I found from autopsy regarding the leg injuries. It
14 appears that that would be one -- that may be the left.
15 You've talked about the right, with the blood there.

16 A. Right.

17 Q. In any event, you noted in your autopsy some
18 injuries to the knee --

19 A. Right. An abrasion on the knee.

20 Q. Okay.

21 A. It's not terribly well depicted there, as a matter
22 of fact.

23 Q. Okay. Well, I guess what I'm getting at is: First
24 of all, did you note -- what injuries did you note to his
25 knee or knees?

1 A. I have to -- I'll have to review my report.

2 Q. Okay.

3 A. I think it was to his right knee.

4 (Witness referring to report.)

5 A. You know, I don't actually see that in this report
6 at this time.

7 Oh, okay. No, I don't see that in my report.

8 Q. Okay. Well, looking at the photographs and looking
9 at the -- looking at the pants and the photograph we have
10 here in 96C, does that refresh your recollection as to any
11 injuries --

12 A. It looks like there's an abrasion here and blood
13 here. And there's also -- this looks like an abrasion. It's
14 very difficult to tell where this blood's coming from, since
15 his body was covered with a great deal of blood.

16 Q. Okay. Well, what do you recall -- strike that. The
17 bleeding that we see on the pants and also the -- what did
18 you say? Contusion? Laceration?

19 A. Contusion.

20 Q. -- to the knee in 96C, what would that -- what would
21 be a consistent cause?

22 A. It would be a consistent cause if he fell on his
23 knee.

24 Q. Okay. That does not appear to be consistent with
25 somebody striking him on his knee.

1 A. No.

2 Q. With a blunt object.

3 A. It was a -- it was a -- it was a -- it was a
4 contusion or a bruise, and it wasn't -- there was no
5 laceration of the skin.

6 Q. Okay. Moving to the top two photographs, 96A and B.

7 A. That's right.

8 Q. Okay? Which hand is this?

9 A. This is the dorsum of the right hand.

10 Q. Okay. And dorsum just means top?

11 A. Right.

12 Q. Okay. And 96B is the left hand?

13 A. That's correct.

14 Q. Can you tell us about the injuries you observed to
15 the victim's hands.

16 A. There are multiple injuries on the tops of both
17 hands.

18 Q. And --

19 A. These are bruising. Some -- some abrasions here.

20 Q. Okay. What are the darker injuries to the top of
21 the hands?

22 A. These are abrasions.

23 Q. And what would those be consistent with?

24 A. Those could be consistent with a lot of things.

25 They could be consistent with dragging of your hand along the

1 ground, where you run into something like gravel, will
2 produce those kind of linear abrasions. They could also be
3 self-defense wounds. If you hold up your hand in front of
4 you. Although they look more like the kind of abrasion that
5 you would get if your hand was dragging on the ground.

6 These injuries are -- and these -- some of these
7 injuries are maybe a little more consistent with being --
8 with being injuries directly to the hand. They would be
9 self-defense, such as when you put your hands up to protect
10 yourself from being injured.

11 Q. Well, it sounds like you're breaking up types of
12 injuries here. Could you point again to what the distinction
13 between --

14 A. These are fairly linear bruises like this. Like you
15 could be struck by an object, that could produce this.

16 Q. Okay. Wait a minute. Slow down. Is this one of
17 the ones -- this one here on 96A, this dark spot --

18 A. Right, is a bruise.

19 Q. -- is a bruise.

20 A. Right.

21 Q. Okay. Consistent with maybe slamming your hand down
22 on pavement?

23 A. Right. Or being hit on the hand, yes.

24 Q. Okay. And then these other marks on the hands, that
25 are separate, if you will, what are those consistent with?

1 A. Those are more consistent to me of abrasions of
2 someone who's taking -- whose arm is moving fast along an
3 irregular surface, such as concrete or some sort of surface
4 material.

5 Q. Okay. Which are the injuries that are consistent
6 with putting your hand up, being struck, as you mentioned a
7 minute ago?

8 A. Some of these injuries -- you really can't say for
9 certain, but some of these injuries like that, that look
10 pretty linear. An injury like this, you might think he was
11 striking someone, but no one really hits people on their
12 knuckles. So injuries like this could be induced by holding
13 your hand in front of you and being struck. I mean, we would
14 look at these as possible self-defense wounds.

15 Q. Doctor, what did you observe at the victim's neck
16 area? And I believe you've also utilized State's Exhibit 95
17 in that connection?

18 A. That's correct.

19 Q. And let me also show you what's marked for
20 identification as State's Exhibit Number 97.

21 MR. CRANE: Charlie.

22 (Mr. Crane showing exhibit to Mr. Rogers.)

23 Q. Show you what's marked for identification as 97A,
24 97B, and 97C, and ask if you recognize -- are those fair and
25 accurate depictions of the victim's neck area when you

1 conducted your autopsy November 1, 2001?

2 A. That's true.

3 MR. CRANE: Judge, I'd offer State's Exhibit 97, A,
4 B, and C.

5 MR. ROGERS: No objection.

6 THE COURT: State's Exhibit 97, A through C, are
7 admitted.

8

- - -

9 State's Exhibits 97, 97A through 97C, admitted into
10 evidence.

11

- - -

12 Q. Could you talk a little bit about the injuries,
13 utilizing, first of all, State's Exhibit 97A, to the victim's
14 neck that you observed?

15 A. We saw along the neck this abrasion, which you can
16 appreciate some linear, in that it looks like a line, that
17 occurs around his neck. Then it extends on the left side and
18 makes a fairly strong linear mark. And then when it extends
19 up to the right side, you see there's much more defined marks
20 here. And then on the third drawing we see that these marks
21 actually match the loop of a belt buckle. And this area,
22 this isn't much of an abrasion, because this would be an area
23 where the strap probably wouldn't make --

24 THE COURT REPORTER: I'm sorry? The strap probably
25 wouldn't what?

1 THE WITNESS: The strap would not make close
2 contact.

3 THE COURT: Our court reporter has laryngitis now --

4 THE WITNESS: And I will start --

5 THE COURT: -- so you need to speak just a little
6 bit louder, if you don't mind.

7 Q. Looking at 95, have you depicted the injuries there
8 for the jury to consider?

9 A. Right. You can see the abrasions that went around
10 the neck here. There was an outline here of a fairly solid
11 object here, which is depicted I think in this picture, which
12 matches identically to a fragment of a belt that was found at
13 the scene.

14 Q. What did you note underneath the skin of the
15 victim's neck?

16 A. In this area, there is a profuse hemorrhage under
17 this area. That is, blood cells that leak out.

18 Q. What about any fractures at the neck?

19 A. We actually, to examine this, and we actually remove
20 the entire air box or the larynx, so we're able to look at
21 the larynx itself, which is what we would call like our
22 throat box. And we noted there was some broken cartilages
23 that extend out from this larynx, which make contact with the
24 hyoid bone, which allows us to eat and breathe and separate
25 the air from the fluid. And we noted that the hyoid bone was

1 broken. And that the arytenoid cartilages, which are fairly
2 delicate extensions that make contact with the hyoid bone,
3 were also broken.

4 Q. What's all that mean? You've got the abrasions to
5 the neck. Oh. Let me real quick, before you answer that,
6 let me show you State's Exhibit 47 and ask if this was the
7 item --

8 A. That is.

9 Q. -- that you compared to the victim's injury on the
10 neck.

11 A. That's correct.

12 Q. Okay. And did you find that item to be consistent
13 with that horseshoe-shaped injury?

14 A. I did.

15 MR. CRANE: And I'm showing the jury and
16 Dr. Adelstein State's Exhibit 47.

17 Q. Okay. Now, what -- let me ask you now, what are the
18 neck injuries consistent with?

19 A. The neck injuries are consistent with the kind of
20 pressure that will cause someone to die from asphyxiation.
21 That is, these kind of pressure around the neck does a couple
22 of things. It compresses the artery and vein that goes up to
23 the head, which is life giving. And when you compress --
24 initially when you put a ligature around someone's neck, when
25 you first put it around, it compresses the veins, the large

1 jugular veins that go to the head. But the arteries keep
2 pumping blood in. And because of the increased pressure you
3 see in the eyes, you often see hemorrhages in the eyes.
4 Little blood spots in the eyes. And when we see that, we
5 have fairly substantial evidence of two things: One, they
6 were alive when this ligature was placed around their neck,
7 and that was the initial sequence, that originally the veins
8 were cut off and the arteries were not.

9 Q. And did you observe -- what are those hemorrhages
10 called?

11 A. Petechiae hemorrhages.

12 Q. And did you see those in the eyes of Mr. Heitholt?

13 A. He had more diffuse hemorrhages and small petechiae.
14 He had extensive hemorrhages in his eyes.

15 Q. Okay. And that's indicative?

16 A. It's indicative of what we see in people who die of
17 asphyxiation because a ligature has been placed around their
18 neck.

19 Q. Asphyxiation is not able to breathe.

20 A. Lack of oxygen.

21 Q. All right. Now, the injuries to the front of the
22 neck as we see here in 97A, and also as you've diagramed, are
23 consistent with -- strike that. Are they consistent with the
24 victim being strangled with the pressure being applied from
25 the front or from the back of the victim?

1 A. Most likely from the back of the victim. At least
2 the best way I could understand would be that someone would
3 be pulling up this way, as this area had no ligature marks on
4 it.

5 Q. What area?

6 A. This area here, right adjacent.

7 Q. Well, what's that?

8 A. Well, very small -- this is --

9 Q. I'm just trying to get you to say for the record
10 what area didn't have marks.

11 A. This is the right side of his neck. And this area
12 right under here has minimal ligatures, where on the other
13 side there is more extensive impressions of the leather belt.

14 Q. And there weren't any impressions on the back of the
15 neck.

16 A. No, there weren't.

17 Q. Okay. So pressure you believe was applied with the
18 victim being turned away from the pressure point.

19 A. That's correct.

20 Q. Okay. And Doctor, do you have an opinion -- can you
21 give us a range of time that somebody's air can be cut off in
22 this fashion, that they would survive?

23 A. Generally speaking, when you take away the
24 oxygenated blood from the brain, you get irreparable damage
25 as early as 30 to 40 seconds, where there would be

1 significant brain injury, where it may affect their ability
2 to breathe on their own. This injury, of course, would
3 depend a great deal on the size and the force that was placed
4 around the neck and how consistent that energy was placed on
5 the neck. But it doesn't take a long time before the brain
6 is damaged to where respiration no longer occurs.

7 Q. What about, then, the length of time -- you're
8 talking about breathing stopped?

9 A. Right.

10 Q. Okay. What about the length of time that the heart
11 can continue to beat?

12 A. The heart can continue to beat for as long as ten
13 minutes. In most cases, depending on how much stress is
14 placed on the person at this time, it can go from anywhere
15 from two minutes to ten minutes before the heart actually
16 stops beating.

17 Q. And as long as the heart's beating, blood is
18 pumping.

19 A. That's correct.

20 Q. And if you had injuries, that blood is pumping out
21 of the body.

22 A. Right. That's correct.

23 Q. What about -- do you have an estimate, a range you
24 can give us, of some idea of consciousness,
25 semiconsciousness, unconsciousness, under these

1 circumstances?

2 A. Well, as early as 30 to 40 seconds of having
3 actually the blood not getting to the brain, you will become
4 unconscious. Those of you who are trained in martial arts
5 realize that if people compress your carotid arteries, you
6 can become unconscious in 15 to 20 seconds, or less.

7 Q. Doctor, if -- if you, and I hope you don't do it, if
8 you tried to strangle me with my belt around my neck, and
9 you're standing there, and you pull, and I'm standing here,
10 what would you expect me to do?

11 A. Well, I would expect you to fall toward me.

12 Q. I'd come falling to you?

13 A. Close enough.

14 Q. Okay. My breath's probably not real good. If I'm
15 like this, and I'm upright, and you pull on me...

16 A. I would expect you to probably fall backwards.

17 Q. Okay. And if I'm face up, on the ground, and you
18 try to strangle me, standing over me...

19 A. I would lift you up.

20 Q. If I'm down, face down, and you have the ligature
21 around my neck, what would you expect?

22 A. If you were face down and I tried to lift you, I
23 would lift you.

24 Q. Okay.

25 A. I mean, I would lift the body.

1 Q. So the scenario here with respect to these injuries,
2 what's a consistent location for the killer, if you will, to
3 have been in?

4 A. In order to really -- it's fairly unusual to break
5 the hyoid bone. In the classic hanging of the Old West, when
6 they hung people, and they knew how to do it, they could
7 break the hyoid bone. It's almost rare now that we see
8 anybody who hangs themselves who actually breaks their hyoid
9 bone. So it takes a great deal of pressure. Or at least a
10 rapid generation of force. And in order to do that, the body
11 would need to be fixed in a position so that it couldn't move
12 when that force was applied. An example would be if someone
13 was holding someone down. An example would be if you were
14 sitting on somebody. All those could be reasons that would
15 allow you to put that much force on that you could break
16 those bones without actually lifting up the body off the
17 ground. At least in my opinion, that would be how I would
18 perceive that.

19 Q. Put some pressure on their back?

20 A. Some pressure on the back. Someone holding you
21 down. Or in a position where they couldn't move. You know,
22 if they were trapped in a position where they couldn't move.

23 Q. But these injuries here to the neck are consistent
24 with the victim being down, down, face down.

25 A. They are.

1 Q. Doctor, based on your observations at autopsy, the
2 injuries that you observed, the presence of petechiae, what
3 is your opinion to a reasonable degree of medical certainty
4 as to the cause of Kent Heitholt's death?

5 A. Basically -- and I'll read from my opinion. The
6 cause of death of Kent Heitholt is asphyxia, due to
7 compression of his neck by strangulation.

8 Q. Okay. And is the belt, that we don't have, the
9 strap, and you've already indicated the belt buckle is a
10 consistent cause of the injury to the right side of the neck.
11 Specifically the ligature.

12 A. Consistent with that ligature.

13 Q. And you specifically stated in the autopsy report
14 you just read that it was asphyxia due to compression of the
15 neck by strangulation?

16 A. Right.

17 Q. Mr. Heitholt then, in your opinion, did not die as a
18 result of the blunt trauma to his head.

19 A. No. Not -- not -- no. The thing that actually took
20 his life away was actually strangulation.

21 Q. And you ruled that as the cause of death. What did
22 you rule as the manner of Kent Heitholt's death?

23 A. I ruled the manner of death was a homicide.

24 MR. CRANE: I don't think I have any other questions
25 of this witness.

1 THE COURT: May the witness resume the stand? Or do
2 you want him to be here on cross?

3 MR. ROGERS: That's fine if he resumes the stand,
4 Your Honor.

5 I would tell the Court it's 7:30, and I'm willing to
6 continue with cross-examination, or I'm ready to start
7 tomorrow, whatever the Court --

8 THE COURT: Well, how long -- please be seated. You
9 can sit down, Doctor.

10 Do you think it will be a very lengthy cross?

11 MR. ROGERS: It will not be a very lengthy cross,
12 but it will be more than the ten minutes I took with the
13 other --

14 THE COURT: Well, how long are we talking about?

15 MR. ROGERS: Maybe 20 minutes. Maybe 25.

16 THE COURT: Can I ask the jurors, do you wish to be
17 excused to go home and have dinner and --

18 JUROR: Go on.

19 THE COURT: All right.

20 MR. ROGERS: Your Honor, would the record reflect
21 I'm more entertaining than the Cardinals game?

22 THE COURT: I hope that you're not. I have no idea.
23 I think they started two minutes ago.

24 - - -

25

CROSS-EXAMINATION

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BY MR. ROGERS:

Q. Doctor, I will try to be as brief as I can, since I don't think I'm more entertaining than the Cardinals game. Not that I'm going to get much of a chance to watch it, but.

Let's talk first about these strikes to the head that you've described. Calling your attention to the strikes to the head or the injuries to the head caused by the 11 separate strikes that you've described.

A. Right.

Q. And I have the advantage of getting to ask leading questions, so I can stand here and use the laser pointer, and you can sit in comfort.

Calling your attention to Exhibit 97A, I note this one laceration that has like a right angle to it?

A. Right.

Q. I don't see the right angle here on the --

A. I doubt that that is -- those were really placed on there to give them some sense of where they were and some relative length. Not to try and actually duplicate what was seen.

Q. Okay. Fair enough. So looking at this one, could you tell us whether that right angle is an indication of the shape of the object that inflicted that wound?

A. I wouldn't be confident -- I couldn't tell that. I

1 couldn't tell that.

2 Q. Whether or not it was.

3 A. Right. I couldn't tell that. Because the skin
4 doesn't always -- isn't always perfectly separated, as in --
5 as you might expect. And it can tear -- there can be --
6 there can be underlying structures that would make it not
7 tear perfectly straight in every case.

8 Q. Could that be, in fact, two separate blows that just
9 happened to intersect?

10 A. It's -- it's possible, but a little more
11 coincidental than I usually expect to see.

12 Q. Okay.

13 A. In other words, it's -- generally when you have a
14 laceration, it can be irregular. It isn't always linear.
15 And it's not uncommon for them to be, you know, irregular.

16 Q. Would it be fair to say that that wound may or may
17 not have been caused by the same implement which caused this
18 wound? And I'm referring to the very linear laceration to
19 the back of --

20 A. Or that was on the top --

21 Q. -- towards the back -- on the top of the head,
22 towards the back --

23 A. Right.

24 Q. -- from the first --

25 A. That's correct. And yes, it could be --

1 THE COURT: Excuse me. If you will -- when there's
2 a question being asked, Doctor, if you'll just pause. I know
3 in normal conversation we both talk at the same time, but the
4 reporter can't write you down at the same time. And she
5 can't even tell you right now that she's unable to. So she's
6 waiving her arms a little bit. If you'd just wait until
7 Mr. Rogers finishes his question.

8 THE WITNESS: I will.

9 MR. ROGERS: Maybe we should give her something to
10 throw at me.

11 Q. Okay. Let me start again and then do that.

12 This very linear laceration, which is on the top of
13 the head, behind the right-angled laceration on the top of
14 the head, could those have been caused by the same implement?

15 A. They could be.

16 Q. Do you have an opinion as to the degree of
17 likelihood that they were?

18 A. I can't -- I can't say, with the exception of the
19 fact that since these blows apparently were delivered in a
20 close interval, it would seem logical to assume that it was
21 the same implement, but I can't say there were more than one
22 implement there, based on these injuries.

23 Q. And is it fair to say that the implement which
24 caused the round laceration and three round contusions above
25 the eye -- right eye?

1 A. Correct. Yes, sir.

2 Q. -- were caused by some other blunt force object than
3 the one which caused the linear laceration on the top of the
4 head?

5 A. They could be caused by a different object or they
6 could be caused by a blunt force object that had one end of
7 it different than the other.

8 Q. So somebody could use one end and then turn it
9 around and use the other.

10 A. Or, you know, for example, if you had -- if you
11 had -- if you had a weapon that was, say, a tire tool that
12 was -- had an angle and one end had the socket by which you
13 would change a tire, you might expect that on occasion you
14 would get linear and another occasion you might get a
15 circular injury.

16 Q. Or if you had a hammer, like you said before?

17 A. Or if you had a hammer, yes.

18 Q. And one time you hit with the head of the hammer and
19 the other time with the handle end.

20 A. That's possible, yes, sir.

21 Q. It's also equally possible that there are two
22 different implements being wielded by two or more different
23 people.

24 A. That's possible, yes.

25 Q. Maybe two or more different implements.

1 A. Right.

2 Q. Okay. Some of those wounds appear to have been
3 inflicted from behind the decedent? Is that a fair
4 statement?

5 A. I think that's a fair statement, yes. Especially
6 the posterior one. The most posterior one.

7 Q. The most posterior one? And that would be the one
8 represented by this --

9 A. That's correct.

10 Q. -- mark on the mannequin? And that would be this
11 one here?

12 A. Looks like it. On the other -- I'm sorry. Or if I
13 could point. That one. Yes, sir.

14 Q. And that's another little kind of right-angle
15 shaped --

16 A. Right.

17 Q. -- thing, isn't it?

18 A. Yes.

19 Q. It's almost like the corner of a board?

20 A. Could be.

21 Q. Okay. Or maybe the end of a -- the
22 prying-up-the-nail end of a crowbar?

23 A. It's possible, yes, sir.

24 Q. Now, moving along to the wounds to the hand and
25 whatever has gone on with the knee, you're indicating the

1 pattern of bruising on the left knuckles of the little
2 finger, ring finger, and middle finger of the left hand --

3 A. Right.

4 Q. -- would sort of line up next to each other?

5 A. That's correct.

6 Q. And so that's consistent with something like the
7 board or the crowbar or whatever hitting --

8 MR. CRANE: Or the tire tool, I think he said.

9 MR. ROGERS: Excuse me. I'm asking the questions.
10 Are you making an objection?

11 MR. CRANE: Yeah. I'm going to object to the
12 characterization of his testimony with respect to only the
13 implements that you've referenced.

14 MR. ROGERS: Your Honor --

15 MR. CRANE: Certainly didn't mean to upset you.

16 MR. ROGERS: That is not an objection to my
17 question. That's an attempt by this prosecutor to try and
18 interfere with my cross-examination of the witness. It's
19 totally improper.

20 THE COURT: The objection --

21 MR. ROGERS: I'm trying to move through this thing
22 quickly, and I don't want to be interfered with with cheap
23 theatrics.

24 THE COURT: The objection is overruled, Mr. Crane.
25 You will have a right to redirect.

1 MR. ROGERS: Thank you.

2 Q. I forgot what I was asking you.

3 A. You were asking about the linearity of the --

4 Q. I got confused and disoriented there.

5 A. And it didn't even take a small blow to the head,
6 so.

7 It's a -- it's a linear-like lesion, which, as you
8 say, could be caused by a great variety of instruments.

9 Q. Okay. Including a board or a crowbar or a tire tool
10 or a baseball bat.

11 A. Maybe not a baseball bat.

12 Q. Have to be real skinny.

13 A. It would have to be the skinny end of the baseball
14 bat.

15 Q. Okay. Fair enough. But it's also consistent with
16 the individual hitting the ground with a great deal of force,
17 with his hand out, trying to instinctively stop the fall.

18 A. It's possible, yes, sir.

19 Q. Okay. And you were talking about these abrasions on
20 both the left hand and on the right hand as being more
21 consistent with being dragged across a rough surface?

22 A. That's true.

23 Q. Would that include an asphalt parking lot?

24 A. Yes, it would.

25 Q. Okay. And there were also, I think you said, some

1 linear wounds on the right hand --

2 A. Right.

3 Q. -- which is the top picture, that were consistent
4 with being struck with a linear blunt object.

5 A. Or -- or he striking something.

6 Q. Or either -- either one? I'm just trying to see
7 which ones those were.

8 A. Right. Those -- the ones that are bruising, that
9 you can see. Those. Yes. Yes, sir.

10 Q. Across the upper -- the upper knuckles. Okay.

11 And on the bottom picture, the picture of the knee,
12 you can't tell us whether this is actually an abrasion, or is
13 that just some blood left over, or is that an abrasion?

14 A. That's -- I cannot tell.

15 Q. Okay. And you didn't note an abrasion in your
16 report.

17 A. I do not, no. It may be in there, but I can't
18 recall it. I may have -- but I don't recall seeing it.

19 Q. Okay. I didn't see it in the typewritten report and
20 I didn't see it in the handwritten notes.

21 A. Right. And I don't either.

22 Q. Okay. Now turning to the wounds -- or lesions, I
23 guess is a better term, to the neck?

24 A. Yes, sir.

25 Q. Is lesion like a general term that encompasses

1 abrasions and contusions and almost anything else you can
2 think of?

3 A. Could be called a lesion, yes, sir.

4 Q. Okay. On the left side of the neck, are these more
5 linear lesions going around the front of the throat?

6 A. That's correct.

7 Q. And then on the right side you can see some of the
8 diffuse bruising through the skin?

9 A. That's correct.

10 Q. And then you see the very much darker part that you
11 have lined up with the buckle here; is that correct?

12 A. That's correct, sir.

13 Q. And these are not just straight around the neck, are
14 they?

15 A. Well, they're -- they run toward the back, upwards.

16 Q. Upwards and towards the back.

17 A. That's correct.

18 Q. And so if this person were standing up -- somehow
19 standing in an upright position and somehow being held to the
20 ground, then it would have to be a force that's up and back?

21 A. Could you repeat that again?

22 Q. If the person were standing up and were prevented
23 from moving in response to the force of the ligature, would
24 the force have to be coming from an up and back direction?

25 A. Yes, it would.

1 Q. Okay. And of course you can't tell, except relative
2 to the rest of the body, what direction these were coming
3 from, because you don't know what position the body was
4 probably in.

5 A. That's correct.

6 Q. Okay. But you can tell, with respect to the body,
7 that the force is coming towards -- from a direction which is
8 towards the top of the head and towards the back of the body.

9 A. That's correct.

10 Q. Okay. Can you tell whether this ligature wound was
11 inflicted before, during, or after the head injuries that
12 we've talked about?

13 A. You can't really determine that. Not on the basis
14 of simply what we see here.

15 Q. Okay. On the basis of what you had in the autopsy.

16 A. Right. You can't say that.

17 Q. And if, in fact, all 11 of the strikes to the head
18 occurred before the ligature was attached, then the question
19 of how soon would the ligature cause loss of consciousness
20 would be a fairly moot question, because I think you
21 testified earlier loss of consciousness would have already
22 occurred.

23 A. That's correct.

24 Q. By the way, did you detect any bleeding under the
25 skull, subdural, or whatever?

1 A. There was a great deal of subscapular. That is,
2 right under the skin. Such as if you were to bump your head.
3 Only it was diffuse and covered the entire area. But
4 actually when you looked at the brain, there was no
5 hemorrhage around the brain or under the brain.

6 Q. Okay. And so you don't know if the blows that had
7 been struck before the ligature was applied, whether, had the
8 ligature not been applied, such -- the blows to the head
9 would have caused some brain injury?

10 A. You can't predict that, because of the great
11 variability about how people respond to head injuries. Some
12 people respond to head injuries and would be fine. Other
13 people, hours later, I'm not talking about immediately, but
14 maybe hours later would have actually developed cerebral
15 edema that's very difficult to treat and could have resulted
16 in his death. Nobody can say that.

17 Q. All right. And --

18 A. Let me give you an example. That when boxers are
19 hit many times, as you know, they're unconscious, they take
20 them into hospitals, and some live and some die.

21 Q. And sometimes they get up and want to continue
22 fighting, and then they take them to the hospital and they
23 die.

24 A. That's correct. So it's unpredictable as to how
25 those injuries would have affected him in the long run.

1 Q. Now in terms of what would it take to immobilize
2 somebody to apply sufficient force to fracture the hyoid
3 bone -- first of all, you mentioned hanging, like in the days
4 of the Old West. You're not talking about throwing a noose
5 over a tree branch and kicking the horse, are you?

6 A. No. I'm talking about when they had professional
7 hangmen, that really considered and actually were able to
8 induce other fractures, but actually they could induce hyoid
9 fractures, but most of the people that we find, who've died
10 by asphyxiation, do not have fractures of their hyoid bone or
11 fractures of their cartilages of their voice box either.

12 Q. So you were talking about a hanging with a
13 gallows --

14 A. That's correct.

15 Q. -- and a drop through a trap?

16 A. That's correct.

17 Q. And that's -- even then, that would not always
18 fracture the hyoid bone.

19 A. That's correct.

20 Q. Did you -- obviously you had access to this belt,
21 because you used it for the picture.

22 A. That's correct.

23 Q. And did you look at the separation on the belt
24 buckle?

25 A. I did. I did extensively look at that separation.

1 Q. And I'm now handing you a buckle, State's Exhibit
2 47. What did you think?

3 A. Well, you can -- to show the jury, you can see this
4 is a suture line where the belt came together. And at this
5 line, this is a -- seems like a common construction of
6 leather belts, that the leather actually shredded at this
7 point.

8 Q. Is it within the realm of your expertise how much
9 force that would take?

10 A. It is not.

11 Q. But fair to say it might take about as much force as
12 it would take to break the hyoid bone?

13 A. I think -- I think the difficulty in determining the
14 amount of force would be to recognize that Mr. Heitholt was a
15 large man, with an abundant waist, and there may have been
16 constant pressure on his belt. I don't know how old the belt
17 was, so it may be weakened. But it still -- it still would
18 take, by what I would call more common sense than special
19 knowledge I have, a fair amount of energy to have a belt
20 separate like that. But I have no scientific data to base
21 that on.

22 Q. And if someone were standing over a prone
23 Mr. Heitholt, with his foot in Mr. Heitholt's back, pulling
24 back on the belt, that would not cause the same pattern of
25 the ligatures as we see in State's Exhibit 47, because that

1 would pull down, not up, relative to the head. Correct?

2 A. It would depend on the position of his head. I
3 mean, actually if his head could be moved up and his body was
4 stable, you could pull his head up and produce that injury.

5 Q. You could, but isn't it more likely that the angle
6 would be down like this?

7 A. It would be, if, as a matter of fact, the head was
8 absolutely flat down. But even then, it's difficult. And I
9 don't believe I could say what angle would occur. I mean, I
10 could tell you, from looking at that, that the strap was
11 pulled upwards, and that it would be hard to have induced
12 those injuries if his body or head wasn't fixed in some
13 position.

14 Q. And if someone were standing or kneeling over
15 Mr. Heitholt and holding him down, and somebody else were
16 above his head, pulling on the belt, would that account for a
17 mark like we see?

18 A. I believe you could pull in any direction,
19 seriously, from the position of him being down.

20 Q. And you'll agree that it probably takes more force
21 to lift a 300-pound person than it would to lift Mr. Crane.

22 A. That's correct.

23 Q. Now when you first observed -- did the autopsy and
24 observed these injuries to Mr. Heitholt, did you think this
25 was an opportunistic kind of homicide?

1 MR. CRANE: Judge, I'm going to object,
2 respectfully, that that's --

3 MR. ROGERS: I don't mind you objecting.

4 MR. CRANE: That type of question, "opportunistic
5 type homicide," is, A, vague, and, if it isn't vague, it's
6 outside this witness's area of expertise to speculate on such
7 a question.

8 THE COURT: The objection is sustained.

9 Q. Have you examined -- you said you've done 600
10 autopsies. Have some of those been autopsies involving blunt
11 force trauma and/or strangulation?

12 A. Yes. Yes, sir.

13 Q. And by the way, when you say "asphyxiation from the
14 ligature," is strangulation kind of a short way of saying
15 that?

16 A. That's correct.

17 Q. Okay. And have some of those autopsies involved
18 what were determined to be professional hits?

19 A. None that I know of, actually, that were
20 professional.

21 Q. Have you had any autopsies which would include both
22 blunt force trauma to the extent of this one and
23 strangulation like this?

24 A. Yes. Probably have had, say, anywhere from five to
25 seven cases where people are, you know, basically

1 incapacitated by injury, and then, as a final common pathway,
2 they were strangled.

3 Q. And did those occur in the course of a street
4 robbery?

5 MR. CRANE: Judge, I'll object there to relevance.

6 THE COURT: That objection's overruled.

7 A. Most of those occurred during, as I recall, really
8 during fights.

9 Q. Knock-down, drag-out, to the finish, literally
10 speaking.

11 A. Fights like that. I mean, often those were -- yes.
12 Often those were fights.

13 Q. Thank you.

14 MR. ROGERS: I believe those are all the questions I
15 have.

16 THE COURT: Recross? I mean redirect? Excuse me.

17 - - -

18 REDIRECT EXAMINATION

19 BY MR. CRANE:

20 Q. You've seen hammer injuries to the skull, haven't
21 you?

22 A. I have.

23 Q. In fact, you were -- you are familiar -- I don't
24 think you -- I think you were the assisting medical examiner
25 on the Casey's triple homicide.

1 A. That is correct.

2 Q. And in that homicide, the three victims were each
3 dealt multiple blows to the head with a regular claw hammer.

4 A. That's correct.

5 Q. Okay. Now, the injuries to -- that you viewed to
6 Mr. Heitholt would not be consistent with hammer blows
7 delivered with force enough to break the skull.

8 A. In that case and in most cases when you're hit with
9 a hammer, it quite often does destroy the bone or cause
10 fractures.

11 Q. In fact, in that very dramatic case, granted, the
12 hammer used, that claw hammer, with every blow it delivered,
13 at a minimum, there was some fracturing to each of the three
14 victims' skulls; is that correct?

15 A. That's correct.

16 Q. In fact, in that case, each of the victims sustained
17 actual puncture injuries from the head of the hammer
18 penetrating their skull.

19 A. I don't recall that, but I think -- I know that they
20 died as a result of those direct injuries.

21 Q. Do you doubt that?

22 A. No, I don't doubt it.

23 Q. These injuries to the front of the head here --

24 A. Those circular abrasions, yes.

25 Q. Okay. Yeah. The ones you've got in dots you refer

1 to as what?

2 A. Sort of abrasion contusions.

3 Q. Okay.

4 A. In other words, there is a round outline there,
5 there was a little hemorrhage under there, but it didn't
6 actually penetrate the skin.

7 Q. Okay. And then you've got another darker circle --

8 A. Right.

9 Q. -- here; correct?

10 A. And that's -- and that's one that the skin was
11 broken, in a circular fashion.

12 Q. Okay. Now, could the ones you've got in dots, that
13 you referred to as -- what?

14 A. Abrasions or contusions.

15 Q. -- be also consistent and under the umbrella here of
16 blunt trauma, with the victim's head impacting the pavement?

17 A. Not likely produce that.

18 Q. You think those are striking injuries?

19 A. Yes, I do.

20 Q. Why do you say that?

21 A. Because you have -- you have to sort of judge
22 injuries by the friends you have. And the friend you have is
23 one where there was extensive breakdown of skin. That is, a
24 laceration. And you have other injuries of the same size.
25 So you would assume it comes from the same instrument that

1 produced those. And it's very unusual, when you strike your
2 head on a surface, that you do -- that you would produce what
3 I would call a defined lesion like that. You generally
4 produce an irregular laceration.

5 Q. And you indicated that -- I believe your words on
6 cross-examination were that it seems logical that the
7 injuries to the victim were caused by the same instrument.

8 A. Seems logical, yes, sir.

9 Q. Mr. Rogers mentioned a crowbar as a possible
10 instrument.

11 A. (Nodding head up and down.)

12 Q. And you had previously, on direct, or maybe it was a
13 portion of your cross-examination, indicated a tire tool
14 would also be a consistent instrument.

15 A. That's true. It would be.

16 MR. CRANE: I think that's all I have.

17 THE COURT: Recross.

18 MR. ROGERS: Thank you.

19 - - -

20 RE-CROSS-EXAMINATION

21 BY MR. ROGERS:

22 Q. With regard to the circular injuries, they appear to
23 be sort of clustered in the same general area.

24 A. They do.

25 Q. And in fact, there's this little semicircle that

1 looks like it's coming from the same direction, but doesn't
2 go all the way.

3 A. That's correct.

4 Q. And they are not at the same area as many of the
5 more linear injuries.

6 A. That is correct.

7 Q. Or as either of the right-angle injuries.

8 A. That's correct.

9 Q. And so it's equally logical to assume that these are
10 happening with two different implements, being wielded by two
11 different people at the same time, isn't it?

12 A. You could make that observation.

13 MR. ROGERS: Thank you.

14 THE COURT: Redirect.

15 - - -

16 FURTHER REDIRECT EXAMINATION

17 BY MR. CRANE:

18 Q. And Doctor, you could also make a consistent finding
19 that the injuries, the head injuries, were delivered with the
20 same instrument in the hands of one or two different people.

21 A. I could.

22 MR. CRANE: No further questions.

23 THE COURT: Recross?

24 - - -

25

1 FURTHER RECROSS-EXAMINATION

2 BY MR. ROGERS:

3 Q. Or three or four or five or six or seven or eight or
4 nine or ten or a total of eleven; right?

5 A. That's correct.

6 MR. ROGERS: Thank you.

7 THE COURT: Anything further?

8 MR. CRANE: No.

9 THE COURT: May Dr. Adelstein be finally excused?

10 MR. CRANE: He may.

11 THE COURT: For the defense?

12 MR. ROGERS: Yes, Your Honor.

13 THE COURT: Thank you, Doctor, for waiting so long.
14 I'm sure you were here much longer than you've been on the
15 stand.

16 THE WITNESS: Many days.

17 THE COURT: Appreciate it. Would ask you not to
18 discuss your testimony with any other person who's to be
19 called as a witness. You're finally excused.

20 THE WITNESS: Thank you very much.

21 THE COURT: Ladies and gentlemen, the Court again
22 reminds you of what you were told at the first recess of the
23 Court. Until you retire to consider your verdict, you must
24 not discuss this case among yourselves or with others, or
25 permit anyone to discuss it in your hearing. You should not

1 form or express any opinion about the case until it is
2 finally given to you to decide. Do not read, view, or listen
3 to any newspaper, radio, or television report of the trial.

4 Hopefully the game will be over with in eight and a
5 half innings and you'll get a good night's rest.

6 I would like to start at 8:30, but I don't usually
7 have 12-hour days in court, unless it's the last day of the
8 trial. And I really want to finish this case, and insist
9 that we do by Saturday. Why don't we try to our best to be
10 here at 8:30 to start court in the morning, if you would.

11 The jury may be excused. If counsel will remain.

12 - - -

13 The following proceedings were held out of the presence
14 of the jury:

15 THE COURT: Mr. Crane, how many more witnesses do
16 you intend to call tomorrow?

17 MR. CRANE: I don't think we're going to be very
18 much longer in the morning. One thing I would like to do, if
19 I could at some point, is pass exhibits.

20 THE COURT: If you have duplicates of things that
21 are not photographs, you can pass them. I should say not
22 duplicates. Quad -- fourteen of them. If there are pictures
23 you want to pass, or if you want --

24 MR. CRANE: Well, I mean physical items, Judge. I'm
25 talking about --

1 THE COURT: I understand.

2 MR. CRANE: What I would do is lay the items out,
3 that there's no objection to publishing, give the jury an
4 opportunity to look more closely at them.

5 THE COURT: You may do that. We always allow that,
6 on both sides. What I'm trying to say is: If there's a
7 document, you have to have 14, rather than have one document
8 and have 14 people read it.

9 MR. CRANE: That's understood. And we may have -- I
10 don't think we'll be very long in the morning.

11 THE COURT: Are you calling another witness
12 tomorrow, do you anticipate?

13 MR. CRANE: We may, Judge. Yeah, I don't -- again,
14 I think it's -- I don't think it's going to be that long.

15 THE COURT: And so you will have someone ready first
16 thing in the morning.

17 MR. ROGERS: I certainly will.

18 And I realize you probably don't have to tell me,
19 but can you give us a clue as to who you may be calling, so
20 we don't have to waste a whole lot of time getting ready for
21 everybody else on the list? We've gone through, like, what,
22 ten, out of 253 or something.

23 MR. CRANE: Well, you going to tell me who you're
24 calling?

25 MR. ROGERS: I can tell you at least one we will be

1 calling tomorrow. That will be Mr. Singer.

2 MR. CRANE: Well, I don't know if I'm in a position
3 to negotiate on that at this point. I'll consult
4 with Mr. Knight.

5 MR. KNIGHT: You're going to call just one witness?

6 MR. ROGERS: I said I could tell you at least one.
7 This is the first time you've told us who you're going to be
8 calling before we see them walk through the door.

9 THE COURT: All right. Well, if you're not
10 disclosing witnesses, all I'm telling you is if we have an
11 expert that's going to take all day tomorrow, Mr. Crane,
12 we're going to work until quite late tomorrow evening. Very
13 late.

14 MR. CRANE: Well, Judge, I'm all for it.

15 THE COURT: Good. I'm glad you are. I just want
16 you to be prepared.

17 MR. ROGERS: I assume the jury would be advised of
18 why we're going that late.

19 MR. KNIGHT: Hopefully we'll have a game tomorrow
20 night.

21 THE COURT: Well, don't count on being able to see
22 it then, unless --

23 MR. KNIGHT: I don't care.

24 THE COURT: -- because I really do not want to argue
25 this case Saturday. I want it, if at all possible, to be

1 argued on and submitted on Friday. It may have to go over
2 until Saturday, but I don't want to start then.

3 MR. ROGERS: My view of it, depending on when they
4 start, is that if we were to start at 10:00 tomorrow morning
5 with the defense case, we should be able to argue Friday
6 afternoon.

7 THE COURT: Okay.

8 MR. ROGERS: Long before now. Let me put it that
9 way.

10 THE COURT: Well, we'll have to plan to have an
11 instruction conference also.

12 MR. ROGERS: All right.

13 THE COURT: And I definitely -- I don't know whether
14 or not you're planning to call the defendant, but I
15 definitely need to make a record, whether or not you are.

16 MR. ROGERS: Okay.

17 THE COURT: We will be in recess then.

18 MR. ROGERS: Thank you.

19 MR. CRANE: Thank you, Judge.

20 (Recess taken.)

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P R O C E E D I N G S

October 20, 2005

- - -

The following proceedings were held out of the presence of the jury:

THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready with a couple of preliminary issues.

THE COURT: And what says the defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: All right. What are the preliminary matters for the state?

MR. CRANE: Well, I guess the first one is: I just got a motion to endorse. By the defense. Additional witnesses.

THE COURT: Yes.

MR. CRANE: I don't know -- I may have forgotten, and maybe my memory will be refreshed, but Kris Canada and Melissa Griggs have been endorsed this morning, about --

MR. KNIGHT: One second ago. A minute ago.

MR. CRANE: 30 seconds ago. We'd object. Late notice. And I -- I mean, you may remind me who they are. I don't know who they are.

MR. ROGERS: Your Honor, Kris Canada, we have

1 learned during investigation done this week during the trial,
2 was the bartender who worked at By George's on Halloween
3 night, October 31st, and into the early morning of November
4 1st, 2001. And as soon as we were able to learn who he was
5 and talk to him, we disclosed that to the state this morning.

6 Melissa Griggs was mentioned in the testimony of
7 Charles Erickson as being a person that he had seen at By
8 George's that night. A person that he knew. We have been
9 able to track down Miss Griggs. Miss Griggs was mentioned in
10 I think one police report that we had been given by the state
11 some time ago.

12 When we located Miss Griggs and interviewed her, we
13 learned that Miss Griggs was interviewed sometime in 2004, I
14 believe. Some time ago. Let me put it that way. I'm not
15 clear. And I'm not the one who talked to her directly. Was
16 interviewed some time ago by agents of the prosecutor's
17 office. That she told those people that she was at By
18 George's on Halloween night, 2001; that she stayed there
19 until closing time; and that the bar closed at 1:30 p.m.

20 Our position, Your Honor, is --

21 THE COURT: P.m?

22 MR. ROGERS: A.m. I'm sorry. Thank you. I
23 misspoke. 1:30 a.m., in the morning, of November 1st.

24 She told us that she had conveyed that information
25 to investigators from the prosecution some time ago. We have

1 never been given that information. That information is, in
2 my view, clearly exculpatory of Mr. Ferguson and clearly
3 impeaching of Mr. Erickson. Therefore, even if no report was
4 ever prepared, we would be entitled to that information under
5 Brady versus Maryland and under Giglio versus United States.
6 And that wasn't disclosed to us. And I think it's a little
7 disingenuous for the government to claim surprise that we
8 have found a witness, a very significant witness, who they
9 have not disclosed, when they had a constitutional obligation
10 to disclose.

11 THE COURT: Do you know who interviewed her for the
12 state?

13 MR. ROGERS: I believe it was Mr. Hawes, Your Honor.
14 Is what we were told.

15 MR. CRANE: Hey, Bill. They're saying that an agent
16 of the prosecutor's office talked to her.

17 MR. HAWES: I don't recall talking to her.

18 MR. CRANE: Judge, I guess -- I know we're trying to
19 litigate this case, and Mr. Rogers is a professional, but to
20 throw down two names on a Thursday, when we started on a
21 Monday, and then turn around and call me disingenuous, is a
22 little bit beyond the pale.

23 The state -- I don't know -- the name doesn't ring a
24 bell to me. If Mr. -- maybe it was in a report. Maybe her
25 name was mentioned in a report. That's -- that's possible.

1 I'm not denying that. And if Mr. Erickson mentioned her as
2 one of the people he'd seen at George's in testimony, I'm not
3 going to dispute that. My -- the investigator, if it's from
4 the prosecutor's office, I think it would only be Bill or
5 Ben. And I don't -- I mean --

6 MR. HAWES: I don't recall talking to her.

7 MR. CRANE: He doesn't recall. And, you know, I
8 don't have a report. We -- I've certainly never talked to
9 her. Had we ample -- appropriate notice, and, you know --
10 and the defense had an opportunity -- was she mentioned in
11 the defense -- your deposition of Chuck Erickson?

12 MR. ROGERS: I don't know. She was mentioned at
13 discovery page 2277, which is the report of the proffer
14 session on October 1st, 2004.

15 MR. CRANE: Okay. And how long have you had that
16 report, sir?

17 MR. ROGERS: We have had that report since February,
18 I believe.

19 MR. CRANE: Since you got in the case?

20 MR. ROGERS: But she was just mentioned as somebody
21 who was there. She wasn't -- there was no indication in that
22 report that she had been questioned and had given information
23 about when By George's closed.

24 Anyway, those are who those witnesses are, Your
25 Honor. We would ask leave to endorse them.

1 MR. CRANE: Well, wait. I didn't get -- the other
2 one's the bartender?

3 MR. ROGERS: The other's the bartender.

4 MR. CRANE: I wanted to respond to that, if you're
5 done.

6 MR. ROGERS: Let me explain the bartender, why it
7 took us so long to get him. What we did, when Mr. Erickson
8 mentioned people that he claimed to have known at the --
9 being at By George's during his -- I don't know whether
10 direct or cross-examination now, during his examination,
11 during his testimony in this case, one of the people we were
12 able to locate, who didn't have a recollection of that night,
13 but who was able to give us to some -- lead us to somebody
14 who was able to lead us to the person who was the bartender
15 that night. And that's why we found out -- that's why we
16 learned the name of Mr. Canada and talked to him and
17 confirmed his memory.

18 MR. CRANE: Judge, I mean, I guess I've already made
19 my objection and the bases. I mean, the defense has had
20 ample opportunity to notice the state up of witnesses. I
21 realize Mr. Rogers has not been in the case during the entire
22 time of its pendency. However, I do -- I think this is
23 right, I'll stand corrected, that an investigator that worked
24 for the original attorney, Mr. McBride, has continued to be
25 retained by the defendant's current defense team. So he

1 would have had knowledge of the reports and had done
2 investigation on the case back when these reports were first
3 given to the defense, gosh, I guess there we'd be going back
4 to mid-2004.

5 So, Judge, it's not fair to be throwing these
6 witnesses down on me at this late juncture. The state
7 wouldn't be able to do that. And we object.

8 MR. ROGERS: If I may respond, Your Honor. The rule
9 requires us to disclose the identity of witnesses we intend
10 to call. And we have done that faithfully and as timely as
11 we could throughout. And as soon as we learned of the
12 significance of these witnesses and their testimony and
13 formed the intent to call them, we have disclosed it.

14 THE COURT: It would seem to me that if Melissa
15 Griggs was previously -- the microphone's not on.

16 If Melissa Griggs was previously mentioned in a
17 document disclosed to the defense, and the defense did not
18 pursue investigating this particular witness, and I'm
19 referring to Griggs right now, and then -- actually it's
20 almost a week into the trial since we began jury selection a
21 week ago tomorrow, I certainly wouldn't, and Mr. Crane is
22 right, I would not permit the state to suddenly come up and
23 find someone that would tell us that the bar was open 'til
24 3:00 on that morning. I think it is unfair at this point in
25 the trial, as to her and to Mr. Kennedy. Assuming that the

1 state did not know of Kennedy --

2 MR. CRANE: I think it's Canada, isn't it?

3 MR. ROGERS: Canada.

4 THE COURT: Canada? Did not know of Canada, I
5 mean -- and -- I mean, if the state knew that he worked as
6 the bartender, had that information, and interviewed him and
7 failed to provide his name or provide a report that -- of
8 that, I think you certainly would be entitled at this point.
9 But I don't see that there's a failure to disclose these
10 witnesses to you. And if the significance of their testimony
11 has become apparent because of further investigation that
12 took place during the trial, I think it's unfair to the state
13 to call these witnesses.

14 MR. ROGERS: Your Honor, with regard to Miss Griggs
15 especially, I want to make sure the Court understands our
16 position, which I don't think has been refuted by Mr. Hawes,
17 which is: That sometime after her name was, one of literally
18 hundreds of names listed in police reports, disclosed to us,
19 she will testify that she was interviewed by Mr. Hawes. That
20 she told Mr. Hawes explicitly that the bar closed at 1:30. I
21 will represent to the Court that that information is not in
22 any report whatsoever. And for the Court to permit the state
23 to hide that exculpatory information and preclude us from
24 calling a witness who could provide that significant
25 information, because the state was successful in hiding it

1 from us, would violate Mr. Ferguson's rights under the Fifth
2 and Fourteenth Amendments to the United States Constitution
3 and his right to a fair trial and his right to due process of
4 law and his right to effective assistance of counsel under
5 the Sixth Amendment. So that is our argument with regard to
6 Miss Griggs.

7 THE COURT: Well, I will reserve ruling on Griggs
8 until, out of the hearing of the jury, I can hear her and I
9 can hear Mr. Hawes, if the state chooses to call him. If
10 there is documents relating to her testimony that might be
11 exculpatory that is in the hands of the state and has been
12 and not been disclosed, I will take that issue up.

13 As to Kris Canada, I don't think that -- you're not
14 making that claim with respect to him. You just suddenly,
15 through your investigation, discovered his name. Is
16 that what you're telling me?

17 MR. ROGERS: Discovered who he was and that he was
18 the bartender.

19 THE COURT: Yes. The motion to endorse Kris Canada
20 is denied at this time. I'll reserve ruling on Miss Griggs
21 until I can hear from her. And if the state cares to present
22 information relating to an interview and a report that was
23 not disclosed to the defense, I would be more than happy to
24 consider that.

25 Now, the jury's been waiting 15 minutes or more.

1 This is a matter that would be taken up in the state's -- in
2 the case of the defense. Not the state's case. The state
3 has not rested at this point.

4 MR. CRANE: No. What I'd like to do, Judge, before,
5 is: Can I reoffer, just for housekeeping purposes, I'm not
6 going to go through passing the exhibits at this point, for
7 expedience sake. I did want to go over the exhibits that we
8 believe have been offered and admitted.

9 THE COURT: Just a moment.

10 Very quickly, I will tell you that I show 1 through
11 21A through C have been admitted, 22 through 37, 39 through
12 44 --

13 MR. CRANE: I don't think 43.

14 THE COURT: I have 44A through J has been admitted.

15 MR. CRANE: What about -- you said 39 through 44.

16 THE COURT: I'm sorry. 43 has not been admitted and
17 38 has not been admitted.

18 MR. CRANE: Okay.

19 THE COURT: 45 through 61, 66, 69, 70, 72 through
20 86, 87A, B, C, D, and E, 89, 91 through 100.

21 MR. CRANE: Yeah, there was that State's E-1.

22 THE COURT: And E-1, which was the --

23 MR. CRANE: Excerpt, jail conversation.

24 THE COURT: That's correct. Which was Defendant's
25 E, and you -- you offered the entire conversation to be

1 played to the jury. Is that what --

2 MR. CRANE: Or a bigger -- the bigger excerpt, yeah.

3 THE COURT: Yes.

4 MR. CRANE: That's what my records show. Thank you.

5 THE COURT: Okay.

6 Please -- ah. Before you bring the jury in, will
7 you swear the marshals, the additional marshals, please?

8 (Deputy Court Marshals Joe Horton, Harold Calvin,
9 and Scott Kuntz sworn by Eileen Moore, Deputy Clerk, to take
10 charge of the jury.)

11 THE COURT: You may bring the jurors in.

12 Mr. Rogers, this motion to endorse, I don't see that
13 it's been filed with the Court. You may have courtesy
14 provided a copy to Mr. Crane. I don't --

15 MR. ROGERS: I don't believe I have. I'm sorry,
16 Judge. Let me do that.

17 THE COURT: If you'll come over here. They entrust
18 me with the filing stamp, for whatever that means.

19 MR. ROGERS: And Your Honor, may that filing relate
20 back to our earlier discussion?

21 THE COURT: Oh, certainly.

22 MR. ROGERS: Thank you.

23 - - -

24 The following proceedings were held in the presence of
25 the jury:

1 THE COURT: Good morning, ladies and gentlemen. Sad
2 morning for the Cardinals, I'm afraid.

3 If you will answer as the clerk calls your names,
4 please.

5 (Roll call by Eileen Moore, Deputy Clerk.)

6 THE COURT: Thank you. You may be excused.

7 (Clerk excused.)

8 THE COURT: The state may call its next witness.

9 MR. CRANE: Your Honor, we have no further witnesses
10 at this time. The state rests its case.

11 THE COURT: At one point you had indicated you would
12 want the jurors to look at the exhibits that have been
13 offered. Are you wanting to do that now or at some later
14 time?

15 MR. CRANE: We would welcome the jurors to take all
16 of the evidence back with them when they deliberate, but for
17 expedience sake, we're assuming that the jurors would
18 observe -- examine the exhibits during their deliberations.

19 THE COURT: With that understanding, that is fine.

20 - - -

21 STATE RESTS

22 - - -

23 MR. ROGERS: May we approach, Your Honor?

24 THE COURT: You certainly may.

25 - - -

1 Counsel approached the bench and the following
2 proceedings were held:

3 THE COURT: Do you have a written motion?

4 MR. ROGERS: That's what I was going to tell the
5 Court. Your Honor, at this time we would move for judgment
6 of acquittal at the close of the state's evidence. We will
7 supplement that with a written motion, which Miss Benson went
8 to get when we realized that the state was not calling
9 another witness. So she should be back with one or have her
10 office bring one over this morning.

11 THE COURT: You want to elaborate on your oral
12 motion?

13 MR. ROGERS: I don't think so, Your Honor. I think
14 it will be pretty much --

15 THE COURT: Standard?

16 MR. ROGERS: -- the standard motion. I'm sure you
17 have seen many of them.

18 MR. CRANE: And this would be, the oral motion,
19 would be followed up with a written?

20 MR. ROGERS: That's correct.

21 THE COURT: Okay. Motion for judgment of acquittal
22 at the close of the state's evidence is overruled.

23 MR. ROGERS: Thank you.

24 THE COURT: And Mr. Rogers, at some time, not now,
25 but at some time I want to make a record with Mr. Ferguson.

1 MR. ROGERS: Okay.

2 THE COURT: So, I mean, I'm not going to --

3 MR. ROGERS: Probably be sometime today.

4 THE COURT: Yeah. I would want to do that sometime
5 today.

6 MR. ROGERS: Right. Okay. Thank you.

7 THE COURT: Thank you.

8 - - -

9 The following proceedings were held in open court:

10 MR. ROGERS: Your Honor, at this time the defense
11 calls Kelly Ferguson.

12 THE COURT: Do you have someone to get her?

13 MR. WEIS: Yes. Her mom went to get her.

14 THE COURT: And I assume that she would not be
15 out -- none of your witnesses will be out in the hall?

16 MR. WEIS: No, Your Honor.

17 MR. ROGERS: Well, at least not by the media place.

18 THE COURT: Well, yes. I was going to say, I can't
19 control how loud the feed might be on the media. If she
20 would come forward and be sworn as soon as you locate her,
21 please.

22 Would you come forward and be sworn, please. Raise
23 your right hand.

24 - - -

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KELLY FERGUSON,

being first duly sworn by the Court, testified as follows:

THE COURT: Take the witness chair, please. And the small mic sitting on that bench is one that will amplify your voice. The others do not. So if you'll just direct your voice in that area --

THE WITNESS: Okay.

THE COURT: -- you can be heard better.

-- --

DIRECT EXAMINATION

BY MR. WEIS:

Q. Could you state your name for the record, please.

A. Kelly Ferguson.

Q. And Miss Ferguson, how old are you?

A. Twenty-six.

Q. October 21st -- or excuse me, October 31st, 2001, how old were you at that time?

A. I was 22.

Q. Where do you live now?

A. I live in Florida.

Q. Okay. Do you know this gentleman?

A. Yes.

Q. And what's his name?

A. Ryan Ferguson.

Q. And are you related to him?

1 A. Yes. I'm his sister.

2 Q. How are you related?

3 A. I'm his sister.

4 Q. October 31st, 2001, I'm going to direct your
5 attention mostly to that time period.

6 A. Uh-huh.

7 Q. Where were you living on October 31st, 2001?

8 A. I was living in town here, in Columbia, at College
9 Park Apartments.

10 Q. And were you a student at that time?

11 A. Yes, I was.

12 Q. And where were you a student?

13 A. University of Missouri.

14 Q. What was your area of study?

15 A. Social work. I wanted to help people.

16 Q. And what year of school were you in in 2001?

17 A. I believe I was a junior.

18 Q. And did you graduate from Mizzou?

19 A. Yes.

20 Q. Do you recall the day of October 31st, 2001?

21 A. Some of it. I mean, it was a long time ago. I
22 don't remember everything.

23 Q. On that particular day, was there anything
24 significant about it to you on -- in 2001?

25 A. Not specifically.

1 Q. Other than it being Halloween?

2 A. Right. It was Halloween. Uh-huh.

3 Q. And can you tell me -- let's sort of start off in
4 the morning. What did you do that day?

5 A. I went to class. And then afterwards I just
6 remember I was really stressed out because I had a paper due
7 the next day, and I ended up going to my parents' house to
8 use their computer to work on my paper.

9 Q. You said you had a class. Do you remember what
10 class you had that day?

11 A. I don't remember the name of it. It was a social
12 work course.

13 Q. Okay. You said you had a paper due the next day?

14 A. Yes.

15 Q. And what -- do you know what class that would have
16 been?

17 A. I don't remember.

18 Q. And did you have a computer at your apartment?

19 A. I'm sorry?

20 Q. Did you have a computer at your apartment?

21 A. No, I did not.

22 Q. Okay. So you went to your parents'?

23 A. Yes.

24 Q. And where did your parents live at that time?

25 A. They lived on Lloyd Drive, which is south of town.

1 Q. Do they still live there?

2 A. My dad lives there.

3 Q. Okay. And that's -- was Ryan living at that house,
4 on Lloyd Drive, at that time?

5 A. Yes.

6 Q. And what time of the day did you go to your folks'
7 house to work on your paper?

8 A. It was after my class. So either late afternoon to
9 evening, early evening.

10 Q. And how long were you at your house -- at your
11 folks' house working on the paper?

12 A. I mean, it seems like two to three hours maybe. I
13 can't really say for sure.

14 Q. And was Ryan there at that time?

15 A. Yes, he was.

16 Q. Was there anybody else, any friends that he had,
17 there?

18 A. No.

19 Q. Were your parents at home?

20 A. No. Not at that time.

21 Q. And were you just working on your paper? Or did you
22 talk to Ryan?

23 A. Yes, I was working on my paper, and we started
24 talking about the fact that it was Halloween.

25 Q. And is there more than one computer located at your

1 folks' house?

2 A. No. There's just one.

3 Q. And where is that located?

4 A. No. I'm sorry. There's -- there was two. There
5 was one upstairs and there was one downstairs.

6 Q. Which one were you working on?

7 A. The one downstairs.

8 Q. Okay. And where's Ryan's room located?

9 A. Downstairs as well.

10 Q. Is that where you ran into him?

11 A. I believe so.

12 Q. Okay. And had you made any plans that day for any
13 Halloween celebrations?

14 A. Yes. My roommates and I were planning on going to
15 the By George's bar to celebrate Halloween.

16 Q. Had you been to By George's before?

17 A. Yes.

18 Q. Okay. And why were you going to By George's, as
19 opposed to --

20 A. They always --

21 Q. -- somewhere else?

22 A. They're known for having a big Halloween party, with
23 costumes.

24 Q. And did you dress up that night?

25 A. Yes.

1 Q. What did you dress up as?

2 A. A cat.

3 Q. A cat?

4 A. Uh-huh.

5 Q. And did you already have your costume on that day?

6 A. No.

7 Q. Okay. Where did you get your costume?

8 A. Gotcha. It's a costume store downtown.

9 Q. And did anybody go with you to get your costume?

10 A. Ryan. My brother.

11 Q. Did you normally hang out with your brother?

12 A. Not normally. Back then I guess it was kind of a

13 special occasion. We just started talking and hanging out.

14 Q. How much older is he -- are you than him?

15 A. I'm five and a half years older than him.

16 Q. So you didn't want to hang out with your little

17 brother or he didn't want to hang out with his older sister?

18 A. I guess so.

19 Q. But on that day you hung out. How did that -- how

20 did that come about?

21 A. Well, I was there at my parents' house, and he

22 happened to be there, and we just started talking about

23 Halloween and what we were going to do. And I think --

24 Q. He asked you what you were going to do?

25 MR. CRANE: Well, Judge, I'm going to object to

1 statements that the defendant may have made as hearsay.

2 THE COURT: That objection is sustained.

3 MR. WEIS: Okay. I think she's already answered the
4 question, but that's fine. I won't ask any more about that.

5 Q. Did you invite him to go along with you to Gotcha?

6 A. Yes.

7 Q. And he did go along with you?

8 A. Yes, he did.

9 Q. Okay. But do you know approximately what time you
10 went there that day?

11 A. Maybe around 6 or so. I -- honestly, I don't recall
12 the exact time.

13 Q. Do you remember if it was still light or anything?

14 A. It was still light out when we left.

15 Q. And that's roughly around the same time as it is
16 now. I mean in terms of time of year.

17 A. Yes.

18 Q. Okay. How long were you gone at the Gotcha store?

19 A. I'm not sure. Maybe an hour or so. I'm not sure.

20 Q. Did you drive?

21 A. No. Ryan drove. I'm pretty sure.

22 Q. What car was he driving then?

23 A. His old Mercedes.

24 Q. Where did you go from the store? After.

25 A. I believe we came back to my parents' house.

1 Q. And did you change? Did you get in your costume
2 there at the house?

3 A. No.

4 Q. So how long -- you went back to that house. How
5 long were you there?

6 A. Not too long. I just remember it was just starting
7 to get dark, and I thought, Well, I better get home and
8 change and meet up with my roommate so we can go.

9 Q. Had you made any specific plans with Ryan that
10 night?

11 A. Not at this time. Not at that time I don't think.
12 Not yet.

13 Q. Had you told him what you were going to do that
14 night?

15 A. Yes.

16 Q. Did you invite him along?

17 A. Yes.

18 Q. And how old was he at that time?

19 A. He had just turned 17.

20 Q. And was he allowed to get into By George's at 17
21 years old?

22 A. No.

23 Q. You're going to have to speak up a little bit.

24 A. No, he was not. Sorry.

25 Q. Had you ever done that before? Had you ever gotten

1 him into a bar?

2 A. Never.

3 Q. What -- why did you decide to do it that night?

4 A. I don't know. Maybe we were just getting along. I

5 thought it would be fun to invite him. I thought maybe he'd

6 think that would be kind of cool.

7 Q. Did you think you'd be able to get him in?

8 A. Yes, I was pretty certain that we could.

9 Q. Okay. Why's that?

10 A. My friend knew the bouncer, one of the bouncers, and

11 she thought that we could definitely get him in.

12 Q. Okay. And who was your friend?

13 A. Christine Lo.

14 Q. And was that someone you lived with at the time?

15 A. Yes. She was my roommate.

16 Q. So you're at parents' house. You get your costume.

17 Sometime you leave the house?

18 A. Yes.

19 Q. Okay. Where did you go?

20 A. I went back to my apart -- my place of residence.

21 Where Christine and I live.

22 Q. And that's, in relation to where this courthouse is,

23 it's down Providence? South on Providence?

24 A. Yes. Uh-huh.

25 Q. It's not too far from here.

1 A. No. Maybe ten minutes.

2 Q. Okay. You go back to your apartment. Do you know
3 roughly what time that was in the evening?

4 A. It had to have been just after it had gotten dark.

5 Q. And how long were you at your apartment before you
6 went to the -- to By George's?

7 A. Several hours. We took a long time to get ready.

8 Q. Who else was there with you?

9 A. I believe it was just Christine and I. I think
10 Angie had already left. Our other roommate.

11 Q. Had you -- had you talked with Ryan between -- while
12 you were getting ready?

13 A. I may have. I don't recall.

14 Q. You don't remember if you -- if you called him or if
15 he called you?

16 A. I don't remember.

17 Q. Okay. You went to By George's that -- did you go
18 anywhere else before -- after leaving your apartment, before
19 you got to By George's?

20 A. It seems like I went to Dillard's to pick up my
21 shirt that I was going to wear inside of my costume. But
22 that's the only...

23 Q. Do you know what time you got to the bar?

24 A. To the bar?

25 Q. Yeah.

1 A. It was about 11:30, quarter to 12.

2 Q. And at that time had you made any arrangements with
3 Ryan as to when he was supposed to be there?

4 A. Yes. We had talked before that. I know -- I
5 probably called him, like, on the way to the door, saying,
6 "Are you going to meet us here at this time?" Making sure
7 that he was there, so we could walk in together.

8 Q. And did Ryan show up at the bar?

9 A. Yes.

10 Q. Okay. Where did you meet him?

11 A. Right at the front door of the bar.

12 Q. Did he have anybody with him?

13 A. Yes.

14 Q. Who did he have with him?

15 A. Chuck Erickson.

16 Q. Had you met Chuck before that?

17 A. Yes.

18 Q. Okay. And how did you know Chuck?

19 A. I think I had only met him like twice before. He
20 had brought Ryan over to my parents' house. And -- hadn't
21 really talked to him much before that.

22 Q. And he's roughly the same age as your brother?

23 A. Yes.

24 Q. Okay. So you're at least five years -- around five
25 years older than Chuck as well.

1 A. Right.

2 Q. Okay. So you guys meet outside. Who did -- is
3 there anybody else with you at the bar?

4 A. Well, Christine and I walk in with Chuck and Ryan,
5 but inside the bar was our other roommate and her boyfriends
6 and one of Christine's good friends and his friends.

7 Q. Did you have to pay a cover charge to get in?

8 A. I don't remember paying a cover charge.

9 Q. Could have happened and you don't know?

10 A. It could have, but I don't recall.

11 Q. Were you able to come and go from the bar as you
12 wanted?

13 A. Not that I know of. We never left the bar until it
14 was time to leave.

15 Q. You never left. You --

16 A. No.

17 Q. -- never went outside or went to another bar and
18 came back?

19 A. No.

20 Q. Okay. Ryan and Chuck go in with you and Christine.
21 Then what do you do?

22 A. Well, we went in and we pretty much immediately
23 split ways, because, you know, I guess, they probably didn't
24 want to hang out with us. And that's -- I only saw him one
25 other time.

1 Q. And you probably didn't really want to hang out with
2 a 17-year-old?

3 A. Well, I guess not.

4 Q. Okay. You were dressed up?

5 A. Yes.

6 Q. Was Christine dressed up?

7 A. Yes.

8 Q. What was she dressed up as?

9 A. A lady of the night.

10 Q. Okay. And your brother, was he dressed in a
11 costume?

12 A. No.

13 Q. How about Chuck?

14 A. No.

15 Q. Do you remember what they were wearing? Well, let
16 me ask you this. Do you remember what Ryan was wearing that
17 night?

18 A. Not specifically. Probably jeans, but I don't know
19 for sure.

20 Q. Okay. Nothing that you -- stands out in your mind
21 that he was wearing?

22 A. No.

23 Q. How about Chuck? Do you recall what Chuck was
24 wearing?

25 A. I have no idea.

1 Q. Again, nothing stands out in your mind?

2 A. No.

3 Q. Were you drinking that night?

4 A. Yes.

5 Q. And when did you start drinking?

6 A. Pretty much right after we got inside the club.

7 Q. Okay. Had you been drinking before that?

8 A. No.

9 Q. And just for clarification, were you over 21 at that

10 time?

11 A. Yes.

12 Q. On October 31st, 2001?

13 A. Yes, I was.

14 Q. Okay. So you had legal -- had at least the legal

15 right to be in the bar.

16 A. Correct.

17 Q. Okay. Were you buying drinks?

18 A. I don't remember personally purchasing drinks. I

19 normally don't carry money with me to the bars.

20 Q. How are you supposed to drink?

21 A. Well, usually guys buy us drinks.

22 Q. So you go there with the expectation that you're not

23 going to be having to purchase very many drinks yourself.

24 A. Yes.

25 Q. And you were a college student at the time?

1 A. Yes, I was.

2 Q. Living on your own?

3 A. Well, no, not really. I mean, my parents were
4 supporting me as well. And I lived with a roommate.

5 Q. And did you work?

6 A. Yes. I had a full-time -- well, part-time job I
7 guess.

8 Q. Okay. While you were in the bar, at By George's, on
9 October 31st, 2001, how many times did you come in contact
10 with your brother Ryan?

11 A. I --

12 Q. And what I mean by "contact," how many conversations
13 did you have with him?

14 A. While I'm in the bar?

15 Q. Sure.

16 A. Only one.

17 Q. Was that something you initiated or something that
18 he initiated?

19 A. Yes. I found him.

20 Q. You found him? Why did you find him?

21 A. I don't remember if I just spotted him and went up
22 to him or if I was, like, trying to figure out where he was.

23 Q. Do you recall roughly in the evening when that was?

24 A. No, I don't really know. Maybe -- maybe a half an
25 hour after we got there.

1 Q. So you guys had separated?

2 A. Yes.

3 Q. Was Chuck still with him?

4 A. I believe Chuck was standing right by him, but I
5 can't say for sure.

6 Q. Did you see -- did you just keep an eye on your
7 brother throughout the night?

8 A. No. I just saw him that once.

9 Q. Describe By George's for me. What -- what's the bar
10 look like? From the outside. Or I guess the inside.

11 A. Yeah. Well, you walk in, and the bar is like maybe
12 ten feet back, and then there's some stairs, and it's like
13 the whole dance floor area.

14 Q. Is this a big bar?

15 A. Yeah. It's a pretty good size.

16 Q. And on this particular night, was there music going?

17 A. Yes.

18 Q. What was the lighting like? Was it bright? dark?

19 A. Dim.

20 Q. Dim. Did they have strobe lights or anything like
21 that going?

22 A. Yes, I believe so.

23 Q. Okay. Was it loud?

24 A. Yes. Very. It was packed.

25 Q. It was packed. Did you have trouble moving around?

1 A. Yes.

2 Q. How long were you at the bar that night?

3 A. Let's see. Less than two hours, at the most.

4 Q. When did you leave?

5 A. When the lights came on and they started pushing us
6 out. Maybe 1:15, 1:30.

7 Q. Why do you recall that?

8 A. Well, it's like the same, you know, with every bar,
9 you know. The lights go on; you get pushed out. It's always
10 the same time. I said -- I remember the lights coming on
11 specifically because there was a girl that was wearing almost
12 nothing, and I remember thinking, Okay, the lights are coming
13 on now and she must be running for cover or something.

14 Q. All right. What outfit was she wearing that night?

15 A. She was wearing nothing but an apron and like a
16 board that covered her back side that said, "The Perfect
17 Housewife."

18 Q. Okay. And you recall seeing that at By George's
19 that night?

20 A. Yes.

21 Q. Okay. Did you see your brother once the lights came
22 on?

23 A. No.

24 Q. Where were you in the bar when you remember the
25 lights coming on?

1 A. To the side, by the tables. Right off the dance
2 floor.

3 Q. In the front or the back of the bar?

4 A. In the middle.

5 Q. Is there -- how do you get out of the bar itself?

6 A. You have to go out through the front, the same way
7 you came in basically.

8 Q. Is that -- does that exit onto Broadway?

9 A. Yes.

10 Q. I'm going to show you State's Exhibit 9. Can you
11 step down here for a second?

12 A. Okay.

13 Q. State's Exhibit 9 has got By George's marked as
14 number 1. Is that -- is that your recollection?

15 A. Yeah, it looks like it.

16 Q. Okay. And this being Broadway Street that's been
17 marked on State's Exhibit 9?

18 A. Uh-huh.

19 Q. You have answer yes or no.

20 A. Yes.

21 Q. Okay. And show me on here where you'd exit out.

22 A. At the front here.

23 Q. Okay.

24 A. Oh. Is this the front door there? Yeah.

25 Q. This is Broadway and this is First.

1 A. Okay. So yeah, it was right here.

2 Q. Okay. Into the parking lot?

3 A. Right.

4 Q. Okay. Did you exit with other people?

5 A. Yes.

6 Q. Okay. Who did you leave with?

7 A. Christine, and I don't remember if there were other

8 people with us.

9 Q. Were you driving that night?

10 A. No, I was not.

11 Q. Who was driving?

12 A. Christine was driving.

13 Q. Did you see your brother arrive? I mean, what --

14 where he parked?

15 A. No, I don't know where they parked.

16 Q. Did you see him when you left?

17 A. No.

18 Q. Did you try and find him?

19 A. I probably was wondering where he was. I may have

20 even called his cell phone. But I didn't catch up with him.

21 Q. Okay. Did you see him the rest of the evening?

22 A. No.

23 Q. Talk to him?

24 A. No.

25 Q. Okay. Where did you go from By George's?

1 A. We went home, to College Park Apartment.

2 Q. Did you stay up or --

3 A. No. I wanted to get to bed because I had my paper
4 due the next day.

5 Q. Okay. Let's talk about the next day. Did you --
6 did you see your brother on -- that would be November 1st,
7 2001?

8 A. Not that I recall. I could have seen him.

9 Q. Were you at your parents' house?

10 A. Yes.

11 Q. And what were you doing at your parents' house?

12 A. Working on my paper again.

13 Q. Did you finish it?

14 A. Yes.

15 Q. Okay. And it was due that day?

16 A. It was.

17 Q. What time of the day did you go and work on your
18 paper at your folks' house?

19 A. It was after I woke up. So maybe late morning,
20 early afternoon.

21 Q. And was anybody else at your parents' house that
22 day, that you recall seeing?

23 A. Not that I remember. I think everyone was at work.

24 Q. Okay. While you were at the bar, speaking of By
25 George's, did you loan any money to your brother to get

1 drinks?

2 MR. CRANE: Judge, I'm going to object to the
3 leading nature of this question.

4 THE COURT: Sustained as to the form of the
5 question.

6 Q. Did you loan any money to anyone that night?

7 MR. CRANE: Judge, the same objection.

8 THE COURT: Sustained.

9 Q. You said you only spoke with your brother once?

10 A. Inside the club, yes.

11 Q. Okay. Did you buy any drinks yourself?

12 A. No.

13 Q. Okay. You said that drinks were purchased for you?

14 MR. CRANE: Judge, I'm going to object again.
15 Leading.

16 THE COURT: Sustained.

17 Q. Did your brother buy you any drinks?

18 MR. CRANE: Same objection. Form --

19 THE COURT: Sustained.

20 MR. CRANE: -- of the question.

21 Q. Can you tell us whether or not -- can you tell us
22 how you were obtaining drinks that night?

23 A. I believe either Christine knew the bartender and
24 was getting them for free or she was getting them -- buying
25 them herself.

1 Q. Did you see who she was getting drinks from?

2 A. Yes, but I don't remember. I don't know if I knew
3 them or I don't remember their name or anything.

4 Q. Did you see whether she was paying for them or not?

5 A. No.

6 Q. Did you see whether she gave --

7 MR. CRANE: Well, Judge, I'm going to --

8 Q. -- drinks to anyone else?

9 MR. CRANE: I'm sorry. I respectfully object to the
10 form of the question again. It's a leading question.

11 THE COURT: I don't know what the question is before
12 the attorney asks the question.

13 If you will pause before answering, Miss Ferguson,
14 so I can hear the question.

15 MR. WEIS: I merely asked whether she observed
16 Christine provide drinks to anyone else.

17 MR. CRANE: That's a different start than what he
18 had before.

19 THE COURT: Are you objecting to that?

20 MR. CRANE: I won't object to that one. The other
21 one was, "Did you?" But I won't object to that one.

22 THE COURT: You may answer the question,
23 Miss Ferguson, if you --

24 A. I'm sorry. What was the question?

25 Q. Did you observe Christine provide drinks to anyone

1 else?

2 MR. CRANE: Objection --

3 A. No.

4 MR. CRANE: -- leading. He switched it up from
5 "whether" to "did."

6 THE COURT: Well, the question has been asked and
7 answered, and the objection is overruled, although well
8 taken. It is a leading question.

9 Q. Do you know whether or not Christine was getting
10 drinks for anyone else?

11 A. I don't think so, but I'm not sure.

12 Q. Do you know whether Christine was buying drinks for
13 Chuck Erickson?

14 A. I don't think she was.

15 Q. Do you know whether she was buying drinks for your
16 brother Ryan?

17 MR. CRANE: Judge, again I'm going to object to the
18 form of the question.

19 THE COURT: Sustained.

20 Q. Did you see the person -- or did you see -- did you
21 know the person that Christine was getting drinks from?

22 MR. CRANE: Asked and answered. Form of the
23 question.

24 THE COURT: Sustained as to asked and answered. And
25 it is a leading question as well. But it's been asked and

1 answered.

2 Q. Could you tell us whether or not you provided any
3 money --

4 A. I did not provide --

5 Q. -- to anyone?

6 A. No. I did not provide any money to anyone.

7 Q. And when I speak of that, I'm referring to October
8 31st of 2001 at By George's.

9 A. That's correct.

10 MR. WEIS: I think that's all I have, Your Honor.

11 THE COURT: State may inquire.

12 MR. CRANE: Thank you.

13 - - -

14 CROSS-EXAMINATION

15 BY MR. CRANE:

16 Q. Ma'am, do you remember on October 31st, 2001, what
17 time you got up that morning?

18 A. Not specifically.

19 Q. And do you remember what you wore to class that
20 morning?

21 A. No.

22 Q. Do you remember what your first class was that
23 morning?

24 A. It was a social work course, but I don't remember
25 the name.

1 Q. Well, now, your major was social work; correct?
2 A. Correct.
3 Q. So all of your classes were primarily social work
4 classes.
5 A. True. They primarily were.
6 Q. Okay. Do you remember the specific class that you
7 went to that morning?
8 A. Well, the social work classes are numbers. They're
9 like social work 331, social work 228. I don't remember the
10 name.
11 Q. Well, what -- you don't remember what building you
12 went to that morning?
13 A. I do, but I don't remember the name of the building.
14 I remember where I parked.
15 Q. You do remember where you parked --
16 A. Yes.
17 Q. -- that morning?
18 A. It's at a parking meter right outside of that
19 building.
20 Q. Okay. And --
21 A. Middlebush Hall. That's it.
22 Q. Okay. Did you remember where you parked and what
23 building you went into when we talked before about this case?
24 A. No. I just now recalled the name of the building.
25 Q. Okay. But you didn't remember it when we talked,

1 when was that, back in July of this year?

2 A. Did I remember it or did I not remember it?

3 Q. You didn't remember --

4 A. Correct.

5 Q. -- where you parked. And you still don't remember

6 the specific class.

7 A. Right.

8 Q. Okay. Don't think you remembered the instructor.

9 A. Yes. John Hodges was the instructor.

10 Q. Did you remember the instructor back when we

11 talked --

12 A. Yes. It is in my deposition.

13 Q. Okay. So you remember the instructor.

14 A. Yes.

15 Q. Do you remember what car you were driving?

16 A. Yes.

17 Q. Okay. Where did you get that vehicle?

18 A. My dad leased it for me.

19 Q. Okay.

20 A. And I --

21 Q. After class, what did you do that day?

22 A. After class, I went to my parents' house to work on

23 my paper.

24 Q. Okay. Do you remember the time that you got to your

25 parents' house?

1 A. Not specifically.

2 Q. What other classes did you have that day?

3 A. I don't remember.

4 Q. Okay. So you remember there was other classes, but
5 you don't remember or -- what they were or you don't remember
6 if you had other classes?

7 A. There may have been other classes, but I don't
8 remember if there were one or two.

9 Q. You don't remember one way or the other.

10 A. Right.

11 Q. Okay. And you don't remember what time you got to
12 your parents' house, but you indicated you worked on your
13 paper for a couple hours?

14 A. Yes. But I don't know if that's completely
15 accurate. I don't know how many hours I worked.

16 Q. I understand. It is difficult to remember things
17 that far back; correct?

18 A. Correct.

19 Q. And ma'am, you didn't think that this date, October
20 31st, 2001, was significant, soon after it had passed, did
21 you? I mean, like, the next day, you didn't think it was a
22 big deal. You went to a Halloween thing at George's.

23 A. Right. It didn't become a big deal until March the
24 10th, 2004.

25 Q. Right. So many of the details about October 31st,

1 2001, had been forgotten by you. And understandably so. Is
2 that true?

3 A. Yes.

4 Q. Were you aware that this murder had occurred on the
5 early morning hours of November 1st, 2001?

6 A. No.

7 Q. Okay. You didn't even hear about it.

8 A. No. I don't remember hearing about that.

9 Q. Okay. So the first time you were told about it was
10 when you were called by a, and understandably, again, you'd
11 be called by a relative and --

12 A. Yes.

13 Q. Okay. That's the first you were made aware of it.

14 A. Yes.

15 Q. And that would have been March -- do you remember
16 the date --

17 A. Yes, I do.

18 Q. -- when you were told? What was that?

19 A. March the 10th, 2004.

20 Q. Okay. Had you driven the Mercedes -- let me show
21 you what we've got marked here as State's Exhibit 87A. Can
22 you see that from where you are?

23 A. Yes.

24 Q. Up here. 87A, 87B?

25 A. Yes.

1 Q. Is that the Mercedes that your brother was using?
2 A. I think so.
3 Q. Okay.
4 A. It looks like it.
5 Q. And you drove that vehicle?
6 A. I have driven it before.
7 Q. And in fact, you got into the trunk of that vehicle;
8 correct?
9 A. Yeah. I believe I have.
10 Q. Did you ever change a tire?
11 A. No.
12 Q. Okay. Did you ever -- well, strike that. Let me --
13 you, on occasion, would put groceries in the back -- in the
14 trunk area of this vehicle; correct?
15 A. Correct.
16 Q. And there was room to put groceries in the trunk.
17 A. I believe so.
18 Q. Okay. You indicated you did not remember what Ryan
19 Ferguson, your brother, was wearing when you saw him on
20 October 31st, 2001?
21 A. Right.
22 Q. You do not remember.
23 A. I do not remember.
24 Q. You are sure, though, that it wasn't some kind of a
25 costume; is that correct?

1 A. Right.

2 Q. And that would be for the entire night. Day, night.

3 Regular clothes.

4 A. Yes. Regular clothes.

5 Q. But you can't remember what they were.

6 A. Correct.

7 Q. You mentioned that you had met Charles Erickson

8 prior to October 31st, 2001?

9 A. Yes.

10 Q. During those encounters -- and it sounds like they

11 were fairly brief.

12 A. Yes.

13 Q. Is that true?

14 A. Yes, that's true.

15 Q. But Mr. Erickson would be over at your parents'

16 residence?

17 A. Yes.

18 Q. Visiting your brother.

19 A. Correct.

20 Q. Did you ever observe -- I'm not asking for what

21 anybody may have said, but did you ever observe any type of

22 conflict between the two of these young men?

23 A. Not that I recall.

24 Q. Okay. Seemed to be getting along fine.

25 A. Yes.

1 Q. Okay. And you don't know what time you left to go
2 to the -- what was the name of the costume place?

3 A. Gotcha.

4 Q. Gotcha? What time did you go there?

5 A. It was in the evening. I can't say specifically.
6 Maybe 6.

7 Q. Okay. But you're guessing; right?

8 A. I'm just guessing.

9 Q. You don't remember what time you went to Gotcha.

10 A. Correct.

11 Q. Okay. Ma'am, have you -- strike that. When you
12 were first notified in March of 2004 about your brother's
13 arrest in connection with the Heitholt homicide, did you
14 remember some of the details that you told us this morning?

15 A. Some.

16 Q. Okay. What helped you remember some details?

17 A. I kept a diary.

18 Q. Okay. Now, before you looked at your diary, you had
19 forgotten some things about that night; is that correct?

20 A. That is correct.

21 Q. And then you look at the diary, and you're reminded
22 of things about that night that you now believe actually
23 occurred; correct?

24 A. About the day and the night.

25 Q. Some of the things. I mean, it's not every little

1 detail you've talked about today, but --

2 A. Right.

3 Q. But there were things that you had forgotten.

4 A. Yes.

5 Q. And when you read your diary, you remembered them
6 again.

7 A. Correct.

8 Q. Ma'am, I'm going to show you State's Exhibit 4. Do
9 you recognize who's in that photograph?

10 A. Yes.

11 Q. And who's that?

12 A. Christine Lo.

13 Q. And that's the young lady that you went to the bar
14 with?

15 A. Yes.

16 Q. Okay. And it's -- I believe you've confirmed, it's
17 accurate that you met your brother and Charles Erickson out
18 in the parking lot?

19 A. Yes.

20 Q. And that was after some cell phone contact with your
21 brother?

22 A. Yes.

23 Q. And you and Christine assisted your brother and
24 Mr. Erickson in getting into the bar?

25 A. Yes.

1 Q. And that was because your brother and Mr. Erickson
2 were both well under age; isn't that correct?

3 A. Correct.

4 Q. And inside the bar, am I correct that you didn't
5 necessarily keep track of both of them the whole time; is
6 that true?

7 A. True.

8 Q. But to your knowledge, they were together that
9 night.

10 A. I think so.

11 Q. Ma'am, you don't know what your brother and Charles
12 Erickson did after you left the bar, do you?

13 A. No.

14 Q. And you don't know what time it was that you left
15 the bar, do you?

16 A. Well, I don't know specifically, but I have a pretty
17 good estimation.

18 Q. You testified on direct examination that the bars
19 close at 1:30.

20 A. Right.

21 Q. And that is based on your -- and I'm not trying to
22 be disrespectful to you, but that's based on your having been
23 to bars on several occasions.

24 A. Yes.

25 Q. And that's okay. I mean, you know, you've been to a

1 lot of bars in Columbia. Correct?

2 A. A fair amount.

3 Q. Okay. There's a number of bars. It's a college
4 town. Right?

5 A. Yes.

6 Q. Had you -- had you also been to George's, By
7 George's bar, prior to this night?

8 A. Yes.

9 Q. Okay. Several times; correct?

10 A. Yes.

11 Q. And you'd been to By George's several times after
12 October 31st, 2001; correct?

13 A. Yes.

14 Q. You don't know where your brother parked that night,
15 do you?

16 A. No.

17 Q. You don't know where he parked the Mercedes when he
18 and Chuck arrived at George's, do you?

19 A. No, I don't know.

20 Q. Do you even remember where your vehicle was parked
21 that night?

22 A. I didn't drive, but I don't remember Christine --

23 Q. Well, I -- your -- let me rephrase it. You don't
24 remember where Christine parked that night, do you?

25 A. No.

1 Q. Okay. How many drinks, alcoholic beverages, did you
2 consume that night?

3 A. Two or three.

4 Q. Okay. And these -- you -- I believe you testified
5 you don't remember how you obtained those. Is that correct?

6 A. Correct.

7 Q. Okay. Did you say you didn't know if there was a
8 cover charge or not?

9 A. Right. I don't recall having to pay one. I
10 normally --

11 Q. Okay.

12 A. -- don't worry about cover charge.

13 Q. But there could have been; you don't remember?

14 A. There may have been.

15 Q. Okay. And you don't remember whether there was any
16 kind of a stamp or arm bracelet after you got inside?

17 A. I don't recall that.

18 Q. Could have been, but you don't remember?

19 A. Maybe.

20 Q. And ma'am, isn't it true that you never saw your
21 brother or Charles Erickson leave the bar that night.

22 A. Correct.

23 Q. You lost track of them prior to the time you left?

24 A. Yes.

25 Q. You didn't read the newspaper the next day?

1 A. I don't think so.

2 Q. Did your brother regularly read the newspaper?

3 A. No. Not that I know of.

4 Q. Did your brother regularly keep up with current
5 events?

6 A. I don't think so, but I could be wrong.

7 Q. Did you ever see your brother watching the news on
8 TV?

9 A. Seldomly.

10 Q. Okay.

11 MR. WEIS: May we approach, Your Honor?

12 - - -

13 Counsel approached the bench and the following
14 proceedings were held:

15 MR. WEIS: I don't know if you want to ask the
16 question first.

17 MR. CRANE: Well, yeah. Judge, this just came from
18 the defense. And actually I'm only talking about the first
19 page. This is -- defense sent me just the diary from October
20 31st, '01. And I want to ask her some questions about that.
21 That's my highlighting. I want to ask her -- I'm not asking
22 her what the defendant said. I'm just asking her to read
23 that portion of her diary.

24 MR. WEIS: He --

25 MR. CRANE: I mean, I guess and any other portions

1 she wants to.

2 (Court reading the exhibit.)

3 MR. WEIS: My response, Your Honor --

4 THE COURT: Just a minute. I'm having trouble
5 reading the entire -- right where my pen is pointing.

6 MR. CRANE: "Credit card."

7 THE COURT: "The whole"?

8 MR. CRANE: "The whole credit card dilemma. He had
9 lost his c/c for a week now. I told him he needed to cancel
10 it ASAP and call dad. We ended up going downtown to get my
11 costume, Bad Kitty."

12 THE COURT: Now, this document, which is State's
13 Exhibit 103, is a page from her diary that she has testified
14 that she kept and that she refreshed her recollection --

15 MR. CRANE: Right.

16 THE COURT: -- I assume of what happened --

17 MR. CRANE: Right.

18 THE COURT: -- that night.

19 MR. WEIS: For the deposition, that's correct. I
20 mean, I don't think she's testified that she did it for
21 today. She hasn't said --

22 MR. CRANE: She said her memory's been refreshed by
23 the thing she's testified to, in the diary.

24 MR. WEIS: But not as preparation for her testimony
25 today.

1 MR. CRANE: Well, so --

2 MR. WEIS: In addition, she hasn't said anything
3 inconsistent with this, so I think it's improper impeachment
4 for him to be questioning her about something that she has
5 never said anything inconsistent about.

6 THE COURT: Well, she has testified she didn't
7 remember many of the events, and that she remembered them by
8 reading this document. I don't think it necessarily has to
9 be inconsistent. I think you can ask her about anything here
10 that might be relevant to this case. Now, if she said she
11 went to the gynecologist and arranged for -- that would not
12 be admissible. I mean, I'm just saying, there's a "for
13 instance" of something that could be inadmissible.

14 MR. WEIS: There is a reference in there to her not
15 taking her birth control pill, about her getting sick the
16 next day.

17 MR. CRANE: Where?

18 MR. WEIS: It's on the bottom of that.

19 THE COURT: If there is something of that nature, of
20 a personal nature, I would strongly suggest that you not
21 ask --

22 MR. CRANE: We can have her redact it.

23 THE COURT: That's -- that's certainly not --

24 MR. CRANE: And we can take that page off, if you
25 want to.

1 MR. WEIS: That's fine.

2 MR. CRANE: For now.

3 THE COURT: If you'll give it to Mr. Crane.

4 MR. WEIS: Okay.

5 - - -

6 The following proceedings were held in open court:

7 MR. CRANE: May I approach the witness, Judge?

8 THE COURT: You may.

9 Q. Miss Ferguson, I'd like to show you what's marked as
10 State's Exhibit 103 and ask if -- and that's a copy of a
11 document; is that correct?

12 A. Uh-huh. Yes.

13 Q. And that's your -- a portion of your diary that you
14 provided to your attorney -- strike that, to your brother's
15 attorney, who gave that to me; is that right?

16 A. Yes.

17 Q. And that's just -- we didn't get the whole diary,
18 but you gave your attorney that page and I believe the day
19 after.

20 A. Yes.

21 Q. Now, when you first heard about Ryan's arrest in
22 March of 2004, you went and found your diary?

23 A. Yes.

24 Q. Okay. And where was that?

25 A. It was at my mom's house, I think under my bed.

1 Q. Okay. Had you been keeping up with -- so you
2 weren't even living in town.

3 A. No.

4 Q. So you hadn't been keeping up with your diary.

5 A. No.

6 Q. Okay. Now, ma'am, is it your testimony that all of
7 the things that are written on that page, for October 31,
8 2001, were written on October 31, 2001, by you?

9 A. No. I didn't write it the same night. I wrote it,
10 like, maybe the next day or something.

11 Q. So you believe you wrote those entries the day
12 after, on 2001, November 1st?

13 A. Or November 2nd.

14 Q. Okay. Because there's another page with November 1.

15 A. Right.

16 Q. And you may have written that November 2nd?

17 A. Well, sometimes a week would go by, and I would try
18 to remember everything and catch up.

19 Q. Okay.

20 A. It wasn't like every single day I wrote something.

21 Q. Right.

22 A. I would try to remember everything.

23 Q. So would there also be times when different dates
24 flowed over, when you'd write onto another day? Or would you
25 try to jam it all into one page?

1 A. Probably both. A little bit of both.

2 Q. Okay. Was anything written in the diary there after
3 2004, in March?

4 A. No.

5 Q. Okay. So this is all written the day after October
6 31st, 2001, or maybe two days after?

7 A. Right. Yeah.

8 Q. Okay. It looks like you do mention it's Halloween.
9 You mentioned you got up and went to class?

10 A. Uh-huh.

11 Q. You mentioned you went to your parents' house.
12 Those were things that, when you first were asked what you
13 remembered about that night, you did not remember.

14 A. Right.

15 Q. And when you looked at your diary, you remembered
16 those facts again.

17 A. Yes.

18 Q. And you remembered them as accurate.

19 A. Yes.

20 Q. And then you wrote -- about the middle of the page,
21 starting there. And then the highlighted portion I've got,
22 what does that say?

23 MR. WEIS: Your Honor, I would just object to the
24 initial portion of it as being irrelevant to this case.

25 THE COURT: That objection is overruled, if you're

1 referring to the highlighted area? Is that what you're
2 referring to?

3 MR. CRANE: Well, the part that says, "Before Ryan
4 came home."

5 MR. WEIS: That's what I'm referring to.

6 THE COURT: The objection's overruled. It's
7 cross-examination.

8 Q. We --

9 MR. CRANE: May I proceed, Judge?

10 THE COURT: Yes.

11 Q. We covered the -- I'm sorry. I'm trying to look at
12 it. I don't mean to crowd you here. You indicate -- the top
13 part I'd summarized. You -- you remembered -- you wrote it
14 down and then you remembered it later that you went to class.
15 And then down here it says, in the middle, you -- this is all
16 your writing; correct?

17 A. Yes.

18 Q. "Ryan came home." Right?

19 A. Yes.

20 Q. And then what's that highlighted part say?

21 A. I wrote: "The whole credit card dilemma. He had
22 lost his credit card for a while -- or for a week now. I
23 told him he needed to cancel it and call dad as soon as
24 possible. We ended up going downtown to get my costume at
25 Gotcha and his new backpack."

1 Q. Okay. Now, I'm not asking you to testify as to what
2 your brother said. Okay?

3 A. Right.

4 Q. But you wrote "the whole credit card dilemma.
5 He" -- who were you referring to there?

6 A. My brother.

7 Q. -- "had lost his credit card for a week now. I told
8 him he needed to cancel it ASAP." As soon as possible.

9 A. Uh-huh.

10 Q. "And call dad."

11 A. Yeah.

12 Q. That would be your father -- your and Ryan's father,
13 Bill Ferguson.

14 A. Yes.

15 Q. And then you talk about going downtown and getting
16 your Bad Kitty? Is that what it is? Your cat outfit?

17 A. Yeah.

18 Q. And you had not remembered the cat outfit until you
19 read your diary?

20 A. No. I remembered that I --

21 Q. That was something that you did remember?

22 A. Yes.

23 Q. Okay.

24 MR. CRANE: Judge, I offer State's Exhibit 103.

25 THE COURT: Do you have an objection?

1 MR. WEIS: No, Your Honor.

2 THE COURT: State's Exhibit 103 is admitted.

3 - - -

4 State's Exhibit 103 admitted into evidence.

5 - - -

6 Q. The next day, do you remember what time you got up?
7 November -- now we're on November 1. I know we're talking
8 about you left, November 1, 2001, you went home. But then
9 the next day, you know, when you -- after you went to sleep
10 and got up.

11 A. Right.

12 Q. You got up in the morning?

13 A. Yes -- I don't remember if it was late morning or
14 early afternoon.

15 Q. You think you got up in the early afternoon?

16 A. Well, yeah, because I believe in the diary I said I
17 skipped my first class, because --

18 Q. Okay.

19 A. -- basically my paper --

20 Q. What time's your first class?

21 A. I don't remember. But my paper was due that
22 afternoon. And I probably slept in and then woke up and
23 worked on it -- went to work on it.

24 Q. Well, I thought you said you just might have slept
25 'til the early afternoon.

1 A. Yeah. It may have been like noon.

2 Q. And then worked on your paper?

3 A. Right. My paper wasn't due 'til 4, I believe it
4 says in the diary.

5 Q. So do you remember when you would have gotten in bed
6 and gone to sleep that night?

7 A. Maybe around 2.

8 Q. Okay.

9 A. I sleep a lot.

10 Q. Ten hours?

11 A. Yeah.

12 Q. And then jumped up and got on that paper.

13 A. Oh, yeah.

14 Q. Okay. Do you have a -- you worked on the paper when
15 you got up?

16 A. Yes, I did. I went to my parents' house and worked
17 on it again.

18 Q. Okay. And was that a memory that you had in
19 October -- strike that, March of 2004?

20 A. No.

21 Q. You'd forgotten that.

22 A. Yes.

23 Q. And your memory's back now because you read your
24 diary?

25 A. Yes.

1 Q. And it's also back on some of these things that
2 happened on October 31st, 2001, because you talked to
3 Christine Lo, and she's helped you remember some things as
4 you've talked about it; correct?

5 A. Yes, like --

6 Q. And also have you spoken with your brother?

7 A. Yes, but --

8 Q. About this case?

9 A. Not really. Every time I try to talk to him, he's
10 like, "No, let's not talk about it."

11 Q. Okay. And I'm not asking you for anything he
12 said --

13 A. Okay.

14 Q. -- okay? The next day, you indicated you got up --
15 I believe on direct examination you said you got up at some
16 point. And where did you go?

17 A. My parents' house.

18 Q. Back over there.

19 A. Yes.

20 Q. And what did you -- you say this is sometime between
21 10 and 1? 10 a.m. and 1? Something like that?

22 A. Yeah. That sounds -- yeah, that time frame
23 anywhere.

24 Q. And you testified you did not see your brother.

25 A. I don't remember seeing him. I may have seen him,

1 but I don't remember.

2 Q. Okay. You don't remember seeing him that morning.

3 A. Correct.

4 Q. Okay. Did you again work on the computer
5 downstairs?

6 A. Yes.

7 Q. And is that where your brother's room is located?
8 Downstairs?

9 A. Well, the computer's at one end, and his room's back
10 at the other end. It's like really -- it's a long --

11 Q. Big house? Big long stretch across the rec. area?
12 Is that what it is?

13 A. It's just a long stretch, yeah.

14 Q. Okay. Well, so what does that mean? You might not
15 have known he was there?

16 A. Maybe. I don't know if he was home or not. I don't
17 remember seeing him.

18 Q. Well, it was a school day.

19 A. Right. Yeah, he may have been at school. I
20 don't -- I don't know.

21 Q. Okay. But you didn't see him.

22 A. Correct.

23 Q. How long were you at your parents' residence on
24 November 1, 2001?

25 A. Two or three hours. Just enough time to finish my

1 paper.

2 Q. During the entire two- to three-hour period that you
3 were at your parents' residence on the morning of 2001,
4 sometime starting between 10 and 1 in the afternoon, is it
5 your testimony you never once saw your brother at the
6 residence?

7 A. Correct.

8 Q. Never saw him come out of his room to go get
9 something to eat, go to the bathroom, nothing.

10 A. No.

11 Q. I'm sorry. I'm going to wrap it up here, ma'am.
12 I'm sorry to keep dragging it out.

13 MR. CRANE: Judge, I -- I don't think I have any
14 other questions of this witness.

15 THE COURT: Redirect?

16 - - -

17 REDIRECT EXAMINATION

18 BY MR. WEIS:

19 Q. Miss Ferguson, I'm going to refer you back to
20 State's Exhibit 103. Again, what -- what is State's Exhibit
21 103?

22 A. My diary -- my journal entry of October 31st.

23 Q. Okay. And when did you draft that notation?

24 A. It was either --

25 Q. If you recall.

1 A. -- the next day or two days later.

2 Q. So you had to recall what you did the next day?

3 A. Yeah. Yes.

4 Q. All right. I think -- did you -- what was the
5 purpose of you keeping a diary?

6 A. I don't -- I don't know. Just -- I guess when I can
7 look back in the future and look back on my life.

8 Q. Did you note everything that you did during a
9 particular day?

10 A. Not every single thing, but most things.

11 Q. How did you choose what you put in and what you
12 didn't?

13 A. I'm not quite sure. I just -- I would just write,
14 start writing out what, you know, the first thing I did that
15 day and then kind of if anything exciting happened.

16 Q. Things that are important?

17 A. Yeah.

18 Q. Significant to you?

19 A. Sure.

20 Q. Okay. I'll take that back.

21 Had you ever been to By George's before October
22 31st, 2001?

23 A. Yes.

24 Q. Do you know how many times?

25 A. No.

1 Q. Had you ever been at By George's after 2 in the
2 morning?

3 A. Never.

4 Q. Did you have a cell phone --

5 A. Yes.

6 Q. -- in Oct -- let me ask -- did you have a cell phone
7 on October 31st of 2001?

8 A. Yes, I did.

9 Q. Okay. Do you remember what your cell phone number
10 was?

11 A. No.

12 Q. And were you living here, in town, in Columbia?

13 A. Yes.

14 Q. Okay. I'm going to show you what's been previously
15 marked as Defendant's Exhibit H. Don't show that to the
16 jury. Do you recognize that document?

17 A. Oh. Oh, okay. Yes.

18 Q. And what is that?

19 A. It's my credit card -- I'm sorry. My cell phone
20 bill; right?

21 Q. Now what is it?

22 A. It's, like, my cell phone bill, the calls I made.

23 Q. Okay. And that's all I'm asking. Was that the cell
24 phone that you had October 31st, 2001, November 1st, 2001?

25 A. Yes, it is. I recognize the number now.

1 Q. Okay. And did you receive that bill?

2 A. I guess I probably did, but I don't recall.

3 Q. Okay. I mean -- but that was your cell phone at the
4 time?

5 A. Yes.

6 Q. Okay.

7 MR. WEIS: At this time we'd move to admit
8 Defendant's Exhibit H. Minus --

9 MR. CRANE: Well, I'm going to -- yeah. Before that
10 document is admitted, there's going to have to be some
11 agreements made as to what all dates come in. I don't think
12 I'm going to have any objection, but I think that's the whole
13 record we gave you.

14 MR. WEIS: It's for the month.

15 MR. CRANE: Yeah.

16 MR. WEIS: And we would agree to redact and just --

17 THE COURT: What part of the Exhibit H are you
18 offering?

19 MR. WEIS: The date of November 1st, 2001, and
20 October 31st of 2001.

21 THE COURT: With that understanding, Mr. Crane, do
22 you have an objection to the admission of Exhibit H?

23 MR. CRANE: I would at this time object, until we've
24 had an opportunity to review the document. But I agree that
25 he has established a foundation with this witness.

1 MR. WEIS: In terms of reviewing it, these are
2 documents provided by the state.

3 MR. CRANE: Yeah, they are. Provided duly in
4 discovery to the defense by the state. There are some issues
5 that I want to cover with the document. I agree he's laid a
6 foundation for them. And if he wants to ask her some
7 questions about specific calls on October 31st, 2001, now, I
8 have no objection, but I will -- would ask that the Court and
9 defense counsel and I look at that document one more time
10 before it's admitted finally, particularly for publishing to
11 the jury.

12 MR. WEIS: And that --

13 THE COURT: Is that --

14 MR. WEIS: Yeah. And I don't intend to publish it
15 to the jury at this point.

16 THE COURT: Mr. Crane, are you wanting to look at
17 the document now?

18 MR. CRANE: No. Not now. I don't have any
19 objection to him asking questions about specific phone calls
20 if he wishes to do so.

21 MR. WEIS: And that's what I intend to do, Your
22 Honor.

23 THE COURT: You may inquire.

24 MR. WEIS: Okay.

25 Q. I'm going to hand you back what's been marked as

1 Defendant's Exhibit H. Do you -- what was your telephone
2 number on October 31st, 2001?

3 A. With the area code?

4 Q. Yes.

5 A. It was 573-228-0652.

6 Q. Did you have any other cell phones? At that time?

7 A. No.

8 Q. Do you recall what your -- from your memory, what
9 your brother's -- did your brother have a cell phone?

10 A. Yes.

11 Q. Did you see him use it?

12 A. Yes.

13 Q. Okay. Did he carry it with him?

14 A. Yes.

15 Q. Do you recall what his telephone number was at the
16 time?

17 A. No.

18 Q. I'm going to refer you to -- I've got two tabbed
19 pages there. And when I ask you questions, I'm going to
20 limit it specifically to just the dates of October 31st of
21 2001 and November 1st of 2001; okay?

22 A. Okay.

23 Q. I'm going to have you look at Defendant's Exhibit H.

24 MR. CRANE: Now these are her cell phone records?

25 MR. WEIS: Yeah. These are just her cell phone

1 records. I'm not going to have her look at anybody else's.

2 Q. Do you recognize, from October 31st -- let me
3 specifically ask you that. Do you recognize any of the
4 numbers on October 31st, 2001, as being from your brother,
5 Ryan Ferguson?

6 A. Yeah. I believe his was the 356 number.

7 Q. Okay. And did you receive a call from the 356 --
8 and what is the 356 number? Can you tell me what that is?

9 A. The whole number?

10 Q. Yes.

11 A. It's 573-356-6625. I think that was Ryan's cell
12 phone number.

13 Q. Was that number called -- did that number come in to
14 you on that particular day, on October 31st, 2001?

15 A. Well, let me see.

16 Q. And I'm just specifically saying the 31st.

17 A. It looks like I called him. And I called him again.

18 Q. When did you call? Let's go through it one by one.

19 A. Okay. Let's see. I called him at 10:14 p.m.

20 Q. On October 31st, 2001?

21 A. Yes. And I called him at 11:02 p.m.

22 Q. Again on October 31st?

23 A. Yes.

24 Q. Were there any other calls made to or from that cell
25 phone number on October 31st of 2001?

1 A. It doesn't look like it.

2 Q. Okay. Could you look and see -- are there records
3 indicating whether, for October -- excuse me, November 1st,
4 2001, in Defendant's Exhibit H?

5 A. I'm sorry?

6 Q. Are there records for cell phone calls made and
7 received on November 1st, 2001, in the document you're
8 holding?

9 A. Yes.

10 Q. Okay. From the number that you've indicated that
11 was Ryan's at the time, did you receive or make any phone
12 calls to that particular cell phone number? On November 1st
13 of 2001.

14 A. It doesn't look like it.

15 Q. May I see that? On November 1?

16 A. Right.

17 Q. Do you know who the number 228-0652 is?

18 A. That's my phone number.

19 Q. That's your phone number?

20 A. Yes. Are you talking about the underlined one?

21 MR. WEIS: Just a second.

22 Q. I hand you back what's marked as Defendant's Exhibit
23 H. Was there a call made at 1:19 in the morning?

24 MR. CRANE: Judge, I'll -- well, forget it. Never
25 mind.

1 A. Yes.

2 Q. Okay. And what number does that go to?

3 A. My voice mail.

4 Q. Okay. Mr. Crane asked you on cross-examination,
5 referring to November 1st, 2001: Did you remember seeing
6 your brother at your parents' house?

7 A. I don't remember seeing him or not seeing him.

8 Q. You don't recall either way?

9 A. Right.

10 Q. Okay.

11 MR. WEIS: I think that's all the questions I have.

12 THE COURT: Recross?

13 - - -

14 RE-CROSS-EXAMINATION

15 BY MR. CRANE:

16 Q. Miss Ferguson, before you saw the phone records --
17 you probably saw those phone records before today, or
18 somebody talked to you about them before today. The phone
19 records you were just looking at?

20 A. I don't -- I don't think I've seen them before.

21 Q. Okay. Well, then let me ask you, before you saw
22 them today, did you remember how many phone calls there may
23 have been between you and Ryan?

24 A. No.

25 Q. Okay. Did you remember the duration of those calls?

1 A. No.

2 Q. Did you remember the time of those calls?

3 A. No.

4 Q. I mean, those were details that you've long since
5 forgotten; isn't that correct?

6 A. Yes.

7 Q. And, in fact, you may have never even known he
8 called you on November 1, 2001, at -- what was that? 1:19?
9 1:19 a.m.? Because it was a voice mail and you might have
10 missed it or deleted it. You don't remember.

11 A. No. It showed my number, which means I was calling
12 myself. My voice mail.

13 Q. Oh. That's what that -- okay. I'm sorry. I didn't
14 understand. I thought that was somebody leaving you a voice
15 mail. So --

16 A. I could be wrong.

17 Q. Okay. You're thinking -- all right. Well, I
18 screwed that up. But you're thinking the 1:19 a.m. on
19 November 1, 2001, is you calling yourself and going, "Hey,
20 don't forget to work on paper."

21 A. No. No. No. Like I would call my cell phone and
22 check my messages.

23 Q. Okay. All right. I was confused. I thought that
24 was from -- a call potentially from Ryan. Okay. It wasn't.
25 So the -- then that means -- am I correct then, based on that

1 record, that there was a phone call between you and Ryan at
2 10:49 -- let's see, at approximately 10:14 p.m.? Isn't that
3 what you were telling him?

4 A. I think that's what I read off.

5 Q. And that was a short call; right?

6 A. I didn't look at the duration.

7 Q. Well, would you argue that it's two minutes?

8 MR. CRANE: Is that right?

9 MR. WEIS: Yeah.

10 Q. And then there's another call, I believe you said at
11 10:49 p.m. on October 30th, 2001. Does that sound like the
12 one you were just talking about a minute ago?

13 A. Right.

14 MR. WEIS: Actually, I think that misstates the
15 record.

16 MR. CRANE: What's it say?

17 MR. WEIS: 11:02.

18 MR. CRANE: 11:02 p.m.? And that -- that shows a
19 one minute in duration? Is that correct, Mr. Weis?

20 MR. WEIS: Yes.

21 MR. CRANE: Okay.

22 Q. And then there was another call at 11:07 p.m. I
23 believe you talked about? That was it?

24 A. I think.

25 Q. Does that sound right? Another short call?

1 A. I think so.

2 Q. And if the record shows it was one minute in
3 duration, you wouldn't argue with that.

4 A. Okay.

5 Q. Okay. And you guys did talk on the cell phone that
6 night about, "Hey, you know, we're going to George's. I can
7 get you in. You know, meet at the parking lot." What have
8 you.

9 A. Yes.

10 MR. WEIS: Objection. That actually calls for a
11 hearsay response.

12 MR. CRANE: Well, that's -- okay.

13 THE COURT: I beg your pardon. That objection is
14 overruled. It would not be hearsay, considering the maker of
15 the statement.

16 MR. CRANE: Well, I -- I can ask it -- I don't even
17 need to ask that.

18 THE COURT: Do you have any further questions,
19 Mr. Crane?

20 MR. CRANE: I don't think I've got anything else of
21 this witness.

22 THE COURT: Redirect.

23 MR. WEIS: Nothing further, Your Honor.

24 THE COURT: Is the witness finally excused for the
25 defendant?

1 MR. WEIS: She is, Your Honor.

2 THE COURT: For the state?

3 MR. CRANE: Judge, I will not have any objection to
4 her being finally released, subject to a quick thing I'd like
5 to talk to defense counsel about.

6 THE COURT: If you'll hold on just a minute.

7 - - -

8 Counsel approached the bench and the following
9 proceedings were held:

10 MR. CRANE: Would it be all right with you that we
11 agree -- I know she wants to be in here with the family.
12 That if she is -- if your client testifies, and
13 understandably Mr. Rogers has declined to tell me whether or
14 not his client's going to testify. That's fine. But if he
15 does testify, that during that juncture the rule be invoked
16 with respect to Kelly.

17 MR. ROGERS: In other words, you're saying you want
18 to recall her for rebuttal?

19 MR. CRANE: Yeah. Who knows. Yeah. Who knows
20 what's going to occur. Yeah. So if he testifies, I would
21 ask that the rule be invoked as to her, when he's in the
22 room. And he's not telling me either way.

23 MR. ROGERS: Obviously we're ready to release her.
24 I guess --

25 THE COURT: I think she has been endorsed by the

1 state.

2 MR. ROGERS: She has been endorsed by -- the state I
3 think has paid -- they subpoenaed her and they paid for her
4 travel expenses getting here, so I don't have a problem with
5 that arrangement.

6 MR. CRANE: I mean, she can be in the room.

7 THE COURT: State is not willing to release her, but
8 consents that she may remain in the room, unless the
9 defendant takes the stand. Is that the understanding?

10 MR. CRANE: Is that okay with you?

11 MR. ROGERS: For Mr. Ferguson's testimony. That's
12 fine.

13 THE COURT: You agree with that?

14 MR. ROGERS: Yep.

15 THE COURT: All right.

16 - - -

17 The following proceedings were held in open court:

18 MR. CRANE: Thank you, ma'am.

19 THE COURT: Miss Ferguson, you are not finally
20 released. The Court would instruct you not to discuss your
21 testimony with any other witness. However, at this time, if
22 you choose to remain in the courtroom, you may do so, until
23 further instructions from the Court. Okay?

24 THE WITNESS: Thank you.

25 THE COURT: You may step down.

1 State may call its next witness.

2 MR. ROGERS: Defense.

3 THE COURT: Oh, I'm sorry. That is correct. I beg
4 your pardon. Defense may call the next witness.

5 MR. ROGERS: Your Honor, the defense calls Ron
6 Singer.

7 THE COURT: After this witness, we'll take our
8 mid-morning recess.

9 Raise your right hand, sir.

10 - - -

11 RONALD SINGER,

12 being first duly sworn by the Court, testified as follows:

13 THE COURT: Would you take the witness stand,
14 please. And the small black metal piece on the -- there is a
15 live mic. The others are not -- will not amplify your voice.
16 So if you have any trouble in speaking, that will amplify
17 your voice.

18 THE WITNESS: It's never been a problem before.

19 THE COURT: Well, it is not for many people. Some
20 people it is.

21 You may inquire.

22 - - -

23 DIRECT EXAMINATION

24 BY MR. ROGERS:

25 Q. Would you please state your name for the record,

1 sir.

2 A. My name is Ronald, R-o-n-a-l-d, Singer, S-i-n-g-e-r.

3 Q. Mr. Singer, what is your profession?

4 A. I'm a forensic scientist. I am currently the crime
5 laboratory director for the Tarrant County, Texas, medical
6 examiner's office crime laboratory. In addition, I am a
7 consultant in forensic science. And that is the capacity in
8 which I'm here today.

9 Q. Where is Tarrant County, Texas?

10 A. I'm sorry. That's Fort Worth, Texas.

11 Q. Noplace close to Houston.

12 A. No.

13 Q. Okay. Thank you. Sir, I'm going to show you what's
14 been marked for identification as Defendant's Exhibit G. And
15 I will ask you if that is a copy of your resume or curriculum
16 vitae.

17 A. Yes. This is the most current copy of my resume
18 that I have.

19 Q. And that summarizes your education, experience,
20 publications, professional organizations, and other
21 information, touching on your qualifications as an expert in
22 the field of forensic sciences?

23 A. Yes, sir, that's correct.

24 Q. And I'm going to ask you some specific things, but
25 obviously a fairly lengthy document.

1 A. Yes.

2 Q. All right.

3 MR. ROGERS: Your Honor, at this time I would offer
4 Defendant's Exhibit G, with the understanding that it not be
5 published to the jury or read in detail, unless they sometime
6 during their deliberations want to see it.

7 MR. KNIGHT: Your Honor, I have no objection if this
8 is not going to be published to the jury at any time. No
9 problem.

10 THE COURT: Well, it was with the understanding that
11 if, during deliberations, the jury wished to look at the
12 resume, that they would have an opportunity to do it, but not
13 to publish it at this time. That's what I understood the
14 offer was for.

15 MR. ROGERS: That's what I'm suggesting, Judge. I
16 didn't bring 14 extra copies, and I don't want to spend the
17 time for everybody to read through it right now. If they
18 don't have an issue with the qualifications, then they'll
19 never have to ask for it.

20 MR. KNIGHT: No objection.

21 THE COURT: Defendant's Exhibit G is admitted.

22 - - -

23 Defendant's Exhibit G admitted into evidence.

24 - - -

25 Q. Mr. Singer, do you hold any college or university

1 degrees?

2 A. Yes, sir, I do. I have a Bachelor of Science degree
3 which I received from Tulane University in New Orleans,
4 Louisiana, and a Master of Science degree in biological
5 sciences which I received from Loyola University of New
6 Orleans.

7 Q. And when did you receive those degrees?

8 A. I received my Bachelor's degree in 1967 and my
9 Master's degree in 1978.

10 Q. And how long have you worked in the field of
11 forensic science?

12 A. In about a week it will be 33 years.

13 Q. And have you also attended numerous training
14 seminars dealing with your work in forensic science?

15 A. Yes, sir, I have. Over the course of my employment
16 with first the sheriff's office in Metairie, Louisiana, which
17 is a suburb of New Orleans, and then with the Tarrant County
18 medical examiner's office, I've had an opportunity to attend
19 many workshops, seminars, courses, and professional meetings
20 that cover the areas of my expertise.

21 Q. And have you, in fact, given lectures, other
22 presentations, at training seminars for forensic scientists?

23 A. Yes, I have. And also, I was a member of the
24 faculty at Loyola University in New Orleans for about ten
25 years, where I taught crime scene investigation, among other

1 courses. I was a faculty member at Texas Christian
2 University for about the same length of time, I think it was
3 about ten years, where I also taught crime scene
4 investigation. I've had an opportunity to lecture on blood
5 spatter analysis and crime scene reconstruction in numerous
6 venues throughout the United States. I've also been invited
7 and have participated in courses where I taught blood spatter
8 analysis and crime scene investigation in England, Bosnia,
9 Hungary, the Maldiv Islands, and just recently Sri Lanka.

10 Q. I know I know where England is. I have some idea
11 about Bosnia and Hungary. Where are the Maldiv Islands?

12 A. The Maldives are a series of islands -- actually a
13 series of atolls made of about 1,200 islands that are off of
14 the southwest coast of India. It is an independent nation.
15 It was once British protected.

16 Q. So that would be between India and the Arabian
17 peninsula maybe?

18 A. It's between India and Africa, yes.

19 Q. Okay. And Sri Lanka is what used to be called
20 Ceylon?

21 A. Ceylon, yes.

22 Q. Okay. Now have some of those classes you have
23 taught dealt with the issue of blood stain pattern analysis?

24 A. Yes, they have.

25 Q. And have some of the classes that you have taught

1 dealt with luminol testing?

2 A. Yes. That's included in most crime scene
3 investigation courses as well as the -- any specialized
4 courses in blood spatter analysis. Generally luminol is
5 covered.

6 Q. And have some of those classes you've taught also
7 dealt with the area of shoe tread analysis and comparison?

8 A. Yes, they have. One of the things that I have done
9 in the laboratory, and still continue to do, although not
10 very often any more, is actually to do shoe print analysis
11 and comparisons.

12 Q. And when you say you don't do it that often any
13 more, is that because you have more administrative
14 responsibilities?

15 A. I have administrative responsibilities. Also my --
16 the major areas that I'm utilized in the laboratory these
17 days are in crime scene reconstruction, which includes blood
18 spatter analysis for the laboratory. And my general area of
19 expertise is firearms and tool mark examination. And I
20 generally do as much of that as I am able. So the shoe print
21 -- impression type evidence, such as shoe prints and tire
22 tracks, has been given over to the trace analysis unit.

23 Q. Okay. But they do that under your supervision.

24 A. Yes. I supervise the unit and approve -- in fact,
25 do a lot of the peer review. The technical peer review.

1 Q. And is your laboratory an accredited laboratory?

2 A. Yes, sir, it is. It's ASCLD lab accredited. And
3 has been since 1999.

4 Q. And how -- what does that mean?

5 A. The American Society of Crime Laboratory Directors
6 laboratory accreditation board is an independent organization
7 that comes in and inspects laboratories to determine whether
8 or not proper quality control measures are in place, whether
9 or not the people who are working in the laboratories have
10 the basic requirements that are necessary to be doing the
11 work, whether or not the supervision that is in place is
12 adequate to make sure that the work is being done properly,
13 and that a whole series of quality measures are in place in
14 the laboratory.

15 Q. Do they also do what's called proficiency testing?

16 A. Well, proficiency testing is considered to be part
17 of the process that's required for accreditation. They don't
18 do proficiency testing. ASCLD lab has a subcommittee that
19 reviews proficiency tests that are taken in the laboratory.
20 They have to be provided by an external vendor or internal
21 proficiency testing.

22 Q. And in fact, have you served on that subcommittee,
23 the proficiency advisory committee of the American Society of
24 Crime Laboratory Directors?

25 A. Well, actually, yes. I served on a committee that

1 was the forerunner of what is in place today. The American
2 Society of Crime Laboratory Directors is actually a separate
3 organization made up of laboratory managers. And for a
4 period of time what we were doing was: We were providing
5 technical assistance to proficiency test manufacturers who
6 wanted to provide proficiency tests for the forensic field.
7 And I was a member of that committee for a number of years
8 and actually served as chairman of that committee for I think
9 about eight or nine years.

10 Q. And we've also heard mention of the American Academy
11 of Forensic Sciences. What is that?

12 A. The American Academy of Forensic Sciences is an
13 international organization of forensic sciences -- scientists
14 and attorneys. It represents about 6,000 members, spread out
15 over 58 or 59 countries. The bulk of them, of course -- the
16 bulk of the membership comes from the United States and
17 Canada, but it's the -- I would consider it to be the premier
18 forensic -- professional forensic science organization,
19 learned society in forensic science.

20 Q. And are -- does it have different degrees of
21 membership?

22 A. Yes, it does. First of all, membership is not
23 simply by writing a check and joining. You have to -- you
24 fill out an application. You have to have recommendations.
25 Your application then is investigated to make sure that what

1 you've put on there is authentic and verifiable. And once
2 you are elected to membership, you are elected as a
3 provisional, or now an associate member, for a minimum of, in
4 most sections, two years, after which you can apply for
5 regular membership. Regular membership is based primarily on
6 meeting attendance and participation. And then there is a
7 level above that, which is fellow. And you are promoted to
8 fellow or elected fellow in the academy based on service to
9 the field as well as service to the academy.

10 Q. And are you, in fact, a fellow of the American
11 Academy of Forensic Sciences?

12 A. Yes, sir, I am.

13 Q. How long have you been a fellow?

14 A. At least 25 years. I'm not sure.

15 Q. And have you ever held any offices in that
16 organization?

17 A. Yes. I've held numerous offices.

18 Q. What's the most recent?

19 A. The most recent, I completed -- just completed a
20 term as president of the American Academy of Forensic
21 Sciences. That ended in February.

22 Q. Of 2005?

23 A. Of -- yes. Of this year. February of this year.

24 Q. Are you also affiliated with the International
25 Association of Forensic Sciences?

1 A. Yes. I am currently the president of the
2 International Association of Forensic Sciences. I just was
3 elected to that position in August of this year.

4 Q. Well, all this other stuff you've done is probably
5 here in the exhibit; is that correct?

6 A. Yes.

7 Q. Okay. Have you testified in courts concerning crime
8 scene reconstruction, blood stain pattern analysis, shoe
9 print comparisons, and tool mark analysis --

10 A. Yes, I have.

11 Q. -- as an expert?

12 A. I have testified in federal, state, and local courts
13 in Texas, Louisiana, Oklahoma, Colorado, Missouri, Kansas,
14 Georgia, and Mississippi, in one or more of those fields.

15 Q. Now, in connection with the homicide of Kent
16 Heitholt, did you receive a number of materials from my
17 office, which we in turn had received from the prosecution?

18 A. Yes, sir, I have.

19 Q. And were those -- did those materials include some
20 compact disks which contained digital photographs?

21 A. Yes, sir.

22 Q. Do you have those with you?

23 A. Yes, I think I do, as a matter of fact.

24 Q. Preliminarily, sir, I notice there's a disk here
25 entitled "Crime Scene 2." Was there another disk called

1 "Crime Scene 1"?

2 A. No, sir, I didn't receive one that was specifically
3 labeled as "Crime Scene 1," but I did have a set of Xerox
4 color copies of -- that were listed under a tab that was
5 marked "Crime Scene 1."

6 Q. And did you have a disk that also had those
7 photographs or not?

8 A. I don't think so.

9 Q. Let me see if I can find them over here.

10 MR. ROGERS: Don't worry about it. Don't worry
11 about it.

12 MR. KNIGHT: I'm going to object right now to any of
13 these photographs being offered or shown to the jury.

14 THE COURT: Mr. Knight, they're being marked.
15 They're not -- they're not being offered at this point. And
16 before they're shown to the jury, they will have to be
17 admitted into evidence.

18 MR. KNIGHT: Okay. I'm sorry. I thought I'd just
19 save a little time there and object beforehand.

20 THE COURT: If you'll let the reporter mark them.
21 And then I will caution counsel that we will not play them
22 for the jury until in some other way they've been identified
23 and become relevant.

24 MR. ROGERS: Correct.

25 THE COURT: Thank you.

1 Would you mind showing those to opposing counsel, if
2 you're going to refer to them, just before you go?

3 (Mr. Rogers showing exhibits to Mr. Knight.)

4 Q. Mr. Singer, I'm going to just hand you for
5 identification what have been marked Defendant's Exhibit K.
6 And is that one of the CDs that we sent to you, that we got
7 from the prosecutor's office, that you looked at in
8 connection with this case?

9 A. Assuming that you didn't switch anything over in the
10 table there, yes, that's -- that is.

11 Q. Okay. Fair enough. And Defendant's Exhibit L, is
12 that labeled "Luminol Trail 1"?

13 A. Yes, that's correct.

14 Q. And Defendant's Exhibit M, "Luminol Trail 2"?

15 A. Yes.

16 Q. And Defendant's Exhibit N, another showing the
17 photographs of the search of the Ferguson vehicle and other
18 photographs relating to the downtown Columbia area?

19 A. Yes, that's correct.

20 Q. Defendant's Exhibit O, autopsy photos?

21 A. Yes.

22 Q. Defendant's Exhibit P, photos of the diner and the
23 victim's car?

24 A. Yes, that's correct.

25 Q. Now, I want to show you some still photos which have

1 been introduced into evidence, starting with State's Exhibit
2 15, which contains eight photographs. I'm not going to have
3 you look at these in detail now, but do you see what those
4 are?

5 A. Yes.

6 Q. Are those some of the photographs which you viewed
7 in digital form on one of the compact disks I just showed
8 you?

9 A. Yes, they are, both in digital form, and I also had
10 color Xerox copies of those photographs.

11 Q. Okay. And the photographs that are marked on
12 State's Exhibit 59, also photographs which you have viewed in
13 digital form on one or more of the compact disks?

14 A. Yes, they are.

15 Q. And also of which you had color copies.

16 A. Yes. They are at least similar. I -- you know.
17 There's a lot of photographs. And I've seen photographs that
18 look like that.

19 Q. Okay. And State's Exhibit 87, also photographs that
20 you've seen on one of those compact disks?

21 A. Yes, sir.

22 Q. State's Exhibit 94?

23 A. Yes.

24 Q. Once again, photos that you have seen on one or more
25 of those compact disks?

1 A. That's correct, yes.

2 Q. Same for State's Exhibits 96 and 97?

3 A. Yes.

4 Q. State's Exhibit 14?

5 A. Yes.

6 Q. State's Exhibit 41?

7 A. Yes. Oh, yes.

8 Q. State's Exhibit 33?

9 A. Yes.

10 Q. You were not given a videotape to review, were you,
11 or a CD of a videotape?

12 A. I had a DVD of a crime scene video, yes.

13 Q. Do you have that with you as well?

14 A. I don't -- no. I did not bring that.

15 Q. Okay. Let me ask you this. Does State's Exhibit 13
16 look like various still shots from that video?

17 A. Yes.

18 Q. State's Exhibit 39, is that, once again, excerpts of
19 photographs that you viewed in digital form?

20 A. Yes, they are.

21 Q. State's Exhibit 44. First of all, I'll call your
22 attention to the -- obviously not a photograph, but a diagram
23 in the bottom left-hand corner, which is marked as Exhibit
24 44J. Had you seen it before too?

25 A. No. I have not seen 44J. The photographs, though,

1 are all photographs that were included in the photographs
2 that I've seen.

3 Q. Okay.

4 MR. CRANE: Charlie, which one's J? Sorry.

5 MR. ROGERS: J is the diagram.

6 MR. CRANE: All right.

7 Q. State's Exhibit 74?

8 A. Yes.

9 Q. And those are what's been -- photographs you
10 viewed --

11 A. Yes.

12 Q. -- digitally as well as in --

13 A. Yes.

14 Q. -- Xerox copies?

15 A. Yes.

16 Q. And last but not least, State's Exhibit 34. Are
17 those also photographs that you reviewed --

18 A. Yes, they are.

19 Q. -- digitally. Now, what would be the advantage to
20 viewing a photograph digitally, first of all, from the point
21 of view of your analysis, to viewing a photograph digitally
22 rather than a -- an enlargement, eight-by-ten enlargement of
23 a photograph?

24 A. There's still a little bit of controversy about
25 this, so I'll be careful how I phrase this. From my own

1 personal standpoint, I prefer to look at digital photographs,
2 because, in my opinion, they tend to be clearer. The
3 resolution -- assuming that they're taken with a camera that
4 has a good enough resolution, they tend to be clearer than
5 photographs -- 35-millimeter photographs that are shot with
6 film. Although film that is transferred to digital is just
7 as good, as long as the process is proper.

8 The big advantage is that it allows you to use the
9 power of the computer to zoom in on areas and look at areas
10 that may only be represented as a small portion of a
11 photograph. And again, assuming that you have enough of the
12 initial resolution, whether it be by film or digital camera,
13 and the image is good enough, you can actually get some very
14 good images of larger sections of -- or of smaller sections
15 of larger photographs. So that makes it a lot easier.

16 Plus, I can go through a whole series of
17 photographs, although in this case I had, you know, a stack
18 of Xerox copies about that thick, and then I had these disks.
19 I can go through a disk, pick out the ones that are germane
20 to what -- to the questions that I'm being asked, and print
21 those in my -- in-house and have things in my hand that I can
22 look at.

23 Q. And in terms of explaining to the Court and jury
24 what you see in the photographs and the conclusions you draw
25 from what you see, are there any advantages to using the

1 digital format and a screen such as this over using a still
2 photo mounted on a piece of foamboard?

3 A. Well, the obvious advantage is that you can blow up
4 the digital photograph to as large as the, again, the
5 resolution of the image will allow you to. And it allows
6 people to see things that perhaps would be harder to see on a
7 smaller enlargement, particularly with the photographs that I
8 was dealing with, which were smaller than even the
9 eight-by-tens that you have here.

10 MR. ROGERS: Your Honor, at this time I would offer
11 Defendant's Exhibits K, L, M, N, O, and that portion of P
12 which deals with the victim's car.

13 MR. KNIGHT: Your Honor, I would object. I don't
14 have any problem with the defense maybe playing these or
15 showing these images that are maybe enhanced digitally.

16 MR. ROGERS: They're not -- they're not enhanced.
17 They're --

18 MR. KNIGHT: Well --

19 MR. ROGERS: -- what we got from you. But we intend
20 to use the computer to focus on things.

21 MR. KNIGHT: These digital images that they intend
22 to put up there on that screen, I'm not going to object to
23 that if they are duplicates of photographs that are already
24 admitted into evidence. Otherwise, these disks certainly
25 contain photographs that have not been entered into evidence.

1 So, I -- there is no foundation at all that this witness was
2 at the crime scene. That -- at any time close in time to the
3 processing the crime scene.

4 Also, if the defense wanted to use these exhibits,
5 they could have laid a foundation through a person that was
6 there, that testified earlier. Jeff Nichols.

7 So, I'm certainly opposed to all these images and
8 all these disks coming in. But if they want to play or just
9 show the ones that are duplicates of the ones -- the images
10 that already are in, I'm not going to have an objection. But
11 entering all these CDs, the entire CDs, I'm certainly
12 opposed.

13 THE COURT: Let me just -- before you respond, are
14 these the CDs that the state furnished to the defense in the
15 course of discovery? I mean, you've looked at the CD itself?
16 Or these other CDs?

17 MR. ROGERS: These are copies that we made. Direct
18 copies that we made of them.

19 MR. KNIGHT: Yes, Your Honor, but still --

20 THE COURT: I'm just -- that was my only question.
21 You've already made your objection, Mr. Knight.

22 You may respond.

23 MR. ROGERS: Your Honor, I don't think there's a
24 serious question as to the authenticity of these photographs.
25 Obviously these actual CDs themselves were not here when

1 Mr. Nichols testified, so we couldn't have had him identify
2 them. And plus, he didn't make them. But I don't think that
3 that's the issue here. Mr. Nichols testified that he made
4 digital photographs. The state chose to have some of those
5 developed or printed or whatever and mounted as exhibits, and
6 I have no problem with that. But I do think that the rest of
7 them, since we got them in discovery from the state and gave
8 them to this expert for his formulation of conclusions,
9 becomes admissible to explain his conclusions.

10 THE COURT: Okay. I'm going to sustain the
11 objection as to those photographs on those disks. And I have
12 no way of knowing, because I don't have a laptop here, to
13 know which ones are here that have already been admitted and
14 for which a foundation has been laid. If there's no
15 foundation laid for the particular photograph, then I will
16 sustain the objection. And that sort of leaves you in an
17 uncomfortable position, because I don't know -- I'm going to
18 let the jury take its morning recess anyway. And perhaps you
19 can work it out somehow during the recess. Simply because
20 the state provided them does not make them authenticated or a
21 foundation laid.

22 Ladies and gentlemen, the Court again reminds you of
23 what you were told at the first recess of the Court. Until
24 you retire to consider your verdict, you must not discuss
25 this case among yourselves or with others, or permit anyone

1 to discuss it in your hearing. You should not form or
2 express any opinion about the case until it is finally given
3 to you to decide. Do not read, view, or listen to any
4 newspaper, radio, or television report of the trial.

5 Jury may take a 10- or 15-minute recess.

6 If it's necessary for you to look at those CDs and
7 see which ones are admitted and which ones you want to lay
8 another foundation for, we might take a shorter -- a little
9 longer break. But I don't want to be out 45 minutes looking
10 at CDs.

11 Ladies and gentlemen, you may be excused.

12 Mr. Singer, you may step down, as long as you're
13 available. And would ask you not to discuss your testimony
14 with other witnesses, as you probably understand.

15 THE WITNESS: Yes.

16 - - -

17 The following proceedings were held out of the presence
18 of the jury:

19 THE COURT: We'll be in recess then.

20 (Recess taken.)

21 - - -

22 The following proceedings were held out of the presence
23 of the jury:

24 THE COURT: Have we arranged to get the photographs
25 sorted out that are to be displayed?

1 you viewed, both in Xerox and in digital format?

2 A. Yes, sir, we did.

3 Q. And have we selected out digital images which are
4 the same photograph as the image depicted in State's Exhibit
5 33F?

6 A. Yes.

7 Q. State's Exhibit 33C?

8 A. Yes.

9 Q. State's Exhibit 74A?

10 A. Yes.

11 Q. And we've managed to locate those on the CDs of many
12 photographs.

13 A. Yes, we have.

14 Q. And now I'm going to hand you what's been marked as
15 Defendant's Exhibit Q and ask you if that is a photograph
16 that you viewed both in digital form and in the printout
17 form.

18 A. Yes, sir, it is.

19 MR. ROGERS: At this time, Your Honor, I'd offer
20 Defendant's Exhibit Q.

21 THE COURT: Do you have an objection, Mr. Knight?

22 MR. KNIGHT: No objection, Your Honor.

23 THE COURT: Defendant's Exhibit Q is admitted.

24 - - -

25 Defendant's Exhibit Q admitted into evidence.

1

- - -

2

Q. Now, let's start with generally what you did regarding the blood stain pattern analysis in this case.

4

A. I was asked to review a series of reports, as well as a large number of photographs that depicted this scene, the crime scene, and also depicted the victim's vehicle, both at the scene and then later on, after it had been impounded, in an effort to determine if there was any information that I could provide in the way of just simply basic information regarding the scene itself, as well as an attempt to perhaps reconstruct what occurred or might have occurred at the time of the incident.

13

The first thing that I -- that I noticed and made you aware of and is in my report is that there is evidence, both in the reports themselves as well as the photographs, that Mr. Heitholt's body had been moved prior to the photographs being taken. And in addition, there is evidence that there was some medical intervention that had occurred at the scene prior to Mr. -- prior to the photographs being taken.

21

Q. Well, now, what impact would that information have on your crime scene reconstruction regarding blood stain pattern analysis?

24

A. Well, when you look at the blood stain pattern analysis, you have to take into account that, because he had

25

1 been moved and because there was activity that was going on
2 right around his body, plus there was a lot of blood there,
3 that there is the possibility and, in fact, the probability
4 that at least some of what we're seeing is the result of the
5 attempts to save his life, as opposed to the actual incident
6 itself. So when there's -- when someone like myself is asked
7 to reconstruct the events that occurred, obviously I can't do
8 that completely without at least the caveat that there is the
9 possibility that some of the stains that I'm seeing are the
10 result of those activities, as opposed to the actual incident
11 itself.

12 Q. And are there particular areas that you were able to
13 focus on that were clearly independent of the medical
14 intervention and the moving of the body after the incident,
15 before photographs were taken?

16 A. Yes, there are. And, in addition, when you -- when
17 you do this, some of what you have to look at is: You look
18 at a pattern and you say, "Okay, you know, what is the
19 possibility or what are the probabilities?" So even in those
20 areas where the medical intervention took place, I think, at
21 least in my opinion, there is some evidence of what actually
22 took place at the scene. And so I was able to get a general
23 reconstruction, again, in my opinion, of the incidents that
24 took place.

25 Q. Let me first call your attention to the interior of

1 the vehicle. And I will show you again what has been
2 received in evidence as State's Exhibit 34, containing
3 photographs labeled 34A through H. And are these, in fact,
4 copies of -- hard copies, if you will, of photographs that
5 you have viewed and analyzed in connection with this case?

6 A. Yes, they are.

7 Q. Do you have the laser pointer?

8 A. Yes. It's over here.

9 Q. You can use that.

10 A. Okay.

11 Q. Start in 34A and 34B. Is 34B a close-up of the
12 white card in 34A?

13 A. Yes, it is.

14 Q. And can you tell what that card is there for?

15 A. Yes, I can. If I could step down, it might --

16 Q. Sure.

17 A. -- be easier for me to go through this.

18 Q. As long as the court reporter can hear you. And
19 she -- she has laryngitis and can't tell you whether she can
20 or not.

21 A. Okay.

22 THE COURT: If you hear a croaking sound, you'll
23 notice that -- if I see that she's trying to talk to you,
24 I'll speak for her.

25 THE WITNESS: Thank you.

1 A. 34A is a photograph of the interior of the driver's
2 side door. Front door. And the card is placed there to show
3 that on the window there are spatters. And the close-up is
4 actually of that area that is being highlighted by the card.
5 If the card wasn't there, you could see the spatters, but you
6 couldn't really tell what side of the window it's on, and it
7 would be more difficult actually to see the spatters.

8 These are, visually, at least, consistent with blood
9 spatter. The fact that they are on the interior of this
10 window, along with several of the other photographs here --
11 if I could just go on, you know, I --

12 Q. All right.

13 A. If we look at, say, 34E here, what we see is a
14 photograph of the panel, the door panel that's just below the
15 window. This is where the armrest is. And here's where all
16 the controls are. And you can see that there are some blood
17 stains on that as well. 34D is a little higher up. You can
18 see that there are some impact spatters on that as well. 34C
19 is the portion of the door that is right by the edge of the
20 frame where the door closes. And right here is a nice little
21 droplet of blood. These spatters all are either striking
22 this door either at 90 degrees or at an angle that approaches
23 90 degrees.

24 Now, when -- and I don't know -- well, when I --
25 when I analyze a scene like this, I tend to group blood

1 spatters into three categories: Those that impact at what I
2 call a high angle of impact, which would 70, 80, or 90
3 degrees; then there's the medium angle of impact, which is
4 40, 50, 60 degrees; and then there would be low angle of
5 impact, which would be 10, 20, or 30 degrees.

6 And basically the way that you can tell is: That
7 when a drop strikes an object at 90 degrees, it makes a nice
8 round drop. If it strikes that object at anything other than
9 90 degrees, the drop that's formed is going to be elongated.
10 And the lower the angle, that is, the closer that blood
11 stain, that blood droplet, is to the surface as it strikes
12 it, the longer and skinnier that elongated drop is going to
13 come up -- is going to be.

14 Now, there is a method that you can use to precisely
15 measure these angles. But I find that in general, when --
16 particularly in a scene like this, where you've had
17 intervention, what you're really looking for is an overall
18 picture. You're just trying to get the big picture of what's
19 going on. And so by grouping it into those kinds of angles,
20 in the general classes, you can get a much better idea,
21 without having to risk the possibility that you're including
22 in your measurements something that is not really from that
23 scene.

24 And these are all, as I said, high angles of impact.
25 80, 90 -- 70, 80, 90 degrees. That indicates to me that --

1 oh. And one other that I think that's important. And that
2 is: These photographs down here, 34I and 34J, which -- and
3 34K, which depict the door frame at the bottom, that's the
4 frame of the vehicle at the bottom of where the door shuts,
5 and you can see that there are -- some of these are fairly
6 round drops that are impacting here, which would indicate
7 that there's some dripping going on or maybe, again, some of
8 this relatively straight-down drops that are coming down.

9 All of this together indicates to me that the attack
10 on Mr. Heitholt began at least near the passenger -- the
11 driver's side of the car, with the door open. Because the
12 door had to be open in order for these blood stains to get on
13 the interior side of the door and show up as they do.

14 Q. Let me stop and ask a question. Could a single blow
15 to Mr. Heitholt at the time he was near the open driver's
16 side door account for this blood spatter depicted on State's
17 Exhibit 34?

18 A. No, sir, it could not.

19 Q. Why not?

20 A. There has to be at least two blows, and possibly
21 more. The reason for that is: Because the first time that
22 you strike somebody, particularly with a blunt instrument,
23 the first time you strike somebody, there's no blood there.
24 It's -- the blood has to accumulate on the surface in order
25 for this spatter to occur. Because the way the spatter

1 occurs is: That you have a surface that has blood on it.
2 Then you have another object that comes down and strikes that
3 surface. When it does, basically what's happening is you're
4 creating this, I guess for want of a better word, sandwich,
5 with the two solid objects being the pieces of bread and the
6 blood being in between as the meat in the sandwich. And
7 blood is a fluid. It's a liquid. It's just like any other
8 liquid. So it doesn't compress. And so what happens is: As
9 this force comes down, it forces the blood out, away from the
10 objects that are coming into contact with one another.
11 That's what creates the spatter.

12 In addition, when you remove that object, if you're
13 coming back and you're going to go down again, you'll have
14 some spatter that comes off of the object. But in this case
15 what you're looking at is impact spatter. That is, spatter
16 that is the result of this impact occurring. And it has to
17 at least have been on the second blow, because there has to
18 be enough time, as I said, for blood to start to accumulate
19 on the surface that's being struck, and then you have the
20 resulting spatter.

21 Q. Now, do you tend to categorize impact spatter with
22 regard to the velocity of the impact?

23 A. Yes. That's -- I'm kind of old school when it comes
24 to that. I do believe in that, yes. You can generally
25 categorize blood spatter into high-, medium-, and

1 low-velocity spatter. And very simply put, low-velocity
2 spatter is spatter that is the result of gravity. You cut
3 your hand, and blood begins to accumulate, it runs down your
4 fingertip, and then it accumulates until there's enough
5 volume of blood there to break the surface tension that's
6 holding it to your finger, and it drops off your finger and
7 hits the ground. That would be low-velocity spatter. You
8 can also create low-velocity spatter by, you know, kind of
9 shaking your hand, maybe moving an object a little bit. Then
10 you reach that kind of gray area.

11 And then you move into medium-velocity spatter.
12 With medium-velocity spatter, you're actually applying some
13 energy to it. So that if I have, say, a baseball bat, and
14 I'm striking someone with the baseball bat, that momentum is
15 building up energy, and that energy is then transferred to
16 that activity that occurs when that spatter is created. And
17 what that does is, if there's enough energy there, to break
18 the blood into smaller droplets.

19 And then, of course, there's high-velocity spatter,
20 which is extremely energetic. Such as, say, a head impacting
21 a windshield at 40 or 50 miles an hour in a head-on
22 collision. Or a gunshot wound. That energy -- there's so
23 much energy there. It's generally classified as energy
24 that's greater than or equal to about a hundred feet per
25 second. That's enough energy to actually break the blood

1 into tiny little droplets, like you get out of a perfume
2 atomizer.

3 And so you can look at a surface, and by looking at
4 general size of the droplets, you can get some idea of the
5 kind of impact that was occurring here.

6 These are medium-velocity stains. With the possible
7 exception of some of the ones that are down there on the
8 frame, the bottom of the frame of the vehicle. Those could
9 be low-velocity. But the ones on the window appear to be
10 medium-velocity spatter, which is consistent with a beating.

11 Q. By the way, based only on the photographs that you
12 viewed concerning the driver's side door and its environs,
13 could you tell -- you told us there had to be at least two
14 blows; correct?

15 A. Yes.

16 Q. Could you tell us if there may have been more than
17 two?

18 A. Well, there may have been more than two, but I
19 can't -- I can't actually say exactly how many blows occurred
20 at this particular position, because then you have to start
21 looking at the big picture.

22 Q. Okay. Now in looking at the big picture, you, of
23 course, viewed photographs, including those in State's
24 Exhibit 33, including 33A through 33H? Is that correct?

25 A. Yes.

1 Q. Okay. And are those photographs that are useful to
2 you in looking at the big picture of the blood stain pattern
3 revealed in the scene of Mr. Heitholt's death?

4 A. Yes, they are.

5 Q. Okay. Could you tell us what you found significant
6 in those photographs.

7 A. Sure. Again, if I may step down.

8 Q. Yes, you may. And bring the laser pointer if you
9 want to.

10 A. If you look at 33A, which is the top left-hand
11 photograph, and then you look at 33G, which is a photograph
12 taken from essentially the same angle, but backed away, what
13 you see is, this is the first thing that you want to look at
14 is: What's on the ground here. And there are two relatively
15 large areas of pooled blood. There's one that's right here
16 by the tire, and then there is another that is associated
17 with Mr. Heitholt's body, under his head.

18 Now, this is where some of that generality comes in
19 that I was talking about before, because we can see from --
20 well, there are other photographs that depict medical
21 intervention in Mr. Heitholt. So we know that he's been --
22 that the EMTs have been working on him. In fact, you can see
23 a chest pad right there, in here. And so we know he's been
24 moved. Plus, there was testimony -- at least in the report,
25 there was an indication in the report that a civilian had,

1 who had witnessed the incident or come right after it, had
2 rolled him over. So we know there's some movement.

3 So I don't know whether he's -- you know, whether
4 this position that he's in here is the result of that
5 movement or not, or whether there are two actual incidents
6 that have occurred here. Either one of those is possible.
7 But that shows you at least that there is some movement now.
8 And we know then -- and you've got a lot more blood here,
9 which means there's a lot more bleeding going on.

10 So in my opinion, at least, the incident started by
11 the passenger -- I mean, I'm sorry, the driver's side front
12 door. And there was then some movement that occurred from
13 there, to end up back over here by the rear driver's side
14 tire.

15 When you look closely at the driver's side tires,
16 and now I'm looking at 33D, E, and F, what you can see there
17 is very interesting to me. I'll have to be careful how I say
18 that too, because I had a serologist who used to work -- who
19 worked for me when I was in Metairie, who made the statement
20 on the stand one day that the clotting process in blood is
21 very -- is a fascinating scientific process, because it is.
22 And that got translated into a newspaper article that said
23 that the witness said that he liked to watch blood dry.

24 So, I have to be a little careful about how I
25 approach this, but this is a -- this tells me a lot. This

1 rear wheel is fascinating to me as a blood spatter expert,
2 because it tells me a lot. What it --

3 Q. Let me ask you, would it be -- with regard to
4 Exhibit 33F, would it be useful and helpful to the jury, in
5 your view, to be able to utilize computer technology to
6 demonstrate things that you saw on that particular
7 photograph?

8 A. Yes. That one and this one.

9 Q. 33C.

10 A. Yes.

11 Q. Which one first?

12 A. Well, you can show F first.

13 Q. Okay.

14 MR. ROGERS: And that would be jpg 93, please.

15 Q. And that's the same photograph as 33F?

16 A. Yes.

17 If you could rotate it 90 degrees to the right. No.

18 Other way. Yeah. That way.

19 Q. There we go.

20 A. There we go.

21 Q. All right.

22 A. Okay. What this -- what this shows is several
23 things. Number one, if you look at these spatters, that's
24 the smaller droplets that are here, those small droplets take
25 two forms. Some of them are very round. Others are

1 elongated. And the shape of the stain will also tell you the
2 direction that the blood is moving. Okay. And if you
3 examine some of these stains closely -- and I don't know if
4 we can come up a little more with it or not. If possible.
5 If not... Well, okay.

6 MR. ROGERS: A little more. If you can.

7 A. All right. Yeah, that's good.

8 You can see, like here and here and here, these are
9 nice round stains. On the other hand, the stains here and
10 down here and across here and these in here, they all have
11 directionality. All right. So what does this tell me? What
12 it tells me is: That at some point during this incident, the
13 victim's head is at a level that is more or less level with
14 that hubcap. Okay. The ones that show the directionality,
15 that are moving up -- that's the round stains (indicating).
16 The ones that show the directionality that are moving up show
17 me that the blood, the source of that blood, is below the
18 level of that hubcap, so -- or at least the top of that
19 hubcap, so that it's closer to the ground.

20 Q. Let me stop you here, Mr. Singer. How can you tell
21 the directionality of an elongated stain?

22 A. Okay. Well, an elongated -- to put it simply, an
23 elongated stain will be pear-shaped, okay, with the smaller
24 end of the pear pointing in the direction of travel of the
25 stain. And that has to do with the fact that, as the blood

1 strikes the object, of course the momentum of that blood, you
2 know, the first blood that strikes the object is going to
3 stay on the object. The rest of that little blood droplet is
4 going to continue to move. And as it moves forward, because
5 of momentum, there's less and less blood there, so that the
6 stain gets narrower and narrower. So you end up this with
7 pear-shaped stain that is in the direction, general direction
8 of the activity. That is, the travel of the blood.

9 And in these stains, you can see quite easily that
10 the blood is moving in this direction. And that these stains
11 are in that medium angle category. So that they're coming
12 from -- and, you know, if you wanted to, you could actually
13 measure some of them and put some -- tape some strings and
14 calculate the angles and pull the strings down and come to a
15 general area. But that really isn't necessary here, because
16 we see that big pool of blood right below the wheel, and we
17 know that they're moving in this direction. What it tells me
18 is that they're coming from a low position.

19 So what this tells me is: That he was struck after
20 he was on the ground. Okay. And perhaps while he was -- his
21 head was higher, not completely on the ground, but somewhat
22 off of the ground. He could have either been on all fours,
23 going down, or he could have lifted his head up in some way.
24 But -- and I can't really tell you that. I don't know that.
25 All I know is that his head is higher up, so that the spatter

1 is coming right on to the hubcap, and that, in at least some
2 of these instances, the spatter is moving up like this at a
3 relatively, as I said, kind of a moderate angle, so that it's
4 coming from below. All right.

5 The next thing that this tells me is this large area
6 here, we don't see any drops. All you see is this big mass
7 of blood. That's called a transfer stain. And that --

8 Q. What's a transfer stain?

9 A. I'm sorry.

10 Q. What's a transfer stain?

11 A. What happens then -- or what a transfer stain is is
12 when a bloody object comes in contact with another object,
13 and -- like a rubber stamp or, you know, or a wet rag, it
14 leaves -- it transfers some of that blood from that object to
15 the other object.

16 This not only tells me that a bloody object came
17 into contact with the hubcap, but it was very bloody. And
18 the reason I can say that it was very bloody is because some
19 of these droplets are of enough volume to actually be running
20 down the tire. So this is -- this is not just -- see if I
21 can give -- well, when you're a painting a house, you know,
22 when you're painting the -- a wall in your house, if you just
23 slop the paint on, what happens? You get run-down. You get
24 those big runs that come down. If you're -- use a thin
25 amount, it just comes off the brush and just stays right

1 where you put it. Well, there's enough blood there to run
2 down. So it's a fair amount of blood.

3 What is the bloody object that came into contact
4 with the hubcap? I can't say. You know, obviously there's a
5 good candidate for that. And that is Mr. Heitholt. Because
6 he is very bloody, as you see in the subsequent photographs
7 that we were looking at. And that would be consistent.

8 So that tells me that, again, in my opinion, he came
9 into contact with that hubcap.

10 Now --

11 Q. Would that -- do you know what part of his body that
12 might have been?

13 A. Well, I can speculate, but I can't say for sure.

14 Q. Don't speculate.

15 A. Obviously it was a bloody part.

16 Then there is more information here. Okay. And
17 that information is going to be a little difficult for you to
18 see, but if you look carefully at this photograph, what
19 you'll see is that there are spots, impact spatter, that is
20 sitting on the top of this transfer stain.

21 MR. ROGERS: Could you enlarge that a little bit,
22 Mr. Weis?

23 A. Ah. Yeah. That's good. Wonderful.

24 There's one here. There's one here.

25 If I could refer to my notes, I have a diagram.

1 All along in here. Here, here, here, here, here,
2 here. Down here there's a nice big one. Almost a clot.
3 Over here there's one.

4 So what you can see is that there's impact spatter
5 that is layered on top of this transfer stain. What that
6 means is that after that object came into contact with the
7 hubcap, there was another incident, at least one more
8 incident, perhaps more, that created impact spatter, that
9 ended up on the hubcap of the wheel.

10 Q. Okay.

11 A. Now if we could go to the next one.

12 Q. All right.

13 MR. ROGERS: If you could then, Mr. Weis, take us to
14 jpg --

15 A. Not that one.

16 MR. ROGERS: -- 96, which is State's Exhibit 33C.

17 Q. So this one here?

18 A. Yes.

19 Q. Okay.

20 A. Yes.

21 Q. And what is this?

22 A. This is -- now we're looking at the rear quarter
23 panel of the car. This is the tire. This is the tire that
24 we have just been looking at. And this is what's immediately
25 on top of that tire. Okay.

1 Now, you see several things here. You see all of
2 this over here. The first -- in the first place. That's the
3 first thing that generally draws your eye.

4 Q. What is that?

5 A. It looks like mud to me. It doesn't have the
6 characteristics of blood. It certainly looks like -- this is
7 what generally happens -- I mean, this is an example of
8 spatter pattern analysis that doesn't involve blood, but it's
9 the same kind of thing. The wheel went through something
10 that was muddy and wet and threw the liquid up onto the
11 quarter panel, and that's what you see.

12 This is much more interesting over here. Okay.
13 This actually is kind of -- well, it shows what we call brush
14 strokes. Again, go back to painting the room in your house.
15 You know, if you get too much paint on there and you don't
16 smooth it out, you end up -- it shows brush strokes. Well,
17 we see this sometimes when bloody hair comes into contact
18 with a vehicle. Okay. Or with a surface. Or -- and that
19 may be what that is. I'm not saying that it is, but it
20 certainly has those characteristics. And it is a transfer
21 type stain rather than an impact stain.

22 These are impact stains. And you can see that they
23 are also coming up from down here. And these are at a
24 kind -- hitting this at a lower angle than the previous
25 stains that we were looking at that are on the tire. So I'm

1 not sure that they're actually related to those -- those
2 incidences. I think these are perhaps independent
3 incidences.

4 And you'll notice here that these form a line.
5 That's what happens when blood is thrown off of an object
6 that's in motion. In this case we're talking about a beating
7 with a blunt object. As that object goes down and strikes,
8 that's when you get the impact spatter. As that object comes
9 back up, you get what's known as cast-off. These are little
10 spatters that come up and then will deposit independently,
11 until you reach the arch of your swing and then you come back
12 down and you start it all over again.

13 These are low angle. That indicates these were made
14 by some fairly short strokes. But -- because there's not
15 enough -- the object is not coming up high enough to actually
16 give you little round dots. What you're seeing is blood
17 that's coming up from the object. So I think you're talking
18 about some short strokes, like this. And there are several.

19 Q. Let me go back a couple of times, and first of all,
20 I'll call your attention to Exhibit 33E, which shows both the
21 hubcap and the fender area, even though it doesn't show the
22 detail of the photograph on the screen; correct?

23 A. Yes. That's correct.

24 Q. But given the relationships spatially between the
25 area that you called the brush stroke transfer stain, or I'm

1 calling it that, based on what you said, and this large
2 transfer stain, does that support an inference that perhaps
3 it was his head, his bloody head, that caused the large
4 stain?

5 A. Yes.

6 Q. Would that be consistent with then a later blow
7 being struck while his head was on the ground?

8 A. Oh, yes.

9 Q. And would that be consistent with the direction of
10 the castoff spatter that you note in the digital version of
11 33C?

12 A. Yes. That's correct.

13 Q. Now, does that explain at least the most significant
14 conclusions you could draw from the area of spatter at the
15 rear of the car?

16 A. Yes, that is.

17 Q. Okay. What were you able to tell -- I'm losing
18 photographs.

19 Oh. Still on the same one I just took down. I note
20 this area of orange cones in 33H. The lower right-hand.

21 A. Yes.

22 Q. Do you know what those are there for?

23 A. According to the reports, that was the extent of the
24 blood spatter that they found.

25 Q. How far out it went?

1 A. That's correct, yes.

2 Q. Okay. And that's the blood spatter on the surface
3 of the parking lot.

4 A. Yes, it is.

5 Q. Were you able to infer a lot from the blood spatter
6 on the surface of the parking lot?

7 A. Only that it was low-angle impact -- low-angle
8 spatter. I -- there's not a lot that I can say about that,
9 because when I look at the photographs and I look at the
10 major portion of that spatter, it leads me back to
11 Mr. Heitholt's present position in the photographs. That is,
12 that position that he's in at -- at the time that the
13 photographs are taken, and not to any of the other areas of
14 the -- of the incident. And because I know that there was
15 activity going on in that area, I don't -- I cannot say what
16 created that spatter. That spatter is consistent with an
17 object falling into or being placed down into a pool of
18 blood. That's when you get that kind of spatter that comes
19 out. As a matter of fact, you've all done that in your
20 kitchens when you drop a pot that's got, you know, spaghetti
21 sauce in it or something, and you see it kind of (indicating)
22 out like that. That's exactly what we're talking about here.
23 If a foot or an object of some sort drops into the pool, you
24 get that spatter that comes out. And when you look at this
25 spatter, it all goes right back to that area right around

1 Mr. Heitholt's head.

2 Q. Would that also relate back to the area where the
3 medical intervention --

4 A. Yes.

5 Q. -- took place?

6 A. Exactly.

7 Q. And when a co-worker may have turned the body.

8 A. That's correct. That's why I really can't --
9 there's nothing that I can say or infer from that without,
10 you know, that probability.

11 Q. Did you also examine some blood stains on the
12 interior of the vehicle depicted in State's Exhibit 74, 74A
13 through G, and in State's Exhibit -- excuse me, Defendant's
14 Exhibit Q?

15 A. Yes, I did.

16 Q. And could you explain what you noted in those
17 photographs and its significance as far as you could tell?

18 A. Yes. If I could come back down.

19 Q. Sure.

20 A. 74A depicts the front seat of the vehicle. And you
21 see that there's a black nylon-looking kind of briefcase.
22 There's this pad, yellow legal pad. Then there is a pair of
23 glasses that are sitting here.

24 This legal pad is of interest to me, because it has
25 transfer stains on it or what appears to be transferred blood

1 stains on it.

2 Q. Would it be significant or easier if you saw that on
3 the big screen?

4 A. Yes, it would. Actually what we have is just a
5 portion of it. If I could --

6 Q. Well, actually --

7 A. We have both. Yeah. Okay.

8 MR. ROGERS: Well, let's first of all look at jpg
9 number 67 on the other CD.

10 THE COURT: Mr. Rogers, when you're concluded with
11 the examination about this particular item, then we will
12 recess. I believe the jury's lunch has arrived. But we'll
13 let you finish on this -- on this photograph.

14 MR. ROGERS: Okay. This particular photograph or
15 the other photograph, however the Court pleases.

16 THE COURT: Well, I'll allow the witness to testify
17 to matters contained here.

18 MR. ROGERS: Okay.

19 THE COURT: Before we break.

20 MR. ROGERS: Great.

21 Q. Go ahead and tell us about that.

22 A. If you look at this pad, there's a couple of areas,
23 again, of interest. One of the areas is right down here.
24 That immediately comes to -- that shows up. Okay. At a
25 distance, and in this photograph -- if you could rotate it.

1 Well, in this photograph, it certainly looks like a blood
2 stain. No question about it. It even has a little ragged
3 edge on it, like blood that was coming out.

4 But the important stains are up here. And there's
5 one over here. In addition, there's a stain right back here.
6 All of -- these are -- these appear to be transfer blood
7 stains. This one -- well, on closer examination, this one is
8 actually -- appears to be a leaf. That's sitting under the
9 glasses. This, what you see here, is the writing on the pad.
10 So that's not a blood stain, but -- can you move it? Maybe
11 not.

12 Okay. Here, right here, I find this to be very
13 significant, because this does appear to be a transfer stain.

14 Okay.

15 If we could go to the next -- that next photograph.

16 Q. Which would be Exhibit Q. 95.

17 A. That has all of the characteristics, in my
18 experience, of a transfer of stain. And there is another one
19 on the other side of the pad that also appears to be a
20 transfer of stain. There is -- that stain, as I said, on
21 interior of -- or on the back of the seat of the car, that
22 also appears to be a transfer of stain.

23 Now, the significance of these is -- there are
24 several possibilities. Okay. Certainly one possibility is
25 that someone with blood on their hands was moving these

1 objects around. The question of who that is is open in the
2 air, of course. The other possibility is that these are
3 artifacts that appear to be blood stains, but are not. I
4 can't say with a hundred percent certainty that they are
5 blood stains, because there is no evidence that they were
6 collected or tested.

7 Q. Okay. And you didn't have the actual legal pad --

8 A. And I didn't have the legal pad. But it certainly
9 does appear -- it certainly does appear to be a transfer of
10 blood stain.

11 MR. ROGERS: Time for lunch?

12 THE COURT: Time for lunch.

13 Ladies and gentlemen, the Court again reminds you of
14 what you were told at the first recess of the Court. Until
15 you retire to consider your verdict, you must not discuss
16 this case among yourselves or with others, or permit anyone
17 to discuss it in your hearing. You should not form or
18 express any opinion about the case until it is finally given
19 to you to decide. Do not read, view, or listen to any
20 newspaper, radio, or television report of the trial.

21 We will commence at 1:00.

22 The witness may step down. And if you care to have
23 lunch, you may. Discuss not your testimony with other
24 witnesses. But you're free to leave the courtroom at this
25 time if you wish.

1 THE WITNESS: Thank you.

2 THE COURT: We'll be in recess then.

3 Is there anything we need to take up?

4 MR. ROGERS: Yes, Your Honor.

5 THE COURT: All right. If the lawyers will remain
6 then.

7 - - -

8 The following proceedings were held out of the presence
9 of the jury:

10 THE COURT: Yes, sir.

11 MR. ROGERS: Your Honor, with regard to our motion
12 to endorse, we now have present both Mr. Canada and I believe
13 Miss Griggs, and we would like to make an offer of proof with
14 those witnesses, explaining the late endorsement and hoping
15 to get the Court to change its mind.

16 THE COURT: I have not ruled on the endorsement of
17 the female that you've endorsed. Miss Griggs. I've taken
18 that under advisement. Absent some -- I'm going to give both
19 sides an opportunity to be heard on whether or not the state
20 actually knew of her testimony and failed to disclose it to
21 the defense.

22 MR. ROGERS: With regard to Mr. Canada, Your Honor,
23 we would ask the Court to reconsider its earlier ruling. And
24 I conceptually blurred the two when I spoke earlier
25 obviously. We have, since the Court's ruling, learned from

1 Mr. Canada that he also asserts that he was contacted by
2 members of the prosecution staff in the past. And I will
3 advise the Court that we have no reports or disclosure of any
4 of that contact. So I think that he's in the same situation.
5 At least that's what I anticipate his testimony to be from
6 what I'm told.

7 THE COURT: I'll give you ten minutes to present
8 these witnesses. I'm going to have lunch, and the reporter
9 is going to have lunch too. So I -- you may call your
10 witness.

11 MR. ROGERS: Mr. Canada.

12 THE COURT: I assume these witnesses are outside
13 this courtroom.

14 MR. ROGERS: Mr. Canada came in -- and does
15 Mr. Singer need to leave while we do this?

16 THE COURT: Well, he -- he should.

17 MR. ROGERS: Yeah. You need to wait. And don't
18 listen to the media.

19 THE COURT: Would you raise your right hand, please.

20 - - -

21 KRISTOPHER CANADA,
22 being first duly sworn by the Court, testified as follows:

23 THE COURT: You may take the witness stand.

24 MR. ROGERS: Your Honor, while this witness
25 testifies, I'd request that Mr. White and Mr. Hawes be asked

1 to leave the courtroom.

2 MR. CRANE: What if -- I want to have him see if he
3 recognizes them. Can we just do that right now?

4 MR. ROGERS: They're both here and looking at him
5 now.

6 MR. CRANE: Yeah.

7 MR. ROGERS: The record can --

8 THE COURT: I'll let them approach and see if they
9 recognize him. And I don't know if he always had facial hair
10 or not. So I'll let them -- they can come forward and take a
11 look at him, if they're not real farsighted.

12 MR. CRANE: Well, no, I was talking about him seeing
13 you.

14 MR. HAWES: Oh. Okay.

15 THE COURT: Okay. In other words, you want the
16 witness to take a look at your investigators.

17 MR. CRANE: Yeah. These two guys right here.

18 THE WITNESS: Yes, sir.

19 MR. CRANE: Do you recognize either one of them?

20 THE WITNESS: Yes.

21 THE COURT: Just a moment. They may step outside
22 the courtroom. I will allow defense counsel to inquire
23 first. If you want to call them back into the courtroom --

24 MR. CRANE: Okay.

25 THE COURT: -- and make those questions, you may on

1 cross-examination.

2 MR. CRANE: Okay. That's fine, Judge.

3 - - -

4 DIRECT EXAMINATION

5 BY MR. ROGERS:

6 Q. For the record, tell us your name.

7 A. Kristopher Canada.

8 Q. And Mr. Canada, what was your job back in October
9 and November of 2001?

10 A. I was a bartender at By George.

11 Q. And were you the bartender who worked Halloween
12 night?

13 A. I was one of many.

14 Q. One of many. Okay. And on Halloween night, what
15 time did By George's close?

16 A. Same time as always. We turn the lights on at 1:15.
17 Everybody was out by 1:30.

18 Q. And what happened at 1:30?

19 A. Doors were locked.

20 Q. Doors were locked?

21 A. Yes, sir.

22 Q. And has -- before this week, has anyone asked you
23 questions like that?

24 A. Yes, sir.

25 Q. And have you given them the same answers?

1 A. Yes, sir.

2 Q. And do you know who asked you those questions?

3 A. I believe the dark-headed investigator that was just
4 in here. I can't recall his name.

5 Q. Okay. And was that the man wearing the dark jacket
6 and the tie, standing behind the guy with the gray hair?

7 A. Yes, sir.

8 MR. ROGERS: May the record reflect the witness has
9 indicated Mr. White.

10 MR. CRANE: Yeah. It's one of the two guys
11 standing, the one with the dark hair. Yeah, I don't have --

12 Q. How long ago was that?

13 A. I really can't be that sure, but I would say
14 probably -- I want to say eight months to a year maybe. It's
15 been a while.

16 Q. And you've never been contacted by anybody else
17 about being a witness in this case, have you?

18 A. No, sir.

19 MR. ROGERS: I don't have any further questions for
20 this witness, Your Honor.

21 THE COURT: You may inquire, Mr. Crane.

22 - - -

23 CROSS-EXAMINATION

24 BY MR. CRANE:

25 Q. Where did he talk to you?

1 A. They came to my work at Boone Hospital Center.

2 Q. Okay. And you say "they"?

3 A. Him.

4 Q. Okay. Was -- the guy was by himself?

5 A. Yes. They -- I believe they tried to contact me at

6 work a couple times, and then eventually they got a hold of

7 someone in security and found out that I was working that

8 day, and I came down and talked to the investigator.

9 Q. Okay. And what did you talk about?

10 A. What time the bar closed, what my duties entailed at

11 the bar. That's about it.

12 Q. Okay. And you remembered specifically what time the

13 bar closed on Halloween of 2001?

14 A. Yes, sir.

15 Q. You had a memory -- you're talking about a

16 conversation you had eight months to a year ago today; right?

17 A. Yes, sir.

18 Q. And your testimony is you had a memory when you

19 talked to the guy with dark hair of the time you closed on

20 October 31st, 2001.

21 A. I don't know if I could remember that exact date,

22 but as -- you know, the law of the land is you close by 1:30.

23 And that's what time our boss always had us close.

24 Q. Right. That's what time the bar's supposed to be

25 closed.

1 A. Yes.

2 Q. Is it your testimony that you told the guy with the
3 dark hair, we'll just call him Ben, White, that on October
4 31st, 2001, you closed at 1:30, and you remembered that date
5 and that time as when the bar closed.

6 A. Yes, sir.

7 Q. And your testimony here is today that you don't
8 remember that date specifically. That that's when you always
9 close.

10 A. I didn't remember whenever I talked to the
11 investigator.

12 Q. So since you've talked to the investigator, have you
13 talked to somebody in Mr. Rogers' office or working for the
14 defense?

15 A. In the past day.

16 Q. Okay.

17 A. Yesterday.

18 Q. Just today.

19 A. Yesterday.

20 Q. And you hadn't talked to anyone before that.

21 A. No, sir.

22 Q. How is it that they indicated they'd located you?

23 A. I have no idea.

24 Q. And when you were talked to before -- at Boone
25 Hospital?

1 A. Yes, sir.

2 Q. -- how are you aware that it wasn't somebody from
3 the defense that was talking to you?

4 A. I don't know. They -- the people I talked to said
5 that this was an investigator who used to be a Columbia
6 Police Department -- or used to be a Columbia police officer.

7 Q. The people you talked to?

8 A. The security officer at Boone Hospital who, you
9 know, called me down from work and brought me down into their
10 office, and I had the interview there.

11 Q. Okay. And so you're not aware of how the defense
12 found out about you today --

13 MR. ROGERS: I'll object to that as irrelevant to
14 the subject of this hearing.

15 THE COURT: Well, how, Mr. -- Mr. Crane, how is that
16 relevant? How is it relevant how they --

17 MR. CRANE: That they -- they just found out about
18 him today?

19 MR. ROGERS: Yesterday.

20 THE COURT: He said yesterday.

21 MR. CRANE: Or yesterday. I mean, I'm trying to
22 explore whether or not they had made contact with him before
23 yesterday.

24 THE COURT: Well, you can ask that question.

25 MR. CRANE: Okay.

1 RECROSS-EXAMINATION

2 BY MR. CRANE:

3 Q. Have you talked to David Tye recently?

4 A. Yes. Last night.

5 Q. You talked to David Tye last night?

6 A. Yes.

7 Q. And is David Tye the former owner of By George's?

8 A. Yes, sir.

9 Q. And he's a potential witness in this case. Correct?

10 A. I guess.

11 Q. And had he -- did he indicate to you that he had
12 talked to the defense attorneys in this case?

13 A. No, sir.

14 Q. What did Mr. Tye tell you?

15 A. I asked him if he was having to come in tomorrow
16 and --

17 Q. You called him?

18 A. Yes.

19 Q. Okay. And that was after you'd been contacted by
20 the defense or before?

21 A. After.

22 Q. Had you talked to Mr. Tye about this case before
23 that?

24 A. No, sir.

25 MR. CRANE: No further questions.

1 MR. ROGERS: Thank you, sir.

2 THE COURT: You may step down. If you'd step
3 outside the courtroom, please.

4 THE WITNESS: Okay.

5 MR. ROGERS: Miss Griggs, please.

6 THE COURT: Literally, I'm going to recess in five
7 minutes. It's 20 minutes into the lunch hour. And --

8 MR. ROGERS: I'm trying to move as quickly as I can,
9 Your Honor. And that's one of my objections to the
10 cross-examination. But --

11 THE COURT: Well, if it's not relevant, you know how
12 to make an objection, I assume.

13 MR. ROGERS: That's correct.

14 THE COURT: Do you want to have those individuals
15 step into the courtroom? Your investigators?

16 MR. CRANE: Okay. Yeah.

17 THE COURT: Would you come forward and be sworn,
18 please. Raise your right hand.

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MELISSA RENEE GRIGGS,

being first duly sworn by the Court, testified as follows:

THE COURT: Take the witness stand, please.

And if we could just identify the witness, so that it would be on the record who it is that's saying this.

- - -

DIRECT EXAMINATION

BY MR. ROGERS:

Q. State your name, please.

A. Melissa Griggs.

THE COURT: All right.

Q. Miss Griggs --

THE COURT: Would you come forward, please. Both --

Mr. White.

MR. HAWES: I recognize her now, Your Honor. I'm the one that talked to her.

THE COURT: All right.

MR. ROGERS: Okay. Fair enough.

MR. CRANE: Did you do a report?

MR. HAWES: No.

Q. Now --

MR. ROGERS: That saved a lot of time.

Q. Do you remember talking to that guy?

A. I do. Yes.

Q. And did you tell him what time By George's closed on

1 Halloween night?

2 A. I did.

3 Q. 2001.

4 A. Yes.

5 Q. You were at By George's Halloween 2001?

6 A. Yes.

7 Q. Do you know Charles Erickson?

8 A. Yes.

9 Q. Did you see him there?

10 A. I did.

11 Q. Did you talk to him there?

12 A. Yes.

13 Q. And did you tell Mr. Hawes what time By George's

14 closed?

15 A. Yes.

16 Q. And what time did you tell him it closed?

17 A. 1:30.

18 Q. Thank you.

19 MR. ROGERS: That's all.

20 - - -

21 CROSS-EXAMINATION

22 BY MR. CRANE:

23 Q. Who did you talk to?

24 A. Charles Erickson.

25 Q. Did you also tell that to Mr. Hawes?

1 A. No.

2 Q. So that's the first time you told anybody that?

3 A. Yes.

4 Q. Okay. And --

5 MR. CRANE: Well, Judge, I guess this is for -- the
6 rest of this is going to be an issue --

7 THE COURT: All right. Anything further?

8 MR. ROGERS: No, Your Honor. Thank you.

9 THE COURT: You may step down. Would ask you to be
10 excused from the courtroom, please.

11 MR. ROGERS: No further evidence on this point from
12 the defense at this juncture, Your Honor.

13 THE COURT: Does the state wish to present any
14 evidence on this issue?

15 MR. CRANE: Well -- Ben, do you remember talking to
16 Canada?

17 MR. WHITE: (Shaking head from side to side.)

18 MR. CRANE: Do you remember?

19 MR. WHITE: No.

20 MR. CRANE: You can't say you didn't?

21 MR. WHITE: I can't say I didn't.

22 MR. CRANE: He said -- we'll stipulate that
23 Detective -- or Investigator White says he can't say whether
24 or not he did talk to Canada. And we'll also agree that --

25 MR. WHITE: Was it prior to my employment here or

1 when I was a detective?

2 MR. CRANE: He said eight months to a year ago.

3 MR. WHITE: No, I don't.

4 THE COURT: Are you offering him as a witness?

5 MR. CRANE: No. We'll agree that he would testify
6 that he can't remember whether he talked to Mr. Canada or not
7 eight months to a year ago.

8 MR. ROGERS: I'll accept that, Judge.

9 THE COURT: All right.

10 MR. ROGERS: I think we've established that this was
11 information known to the state or its agents, or at least
12 with regard to -- I think with regard to both of these
13 witnesses. I think the exculpatory nature of the information
14 is obvious, in the context of the case. I think its
15 impeaching nature with regard to Mr. Erickson is obvious
16 within the context of the case. Whether or not a report is
17 generated, the state has an absolute constitutional
18 obligation to provide that information to the defense. That
19 obligation is rooted in the due process clause of the Fifth
20 Amendment to the United States Constitution, made applicable
21 to this prosecution by the Fourteenth Amendment. And I don't
22 think the state, which, by failing to memorialize and
23 disclose exculpatory information, has any standing to
24 complain of the late endorsement when we finally discover the
25 exculpatory information.

1 MR. CRANE: Well, first of all, Judge, the state has
2 tendered voluminous and complete discovery to the defense in
3 this case. I never heard about these people before. No
4 report was generated. And the issue is solely the one of
5 when these people think George's closed at 1:30.

6 And I want to start off by saying that the idea that
7 Mr. Rogers is trying to imply is that I'm crooked. And that
8 I have deliberately withheld evidence from the defense. And
9 that is simply not true. There have been no reports
10 generated on this. And further, with respect to Ms. Griggs,
11 a report that was duly tendered to the defense, in fact, at
12 discovery page 2277, discovery page number 2277, supplement
13 332, is the complete report of the proffer entered into by
14 Chuck Erickson on October 1, 2004. And in that, Mr. Erickson
15 is recorded as saying: "We asked Erickson if there were
16 other people at By George that had seen him and Ferguson
17 together that night, and he stated there was a girl who had
18 seen them before the crime was committed by the name of
19 Melissa Griggs." That's in the report.

20 Now, Judge, I don't know how the defense themselves
21 got onto Canada. And it's all well and good that they did.
22 They have been noticed up with respect to David Tye, who's
23 the owner of the -- who was the owner of By George's. And
24 would be someone -- we gave them the report on that. Now, if
25 my guy didn't write down what Canada said about the -- it

1 sounds to me like he's just saying he thinks the bar closed
2 at 1:30 because they always did. Okay. I'll take the blame
3 for that. But I certainly do not think it's appropriate to
4 be crucified as a -- some kind of obstructionist, subversive,
5 on this information.

6 THE COURT: There's not going to be any more
7 argument.

8 Mr. Crane, I don't believe the allegation is that
9 you personally withheld information that you knew existed.
10 However, as you're aware, whether your secretary or your
11 investigator knew of it, it is imputed in law that you knew
12 it. I'm not --

13 MR. CRANE: I recognize that.

14 THE COURT: And I don't think defense counsel is
15 saying that you did that. I'm going to sustain the motion to
16 endorse. However, I will permit you time to have someone,
17 co-counsel or some other attorney in the office, to talk to
18 those individuals before they're called as witnesses.

19 MR. CRANE: And that would be with respect to Griggs
20 as well?

21 THE COURT: Both witnesses.

22 We'll be in recess until 1:00.

23 (Recess taken.)

24 - - -

25 The following proceedings were held out of the presence

1 of the jury:

2 THE COURT: Is defendant ready to proceed?

3 MR. ROGERS: Yes, Your Honor.

4 THE COURT: Is state ready to proceed?

5 MR. CRANE: Yeah. Mr. Knight's going to -- I'm
6 going to -- I've been --

7 THE COURT: I understand --

8 MR. CRANE: -- talking to witnesses.

9 THE COURT: -- that this witness appears to be
10 Mr. Knight's, since he's the one that's made objections to
11 certain things, so I assume that would be his witness on
12 cross.

13 MR. KNIGHT: That's correct, Your Honor.

14 THE COURT: We are only missing one essential part
15 of this equation here.

16 MR. ROGERS: The jury.

17 THE COURT: Yes.

18 Is the jury ready to come back in?

19 DEPUTY COURT MARSHAL BAER: Yes, Judge.

20 - - -

21 The following proceedings were held in the presence of
22 the jury:

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RONALD SINGER,

resumed the stand and testified further:

THE COURT: Defendant may inquire.

MR. ROGERS: Thank you, Your Honor.

- - -

RESUMED DIRECT EXAMINATION

BY MR. ROGERS:

Q. Mr. Singer, before the lunch break, had we covered the significant findings that you were able to determine regarding the blood stain patterns at the scene? Most of them?

A. Yes, I think we have.

Q. Okay. Let me move then to the luminol trail. You observed photographs, including those on State's Exhibit 41, 41A, 41B, 41C, 41D, 41E; is that correct?

A. Yes.

Q. And is it your understanding that the photo markers depicted in photographs 41B, C, D, and E were, in fact, placed at the sight of chemiluminescence reacting from -- from the reaction with luminol and something there on the sidewalk?

A. Yes.

Q. And did you also discern little chalk arrows by where those were?

A. Yes, I did.

1 Q. Okay. Do you have any criticism of the way the
2 luminol examination was documented and preserved?

3 A. Well, yes, I do. It -- what I received was two CDs
4 that had a large number of photographs. One was marked
5 "Luminol Trail 1;" one was marked "Luminol Trail 2." And in
6 the report -- in one of the reports that I have, reference is
7 made to testing the area for luminol and getting a positive
8 reaction. Unfortunately, the only thing that was on the CDs
9 are photographs such as the five that are on this -- on this
10 board. It was basically photographs of yellow numbered
11 placards. There was -- I didn't even -- I couldn't find, in
12 the material that had been given to me, any descriptions,
13 other than they appeared to be shoe prints. I believe that's
14 the way that it was described. There was no description that
15 said anything about the size, the intensity, anything else.
16 Nor was there any photographic documentation of the
17 luminescence itself.

18 So basically, for me, you know, when I'm asked to
19 evaluate what all of this means, the significance of all of
20 this, I have nothing to evaluate, because all I see is a line
21 of yellow placards, and that means nothing to me.

22 Q. Okay. With regard to the technique of luminol
23 examination, is it a fair statement that there has to be
24 something that shields the area being examined from outside
25 light?

1 A. Well, yeah. It -- the basic reaction is a chemical
2 reaction that occurs between blood, actually the heme
3 molecule in the blood, and the chemical, luminol. Luminol is
4 actually a trade name for a word that's about that long, and
5 I don't remember what it is, frankly, but it -- and this
6 reaction occurs. And the reaction basically causes a
7 fluorescence. And so it has to be darkened in order to see
8 the fluorescence. And depending on the intensity, of course,
9 and depending on the amount of blood that's present, or other
10 substances, because it is not specific for blood, by the way,
11 you get different intensities, you get different shapes,
12 sizes. And all of that needs to be recorded.

13 Q. Okay. With regard to the photographs depicted, did
14 you see anything that would indicate how light was excluded
15 during the observation of the fluorescence?

16 A. Yeah. In some of the photographs, I don't know that
17 it's depicted on any of these, in some of the photographs you
18 can actually see the team down -- further down the block.
19 Actually -- it appears that they're conducting the luminol
20 examination. And it looks like what they've done is
21 constructed some sort of box that will go -- fit over the
22 concrete, and then they're -- I don't know exactly how
23 they're look into it, but, you know, the spraying occurs --
24 luminol is a liquid, by the way, which you spray. And so you
25 spray it on, and then you look for this fluorescence. So

1 they've gotten some device to darken the area, keep the
2 ambient street light out.

3 Q. So how would one go about recording the luminescence
4 inside such a device?

5 A. Well, I mean, you know, if there's a hole for you to
6 look into, there's a hole for you to take a picture through.
7 And generally speaking -- now, I do realize that there are
8 certain limitations to this. Okay. And obviously -- and I'm
9 not trying to be -- see how I can put this. I'm not trying
10 to be overly critical of the technology that was used. I
11 think that it was, you know, it was -- at least the concept
12 that they had was a well-thought-out concept. The problem is
13 that, you know, if you want to photograph a shoe print -- now
14 I'm talking about any kind of shoe print. If you want to
15 photograph a shoe print, there's certain rules that generally
16 you're supposed to follow. And one is: That you're supposed
17 to shoot the photograph, you know, on the same plane as the
18 shoe print, so that you don't get any distortion of the
19 image. Well, in this case, what you're dealing with here is
20 a photoluminescent reaction, a fluorescent reaction, that you
21 just want to record. And it would seem to me that if you
22 cannot, under the circumstances, set a tripod up and level it
23 and get the thing right, what you want to do is at least get
24 a photograph of what it is that you're dealing with, what
25 you're seeing in there, so that someone else can look at that

1 photograph and say, "Oh. Okay. I either see what you're
2 seeing or I don't see what you're seeing and I disagree with
3 what you've said." In this case, you have nothing.

4 Q. Okay. And since you have no detail to really look
5 at, you have nothing else to say about the luminol trail.

6 A. No. You know, as I indicated in my report, if -- if
7 it is indeed blood that was reacting, the trail basically
8 leads along the side of the building and then up Fourth
9 Street to Walnut.

10 Q. Calling your attention, sir, to State's Exhibit 39,
11 and more particularly 39E, have you seen that photograph
12 before?

13 A. Yes, I have.

14 Q. And what does that appear to be?

15 A. It appears to be a bloody heel print.

16 Q. Okay. Was that photographed in accordance with the
17 rules you've told us about?

18 A. It appears to be, yes.

19 Q. So it's basically straight down on it, so it doesn't
20 distort the photograph.

21 A. That's exactly right, yes.

22 Q. And would the same be true of the print depicted in
23 39F?

24 A. Yes. That's correct.

25 Q. And the print depicted in 39G.

1 A. Yes.

2 Q. And I don't know how well from your -- where you are
3 you can see 39C. Let me bring it closer to you.

4 A. Oh, yes.

5 Q. Is that something you've noted before?

6 A. Yes, it is.

7 Q. And what is that?

8 A. It -- it does have a certain -- a tread pattern
9 attached to it. It could certainly be a shoe print. It's
10 hard to say. It -- because you're dealing now, not with --
11 the yellow background is nice, because the yellow and the red
12 kind of contrast one another. Here it's a darker background,
13 and the print itself is dark, so it's a little difficult to
14 see. But that does appear to also be a shoe print.

15 Q. By the way, these L-shaped cards that are there with
16 numbers on them, on each of these photographs, is that
17 another of the ways one photographs shoe prints or tread
18 prints?

19 A. Yeah. Actually, those -- those little L-shaped
20 rulers are very nice for photographing anything that's laying
21 flat or that's on a flat surface, because what it does is, it
22 gives you a vertical and a horizontal scale from which to
23 work. One of the things that we like to do or attempt to do
24 with shoe prints particularly, but with other items as well,
25 is to blow it up so that it's actual size. And this allows

1 you to do that. And that's, of course, one of the reasons
2 you want to keep your camera in the same plane, so that you
3 don't get any -- any stretching when you enlarge it.

4 Q. I'm going to hand you what has been marked for
5 identification as Defendant's Exhibit I and Defendant's
6 Exhibit J and ask you if you were provided with those
7 photographs in the course of your examination of the evidence
8 in this case.

9 A. Yes, I was.

10 Q. And what's Defendant's Exhibit I?

11 A. I'm sorry?

12 Q. Defendant's Exhibit I. That's the top one.

13 A. Oh. Defendant's Exhibit I is photographs number --
14 well, that are identified as number 3 and number 4.

15 Q. That would be -- 3 would be 39E?

16 A. Right.

17 Q. State's Exhibit 39E. And 4 would be State's Exhibit
18 39F?

19 A. Yes. That's correct. And it shows those tread
20 patterns of those two shoe prints. And then next to it is a
21 photograph of a -- the bottom of a running type shoe, with
22 the logo "Sketchers" on it.

23 Q. Okay. And what is 30 -- what is Defendant's Exhibit
24 J?

25 A. Defendant's Exhibit J is an enlargement of the

1 Sketchers shoe.

2 Q. And if you had a footprint such as the one in
3 Exhibit 39E, how would you go about comparing it to different
4 brands of shoes?

5 A. Well, what you look at is the tread pattern.
6 It's -- that is, if you look at the bottom of most casual
7 type shoes, or shoes with rubber soles, what you see is that
8 they have some kind of pattern on the bottom of them, some
9 kind of either wavy or chevrons or little dots, or some of
10 them say Nike, some of them say other things across the
11 bottom of them. And basically what you do is look at that
12 tread pattern, and then either use your own experience or you
13 compare it to some database that you accumulated either in
14 the laboratory or some other outside database. Most of us
15 don't accumulate large databases of these because we don't
16 get a lot of shoe print cases. And -- or the ones we do get
17 are, you know, Did this shoe print -- did this shoe make this
18 shoe print? And so it's a different kind of comparison. So
19 what we do is rely on a source like the FBI.

20 Q. And when you rely on a source like the FBI, do you
21 get back a photograph such as Exhibit J?

22 A. Yes. Generally that's what they'll do. They'll
23 send you a report that says, "Our database -- the one that
24 most closely matches the tread pattern is such and such a
25 shoe," and then they'll send you an illustration.

1 Q. And can you tell from that illustration if the
2 Sketchers standard, I'll call it, is consistent with the shoe
3 print in Exhibit 39E, which is the number 3 on the -- on
4 Defendant's Exhibit I?

5 A. Yes. In general it is. There is some detail that's
6 missing from the photograph. And certainly all you're
7 looking at is the heel portion, so you can't, you know, make
8 any great comment about the whole shoe, but it certainly does
9 match the heel portion of the Sketchers that they came up
10 with.

11 Q. And it doesn't match any other type of shoe that
12 you're familiar with?

13 A. Not that I know of offhand, no.

14 Q. And you've seen Nikes?

15 A. Yes.

16 Q. You've seen New Balance?

17 A. Yes.

18 Q. You've seen Timberland boots?

19 A. Yes.

20 Q. With regard to the shoe print depicted in Exhibit
21 39F, which is number 4 on Exhibit I, is there enough detail
22 there for you to either rule out or include the Sketchers as
23 having made it?

24 A. Well, I think there's enough detail there to say
25 that the Sketchers probably did not make that print, but

1 there's not a lot of detail there. But when you look at the
2 distance between the wavy lines, it certainly is different
3 than the distance between the wavy lines and the other thing,
4 or in the depiction of the shoe. That, again, with the
5 caution that I'm not sure that this is a one-to-one
6 photograph. And I know that this is not, so. But it
7 certainly does appear to be different.

8 Q. And looking at State's Exhibit 39G, has the number
9 5, how does that compare with the Sketchers standard?

10 A. Well, G looks pretty much like the Sketchers.
11 Again, it's lacking a lot in detail, but on the surface it
12 does have a similarity to the Sketchers, yes.

13 Q. Now, given the L-shaped ruler on -- in Exhibit 39E,
14 were you able to determine the size of that shoe?

15 A. No, I was not --

16 MR. KNIGHT: I would object at this time.

17 MR. ROGERS: He was going to say no.

18 MR. KNIGHT: Okay. Then I'm not going to object.

19 MR. ROGERS: Okay.

20 Q. Were you able to determine the size?

21 A. No, I was not.

22 Q. Okay.

23 MR. ROGERS: Those are all the questions I have,
24 Your Honor.

25 THE COURT: You may inquire, Mr. Knight.

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CROSS-EXAMINATION

BY MR. KNIGHT:

Q. You saw a photograph of a legal pad sitting on the front seat?

A. Yes.

Q. Driver's seat? And I'd like to show you what's been marked as State's Exhibit 76. Does this appear to be what you saw on that image up there on the screen?

A. Uh-huh. Yes, it does.

Q. And you're testifying that this area right here in the top corner, that appeared to you, when you looked at the photograph, to be blood transfer; is that correct?

A. Yes, it did.

Q. Okay. Now that you've had a chance to actually look at the exhibit itself and -- has your opinion changed at all?

A. Yes, it has. This -- it appears that this was sprayed with anhydrant, to develop fingerprints. And that is some kind of pattern that was developed with an anhydrant. If that's correct. I -- and it doesn't look like -- you know, it doesn't look like a blood stain, no.

Q. Okay. And also -- you talked about the luminol trail.

A. Yes.

Q. Singular. And you had -- Jeff Nichols, you know

1 that he's the person that was involved in the luminol
2 processing of this area from the Tribune on Fourth -- Fourth
3 Street going south, and as you can see on this exhibit, going
4 south all the way to Broadway.

5 A. Yes.

6 Q. You understand that, don't you?

7 A. Yes, I do. Yes.

8 Q. And he testified on direct examination that, as he
9 started documenting this luminol trail, or as he started
10 using this luminol to detect nonvisible blood, that when he
11 got to this point, right in here, about halfway -- halfway
12 between this alley and Walnut Street, while he was still on
13 this sidewalk here on Fourth, he saw two trails. He saw two
14 trails side by side.

15 A. Uh-huh.

16 Q. And you've seen photographs also of the placards
17 that showed two different trails.

18 A. Yes.

19 Q. Is that right?

20 A. Yes.

21 Q. So you wouldn't have any quarrel with his
22 determination that there were two independent trails, at
23 least at that particular point.

24 A. Well, the only problem that I have, I mean, I -- I
25 don't have any quarrel -- if we assume, and I have no reason

1 to doubt that he knew what he was looking at when he saw the
2 photoluminescence, then I have no reason to doubt that he saw
3 two areas that photoluminesced, and that they, in his
4 opinion, formed two trails. Without seeing the
5 photoluminescence myself, I can't make any comment.

6 Q. Okay. And also -- let's go -- I want to just
7 briefly summarize what I think your testimony is with regard
8 to the blood stain interpretation on the car at the crime
9 scene. The blood evidence that you found inside of the car,
10 this -- you had low impact, medium impact on the inside
11 driver's window. That's consistent with Kent being upright;
12 is that correct? And being struck at least twice in an
13 upright position.

14 A. Yes. That's correct.

15 Q. That's right. Because the first time wouldn't be a
16 blood-causing event.

17 A. That's correct, yes.

18 Q. Okay.

19 A. Well, it could -- it would be a blood-causing event.
20 It wouldn't -- the blood wouldn't be there for --

21 Q. To --

22 A. -- to have spatter.

23 Q. Okay. And -- okay. But then after that -- can you
24 please come down off the stand for just a second?

25 A. Sure.

1 THE COURT: You can take the laser with you if you
2 want.

3 Would you like to take the laser? I think it's here
4 on the bench.

5 THE WITNESS: Oh. Yes.

6 THE COURT: Right over here.

7 Q. And then after that, you focused pretty much on this
8 area that's right above this rear wheel; is that correct?

9 A. Well, I focused on the whole area of the rear wheel.
10 You have to look at the whole picture. And what you see is:
11 There's this large stain. There's the staining on the wheel,
12 and then there's the staining above the wheel.

13 Q. Okay. Let's just talk about the staining above the
14 wheel first.

15 A. Sure.

16 Q. This -- this area right here is something that -- I
17 don't quite understand what you said before. Did you say
18 that this, these linear marks right here, did you say that
19 you thought that was maybe mud?

20 A. Yes. That does not appear to be blood to me.

21 Q. Okay. How about if you look over here at this
22 photograph. 33D. Doesn't that appear to be red, just like
23 this is red, just like this is red, which you admitted
24 before, that appears to you to be, especially right here,
25 impact spatter; correct? I mean --

1 A. That's true. But when I -- you know, when I look at
2 the totality of it, you've got one picture here that's got a
3 little bit of a red tint to it here.

4 Q. I mean, are we talking --

5 A. There's nothing here. I mean, I can't tell exactly
6 what it is that this is showing, based on here. My opinion
7 is that these long linear strikes here are probably, and
8 again, I'm only basing this on the photograph that I'm
9 seeing, and I've got -- you know, the caveat all along has
10 been that there's been intervention and everything else.
11 This appears more typical of mud. This is not what we would
12 see, say, with a castoff stain or anything else. This is --
13 this is representative of something that's of a higher
14 velocity, to me, because there's no individual staining here.
15 It's more long streaks.

16 Q. But see, I've got a couple of problems with that.
17 My first problem is that the police officer who was actually
18 at the scene, Jeff Nichols, the witness who came and
19 testified before you, he said that this was castoff spatter.
20 He said that this appeared to him to have been cast off.
21 Some type of an instrument coming down, downward, from right
22 to left. He was at the scene. He's the person that actually
23 photographed this. He thought it was blood. And he didn't
24 say anything about dirt. Based on that right there, would
25 you maybe give -- would you give maybe that a little bit of

1 weight in your determination as to whether or not this
2 particular part of this photo was mud or maybe castoff?

3 A. Well, my comment on that would have been that --
4 would be that there would have been a very easy way to
5 determine that. And apparently it was not. Because there
6 is -- there are very simple tests that you can use to
7 determine -- to distinguish what is blood and what is not
8 blood on a vehicle. And that wasn't run. As far as castoff
9 goes, I think I would disagree that that's castoff.

10 Q. Well, if it was --

11 A. Let me -- let me rephrase that, if I may. It is --
12 it may be castoff in the sense that I think that it's being
13 cast off of the wheel, but it is not the same kind of castoff
14 that we're talking about with low-velocity spatter.

15 Q. Okay. So let me ask you this question. If you
16 think that this is mud that was maybe coming off of a wheel,
17 all right, at what speed would this be coming off?

18 A. Oh, I have no idea.

19 Q. How fast would the car be going for mud to be
20 projected up onto this upper wheel well that way?

21 A. I have no idea. I know --

22 Q. Would you agree with me, though, that it would
23 probably have to be going at a pretty significant speed?

24 A. Not necessarily --

25 Q. Well --

1 (Counsel and witness talking at the same time.)

2 THE COURT: Excuse me. Only one person at a time.

3 THE WITNESS: I'm sorry.

4 THE COURT: Mr. Knight, if you'll allow the witness
5 to finish his answer, and then you may proceed with the next
6 question.

7 MR. KNIGHT: Okay.

8 A. You're talking about circular velocity, first of
9 all. You're not talking about forward velocity. And this
10 wheel is turning, is turning -- the speed of this wheel and
11 whatever is coming off of it is what is going to determine
12 how quickly or the length or the shape of the spatter pattern
13 that comes off of it.

14 And in my opinion, and it is only my opinion, what
15 you're dealing with here -- and it may -- I don't know when
16 it happened or how it happened. Okay. I can't tell you
17 that. But when I look at the overall pattern, what I'm
18 seeing here is not consistent with what I normally see when
19 we're talking about castoff spatter.

20 Q. Well, if the tire -- one other thing. If the tire's
21 inside -- these tires are not mounted outside the car;
22 correct?

23 A. Uh-huh.

24 Q. The car frame. Wouldn't you expect -- I mean, just
25 the way that the tire is mounted on this car, wouldn't you

1 expect to see other dirt radiating out, all above this --

2 A. Possibly.

3 Q. -- this wheel well?

4 A. It just depends on how -- when that happened and how
5 long it's been there. I have no idea.

6 Q. You know, and this is not -- I'm not asking you this
7 sarcastically at all. What color is dirt in Fort Worth? I
8 mean, is it more of a reddish color?

9 A. Well, dirt --

10 Q. Are you aware that here in Mid-Missouri dirt pretty
11 much is brown?

12 A. Well, dirt is dark colored. I'm not -- I'm not
13 arguing that. I'm telling you, if there was an issue, then
14 there was an easy way to solve the issue, although you can't
15 solve it now.

16 Q. Well, here's the thing. I'm looking at State's
17 Exhibit 72A. And you can see right here, you can see this
18 area that you think maybe is dirt. But I don't see anything
19 up along the front wheel. And wouldn't you think that it
20 probably would be consistent, that if you've got two wheels
21 on the same side of the car, and you're going over an area
22 that might be dirt or mud or whatever's going to cast up onto
23 the car, that we would have mud up here somewhere also?

24 A. It's possible.

25 Q. Well, wouldn't you -- logically, wouldn't you think

1 that would be consistent?

2 A. Since I don't know what's happened to that car
3 before, since, or after that incident that caused that to
4 occur, I have no way of knowing whether it would be there or
5 not. If you're asking me, does it always happen that way,
6 the answer is no. But you can certainly have spatter and
7 dirt, and everyone who has a car certainly knows that, where
8 the front wheels are completely not affected, especially if
9 it was only the rear wheel that hit whatever it was that
10 spread that up.

11 Q. Yeah, and I guess that might be applicable, you
12 know, if you're doing really sharp turns, going at high rates
13 of speed, in order to cast mud up.

14 A. Not necessarily --

15 Q. -- back tires what caught the mud and not the front
16 tires.

17 A. Not necessarily.

18 Q. Okay. But, see, the jury's going to have a chance
19 to look at these exhibits really close when they get back
20 there. And your testimony is that this area right here,
21 right here -- what -- what color do you think that is?

22 A. I -- I -- my testimony is that this, these long
23 streaks that are here, is different than what you normally
24 see with castoff blood. And in my opinion, based on my
25 experience and my own personal experience with automobiles,

1 you're not dealing with castoff blood there; you're dealing
2 with dirt.

3 Q. My question is this: Is this blood right here, in
4 your opinion? Does that look like --

5 A. That's more consistent with impact spatter. Well,
6 it's consistent with castoff spatter.

7 Q. What color is that?

8 A. Reddish orange.

9 Q. What color is this area right here that you're
10 saying is maybe mud or dirt?

11 A. Kind of brown.

12 Q. You think that that is brown?

13 A. I certainly do. I think that this is a different
14 color than this on that photograph. Most definitely.

15 Q. Okay. What about over on this photograph? A little
16 bit different angle. What color is that? Same thing.

17 A. First of all, if I may, you don't see those streaks
18 in this photograph. I mean, what you see here, I can't tell
19 you what color that is. There's some dark streaks there.
20 This up here, this could be something that I'm not seeing on
21 here. I don't know. I cannot relate necessarily this area
22 to that area.

23 Q. All right. You have -- around this area, above the
24 wheel well, do we have 90-degree spatter?

25 A. I didn't see any, no.

1 Q. Okay. What about this information right here on the
2 wheel?

3 A. Well --

4 Q. Does that look like 90 degree to you?

5 A. Some of this is 90 degree, yes.

6 Q. Okay.

7 A. As far as I can tell. Or close. It's a high angle.
8 So it's between, you know, 70 and 90 degrees. Because
9 obviously without doing any measurements, all of these -- I
10 don't think any of these are perfect circles. You never see
11 that. So I'm not going to pinpoint it to 90 degrees. But it
12 is high-angle spatter, yes.

13 Q. Would this blood information that you see on the
14 wheel at least be consistent with the victim's head being
15 above the ground when it was struck with an instrument?

16 A. I think that some of it is, yes.

17 Q. Okay. What information do you have -- what blood
18 information do you have on this car that might be consistent
19 with the victim in this case maybe being at knee level, maybe
20 this high, when he was struck?

21 A. Well, I don't have anything that really says knee
22 level to me. What I see is stuff that is down. That's why I
23 say, either coming down or on all fours. Because if he's --
24 if he's on his knees, but down like this, then his head tends
25 to be closer to that --

1 Q. Okay.

2 A. -- to this level.

3 Q. Okay. And I'm just about -- almost done here. But,
4 as I've said before, the police officer that was at the scene
5 testified that this was castoff right here. Okay. And if
6 this was, in fact, castoff blood, right here, this area,
7 would that be then consistent with the victim's head being in
8 this area, right in this area, when it was struck? Assuming
9 that this is, in fact, blood and not maybe dirt.

10 A. Well, first of all, I don't -- I can't -- you know,
11 I can't see any directionality to these -- to these spatters.
12 I don't know what he's saying -- what he's using to say it's
13 going this way as opposed to going this way. Regardless of
14 which way it's going, I don't know that that necessarily
15 would put his head anywhere near here, because the same kind
16 of spatters, if we're assuming that, and I'm not, because I
17 just don't agree with that, but if -- if that is castoff, it
18 could still come from an area that's closer to the hubcap.
19 But it is --

20 Q. Even if the tails are going in this direction?

21 A. Well, you know, if the directionality is this way,
22 that's going to present a whole new set of questions,
23 because --

24 Q. That's what the police officer testified about.

25 A. All right. Well, then, I have to -- I have to

1 respectfully disagree with the police officer, again, because
2 when you're -- castoff spatter occurs when the object is
3 being swung away. Not when it's coming down. And the reason
4 is: Because the blood is pooling as -- as the motion -- the
5 upward motion causes the blood to pool down to the end and
6 come off as castoff. So --

7 Q. I don't mean to -- can I just interject one thing?

8 A. Sure.

9 Q. Respectfully. So you're saying then that castoff
10 does not include times when a weapon maybe is coming down
11 before impact. Only when --

12 A. Not generally, no.

13 Q. Okay. What would you -- how would you describe
14 blood that flies off of an instrument as it is coming down?
15 What is that called? Is that just called impact? Or what is
16 that? Before -- before -- before it makes any contact with
17 any other object.

18 A. I'm not exactly sure how you would create that kind
19 of spatter. If you have a bloody object, and you hold it up
20 here, without doing this motion (indicating), if you've got
21 this bloody object already that's up here, that you come down
22 with --

23 Q. Right, right.

24 A. -- then I guess it's possible to create some kind of
25 spatter that would approximate castoff. But that's not

1 generally what happens in beatings.

2 Q. What do you call it when you're making -- you're
3 talking about a backward motion with a weapon or tool or
4 whatever --

5 A. Uh-huh.

6 Q. -- that's definitely castoff. I just want to know
7 what you call -- what would you call it if blood came off
8 from a downward motion?

9 A. Well, it would be castoff. But the requirements for
10 that to happen -- see, that's where we're having our problem.
11 Because in order for that to happen, someone would have to
12 have a bloody object, okay, in this position (indicating),
13 without ever doing this (indicating). Okay. Because this
14 action (indicating) is going to -- is going to push the blood
15 off of the object. So when you're up here, you're not going
16 to have any more blood. If you've got a bloody object, and
17 I'm not exactly sure how you'd do this, but I guess if you
18 picked it up off the ground, say, and it's dripping with
19 blood, and you held it up like this, and then came down with
20 it, you could make a castoff stain that way. But in my
21 opinion, it would have looked like that. It would be --

22 Q. Even if you came down at an angle like this.

23 A. It would be more discrete, in my opinion. You'd be
24 able to see where those droplets came off. Because this is
25 coming off in a stream. This is -- this is coming off of an

1 object, again, in my opinion, at a faster rate than the arm
2 is going to create.

3 Q. Okay. You had an opportunity in court -- my last
4 series of questions. You had an opportunity in court to look
5 at this notepad. And earlier, on direct examination, you
6 said that this was blood transfer.

7 A. I said it appeared to be, yes.

8 Q. Yeah. And you were fairly confident, though, in
9 your -- in your opinion, based on the photograph you saw;
10 correct?

11 A. Actually, I think I qualified my opinion and said
12 that it was based on the photograph that I saw, yes.

13 Q. Okay. So based on the photograph that you saw, you
14 thought that this right here was blood transfer; correct?

15 A. Uh-huh.

16 Q. But today, when you see the object close up, right
17 here, the physical, tangible object, you changed -- you're
18 saying now that, no, you do not believe that that is blood
19 transfer; correct?

20 A. That's correct.

21 Q. Okay. Same thing might hold true for this scenario.
22 This, on a photograph, you think is blood. Correct?

23 A. No. I think that's not blood.

24 Q. I mean, you think it's not blood. Right?

25 A. That's correct.

1 Q. I'm sorry. But the police officer who was actually
2 there, that had the ability to view that -- that item, that
3 car, thought that this was, in fact, blood. So, might you
4 defer to Jeff Nichols' opinion on that issue?

5 A. Since I have no idea what Officer Nichols'
6 qualifications are for identifying things as blood, in the
7 absence of any chemical test to establish whether it's blood
8 or not, no, I can't. My opinion is my opinion.

9 Q. Okay.

10 MR. KNIGHT: Nothing further.

11 THE COURT: Redirect?

12 - - -

13 REDIRECT EXAMINATION

14 BY MR. ROGERS:

15 Q. Looking at the photograph which is State's Exhibit
16 33C, is it clear to you that the castoff blood spatter and
17 the transfer of blood stain are a different color than the
18 things Mr. Knight was asking you about that you say look like
19 mud?

20 A. It is to me, yes.

21 Q. Okay. Is it even more obvious when you see the
22 photograph under magnification, in its digital form?

23 A. Well, as I said, I mean, this is -- what we're
24 boiling down to now is some kind of a visual discrimination,
25 based on a photograph, and I will give you that, but, you

1 know, it certainly does appear to me to be entirely different
2 than the spatter that we're looking at a little further back
3 on the car.

4 MR. ROGERS: Mr. Weis, could you play the -- display
5 the photograph digitally, please?

6 Q. So you're telling me that -- you're telling me that
7 that looks different in color than that and that?

8 A. That's exactly what I'm telling you, yes.

9 Q. And you and I appear to be contemporaries of a sort,
10 age wise?

11 A. I'm 58 years old.

12 Q. I will be next month. Have you ever had an
13 experience of being in the mud in a car that does not have
14 traction control, or Positrack as they called it when we were
15 kids?

16 A. Absolutely.

17 Q. What happens to -- rear wheel drive car especially,
18 what happens?

19 A. The wheels spin in the back and not in the front.

20 Q. And one wheel might spin, and then the other just
21 sits there.

22 A. Especially -- yeah. It depends on the kind of axle
23 you have, but it may be only one of the four wheels that's
24 spinning. That's correct.

25 MR. ROGERS: Those are all the questions I have,

1 Your Honor.

2 THE COURT: Recross?

3 MR. KNIGHT: Thank you, Your Honor.

4 - - -

5 RECCROSS-EXAMINATION

6 BY MR. KNIGHT:

7 Q. And you're aware, aren't you, that this is a Maxima.

8 Correct? Maxima? Japanese vehicle?

9 A. Right. I'll give you that.

10 Q. And this is a front wheel drive vehicle, isn't it?

11 A. Yeah -- I don't know. It could be, yes.

12 Q. So we certainly wouldn't have this rear wheel

13 spinning out under any circumstances.

14 A. Not under the same circumstances that he's talking

15 about, no.

16 Q. Right.

17 A. Of course not.

18 MR. KNIGHT: Nothing further.

19 THE COURT: Any further questions, Mr. Rogers?

20 - - -

21 FURTHER REDIRECT EXAMINATION

22 BY MR. ROGERS:

23 Q. Did you ever have a situation where one wheel goes

24 through a mud puddle and the others don't?

25 A. Yes.

1 MR. ROGERS: That's all.

2 THE COURT: Anything further?

3 MR. KNIGHT: No, Your Honor.

4 THE COURT: Would you mind putting the screen down
5 so our marshal is able to see?

6 MR. WEIS: Sure.

7 THE COURT: May we release Mr. Singer? For the
8 defendant?

9 MR. ROGERS: Yes, Your Honor.

10 THE COURT: For the state?

11 MR. KNIGHT: Yes, Your Honor.

12 THE COURT: You're excused, sir. You may take your
13 papers and go. Don't take any of ours. Would ask you not to
14 discuss your testimony with any other witness, but you're
15 free to go.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: You may call your next witness,
18 Mr. Rogers.

19 MR. ROGERS: Jenny Smith, Your Honor.

20 THE COURT: Would you raise your right hand, please.

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JENNY SMITH,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand,
please.

- - -

DIRECT EXAMINATION

BY MR. ROGERS:

Q. Tell us your name, please.

A. Jenny Smith.

Q. And how are you employed, Miss Smith?

A. I am a forensic chemist at the Missouri State
Highway Patrol crime lab in Jefferson City, Missouri.

Q. In that connection, did you come into contact with
some evidence submitted to the crime lab from the Columbia
Police Department in connection with the death of Kent
Heitholt?

A. I did.

Q. What kind of evidence did you come into custody of?

A. I received items of clothing from the victim for
examination for trace evidence.

Q. Okay. Did you also receive bags which had been
removed from the victim's hand at the autopsy?

A. Yes.

Q. And did you also receive hairs which had been
removed from the victim's hands at the autopsy?

1 A. Yes.

2 Q. And did you receive standards with which to compare
3 those items?

4 A. Yes.

5 Q. Let me show you a bunch of stuff; okay? These are
6 all evidence bags with numbers on them and initials and
7 things. First of all, State's Exhibit 3, would you look in
8 there -- it's been cut open on the side, I believe -- and
9 tell me, have you seen that item before?

10 A. Yes. It is a hair brush.

11 Q. And you received that in the laboratory?

12 A. Yes. It bears my initials and the date I opened it.

13 Q. And what did you do with that hair brush?

14 A. It was to be used as a hair standard from the
15 victim.

16 Q. Now, is it common for somebody's hair to be clipped
17 at the time of the autopsy? Or at least a standard to be
18 taken?

19 A. Yes.

20 Q. But that wasn't done in this case, as far as you
21 know.

22 A. No, it was not.

23 Q. Okay. And would that be maybe because there was a
24 great deal of blood in the hair?

25 A. I don't know why.

1 Q. Okay. But in any event, you got that hair brush for
2 the purpose of taking hair from it to use as elimination hair
3 in comparison purposes?

4 A. Yes. It is purported to have belonged to the
5 victim.

6 Q. Right. And it's been identified as having belonged
7 to the victim by the deceased widow who provided it, so. I'm
8 not try to be sneaky here. All right. And calling your
9 attention to State's Exhibit 93, did you also receive that in
10 the laboratory?

11 A. Yes. It bears my initials and the date I opened it.

12 Q. And what was in it?

13 A. This is a -- part of it is hair standards taken from
14 Charles Erickson.

15 Q. And also what are called buccal or buccal swabs?

16 A. Buccal swabs, yes.

17 Q. Which are like DNA swabs?

18 A. Yes. I would not have examined the buccal swabs.
19 Just the hair standards.

20 Q. Of Mr. Erickson.

21 A. That's right.

22 Q. And show you what's been received in evidence as
23 State's Exhibit 92.

24 A. Yes. This bears my initials and the date I opened
25 it.

1 Q. And what is that?

2 A. Hair standards and buccal swabs from Ryan Ferguson.

3 Q. And now I'm going to hand you what has been marked
4 State's Exhibit 83. And that's an evidence bag. And did you
5 receive that in the laboratory also?

6 A. Yes. It bears my initials as well and our lab
7 number.

8 Q. And what was in that when you opened it?

9 A. It was a paper bag.

10 Q. And was that bag marked, indicating it had been the
11 bag removed from the hand -- one of the hands of Kent
12 Heitholt at the time of the autopsy?

13 A. Yes. His left hand.

14 Q. And is that bag in an evidence bag now?

15 A. Yes. It's a bag containing the bag.

16 Q. And what about -- the bag from a bag. And what's it
17 marked? It's got a red sticker on the other side.

18 A. State's Exhibit 83.

19 Q. Okay. So those are both marked State's Exhibit 83.
20 Is that correct?

21 A. Yes.

22 Q. And that's the bag that you removed from this bag.

23 A. Yes.

24 Q. And what did you do when you removed this smaller
25 bag from the larger bag, State's Exhibit 83?

1 A. Well, anything that might have dropped off the
2 victim's hand into that bag would be of interest to me. So
3 the bag was -- was examined for any extraneous debris that
4 might have fallen off the hand.

5 Q. And when you say "extraneous debris," what do you
6 mean?

7 A. Hairs, fibers, particles. Anything that might have
8 fallen off.

9 Q. And did you find extraneous debris in the left hand
10 bag, 83?

11 A. There were a few hairs.

12 Q. Okay. And giving you what's been marked Exhibit 84,
13 another bag, does that have your initials on it?

14 A. Yes, it does.

15 Q. And removing a smaller bag from the bag, also marked
16 State's Exhibit 84, what is that?

17 A. This is the bag that was removed -- or purportedly
18 removed from the victim's right hand.

19 Q. Okay. And did you also look for trace evidence in
20 it?

21 A. Yes.

22 Q. And what did you find, if anything?

23 A. There were also a few hairs in this bag as well.

24 Q. Okay. Now I'm going to hand you what has been
25 marked State's Exhibit 85. And I will tell you that this is

1 another paper bag that contains some boxes inside of it. So
2 would you look at those, please.

3 A. These were items collected at autopsy from the
4 victim.

5 Q. Including hairs from his hands.

6 A. Yes.

7 Q. Okay. And do they also include the hairs that you
8 collected from the bags in Exhibits 83 and 84?

9 A. That would have been separate. Those would have
10 been kept separate. The ones from the bags and ones from
11 autopsy.

12 Q. Okay. How many boxes are in here?

13 A. Four boxes.

14 Q. And they were all --

15 A. Two are fingernail clippings, or scrapings, and two
16 were hair, one from left hand, one from right hand, that had
17 been collected at autopsy.

18 Q. Okay. Working with what we've got now, did you do
19 comparisons microscopically? Is that how you did it?

20 A. Yes. I would have been examining all hairs removed
21 from all these items, to determine if there were any hairs
22 that were dissimilar to the victim's hairs.

23 Q. Okay. And did you, in fact, find hairs that were
24 dissimilar to the victim's hairs?

25 A. I did find one hair that appeared to not be

1 consistent microscopically with the victim's hairs that were
2 from the hair brush.

3 Q. And did you also find other hair fragments that were
4 not suitable for microscopic comparison?

5 A. Yes. There were many fragments and limb hairs that
6 we don't normally proceed with microscopic exams on.

7 Q. And you say "limb hairs." And that sounds fairly
8 self-explanatory. Is that a hair that's not on your head,
9 but on some limb, leg, arm, hand?

10 A. That's right.

11 Q. Some other body hairs too?

12 A. That's right.

13 Q. If it came from my chest, is that a limb hair?

14 A. No. It would mostly be arms and legs.

15 Q. Okay. I'm going to hand you what have been
16 marked -- when you were doing microscopic comparison, would
17 you mount these things on slides?

18 A. Yes. They -- the ones I would select to proceed
19 with microscopic comparisons, we would mount it on slides and
20 compare it on a dual microscope with hairs from the victim.

21 Q. Once you did this comparison, were there some items
22 that you chose to send on to the FBI laboratory for further
23 analysis?

24 A. Yes.

25 Q. Okay. And that happened on more than one occasion,

1 with regard to this case?

2 A. Yes. I believe in December of '04 and then in July
3 of '05.

4 Q. Okay. I'm going to ask you to look at these items
5 which have been marked for identification as Defendant's
6 Exhibits R, S, and T. Open that, please, starting with
7 Exhibit R. And that's not the envelope you used, is it?

8 A. No. It does not bear any of my markings.

9 Q. Okay. In fact, the red tape there says, "Federal
10 Bureau of Investigation" on it; right?

11 A. That's right.

12 Q. Okay. What's in that envelope?

13 A. I really can't identify these. They do not have my
14 markings on them.

15 Q. Okay. So you don't know what that is.

16 A. (Shaking head from side to side.)

17 Q. All right. How about Exhibit S?

18 You've removed three small envelopes; is that
19 correct?

20 A. Yes, I have. And again, they do not bear my
21 markings, or my handwriting, so I really can't identify them,
22 except for their labeling is printed on them.

23 Q. Okay. And the labeling is consistent with the items
24 that you sent from your laboratory to the FBI?

25 A. These were packaged by Cary Maloney, a fellow

1 criminalist at the highway patrol.

2 Q. Who works in the same lab you do?

3 A. Yes.

4 Q. And he's the DNA guy who testified yesterday?

5 A. I don't know when he testified.

6 Q. DNA guy.

7 A. Okay. Yes.

8 Q. Okay. Thanks. And open Exhibit T, please.

9 A. (Complying.)

10 These are microscope hair slides that were prepared
11 by me.

12 Q. Okay. In Exhibit T we have hit the jackpot here;
13 right?

14 A. Yes.

15 Q. These are the slides that you prepared in connection
16 with this investigation that were submitted to the FBI lab
17 for further testing.

18 A. Yes. There would be a head hair control standard
19 and -- from the victim. Well, this was a secondary hair
20 control from the hair brush.

21 Q. Exhibit 3.

22 A. And hair slides prepared from the -- Mr. Erickson
23 and Mr. Ferguson.

24 Q. Okay.

25 MR. ROGERS: Your Honor, at this time I would offer

1 Defendant's Exhibit T.

2 MR. KNIGHT: No objection.

3 THE COURT: Defendant's Exhibit T, as in Thomas?

4 MR. ROGERS: Yes.

5 THE COURT: Is admitted.

6 - - -

7 Defendant's Exhibit T admitted into evidence.

8 - - -

9 A. May I clarify further? That I believe there -- I
10 did not open those slide boxes, but there should also have
11 been a slide in there containing the hair in question, from
12 the right hand of the victim.

13 Q. Okay. You're saying a hair from the right hand of
14 Mr. Heitholt was not consistent with the standards that you
15 had been given, microscopically.

16 A. The hair in question, that was recovered from the
17 victim's right hand, was not consistent microscopically with
18 his -- the hair from the hair brush that was from the victim.
19 And that hair was of interest and sent on to the FBI for
20 further mitochondrial DNA testing. And that hair, I believe
21 part of it should still be remaining with those hair
22 standards.

23 Q. Okay. And the FBI people who looked at it would
24 know that.

25 A. Yeah, they would know that.

1 Q. Okay. You said mitochondrial DNA testing. What is
2 that?

3 A. I am a trace evidence chemist, and that is outside
4 my area.

5 Q. Okay. Don't worry about it. We'll have somebody
6 else tell us.

7 Do you know whether or not that's an expensive
8 procedure to use?

9 MR. KNIGHT: I'm sorry, Your Honor. I'd object.
10 That's hearsay.

11 MR. ROGERS: That's fine. I'll withdraw it.

12 I have no further questions. Thank you.

13 THE COURT: You may inquire.

14 - - -

15 CROSS-EXAMINATION

16 BY MR. KNIGHT:

17 Q. So microscopic testing, that's only done on head
18 hairs that are longer than what?

19 A. Generally about an inch.

20 Q. Okay. And when you're looking at hairs, you're
21 looking at them macroscopically, which means just eyeballing
22 them; is that correct?

23 A. That would be the initial exam.

24 Q. Okay. And then some -- in some cases you decide to
25 look at hairs microscopically. Under a microscopic. Is that

1 right?

2 A. Yes.

3 Q. Okay. And what kind of a microscope do you use?

4 A. It will magnify up to 400 times.

5 Q. Okay.

6 A. It's a polarized light microscope and also has just
7 transmitted light.

8 Q. All right. So when you decide to do microscopic, it
9 has to be on a head hair that's longer than an inch. So you
10 don't do microscopic testing on body hairs, limb hairs; is
11 that correct?

12 A. And hair fragments.

13 Q. Yeah. I meant to say: And hair fragments. And
14 hair fragments then would be less than an inch. Basically.
15 Is that correct?

16 A. Yes.

17 Q. Okay. And if you look at a head hair, and that head
18 hair looks to be microscopically similar -- like in this
19 case, you looked at a number of hairs, and some of those
20 hairs under the microscope looked to be similar to what was
21 provided to you as the victim's hair standard; is that
22 correct?

23 A. Yes.

24 Q. And under those circumstances, when you got those
25 microscopic similarities, those hairs that you were looking

1 at that maybe were recovered from the crime scene, similar to
2 the victim's hair standard, you're not going to recommend
3 that any further testing be done; is that correct?

4 A. That's right.

5 Q. Generally speaking.

6 A. Yes.

7 Q. But in cases where you find dissimilarities between
8 maybe the victim and -- the victim's standards and the hair
9 that's been recovered at the crime scene, you might, under
10 those circumstances, recommend that mitochondrial DNA testing
11 be performed; is that correct?

12 A. Yes. I'm doing somewhat of a screen.

13 Q. Okay. And mitochondrial DNA can't be done at the
14 Missouri State Highway Patrol crime lab right now; is that
15 correct?

16 A. That's correct.

17 Q. Okay. It's a very expensive procedure; the
18 equipment isn't in place down there to do it; is that
19 correct?

20 A. We don't do mitochondrial DNA testing.

21 Q. How many hairs on average does a person lose per
22 day?

23 A. The reports I've heard range anywhere from 80 to 120
24 hairs a day. Average.

25 Q. And tell us about -- what's -- what is primary hair

1 transfer?

2 A. That would be if two people come into physical
3 contact and the hair from person A is transferred to person
4 B. That's a primary transfer.

5 Q. And that would pretty much be, if we're talking
6 about a head hair, that would be the head hair from person A
7 going directly from the head of person A onto something on
8 person B; is that correct?

9 A. Yes. Head hair would be of interest to us. Not the
10 other hairs.

11 Q. Well, okay. I was just using that as an example.

12 A. Yes.

13 Q. Or maybe it could even be a limb hair. But it would
14 have to go directly from the limb, I guess, over to the other
15 person; is that correct? To be a primary hair transfer.

16 A. Yes.

17 Q. Okay. What is a secondary hair transfer?

18 A. That would be like person A sits in a theater seat,
19 drops a hair on the seat, person B comes and sits in that
20 seat, and the hair gets on his clothing. That would be
21 secondary. It -- the hair is moved twice.

22 Q. Okay. So, in this case, you could easily have --
23 any of these hairs that you looked at could have been either
24 primary or secondary hair transfers; is that correct?

25 MR. ROGERS: Objection. Calls for speculation.

1 THE COURT: Sustained.

2 Q. Okay. I'm going to move right on to the testing
3 that you did. You had the victim's hair brush. You had
4 standards from the defendant; from Charles Erickson. And
5 then you also looked at one hair, isn't that correct,
6 Missouri State Highway Patrol number 8, which is our 83,
7 which should be in front of you, which was the paper bag from
8 Kent Heitholt's left hand.

9 A. Yes.

10 Q. Do you want to go ahead and look at that? Because
11 you talked about hairs, plural, I think, with regard to that
12 piece of evidence, but in fact, when you looked inside that
13 bag, or really both of those bags, you only found one hair;
14 is that right?

15 A. I believe I found a limb hair.

16 Q. Okay. One limb hair. And do you need to look at
17 your notes, to just confirm that? Or --

18 A. I am looking at my notes.

19 Q. Okay. And it was a limb hair; correct?

20 A. It appeared to be, yes.

21 Q. But there was just one hair.

22 A. Yes.

23 Q. Okay. And that limb hair, in July of 2005, was sent
24 to the FBI for mitochondrial testing; is that correct?

25 A. Yes, it was.

1 Q. Okay. And then if you could also take a look there
2 at State's Exhibit 84, which was, correct me if I'm wrong,
3 but that was the hand bag from the right hand on Kent
4 Heitholt; is that correct?

5 A. Yes.

6 Q. Okay. And in that bag you located two head hairs;
7 is that right?

8 A. Yes.

9 Q. And one of those head hairs you found was not
10 microscopically similar to the victim's hair, so that hair
11 was sent to the FBI for mito testing; is that correct?

12 A. That's right.

13 Q. Okay. And then you found another head hair in that
14 bag, didn't you, and you did microscopic analysis on that.
15 You found that that was microscopically similar to the
16 victim's hair; correct?

17 A. Yes.

18 Q. And because of that finding, that hair was not sent
19 for mitochondrial testing at least; is that correct?

20 A. It was not.

21 Q. Okay. But -- you testified earlier that -- you said
22 something about -- let's just talk about this bag that you
23 looked at, where you found the two hairs from the victim's
24 right hand. Right? Those bags; correct?

25 A. Yes.

1 Q. You don't know whether or not either one of those
2 hairs was on the victim's hand at any time, do you?

3 A. No. They were recovered out of the bag that had
4 been on his hand.

5 Q. No. Because you don't have any personal
6 knowledge -- we've had a witness come and testify about the
7 collection of that hand bag and how he put the hand bag into
8 the bigger bag and sealed it all up and sent it over to you.
9 But you don't have any personal knowledge, do you, about
10 either one of those hairs at any time being directly on
11 actually the right hand of the victim in this case, Kent
12 Heitholt.

13 A. No. They were just in a bag purported to be taken
14 from his right hand. I don't know how they got there.

15 Q. And of course you don't have any personal knowledge
16 of these hairs ever being on the victim's hand; is that
17 correct?

18 A. That's right.

19 Q. Okay. So then let's get to State's Exhibit 85 -- I
20 think you've got that in front of you -- which was four
21 boxes. And two of those boxes were labeled as hairs
22 collected from Kent's hands at autopsy, I believe. Do you
23 see those boxes in there? Do you want to take them out?

24 A. Yes.

25 Q. Okay. Can you take those boxes out, by the way?

1 The two boxes that are the hairs that were actually collected
2 from his hands at autopsy? Do you have those in front of you
3 now?

4 A. Yes.

5 Q. Okay. And 10C, there were four hairs in that box;
6 is that correct?

7 A. That's right.

8 Q. Okay. And 10C is labeled as "head hairs from Kent's
9 right hand"; is that correct?

10 A. It was labeled "hairs from victim's right hand."

11 Q. Okay.

12 A. It doesn't say "head hairs."

13 Q. Okay. I'm sorry. But you -- you analyzed those
14 hairs, didn't you?

15 A. Yes.

16 Q. And you did microscopic comparisons of those hairs;
17 is that right?

18 A. I did.

19 Q. And you found that all four of those hairs that were
20 collected from his right hand were all microscopically
21 similar to the victim's hair; is that correct?

22 A. Yes.

23 Q. So those hairs in that box, they were not sent to
24 the FBI for mitochondrial testing; correct?

25 A. No. There was not an indication to do so.

1 Q. And that would be per your procedures, your protocol
2 out there at the highway patrol, when you have microscopic
3 comparisons and you find similarities, they're similar?
4 Known standard, victim, and the hairs that you found, when
5 you find that those are similar, you don't send those on.
6 Correct?

7 A. That's correct.

8 Q. All right. And same thing with 10D. That's labeled
9 as "hairs from the victim's left hand"; is that correct?

10 A. Yes.

11 Q. Okay. And there were two hairs in that box; is that
12 right?

13 A. That's right.

14 Q. Okay. And you did microscopic comparisons on those;
15 is that right?

16 A. Yes.

17 Q. Because they were head hairs of sufficient length to
18 do so; is that right?

19 A. That's right.

20 Q. And what were the results of your tests?

21 A. They were not similar to the victim's secondary hair
22 standard.

23 Q. I'm sorry?

24 A. They were not consistent with the victim's -- or
25 excuse me. They were consistent with the victim's secondary

1 hair standards.

2 Q. Okay. Microscopically consistent with the victim's
3 hair standards; correct?

4 A. Yes.

5 Q. And so you did not, because of that, following
6 protocol at the highway patrol, you did not send those off to
7 the FBI for additional mito testing; correct?

8 A. No.

9 Q. So -- you also tested other evidence in this case.
10 You looked at State's Exhibit 35, which was your number 13.
11 Highway Patrol number 13. And do you remember looking at the
12 victim's pants?

13 A. Yes.

14 Q. Okay. And you did comparisons on some hairs that
15 were obtained from there; is that correct?

16 A. I noted that there -- there were some hairs. I
17 believe they were mostly limb hairs; possibly some hair
18 fragments. I didn't mount anything for microscopic
19 comparisons from the pants.

20 Q. And what were the results of your tests on State's
21 Exhibit -- well, it's actually Missouri State Highway Patrol
22 number 13, our number 35?

23 A. These hairs looked macroscopically consistent with
24 the other hairs on the clothing and the victim's standards.
25 There didn't appear to be anything that was foreign to him.

1 Q. Okay. And you also -- you also analyzed Missouri
2 State Highway Patrol number 15A and 15B; is that correct?

3 A. Yes.

4 Q. And those items were the victim's T-shirt and
5 sweater; correct?

6 A. That's right.

7 Q. And before you looked at those, did you basically
8 beat them down over some type of, I don't know what you had
9 in front of you, some type of paper or something, to collect
10 items that came off these items?

11 A. Yes. They're hung up on some clips over butcher
12 block paper and shook down, to collect anything that falls
13 off of them.

14 Q. Okay. And what did you do then with these? Did you
15 find hairs then?

16 A. Yes. There were many hairs collected from the
17 sweater and T-shirt.

18 Q. What did you do with those hairs?

19 A. They are preserved. And I sift through them, under
20 stereoscope, looking for any debris that might be useful for
21 further comparisons. I also pick hairs out of interest that
22 are longer than an inch and have a root on them and are --
23 for possible microscopic exams. I picked about seven hairs
24 out of this for microscopic exams, although there were many
25 hairs.

1 Q. Well, all the hairs that you saw at least initially
2 you believed to be macroscopically similar; is that correct?

3 A. Yes. There were --

4 Q. To the victim's hair.

5 A. Yes. Although there were some short, darker
6 fragments that were -- that were later sent for more testing.
7 They were beyond -- they were too short for me to do
8 microscopic testing, but they did appear a little bit darker
9 than the other hairs in that collection.

10 Q. And you sent those on over to the FBI for
11 mitochondrial testing; is that correct?

12 A. Yes. That was in July of this year, those were sent
13 off.

14 Q. And were you shown those hairs? Is that one of
15 those exhibits, defendant -- that we have defendant --
16 defendant's exhibit stickers on? Do you remember?

17 A. It would have not been -- no, this would not have
18 been that second shipment of hairs. That was the first
19 shipment of hairs.

20 Q. You also did microscopic comparisons on hairs that
21 came from the sweater and the T-shirt; is that right?

22 A. Yes. I selected a few off of those items for
23 microscopic comparisons. And they all appeared to be
24 consistent with the victim's head hairs.

25 Q. Okay. Now, wrapping up here, you were speaking

1 earlier, and you said people lose an average of maybe 80
2 hairs per day? And how are these hairs lost? Generally.
3 Mostly.

4 A. How many?

5 Q. Didn't you say 80?

6 A. 80 to 120.

7 Q. Okay. And how are these hairs lost? Usually.

8 A. The hair has reached the end of its growth phase and
9 isn't -- the root goes into a resting phase and is passively
10 shed.

11 Q. Okay. And then you also talked about primary hair
12 transfers and secondary hair transfers; is that correct?

13 A. Yes.

14 Q. Okay. And you talked about -- there are a number of
15 different ways that hairs can be transferred to people. I
16 mean, just because somebody has a hair on him doesn't mean
17 that that hair came from him. You can't tell. You can't
18 tell the source of the hair, can you?

19 A. No.

20 Q. I mean, because if you have a hair, say, on a piece
21 of clothing or on the body or something, that hair could be
22 transferred in a number of different ways to that person; is
23 that right?

24 A. You can't tell whether it was a primary or secondary
25 or even a tertiary transfer.

1 Q. Okay. So, for instance, in this case, the victim in
2 this case could have picked up hair from maybe a sporting
3 event that he attended earlier that day; correct?

4 A. Yes.

5 Q. Is that possible? He could have picked up hair that
6 he -- he could have picked up hair from a restaurant that he
7 went to days before; isn't that correct? And still had it on
8 his body somewhere; is that right?

9 A. Yes.

10 Q. Okay. There are a number of different ways that
11 people can collect hairs and retain hairs; is that right --

12 A. That's right.

13 Q. -- that aren't their own.

14 A. It's not uncommon.

15 Q. Okay. And in this case, you didn't find any hairs
16 that were consistent with Ryan Ferguson's hairs or Chuck
17 Erickson's hairs; is that correct?

18 A. That's correct.

19 Q. Okay. And that does not mean, though, that they
20 were not at the crime scene; correct?

21 A. It does not.

22 Q. Okay. And for a couple of different reasons. First
23 of all, their hairs -- weren't there -- hairs from one of
24 those individuals would have had to have fallen out at the
25 crime scene; correct?

1 A. Yes.

2 Q. And there's no guarantee that that's going to happen
3 in the middle of a crime; isn't that right?

4 A. No.

5 Q. Okay. And the second challenge, even if hairs from
6 either one of those individuals did fall out at the crime
7 scene, the second challenge would be to actually find one of
8 those hairs; isn't that correct?

9 A. That's correct. And as I said, I found many, many
10 hairs on all of this evidence.

11 Q. Yeah, I know, but I'm --

12 A. So, I mean, finding that one in hundreds of hairs
13 could be a challenge.

14 Q. And you also know that in crimes where we have close
15 contact between defendants and victims, talking about maybe
16 assault situations, it's extremely rare, isn't it, to have a
17 transfer from either the defendant to a victim or victim to a
18 defendant. Isn't that correct?

19 A. I wouldn't call it extremely rare. Is that what
20 you -- was that your characterization?

21 Q. Well, rare, at least?

22 A. Oh. That is -- no, it's not rare.

23 Q. Well --

24 A. But it's not necessarily -- you're not always going
25 to find that transfer. But it is not uncommon to find a

1 transfer.

2 Q. Well, didn't you and I just discuss this on the
3 phone last week?

4 MR. ROGERS: I'll object, Your Honor.

5 MR. KNIGHT: This is cross-examination.

6 MR. ROGERS: I'll withdraw the objection.

7 Q. Didn't you and I just discuss on the phone last week
8 a study where, in cases where you had close physical contact,
9 violent crimes, close physical contact between defendants and
10 victims, that in only 10 percent of those cases would we
11 have -- would we expect to find either a defendant's hair on
12 the victim or a victim's hair on the defendant? Isn't that
13 true? We discussed that scenario.

14 A. We discussed that, and I guess in my mind, that's
15 not extremely rare.

16 Q. No. No. My question is: Did we discuss that
17 scenario, though?

18 A. Yes, we did.

19 Q. That only 10 percent of the time we have defendant's
20 hair on victim or victim's hair on defendant; right?

21 A. Yes. That was a study done in Canada.

22 Q. And isn't it true that on the telephone you told me
23 that you would not dispute that. That you thought that
24 sounded about right. 10 percent of the time.

25 A. That's a reasonable figure.

1 Q. Okay.

2 A. But, to me, that still makes it -- it's common
3 enough that we look for those head hairs. Even 10 percent is
4 common enough for us to look for those --

5 Q. Sure. I understand that. But really, you would not
6 dispute that study that said that 10 percent of the time we
7 can have transfer of the victim to defendant or defendant to
8 victim.

9 A. That's a reasonable figure, from my experience.

10 Q. Okay.

11 MR. KNIGHT: Nothing further.

12 THE COURT: Redirect?

13 MR. ROGERS: Thank you, Your Honor.

14 - - -

15 REDIRECT EXAMINATION

16 BY MR. ROGERS:

17 Q. Ma'am, you, I assume, don't have any studies about
18 the frequency of a foreign hair being found in the bag used
19 to wrap the bloody hand of a murder victim who was beat in a
20 very violent manner being consistent or inconsistent with
21 that of the person who actually did the beating. Is that a
22 fair statement?

23 A. That would --

24 Q. No 10 percent, no 20 percent, no 90 percent.

25 A. That would be very precise conditions, and I'm sure

1 there hasn't been any studies that fit that precise -- those
2 precise conditions.

3 Q. Okay.

4 A. So I would not know what those chances are.

5 Q. And I want to make sure I did not misunderstand.
6 You talked with Mr. Knight about a number of hairs that you
7 had examined, and some that you couldn't examine but sent on
8 to be examined. But there were also many other hairs and
9 hair fragments that were recovered and seen by you during
10 your examination of the clothing and things that you did not
11 select to examine microscopically; is that true?

12 A. That's true, because they did have a general
13 appearance of consistency with that of the victim's hair and
14 other hairs that were on the items of evidence.

15 Q. And that we can understand. And kind of, if you got
16 zillions of hairs, then you don't want to look at the ones
17 that look the same; you want to look at the ones that look
18 different. Right?

19 A. That's right. And that's what my screening is all
20 about, to find hairs that are different.

21 Q. Okay. And here you found one head hair that was
22 definitely different.

23 A. Yes.

24 Q. And that was the head hair found in the bag wrapped
25 around the right hand of the decedent after the scrub;

1 correct?

2 A. It was from that bag, yes.

3 Q. And it would be very unusual for somebody to get a
4 hair on their hand at a sporting event earlier in the day, go
5 home, have dinner with their wife and family, go back to
6 work --

7 MR. KNIGHT: Your Honor, at this point --

8 Q. -- work for a couple of hours --

9 MR. KNIGHT: I'm sorry. I'd have to object to the
10 leading form of the question.

11 THE COURT: Well, I haven't heard the whole
12 question. If you want to continue, I'll --

13 MR. ROGERS: Yeah, I do, because -- I think we need
14 all of those factors put in.

15 MR. KNIGHT: I would object to him commenting on the
16 question.

17 Q. And then have that hair still remain at 2:00 in the
18 morning, on that right hand, just coincidentally when they
19 happened to be beaten to death.

20 MR. KNIGHT: Once again, Your Honor, I'm going to
21 object to the leading form of the question.

22 THE COURT: The objection to the form of the
23 question is sustained.

24 Q. Considering the factors that I enumerated in the
25 question, would that be -- would you find the foreign hair on

1 the right hand of interest with regard to an identification
2 of the possible perpetrator of the beating?

3 MR. KNIGHT: Your Honor, I'd object. Well,
4 speculation. Foundation. Both. Form of the question also.
5 Leading, for sure.

6 THE COURT: The objection is sustained as to the
7 form of the question.

8 Q. Let me go at it a different way. You testified
9 that, on average, people lose 80 to 120 head hairs per day?

10 A. Yes.

11 Q. Of course, people like me don't. Or if so, they're
12 not suitable for comparison. Right?

13 A. Right.

14 Q. But we don't walk through a sea of hair every day
15 that just sticks with us all the time, do we?

16 A. I -- no. I mean --

17 Q. Okay.

18 A. Not a sea of hair.

19 Q. Right. And it is -- assuming somebody has a hair
20 which has reached its growth limit and is ready to fall out,
21 if somebody is involved in violent activity, that might
22 provide the impetus to make the hair fall out.

23 A. That's possible.

24 Q. And if somebody is involved in a struggle where
25 somebody's trying to defend themselves, somebody might, in

1 fact, lose a hair during that struggle.

2 A. Well, yes. And that's the whole point of why I
3 examine clothing from victims. I'm looking for hairs that
4 might have transferred to him.

5 Q. And even though you can't say with certainty that
6 that hair came during the struggle, you certainly want to
7 know whose hair that is, don't you?

8 A. It would be a hair of interest.

9 Q. Okay. Thank you.

10 MR. ROGERS: That's all the questions I have.

11 THE COURT: Recross?

12 - - -

13 RE-CROSS-EXAMINATION

14 BY MR. KNIGHT:

15 Q. And like you said before, the hair in this case
16 could have come from anywhere. Could have come from
17 attending a sporting event. Could have come from a
18 restaurant. Could have come at any time. That hair could
19 have been deposited on his body any time. Isn't that
20 correct?

21 A. Yes, it is.

22 MR. KNIGHT: Okay. Nothing further.

23 THE COURT: Redirect?

24 - - -

25

1 FURTHER REDIRECT EXAMINATION

2 BY MR. ROGERS:

3 Q. It could have come from one of his assailants --

4 MR. KNIGHT: Your Honor, I'd object.

5 MR. ROGERS: Oh, I thought you were done. I'm
6 sorry.

7 MR. KNIGHT: No. I was just -- the way you're
8 starting that question out, it seems to me to be pretty
9 leading. And I was going to object to the leading form of
10 the question.

11 Q. Could -- tell us whether or not it could have come
12 from one of the assailants during the violent struggle that
13 caused his death.

14 A. Yes. And that's why it's a hair of interest.

15 Q. And do you have any scientific basis for assessing
16 probabilities of coming from a sporting event the day before
17 as opposed to coming during the struggle?

18 A. No.

19 MR. ROGERS: Thank you.

20 THE COURT: Anything further, Mr. Knight?

21 MR. KNIGHT: Nothing further, Your Honor.

22 THE COURT: May this witness be finally excused for
23 the defendant?

24 MR. ROGERS: Yes, Your Honor.

25 THE COURT: For the state?

1 MR. KNIGHT: Yes, Your Honor.

2 THE COURT: You're excused. Would ask you not to
3 discuss your testimony with any other witness. And do not
4 take any of the exhibits that may be deposited there. If you
5 have your own notes or whatever, that's fine. But anything
6 that looks like a bag with a red sticker on it or a box, if
7 you'd leave it behind, please.

8 THE WITNESS: Sure.

9 THE COURT: Thank you.
10 You may call your next witness.

11 MR. ROGERS: Karen Lanning, Your Honor.

12 THE COURT: Would you raise your right hand.

13 - - -

14 KAREN ANN LANNING,
15 being first duly sworn by the Court, testified as follows:

16 THE COURT: Would you take the witness stand,
17 please.

18 - - -

19 DIRECT EXAMINATION

20 BY MR. ROGERS:

21 Q. Good afternoon, Miss Lanning.

22 A. Good afternoon.

23 Q. State your name for the record, please.

24 A. Karen Ann Lanning. Lanning is spelled
25 L-a-n-n-i-n-g.

1 Q. And you appear to have testified before?

2 A. Yes, I have.

3 Q. Okay. How are you employed?

4 A. I am a physical scientist in the trace evidence unit
5 of the Federal Bureau of Investigation laboratory in
6 Quantico, Virginia.

7 Q. And that's by Washington, D.C.?

8 A. Yes, it is.

9 Q. And did you have occasion in your occupation to come
10 into possession of items sent to you by the Missouri State
11 Highway Patrol Laboratory relating to the death of Kent
12 Heitholt?

13 A. Yes, I did.

14 Q. And I want to show you what have been marked for
15 identification as Defendant's Exhibits R, S, and T. And are
16 those things that you've seen before?

17 A. Yes, they are.

18 Q. And could you tell us what's in Exhibit R.

19 A. In which one?

20 Q. R.

21 A. It is a hair identified as specimen Q1.1. It's
22 sublabeled. It was a hair identified to me as coming from
23 Mr. Heitholt's hand. And it has been placed in these tubes
24 by myself.

25 Q. Okay. So you put it in the tubes that are inside

1 there?

2 A. Yes.

3 Q. And that's the hair from the right hand of Kent
4 Heitholt?

5 A. Yes.

6 MR. ROGERS: And Your Honor, at this time I'd offer
7 Defendant's Exhibit R.

8 THE COURT: Do you have any objection, Mr. -- is it
9 Mr. Knight or Mr. Crane?

10 MR. KNIGHT: No, Your Honor. The only objection I
11 have is that it came from his hand. But no, I don't have
12 objection to the admission of that exhibit.

13 THE COURT: Exhibit R is admitted.

14 - - -

15 Defendant's Exhibit R admitted into evidence.

16 - - -

17 Q. Now Exhibit S.

18 A. Actually, Exhibit S -- I misspoke earlier. I did
19 not examine these items. I recognize FBI markings, but I did
20 not examine those items.

21 Q. Okay. And those are -- we'll talk to somebody else
22 about those. Go ahead. And Exhibit T?

23 A. Yes. These items I recognize. And again, these
24 were specimen Q1 and Q2. The Q1 was the hair identified to
25 me as from Mr. Heitholt's right hand, which I had removed.

1 The item Q2 was a hair brush identified to me as belonging to
2 Mr. Heitholt. Item K1 was a head hair sample identified to
3 me as belonging to Ryan Ferguson. And item K2 was a head
4 hair sample identified to me as coming from Charles Erickson.

5 Q. Okay. And is it -- is the question hair, which you
6 said was identified to you as being from the right hand of
7 Mr. Heitholt, the same in Exhibit T as it is in Exhibit R?

8 A. No. There were two hairs on the initial Q1 item.
9 One of those hairs was removed and subsequently labeled as
10 Q1.1. That's in specimen R.

11 Q. Okay. So two different ones.

12 A. Yes.

13 Q. And what type of examination did you conduct with
14 those hairs?

15 A. I conducted a microscopic comparison on those hairs.
16 I compared the head hair, which is now specimen Q1.1, to
17 hairs from the hair brush, as well as to the two known
18 samples, and concluded that the one head hair identified as
19 Q1.1 exhibited similarities and differences to hairs from the
20 hair brush. So there was no conclusion as to whether or not
21 that hair possibly could have come from Mr. Heitholt. And I
22 compared that hair to the known head hair samples from
23 Mr. Ferguson and Mr. Erickson, and those hairs were
24 microscopically dissimilar to those -- to the Q1.1 sample.

25 Q. So what did you do to resolve the issue of whether

1 or not that hair came from Mr. Heitholt?

2 A. That hair was removed for mitochondrial DNA
3 analysis.

4 Q. And that's how it ended up in the little tubes?

5 A. Yes.

6 Q. Okay. Now with regard to the question hair -- the
7 other question hair from the right hand -- and by the way,
8 was this a hair that came from his hand or from the bag that
9 was put around his right hand or --

10 A. The bag from his right hand.

11 Q. Okay. And you're familiar with the technique of
12 bagging a body's hand and removing the bag at the autopsy;
13 correct?

14 A. Yes.

15 Q. That's standard in the industry?

16 A. Yes, it is.

17 Q. What about the other hair?

18 A. The other hair was a fringy head hair. It was not
19 suitable for microscopic comparison purposes, so I did
20 nothing else with it.

21 Q. Okay. Did you also present it for mitochondrial DNA
22 examination?

23 A. No, I did not.

24 Q. In general, is mitochondrial DNA examination more or
25 less reliable than microscopic hair comparison?

1 taking showers, brushing your hair, things like that; is that
2 correct?

3 A. Yes, it is.

4 Q. Okay. Primary hair transfer, that's just basically
5 where hair comes out, talking about head hair, onto something
6 else. Right?

7 A. That's correct.

8 Q. And secondary hair transfer would be hair coming
9 onto something else and then getting transferred onto yet
10 another item; is that correct?

11 A. Yes.

12 Q. Okay. In general, isn't it true that the presence
13 of a hair on a murder victim, that is foreign to the victim,
14 that doesn't mean, if there is a hair on the victim, that's
15 foreign to that victim, that doesn't mean that that hair came
16 from the killer; isn't that right?

17 A. No, that does not mean it is.

18 Q. And just because maybe a hair in this case is
19 recovered from a hand bag that was on the victim, that was
20 foreign to the victim, that doesn't mean that that is the
21 killer's hair either, does it?

22 A. No, it does not.

23 Q. And that's because hairs can be transferred in a
24 number of different ways. Primarily and secondarily.
25 Correct?

1 A. Yes.

2 Q. Okay. And hair in this situation, if we had a
3 situation where the victim was on the ground, in distress,
4 paramedics were hovering over that victim, police officers
5 were at the crime scene and were over the victim also, under
6 those circumstances, maybe even coworkers, hairs could be
7 transferred from any of those people onto the victim; isn't
8 that correct?

9 A. Yes. That's possible.

10 Q. And you wouldn't recommend that -- even though we
11 have other people at the crime scene, paramedics, police
12 officers, co-workers, you wouldn't recommend that hair
13 samples or DNA samples be obtained from any of these other
14 people who might have been at the crime scene or who were at
15 the crime scene, or anybody else that maybe the victim had
16 contact with that day, for comparative analysis; is that
17 correct?

18 MR. ROGERS: Objection. Compound question.

19 THE COURT: The objection as to the form of the
20 question is sustained.

21 Q. Okay. You wouldn't recommend in this case that we
22 obtain hairs from co-workers of the victim for comparative
23 analysis; is that correct?

24 A. That's correct.

25 Q. Why?

1 A. Well, they would be known to have had contact with
2 that individual, so it really wouldn't be meaningful if they
3 had hair that was from that person on an item, because they
4 had to come -- come in contact with each other. And it could
5 be unending. The hair still may never be able to be
6 identified as coming from a particular individual, regardless
7 of how many samples you gave us.

8 Q. Okay. You wouldn't recommend that hairs be obtained
9 from maybe police officers who were at the crime scene for
10 comparative analysis either; is that correct?

11 A. That's correct.

12 Q. And that's for the same reasons that you just stated
13 for the coworkers --

14 A. Yes.

15 Q. -- right? And you wouldn't recommend that hairs be
16 obtained from the -- hairs or DNA be obtained from paramedics
17 at the crime scene, for the same reasons you stated as to the
18 coworkers; is that correct?

19 A. Yes.

20 Q. That's because hairs can be picked up anywhere in
21 any number of ways; isn't that right?

22 A. Yes.

23 Q. Okay. And even if we did test all of the hairs of
24 everybody that was at the crime scene, and you did your
25 analysis, comparing this one hair that we have, that's on the

1 victim, of all these other known hair standards, and even if
2 you found that this hair was inconsistent with people who
3 were at the crime scene, that would not, under any
4 circumstances, mean that this was the hair of one of the
5 killer's; isn't that correct?

6 A. That's correct.

7 Q. Okay. And the problem that we have at crime scenes
8 is, with regard to maybe defendants leaving behind evidence,
9 is that, first of all, we have to find hairs; isn't that
10 correct?

11 A. Yes.

12 Q. Okay. And -- well, I'm sorry. First of all, hairs
13 can be lost, and second of all, we have to find them; isn't
14 that correct?

15 A. Yes, that is correct.

16 Q. Okay. And isn't it true that -- what's a probative
17 transfer rate?

18 A. I'm sorry. Could you repeat --

19 Q. Probative transfer rate.

20 A. I find associations approximately 10 percent of the
21 time, in the cases that I work. Meaning, maybe, with regards
22 to hair, maybe a head hair or a pubic hair from a victim on a
23 suspect's item or a hair from a suspect's item on a victim's
24 item.

25 Q. Okay. And these -- we're talking about crimes where

1 we have close physical contact, aren't we?

2 A. Yes.

3 Q. Okay. Only 10 percent of the time in these types of
4 crimes you find either suspect's hairs on victims or victim's
5 hairs on suspects; is that correct?

6 A. That's correct.

7 Q. All right. Pretty rare. Pretty rare; correct?

8 A. Yes.

9 Q. All right. Now, the testing in this case. You did
10 not do any on Q3, which I think is a limb hair which was
11 taken from the paper bag from the victim's left hand? Is it
12 -- you called it Q3?

13 A. Yes. I identified it as a Caucasian body area hair
14 and removed it from the glass microscope slide for
15 mitochondrial DNA analysis.

16 Q. Okay. And since it was just a body hair, you
17 weren't going to do microscopic analysis; correct?

18 A. I didn't compare it to anything. I did an analysis
19 to identify it as a body area hair.

20 Q. But this one hair, Q -- or Q1.1, you found that that
21 was a head hair. That's --

22 A. Yeah.

23 Q. -- the one we've been talking about; right?

24 A. Yes.

25 Q. And you found that that was microscopically

1 inconsistent with the victim's hair; is that right?

2 A. I had no conclusion to the victim. It exhibited
3 similarities and slight differences to those hairs from the
4 hair brush.

5 Q. Okay. But you sent that on, didn't you, for
6 mitochondrial analysis.

7 A. Yes, I did.

8 Q. Okay. And then in Q4.1 there were three fragments;
9 is that correct?

10 A. In Q4 there were three hair fragments. I removed
11 one of those for mitochondrial DNA analysis and sublabeled it
12 Q4.1. And those three fragments, again, they were Caucasian
13 origin hairs, but they were not suitable for microscopic
14 comparison purposes.

15 Q. So those are sent on -- all three of these -- my
16 understanding, all three of those were sent on for
17 mitochondrial testing; isn't that correct?

18 A. One hair was. I removed one hair for mitochondrial
19 DNA and sublabeled it Q4.1.

20 Q. Okay. Just to be sure, can you look at your notes
21 with regard to specimen Q4? It was my understanding that all
22 three of those fragments were sent for mitochondrial testing.

23 MR. ROGERS: Objection. Asked and answered.

24 THE COURT: It's cross-examination. I'll allow --
25 I'll allow her to review her notes.

1 Q. Is that your understanding from looking at your
2 notes? There were three fragments that were set for mito?

3 A. No. There were three fragments. I only sent one
4 fragment to mitochondrial DNA.

5 Q. All right.

6 MR. KNIGHT: Nothing further. Thanks.

7 THE COURT: Redirect?

8 MR. ROGERS: Yes, Your Honor. Thank you.

9 - - -

10 REDIRECT EXAMINATION

11 BY MR. ROGERS:

12 Q. So when you gave the estimate that in about 10
13 percent of the cases that you have worked on with hairs
14 recovered from crimes involving close physical contact, there
15 is some sort of probative hair transfer? That's basically
16 what your job is; right?

17 A. Yes.

18 Q. And when you say "a probative hair transfer," you
19 have an idea, at least by the time that that case enters the
20 10 percent, as to who the victim is and who the suspect is.

21 A. Yes. It's what has been identified to me as the
22 victim and a suspect in a case.

23 Q. But there are many other cases where there are hairs
24 which are not the victim's and unidentified otherwise;
25 correct?

1 A. Yes.

2 Q. And you don't know whether or not those hairs are
3 the perpetrator's as opposed to the suspect's.

4 A. That's correct.

5 Q. And there is a difference, isn't there?

6 A. Yes, there is.

7 Q. Okay. And so the fact that a hair is found in the
8 bag removed from the hand of the decedent after a homicide
9 does have evidentiary significance in your mind, doesn't it?

10 A. Yes, it does.

11 Q. And that's why you do what you do.

12 A. Yes. That's correct.

13 Q. And it would be -- you don't do the mitochondrial
14 testing.

15 A. No, I do not.

16 MR. KNIGHT: I'm going to object to the form of the
17 question.

18 Q. Tell us whether or not you do the mitochondrial
19 testing.

20 A. No, I do not.

21 MR. ROGERS: I thought it was a preliminary
22 question, Your Honor. I get to lead on those. But that's
23 okay.

24 Q. If there were samples of police officers and
25 paramedics kept in a mitochondrial DNA database, that would

1 facilitate the elimination of those people as donors of hair,
2 wouldn't it?

3 A. I can't speak to mitochondrial DNA. I don't know
4 enough about what all they do; what they can and can't do.
5 I'm sorry.

6 Q. If you had head hair standards of those people in
7 some sort of accessible database, and don't ask me what that
8 would be, that would facilitate elimination of those people
9 as donors of question hairs.

10 A. I would have to physically compare that question to
11 those known samples to determine whether or not it was
12 consistent with those known samples.

13 Q. So that wouldn't speed things up much from your
14 point.

15 A. No. We don't have databases for microscopic hair
16 comparison. It has to be a side-by-side comparison using the
17 microscope.

18 Q. And the more farfetched -- tell us whether or not
19 the more farfetched a source of an extraneous hair found on a
20 murder victim's hand becomes, does it make it more likely
21 that the hair is related to the event which caused the
22 victim's death?

23 MR. KNIGHT: Your Honor, I'd object to the form of
24 that question. Speculation.

25 THE COURT: The objection is sustained. That it is

1 speculation. Unless you have a foundation you want to lay.

2 MR. ROGERS: No, Your Honor. I will give up.

3 I have no further questions.

4 THE COURT: Recross?

5 MR. KNIGHT: No more questions, Your Honor.

6 THE COURT: May this witness be finally excused for
7 the defendant?

8 MR. ROGERS: Yes, Your Honor.

9 Thank you for coming.

10 THE COURT: And for the state?

11 MR. KNIGHT: Yes, Your Honor.

12 THE COURT: You're finally excused. Would ask you
13 not to discuss your testimony with any other witness, but
14 you're free to leave.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Ladies and gentlemen, we'll take our
17 mid-afternoon break.

18 The Court again reminds you of what you were told at
19 the first recess of the Court. Until you retire to consider
20 your verdict, you must not discuss this case among yourselves
21 or with others, or permit anyone to discuss it in your
22 hearing. You should not form or express any opinion about
23 the case until it is finally given to you to decide. Do not
24 read, view, or listen to any newspaper, radio, or television
25 report of the trial.

1 THE COURT: What about 9:00?

2 MR. ROGERS: We can -- if we're not done with
3 everybody but the tomorrow witness by 9:00, we would ask to
4 recess, but my guess is we will certainly -- I don't know
5 that we're going to go that late, but we might get close.
6 Because we have several witnesses.

7 MR. CRANE: You don't feel obligated to go until
8 9:00.

9 MR. ROGERS: I don't think that's what the Court's
10 wanting -- the Court is saying, if you're not done with
11 everybody but Dr. Loftus, you will go 'til 9:00. That's what
12 I'm hearing.

13 THE COURT: Yeah. I'm not asking a question.

14 MR. ROGERS: Am I correctly understanding it?

15 THE COURT: You have it correct. I don't want to
16 start and have six or eight witnesses tomorrow, including
17 that witness. Because it will not get submitted tomorrow.
18 And I don't know but that the state may have some rebuttal
19 testimony. So that's -- that's not within your control. I
20 assume.

21 MR. ROGERS: Not by direct conscious control at
22 least.

23 THE COURT: All right. So I just want you to be
24 prepared that you need to have your witnesses here so that we
25 can continue. And I will visit with our marshal to make sure

1 that they haven't already ordered some kind of dinner for our
2 jurors. And I guess I somewhat indicated it, but perhaps not
3 strongly enough, that we might go tonight.

4 Les?

5 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

6 THE COURT: We're considering an evening session, so
7 that we can have all but an out-of-town witness on the stand.
8 And the jurors had previously said they wouldn't mind eating
9 pizza or having something here.

10 DEPUTY COURT MARSHAL WERNER: That's what they just
11 told me.

12 THE COURT: Yes. I figured they would. Is it
13 possible -- I mean, have you already made arrangements for
14 dinner yet?

15 DEPUTY COURT MARSHAL WERNER: We can cancel that and
16 we can make arrangements for other things.

17 THE COURT: I suggest you make arrangements for
18 dinner here then.

19 DEPUTY COURT MARSHAL WERNER: Okay.

20 THE COURT: All right. Somewhere around 6, 6:15,
21 something like that. Because if they ate at noon, it's
22 reasonable to have them eat again at 6, 6:15.

23 DEPUTY COURT MARSHAL WERNER: Okay.

24 THE COURT: And then there is another matter that I
25 need to visit with Mr. Ferguson about.

1 calls Catherine Theisen.

2 THE COURT: Would you raise your right hand.

3 - - -

4 CATHERINE THEISEN,

5 being first duly sworn by the Court, testified as follows:

6 THE COURT: You may take the witness stand.

7 You may inquire.

8 - - -

9 DIRECT EXAMINATION

10 BY MR. ROGERS:

11 Q. Would you please state your name.

12 A. My name is Catherine Theisen. Catherine is spelled
13 with a C and Theisen is spelled T-h-e-i-s-e-n.

14 Q. And Miss Theisen, how are you employed?

15 A. I'm a forensic DNA examiner in the mitochondrial DNA
16 unit of the FBI laboratory, which is in Quantico, Virginia.

17 Q. Okay. We've had some testimony about what DNA is.
18 What is mitochondrial DNA?

19 A. Mitochondrial DNA is another kind of DNA in our
20 bodies which we have in addition to what's called nuclear
21 DNA. Nuclear DNA is what you, although you may not know it,
22 you may be more familiar with it. Nuclear DNA we get from
23 both our mothers and our fathers. And it's what makes us
24 unique. It's unique to individuals, with the exception of
25 identical twins.

1 And so if two items in a forensic case have the same
2 nuclear DNA type, you can say that a person contributed that
3 item of evidence to the exclusion of all other individuals.

4 On the other hand, mitochondrial DNA is inherited
5 only from our mothers. So therefore we share our
6 mitochondrial DNA type with our mother, our brothers and
7 sisters, and anybody else who's relate to us maternally. And
8 we also, by chance, share our mitochondrial DNA type with
9 other people at random.

10 Q. And is the other kind of DNA called nuclear DNA?

11 A. Yes. That's correct.

12 Q. And is that because it's in the nucleus of the cell?

13 A. It is. The nucleus can be thought of as sort of the
14 brain center of the cell. That's where the nuclear DNA is.
15 The mitochondrial DNA is in the mitochondria, which are in
16 the outer part outside of the nucleus. The mitochondria you
17 can think of as sort of the energy factor of our cells. And
18 that's where mitochondrial DNA is contained.

19 Q. Okay. Do hair contain -- the cells in your hair, or
20 your hair, not mine, obviously, the cells in your hair
21 contain nuclei?

22 A. No, they don't. Our hairs don't really even contain
23 cells. They are -- they contain remnants of cells. And
24 that's why typically we can't get a nuclear DNA result from a
25 hair. So we use mitochondrial DNA typing.

1 Q. They do -- the remnants of cells in your hair do,
2 however, contain mitochondria.

3 A. Not intact mitochondria, but mitochondrial DNA.

4 Q. Enough to type.

5 A. Enough for us to do this typing, yes.

6 Q. Okay. Now, you indicated that, unlike nuclear DNA,
7 mitochondrial DNA is not unique to the individual.

8 A. Yes. That's correct.

9 Q. Is, however, an exclusion by mitochondrial DNA a
10 total and certain exclusion?

11 A. Yes, it is. Two types that -- two mitochondrial
12 types that are different mean that those two samples did not
13 come from the same individual.

14 Q. Or from anybody who is maternally related to either
15 individual.

16 A. That's correct.

17 Q. Okay. Now in connection with -- well, let me ask
18 you first, at your laboratory, do you perform mitochondrial
19 DNA analysis on question hairs and hair fragments?

20 A. Yes, we do.

21 Q. And do you know a woman named Alice Eisenberg?

22 A. Yes, I do. She is in my same unit at the FBI
23 laboratory.

24 Q. Do you sometimes work together on cases?

25 A. Yes, we do.

1 Q. And have you been given to understand that you are
2 here to testify not only about your own work, but also work
3 you did in conjunction with Alice Eisenberg on this case?

4 A. The -- not exactly. She did a portion of the work
5 on the case, and then evidence that came into the laboratory
6 later, I conducted the exams on that evidence.

7 Q. Okay. And do you have also her notes and her
8 information with regard to the exams that she conducted?

9 A. Yes, I do. And I have reviewed those.

10 Q. Okay. And calling your attention to Defendant's
11 Exhibits R, S, and T.

12 A. May I look inside them?

13 Q. Yes. Look inside of them and see if you've seen
14 them before.

15 A. I recognize the outside of this package, which is R,
16 by our laboratory number, the FBI's laboratory number, and
17 the item number. And then I recognize this package inside
18 by, again, our laboratory, the item number, and the initials
19 of the technician who performed the work that Alice Eisenberg
20 then examined.

21 Q. Okay. And that technician was who?

22 A. That was Holly Morton.

23 Q. Okay.

24 A. May I set them here?

25 Q. Yes, please.

1 A. Item S, again, I recognize it by the FBI
2 laboratory's number on the outside and the item numbers. And
3 I recognize each package inside by the individual item
4 number, by the FBI laboratory number, and by the initials of
5 the technician who worked these samples.

6 Q. And what are those items inside?

7 A. The first one, our designation for that is K3. And
8 it is indicated that it is a buccal swab from Ryan Ferguson.
9 A buccal swab is a swabbing taken on a cotton swab from the
10 inside of one's mouth.

11 Q. Let me stop you there and ask you, what is purpose
12 of taking a buccal swab?

13 A. When we conduct mitochondrial DNA analysis, or any
14 kind of DNA analysis, the DNA types are compared from an
15 unknown item of evidence, for example, a hair found at a
16 crime scene, with known reference standards from people
17 thought to be involved in that crime or somehow associated
18 with that. And those are typically suspects or victims in a
19 crime. So we perform a comparison from these known samples
20 with what we call our question samples.

21 Q. So the buccal swab is the source of the known
22 sample?

23 A. That's correct.

24 Q. Because there's cells that have DNA, both nuclear
25 and mitochondrial --

1 A. Yes.

2 Q. -- inside your mouth.

3 A. And it's much easier and faster in the lab. We
4 could compare DNA from a known hair and a question hair, but
5 it's actually much more efficient to compare DNA from a known
6 sample from a buccal swab.

7 Q. Okay.

8 A. The second item is our laboratory's item designation
9 K4. And that is a buccal swab from Charles Erickson. And
10 the third item is our item K5. And that is a blood stain
11 from Keith Heitholt.

12 Q. Kent?

13 A. Kent. I'm sorry. Kent Heitholt.

14 Q. And then item T.

15 A. T is --

16 Q. This one up here.

17 A. Thank you.

18 Q. Defendant's Exhibit T. I'm sorry.

19 A. Yes. This one, again, the outer packaging I
20 recognize by our laboratory's number and our item designator.
21 Now, these are not items that were handled in our unit.
22 These would be the items that were processed by Karen
23 Lanning. These are microscope slides containing hairs. She
24 then removed, in this -- in one of these packages she removed
25 one hair and gave it to Alice Eisenberg to examine. But that

1 was given to Alice in a separate container.

2 Q. Would that be the hair that ended up in Exhibit R?

3 A. Yes.

4 Q. Okay.

5 A. Yes.

6 Q. Now, what is the protocol in your laboratory with
7 regard to the screening of hairs for mitochondrial DNA
8 analysis?

9 A. We don't especially use the term "screening," but we
10 do perform mitochondrial DNA analysis when we can in
11 conjunction with microscopic hair examinations. So that the
12 forensic hair examiner will compare, if she can, hairs found
13 at a crime scene with any known hair standards she may have.
14 She then makes an initial decision, based on her work, as to
15 what hairs would be suitable for mitochondrial DNA analysis.
16 We then discuss that, and she then transfers to me hairs that
17 are appropriate for mitochondrial DNA analysis. And when I
18 say "appropriate," I mean ones that would potentially prove
19 useful or probative in a particular case.

20 Q. Now, calling your attention to the comparison --
21 well, first of all, how were these comparisons done?

22 A. Which comparisons do you mean?

23 Q. Mitochondrial DNA comparisons. I'm sorry.

24 A. We go through some procedures in the laboratory,
25 some chemical-based procedures, where we grind up a hair, and

1 then add various chemicals to ex -- what we call extract or
2 get the DNA from that hair. And following some other
3 procedures, we actually can get a DNA profile of that hair.

4 Once that's completed, we then turn to our reference
5 standards. In this case we had two different buccal swabs
6 from two individuals and a blood stain from a third
7 individual. We then conduct a similar procedure, where we
8 extract the DNA from each of those known samples and perform
9 the mitochondrial DNA typing from those reference standards.

10 We then look at the mitochondrial -- examine the
11 mitochondrial DNA type that we have, from the evidence
12 samples as well as from the known samples, and make the
13 determination as to whether they match or not.

14 And to repeat what I said before, a match doesn't
15 mean that a person could have contributed that evidence to
16 the exclusion of all other individuals.

17 Q. But a nonmatch excludes the known -- the giver of
18 the known standard as the contributor of that sample.

19 A. Yes. An exclusion is absolute.

20 Q. And with regard to the question hair known in your
21 laboratory number as Q1.1, is that the one that was compared
22 by Miss Eisenberg?

23 A. Yes, it is.

24 Q. And did she follow that same procedure in comparing
25 that with the known standards from Kent Heitholt, Charles

1 Erickson, and Ryan Ferguson?

2 A. Yes, she did.

3 Q. And what results did she reach?

4 A. She concluded that the mitochondrial DNA types of
5 each of those four samples were different. Therefore, Ryan
6 Ferguson, Charles Erickson, and Kent Heitholt could not have
7 been the source of the Q1.1 hair.

8 Q. And have you reviewed her bench notes and her report
9 and her findings in that regard?

10 A. Yes, I have.

11 Q. And do you concur with that conclusion?

12 A. Yes, I do.

13 Q. Now, you later, yourself, this summer, were asked to
14 do some comparisons; is that correct?

15 A. Yes, I was.

16 Q. And what did you end up -- did you compare them with
17 the same known standards?

18 A. Yes, I did.

19 Q. And what did you compare with those known standards?

20 A. I received two additional hairs, one of which our
21 designation is Q3, and another designation is Q4.1. And I
22 compared the mitochondrial DNA types from those two hairs to
23 each of the three known standards.

24 And the mitochondrial DNA types of those two hairs
25 is the same as the mitochondrial DNA type of Kent Heitholt.

1 Therefore, he can't be excluded as the source of those hairs.

2 And because mitochondrial DNA is not uniquely
3 identifying, we then use a population database to give an
4 estimate as to how common or rare that mitochondrial DNA type
5 is in the population. And I would like to read those
6 percentages to you.

7 Q. Yes, please.

8 A. And these are what we call an upper bound frequency
9 estimate. It's an estimate of how common or rare this
10 particular type is in the general population.

11 And when we give these results, we give an estimate
12 for each of the three major racial and ethnic groups in the
13 United States: African-Americans, Caucasians, and Hispanics.
14 And we do have slightly different results for the Q3 hair and
15 Q4.1 hair, because we got more information from one hair than
16 the other hair.

17 For the Q3 hair, I would not expect that
18 mitochondrial DNA type to occur in more than .94 percent of
19 the African-American population. It would not occur in more
20 than 9.65 percent of the Caucasian population. Nor would I
21 expect it to occur in more than 2.13 percent of the Hispanic
22 population.

23 Now turning to the Q4.1 hair, I would not expect
24 that type to occur in more than 1.06 percent of the
25 African-American population, 9.83 percent of the Caucasian

1 population, nor 2.13 percent of the Hispanic population.

2 Q. And you can be sure also that it does not occur in
3 either the known -- did not occur in either Mr. Erickson or
4 Mr. Ferguson.

5 A. Their mitochondrial DNA types are different. They
6 could not have been the source of the Q3 or the Q4.1 hair.

7 Q. But Mr. Heitholt certainly could have.

8 A. He could have.

9 Q. And it seems fairly likely that he might have been.

10 A. I can't say that. The mitochondrial DNA type of
11 that particular hair is the most common type in the Caucasian
12 population. So it's possible.

13 Q. Okay. And the one that Miss Eisenberg compared, the
14 Q1.1, was marked to indicate that it had been recovered from
15 a bag removed from Kent Heitholt's right hand at his autopsy;
16 is that correct?

17 A. That's what was indicated to the FBI laboratory when
18 we received that hair, yes.

19 Q. Thank you.

20 MR. ROGERS: I have no further questions.

21 THE COURT: You may inquire.

22 MR. KNIGHT: No questions, Your Honor.

23 THE COURT: May this witness be finally excused for
24 the defendant?

25 MR. ROGERS: Yes, Your Honor.

1 THE COURT: For the state?

2 MR. KNIGHT: Yes, Your Honor.

3 THE COURT: Thank you so much for coming. You're
4 finally excused. If you would leave the samples. The
5 exhibits.

6 THE WITNESS: I will.

7 THE COURT: But you may, of course, take your notes
8 with you.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: You may step down.

11 Defendant may call his next witness.

12 MR. ROGERS: Holly Admire, Your Honor.

13 MR. CRANE: Judge, could we just approach real quick
14 while she's coming up?

15 THE COURT: Surely.

16 MR. CRANE: I guess maybe before you get her sworn.

17 - - -

18 Counsel approached the bench and the following
19 proceedings were held:

20 MR. CRANE: I don't have any problem with her
21 testifying. I would point out that the defense has never
22 noticed the state up on the defense of alibi. If any
23 testimony will -- if the defense seeks to illicit any
24 testimony from Miss Admire, who I believe the testimony will
25 be she will notice -- will recognize phone records about

1 calls between her and the defendant on the night of October
2 31st, I think that's what she is going to testify to, we were
3 given no notice of this alibi. So this witness should not be
4 asked about where the defendant was by the defense. We've
5 talked to her. She said she didn't know where he was. So
6 she --

7 MR. ROGERS: How does she know where he was? I
8 mean, if he was on the phone, obviously on the other end of
9 the phone. She can describe what she heard on the phone.
10 That's not saying where he was. And anything he said on the
11 phone about where he was has got to be hearsay.

12 MR. CRANE: Well, then, let me do this way.
13 Assuming this witness is not going to testify that she knew
14 where he was, during the conversations.

15 MR. ROGERS: I don't anticipate -- I'm not doing
16 this witness. Mr. Weis is.

17 MR. WEIS: No, I'm not going to ask her that.

18 MR. CRANE: Well, okay. Then, I mean, either side
19 can -- if that's going to be the answer, I -- and I thought
20 that was, but, you know, I mean, I'm just saying there ain't
21 no alibi. So if you want to ask her where she was.

22 MR. ROGERS: She was not in his physical presence at
23 the time --

24 MR. CRANE: Okay. So I can ask her or you can ask
25 her, "Do you know where he was?" And the answer will be no.

1 A. Oh, I live here in Columbia.

2 Q. All right. I hate to ask you this, but how old are
3 you now?

4 A. I'm 21.

5 Q. Okay. October 31st, 2001, how old would you have
6 been on that day?

7 A. I guess 17.

8 Q. And where did you reside on October 31st, 2001?

9 A. I lived in Columbia as well.

10 Q. Okay. And were you in school at that time?

11 A. Yes.

12 Q. Where did you go to school?

13 A. Rock Bridge.

14 Q. I'm sorry?

15 A. Rock Bridge.

16 Q. You got to speak up a little bit. I'm --

17 A. Sorry.

18 Q. -- kind of hard of hearing too. Okay. Rock Bridge
19 High School here in Columbia?

20 A. Yes.

21 Q. And did you know Ryan Ferguson on October 31st of
22 2001?

23 A. Yes.

24 Q. Okay. Do you know Charles Erickson?

25 A. Yes.

1 Q. And how did you know those two?

2 A. They were friends. Went to high school with them.

3 Q. You went to high school with both of them?

4 A. Yes.

5 Q. I'm going to direct your attention -- most of my
6 questions to the October 31st of 2001, night of, October
7 31st, 2001, and the early morning hours of November 1st,
8 2001. Okay?

9 A. Okay.

10 Q. Do you have any recollection of that date?

11 A. Yes.

12 Q. Of October 31st, 2001?

13 A. Yes.

14 Q. Okay. And that was Halloween of that year?

15 A. (Nodding head up and down.)

16 Q. You have to answer yes or no.

17 A. Yes. Sorry.

18 Q. Okay. Do you know whether you talked to
19 Mr. Ferguson on that date on the telephone.

20 A. Yes, I did talk to him.

21 Q. Okay. Did you own a cell phone at that time?

22 A. Yes, I did.

23 Q. Okay. Do you recall what -- and I'm not going to
24 ask you specifically what your number is, because -- what
25 your telephone number was, but did you -- do you recall what

1 your telephone number was at that time?

2 A. Yes, I do.

3 Q. Okay. Do you still have that same cell phone?

4 A. No.

5 Q. Okay.

6 MR. CRANE: As with that other one we had, with the
7 Kelly Ferguson, I don't -- I think I know the calls the
8 defense counsel's going to talk about. Insofar as the full
9 content of that document, with other calls to other people,
10 et cetera, that I don't remember, we may have to tailor the
11 exhibit.

12 MR. WEIS: That's fine.

13 MR. CRANE: But I won't object to him offering it at
14 this point for the purposes of discussing it with
15 Miss Admire.

16 MR. WEIS: And that's all I intend to do, Your
17 Honor. I'll lay a little bit more foundation here.

18 Q. I'm going to hand you, Miss Admire, what's been
19 marked as Defendant's Exhibit U. Can you look at that
20 document, please?

21 A. (Complying.)

22 Okay.

23 Q. Do you know what that document is?

24 A. A phone record.

25 Q. Okay. And is it a phone record for what phone?

1 A. It was my cell phone.

2 Q. Okay. It was the cell phone you used in October of
3 2001?

4 A. Yes.

5 Q. Okay.

6 MR. WEIS: I would offer Defendant's Exhibit U at
7 this time, Your Honor, with the stipulation that Mr. Crane --
8 we'll not publish it at this time. And we'll redact it if
9 necessary.

10 THE COURT: Exhibit U is admitted as stipulated.

11 - - -

12 Defendant's Exhibit U admitted into evidence.

13 - - -

14 Q. I want to ask you specifically, you've already
15 testified that you -- you did -- you do recall conversations
16 with Mr. Ferguson on October 31st, 2001?

17 A. Yes.

18 Q. Okay. And referencing specifically Defendant's
19 Exhibit U, do you recall what his cell phone was -- cell
20 phone number was at that time?

21 A. No, I don't.

22 Q. Okay. If you could look at Defendant's Exhibit U.

23 A. Okay.

24 Q. Do you -- well, let me ask you this. Do you know
25 whether you had -- how many conversations you had with

1 Mr. Ferguson that night?

2 A. I am not sure to exactly how many.

3 Q. Was it more than one or just one or --

4 A. It very well could have been more than one.

5 Q. Okay. I'm going to refer you to -- it's the second
6 page of Defendant's Exhibit U.

7 A. Uh-huh.

8 Q. All right. And those are phone calls coming and
9 going from that cell phone?

10 A. (Nodding head up and down.)

11 Q. Is that a yes?

12 A. Oh, yes. Sorry.

13 MR. CRANE: What cell phone?

14 MR. WEIS: From the cell phone that is represented
15 in Defendant's Exhibit U.

16 A. Yeah. It's a different number.

17 Q. You represent that that was the cell phone you used
18 at the time?

19 A. Yes. This was my cell phone.

20 Q. Okay. A phone call received at 10:28 p.m.?

21 A. Okay.

22 Q. Do you find that on that? And that's -- I'm
23 referring to October 31st, 2001.

24 A. Yes.

25 Q. And what's the -- what's the telephone number that

1 called at that point?

2 A. 573-356-6625.

3 Q. Was that -- what was the nature of the call? Was
4 that a received call or an outgoing call?

5 A. It was an incoming call.

6 Q. Okay. How long did that phone call last?

7 A. One minute.

8 Q. Again, I'm going to refer you to 11:03 on the same
9 night.

10 A. Okay. Hang on.

11 Q. Did you find that?

12 A. Yes.

13 Q. Okay. Was a phone call made at that time?

14 A. Yes.

15 Q. And what number was called?

16 A. It was the same number. 356-6625.

17 Q. 356 or 365?

18 A. 356.

19 Q. Okay. That's right. I transposed my own numbers.

20 MR. CRANE: What time did you say that was?

21 MR. WEIS: 11:03 p.m.

22 MR. CRANE: Okay. Go ahead.

23 Q. Another call at 11:34 p.m. on Defendant's Exhibit U?

24 A. Yes.

25 Q. Okay. And was that a -- what kind of call was that?

1 A. That was an incoming.

2 Q. Okay. And the telephone number that called you at
3 that time?

4 A. 356-6625.

5 Q. Okay. And how long was that telephone call?

6 A. That one was two minutes.

7 Q. Now referring to the same exhibit, but moving to
8 November 1st of 2001, did you receive a phone call at 1:41 in
9 the morning?

10 A. Yes.

11 Q. And you may have answered already. Was that a --
12 what was the nature of that telephone call?

13 A. It was an incoming.

14 Q. And how long did that phone call last?

15 A. Four minutes.

16 Q. And from what telephone number did you receive?

17 A. 356-6625.

18 Q. And did you -- you said that you remembered talking
19 to Mr. Ferguson.

20 A. Yes.

21 Q. Okay. I'm not going to ask you what the contents of
22 the conversations were. And I don't want you to even offer
23 that; okay?

24 A. Okay.

25 Q. Did -- could you -- were you able to hear any

1 background noise on the phone?

2 A. No.

3 Q. No loud noises?

4 A. (Shaking head from side to side.) Not that I
5 recall, no.

6 Q. Not that you recall. Okay. Did Mr. -- do you know
7 whether or not Mr. Ferguson contacted you or called you or --
8 through any other telephone that night?

9 A. I don't remember.

10 Q. You don't remember?

11 A. No.

12 Q. You don't -- did you receive a phone call at 2 in
13 the morning from him?

14 MR. CRANE: Judge, I'm going to object to the
15 leading nature of the question.

16 THE COURT: Sustained.

17 MR. WEIS: That's fine.

18 Q. Do you know where you spent the night on October
19 31st, 2001?

20 A. Where I spent the night?

21 Q. Yes.

22 A. Yes. At my friend Ann Churchill's house.

23 Q. What was her name?

24 A. Ann Churchill.

25 Q. Okay. And do you know whether or not Miss Churchill

1 had a cell phone at that time?

2 A. Yes, she did.

3 Q. Did you ever talk to Mr. Ferguson on that cell
4 phone?

5 A. I don't remember. I could have.

6 Q. Okay.

7 A. I really don't remember.

8 Q. That's fine. But you spent the night with her that
9 night.

10 A. Yes.

11 Q. Okay. And you recall that specifically that
12 specific night?

13 A. Yes.

14 Q. Okay. Do you recall Miss Churchill's cell phone
15 number?

16 A. No, I do not. I'm sorry.

17 Q. Let me just ask you, do you -- do you recall the
18 number 57 --

19 MR. CRANE: Judge, I'm going to object. It's a
20 leading question. He's going to sit there and give her the
21 phone number?

22 THE COURT: I don't know what the question is.

23 MR. CRANE: Okay. Well, once -- all right.

24 MR. WEIS: I was -- I was going to ask her, without
25 giving the number, I was going to ask her whether she

1 recognized this telephone number or not.

2 MR. CRANE: Well, now, how's he going to ask her if
3 she recognizes it without giving it to her? Objection.

4 MR. WEIS: Well, I'm going to --

5 MR. CRANE: The question suggests the answer.

6 MR. WEIS: No, it -- I'm asking for the -- I'm
7 asking whether she knows who the phone number went to.
8 Obviously I'm going to give her the telephone number. If I
9 gave her my telephone number, she wouldn't know it.

10 MR. CRANE: My point exactly.

11 MR. WEIS: It doesn't suggest the answer.

12 THE COURT: What is your objection, Mr. Crane?

13 MR. CRANE: The form of the question is improper.
14 Further, the witness has already stated -- I believe she
15 stated that she doesn't recall Ann Churchill's phone number.

16 THE COURT: Would you please approach the bench?

17 MR. WEIS: Sure.

18 - - -

19 Counsel approached the bench and the following
20 proceedings were held:

21 THE COURT: Is the number included in the question
22 that you're going to ask her Ann Churchill's cell phone
23 number?

24 MR. WEIS: It was. And that's why I didn't go ahead
25 and ask it.

1 THE COURT: Okay. She's already testified she
2 doesn't remember the number. If you -- I don't know Ann
3 Churchill's --

4 MR. WEIS: I don't know whether she still uses it or
5 not. That's why I didn't want to throw the number out there,
6 Your Honor.

7 MR. CRANE: I thought you were getting ready to
8 throw out the number.

9 MR. WEIS: That's why I went ahead --
10 (Counsel talking at the same time.)

11 THE COURT: All right. The objection is sustained.

12 - - -

13 The following proceedings were held in open court:

14 Q. Do you recall testifying that you recall speaking
15 with Mr. Ferguson on October 31st, sometime that night;
16 right?

17 A. Yes.

18 Q. Okay. And again, I'm not asking you -- I don't want
19 you to tell me what he said.

20 A. Okay.

21 Q. Okay? The tenor of the conversation you had with
22 him you described as?

23 A. The what?

24 Q. Well, the -- the tenor of the conversation that you
25 had with him.

1 A. I don't know if I can without saying what he said.

2 Q. And again, I don't want you to tell me what --

3 A. Yeah. It was a more serious conversation. Like, it
4 wasn't, like, just a "Hey, how you doing" type thing.

5 Q. Was it personal?

6 A. Yes. I guess that's more --

7 Q. Personal to the two of you?

8 A. Kind of. Probably more personal to me.

9 Q. Okay.

10 A. Yeah.

11 Q. Had, at this time, you and Mr. Ferguson ever had a
12 relationship?

13 A. No.

14 Q. Okay. Did it relate to any relationship with you?

15 A. No.

16 MR. CRANE: Well, Judge, I'm going to object to
17 leading question. "Did it relate to any relationship."

18 THE COURT: She's already said no. And your
19 objection's overruled as untimely.

20 MR. WEIS: That's all the questions I have, Your
21 Honor.

22 THE COURT: Do you have any questions, Mr. Crane?

23 - - -

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CROSS-EXAMINATION

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BY MR. CRANE:

Q. The -- let's see. What did we say? The last call I believe defense -- I just wanted to make sure I got this straight, Miss Admire. The last call you said from -- wasn't it from him? It was from Mr. Ferguson? The last one of the night?

A. I --

Q. 1:40 -- what is it?

A. I see one from him at -- oh, wait. No. That's the next day. Hang on a second.

Q. Yeah.

A. It was 1:41 that night.

Q. Okay. And you said it was four minutes?

A. Yes.

Q. Okay. So if the record there is accurate, it would have gotten over with at 1:45 a.m., November 1, 2001. We got that right?

A. Yes.

Q. Okay. And you were at your buddy's house?

A. Yes.

Q. You didn't go to George's that night, did you?

A. No.

Q. Did you go to Swilling's?

A. Yes.

1 Q. The Swilling party?

2 A. Yes.

3 Q. But then you didn't -- you didn't hit George's
4 afterwards?

5 A. No.

6 Q. Okay. What did you do?

7 A. I actually took a few friends home, and then I went
8 to Ann's house.

9 Q. Okay. Study?

10 A. I did -- I was doing homework that I had due the
11 next day.

12 Q. So you -- the party ended for you, and you went home
13 and studied.

14 A. Yes.

15 Q. You don't recall seeing any conflicts between
16 Charles Erickson and Ryan Ferguson, do you? No arguing or
17 anything --

18 A. No.

19 Q. -- of that nature?

20 A. No.

21 Q. And ma'am, before you looked at those phone
22 records --

23 A. Yes.

24 Q. -- did you remember the time the -- let me just
25 start there, the exact time of the call or calls that he made

1 to you?

2 A. Not the exact time, no.

3 Q. Okay. You were thinking it was at night?

4 A. I knew it was later.

5 Q. After the party?

6 A. I knew it was later. I actually was thinking
7 between 1 and 3, was what I was thinking, but.

8 Q. Okay. You don't dispute that it was from 1:41 to
9 1:45?

10 A. I mean, I don't remember that time exactly, no.

11 Q. Right. But I mean, you're not disagreeing with the
12 record.

13 A. Oh, no, I'm not saying that that's not right, yeah.
14 That sounds right.

15 Q. And Mr. Weis asked you if you heard any noise in the
16 background or anything. The -- when you started thinking
17 about that night, you know -- or Halloween of '01 and the
18 next day, when did that process of thinking about that night
19 start for you?

20 A. When the cops came and talked to me.

21 Q. Okay. After March of 2004, when --

22 A. Yeah.

23 Q. -- Ferguson and Erickson were arrested?

24 A. Yes.

25 Q. Okay. And you hadn't been dwelling on that

1 conversation or him calling you over the three years in the
2 middle, had you?

3 A. Well, there is sometimes that I was, but it was just
4 the content of the conversation, but.

5 Q. Okay.

6 A. But not at that time, no.

7 Q. Right. I mean, by 2004 --

8 A. No, I wasn't.

9 Q. -- the -- this brought it up again; correct?

10 A. Yes. Yes. Yes.

11 Q. You don't know what Mr. Ferguson, Ryan Ferguson, did
12 after you and he got done with that conversation, do you,
13 ma'am?

14 A. No.

15 Q. And you don't know who he was with at the time he
16 called you, do you, ma'am?

17 A. No.

18 Q. And you cannot tell this jury where he was at the
19 time he called you, can you, ma'am?

20 A. No.

21 MR. CRANE: No further questions.

22 THE COURT: Redirect?

23 - - -

24

25

1 REDIRECT EXAMINATION

2 BY MR. WEIS:

3 Q. Can you tell us whether or not it's possible that
4 Mr. Ferguson might have called you --

5 MR. CRANE: Objection. Calls for speculation.
6 Sorry to interrupt your question, but "if it's possible" is
7 speculation on the part of this witness, Judge.

8 THE COURT: Sustained.

9 Q. Mr. Crane asked you whether -- when you started
10 thinking about these conversations; correct?

11 A. Yes.

12 Q. And you didn't think about it until after
13 November -- March of '04, was your testimony. Is that --

14 A. Yes.

15 Q. Did you hear anything on the conversation or in the
16 background -- did you hear anything on the phone that would
17 have made you think about it before March of 2004 when the
18 police talked to you?

19 A. No.

20 Q. No noises?

21 A. No. No noises.

22 MR. WEIS: I think that's all I have.

23 THE COURT: Anything further?

24 MR. CRANE: Nothing further.

25 Thank you, ma'am.

1 THE COURT: May this witness be finally excused for
2 the defendant?

3 MR. WEIS: Yes, Your Honor.

4 THE COURT: And for the state?

5 MR. CRANE: Yes, Judge.

6 THE COURT: You're finally excused. Would ask you
7 not to discuss your testimony with any other witness. You're
8 free to leave, or if you wish to stay, you may.

9 THE WITNESS: Okay. Thank you.

10 THE COURT: You may step down.

11 You may call your next witness.

12 MR. WEIS: Let me make sure they're back here.

13 MR. ROGERS: Melissa Griggs, Your Honor.

14 THE COURT: Raise your right hand, please.

15 - - -

16 MELISSA RENEE GRIGGS,

17 being first duly sworn by the Court, testified as follows:

18 THE COURT: If you'd take the witness stand, please.

19 - - -

20 DIRECT EXAMINATION

21 BY MR. WEIS:

22 Q. Ma'am, could you state your name for the record.

23 A. Melissa Renee Griggs.

24 THE COURT: Are you able -- are all the jurors able
25 to hear? Okay.

1 JUROR: She may want to sit a little closer.

2 THE COURT: All right. The microphone on the bench,
3 the flat black one -- no. That one. That one is -- should
4 be on. And you don't have to put your face right on it. If
5 you just move your chair a little bit and speak up, your
6 voice will carry. Thank you.

7 Q. Okay. Why don't you repeat your name for the
8 record.

9 A. Melissa Renee Griggs.

10 Q. Okay. And Miss Griggs, where do you currently
11 reside?

12 A. Columbia, Missouri.

13 Q. I'm going to ask you about some events that occurred
14 on October 31st, 2001. Do you recall that night?

15 A. I do.

16 Q. Okay. Where were you living on October 31st, 2001?

17 A. At my mom's house.

18 Q. Okay. And where does your mom live?

19 A. She --

20 Q. You don't have to give me the address.

21 A. Columbia, Missouri, 204 West Leslie Lane.

22 Q. Oh, you don't -- that's fine. You did anyway. And
23 you lived with your mom in Columbia at that time?

24 A. I did.

25 Q. And how old were you on October 31st, 2001?

1 A. 15, 16. I want to say 16.

2 Q. And were you in school?

3 A. Yes.

4 Q. Where were you in school?

5 A. Hickman.

6 Q. Hickman High School?

7 A. Yes.

8 Q. Okay. Do you know Ryan Ferguson?

9 A. Yes, I do.

10 Q. How do you know Mr. Ferguson?

11 A. He -- I played soccer with him when we were around

12 12 years old, in a rec. team. He went to West, and I had

13 known him from other friends.

14 Q. West is --

15 A. West Junior High.

16 Q. -- West Junior High?

17 A. Yeah.

18 Q. Do you know Charles Erickson?

19 A. I do, yes.

20 Q. And how do you know Mr. Erickson?

21 A. I knew him when he moved here, and he started

22 hanging out with a lot of the people that I knew. So I met

23 him through friends.

24 Q. And how long did you know Mr. Erickson before

25 October 31st of 2001?

1 A. Probably two to three years.

2 Q. Okay. That night, Halloween of October of 2001,
3 what did you do that day? Or that evening?

4 A. That evening, my ex-boyfriend, Ryan Swilling, had a
5 party at his house. So I went there and got ready. We were
6 at the party. It got broken up by the police. I left with a
7 few friends and went to By George.

8 Q. Okay. Let me stop you there. Were you dressed up
9 that night?

10 A. I was.

11 Q. Okay. And what did you dress up as?

12 A. I was a biker.

13 Q. And you said you were with some other friends. Who
14 were you with at Mr. Swilling's party?

15 A. Well, I was with friends. Lisa Waters. Friends
16 from high school. Heather Ramsey. Sara St. Romaine. There
17 was a girl named Stephanie Slay that was there with me. And
18 Jenny Westberry.

19 Q. Do you remember seeing Mr. Erickson at the party?

20 A. I don't.

21 Q. You don't remember seeing him?

22 A. No.

23 Q. Did you see Mr. Ferguson there at the party?

24 A. No.

25 Q. You said that the -- do you know what time you

1 arrived?

2 A. At the party?

3 Q. Yes.

4 A. It was probably early, like around 5 or 6.

5 Q. All right. And you said that the police had broken
6 up the party. Do you know what time that happened?

7 A. I don't. I can't recall.

8 Q. After dark?

9 A. Yes.

10 Q. Okay. Where did you go after the party? Or after
11 the Swilling party?

12 A. I got in the car with my friends Stephanie and
13 Jenny, and they drove to By George, where we went and -- went
14 inside.

15 Q. Okay. You went to By George -- By George's is a
16 bar --

17 A. Yes.

18 Q. -- is that correct? And you were how old at that
19 time?

20 A. 16.

21 Q. Okay. How did you get in the bar?

22 A. I used Stephanie's ID.

23 Q. And Stephanie's?

24 A. She was 21 at the time.

25 Q. Okay. And was she at the party with you at Ryan

1 Swilling's house?

2 A. Yes.

3 Q. Did you see Charles Erickson at By George's?

4 A. Yes.

5 Q. Did you see Ryan Ferguson?

6 A. Yes.

7 Q. Can you describe for me By George's? Sort of the
8 layout of the bar itself?

9 A. Yeah. You walk in, where they take your ID and you
10 pay. It's on the left side of the building. And then once
11 you go inside, you have to turn to the right to go towards
12 the dance floor. There's a bar that you will come to before
13 you hit the dance floor, and then there's a bar on the far
14 side of the dance floor, on the right side of the building as
15 well.

16 Q. Do you know where you saw Mr. Ferguson?

17 A. I can't recall, no.

18 Q. Do you know where you saw Mr. Erickson?

19 A. No.

20 Q. But you recall seeing them?

21 A. Yes, I do recall seeing them.

22 Q. And why is that? Why do you recall?

23 A. Because whenever I -- it was right when we first got
24 there, Erickson came up to me and asked, "Where's Ryan?"
25 Referring to my ex-boyfriend at the time. And I said that he

1 had gotten arrested. And -- and that's it. That's the
2 extent of it.

3 Q. Did you see him -- was that early on in the evening?

4 A. That was when we first got to By George. So it
5 was -- yeah, it was early.

6 Q. Did you see him any other times throughout the
7 night?

8 A. I did not.

9 Q. How long did you stay at that -- at By George's?

10 A. I stayed until 1:30.

11 Q. You say 1:30. How do you know it was 1:30?

12 A. Well, because that's when it closed, and you had to
13 leave.

14 Q. How did you know that you had to leave the bar?

15 A. Because they turned the lights on, around 1:15. And
16 the bouncers start pushing everyone out and making you leave.

17 Q. Okay. Was Mr. Ferguson wearing a costume that
18 night?

19 A. I don't know.

20 Q. How about Mr. Erickson?

21 A. I'm not sure either.

22 Q. Where did you go after By George?

23 A. I went to Stephanie Slay's house.

24 Q. Did you hang out in the parking lot of By George at
25 all?

1 A. No.

2 Q. Did you see Mr. Erickson or Mr. Ferguson leaving the
3 party?

4 A. No.

5 Q. Is this the first time you had been to By George?

6 A. No.

7 Q. No? So you had been there before October 31st,
8 2001?

9 A. Oh, was it the first time that I --

10 Q. Was that the first time you went there?

11 A. That night?

12 Q. Yes.

13 A. Yes.

14 Q. Okay. Have you been to By George's since then?
15 Since October 31st, 2001.

16 A. Yes. I think --

17 Q. My understanding it's not operating any more.

18 A. Right. No. No, it closed down.

19 Q. Have you ever been at By George's after 1:30 in the
20 morning?

21 A. No.

22 MR. WEIS: I think that's all the questions I have
23 at this time.

24 THE COURT: You may inquire.

25 - - -

CROSS-EXAMINATION

1

2 BY MR. CRANE:

3 Q. Now -- hi, Ms. Griggs. How are you doing?

4 A. I'm good. How are you?

5 Q. Oh, I'm hanging in there. On -- now, how old are
6 you now?

7 A. I'm 20.

8 Q. You going to the bars these days, are you?

9 A. Yes.

10 Q. Okay. I'll try not to run into you there. You
11 started off -- I think you said you were 15 or 16.

12 THE COURT: You need to speak out loud.

13 Q. Yeah, you got to say so for the record.

14 A. Yes.

15 Q. 15 or 16?

16 A. I was 16 years old.

17 Q. Okay. What, did you do the math?

18 A. Tried. Yeah.

19 Q. All right. And since then, before George's closed,
20 you'd gone there periodically?

21 A. No, not since they closed.

22 Q. No, no. Since -- since the first time, before it
23 closed, since the first time you went, the date we're talking
24 about October 31st, '01 --

25 A. Yes.

1 Q. -- you've been to By George's --
2 A. After that.
3 Q. -- several times; right?
4 A. Yes.
5 Q. Okay. And other bars here in town.
6 A. Yes.
7 Q. Okay. Now, on this night, October 31st, 2001, did
8 you have any alcoholic beverages?
9 A. Yes.
10 Q. And where did you start drinking?
11 A. At my ex-boyfriend Ryan's house.
12 Q. Swilling's?
13 A. Yes.
14 Q. And they had beer there?
15 A. Yes.
16 Q. Is that what you drank?
17 A. Yes.
18 Q. Did you have several beers there at Ryan's?
19 A. Yes.
20 Q. Okay. And then when you got to -- did you go right
21 from Ryan's to By George bar?
22 A. Yes.
23 Q. And when you got to the bar, you got on in, and did
24 you have some alcoholic beverages inside George's?
25 A. Yes.

1 Q. About how many -- was it still beer or did you
2 switch up?

3 A. I probably switched up.

4 Q. What did you go to? Hard liquor?

5 A. Yes.

6 Q. Okay. What did you -- what's your -- what was your
7 pleasure that evening?

8 A. An Amaretto Sour.

9 Q. Amaretto Sour. Popular drink?

10 A. Yes.

11 Q. Do you know how many of those you had as you sit
12 there today?

13 A. No.

14 Q. Okay.

15 A. Estimation, probably two.

16 Q. Okay. Two? And did you pay for those?

17 A. Yes.

18 Q. Okay. Was there also a cover charge that evening?

19 A. Yes.

20 Q. And did you pay for that yourself?

21 A. No.

22 Q. Somebody else paid for it?

23 A. Yes.

24 Q. Okay. Did you get intoxicated at some point during
25 the evening?

1 A. Yes.

2 Q. Okay. And was that time prior to when you all left?

3 I say "you all" because I'm picturing you with some buddies;

4 right?

5 A. Yes. Yes. I was intoxicated before we left.

6 Q. Okay. You don't recall what Mr. Ryan Ferguson was

7 wearing when you saw him at the bar?

8 A. No.

9 Q. And you don't recall what Chuck Erickson was wearing

10 when you saw him at the bar?

11 A. No.

12 Q. But you don't think they were in costume; is that

13 correct?

14 A. I don't know.

15 Q. Okay. Can't remember that at all.

16 A. No.

17 Q. Okay. Fair enough. You indicated you did not see

18 either of those two individuals at Swilling's --

19 A. Right.

20 Q. -- party. Your ex-boyfriend's party.

21 A. Right.

22 Q. But that you saw them both at By George bar.

23 A. Yes.

24 Q. Were they together when you saw them?

25 A. Yes.

1 Q. Okay. And when you saw them, you thought that was
2 at the early point in the evening?

3 A. Yes.

4 Q. And ma'am, thereafter did you ever see them during
5 that night, if you will, into the next morning, again?

6 A. No.

7 Q. Okay. And you indicated you had a brief
8 conversation with Mr. Erickson, but you did not at least
9 recall speaking with Ryan Ferguson that night.

10 A. Correct.

11 Q. Now, were you wearing a watch that evening?

12 A. No.

13 Q. When you have been to the bars -- and I'm really not
14 trying to get on you. You know. I mean, you shouldn't do
15 that; okay?

16 A. I know.

17 Q. But -- hey, let me ask you, you've been to the bars
18 a lot, and you've been there at closing time a lot.

19 A. Yes.

20 Q. Okay. And the -- what happens is, is they -- you
21 leave when the lights come up? At least that's the way they
22 had it at George's?

23 A. Well, yeah. They'll turn the lights on usually
24 around 1:15.

25 Q. Okay.

1 A. That's when they stop selling you alcohol. You'll
2 need to stop drinking what you're drinking, throw it away,
3 and they want you out of the building.

4 Q. Okay. Now, when you left at that time, where did
5 you go?

6 A. I went straight to Stephanie's car, and then went to
7 Stephanie's house with her.

8 Q. Okay. Ma'am, you don't know what Ryan Ferguson or
9 Chuck Erickson did after you last saw them, do you?

10 A. No.

11 Q. And you don't know who was inside George's bar after
12 you left; isn't that correct?

13 A. That's correct.

14 Q. You didn't have any trouble getting in, did you?

15 A. No.

16 Q. Did you have some photographs of the party at
17 Swilling's?

18 A. I did, yes.

19 Q. When you looked at those -- have you looked at those
20 recently?

21 A. Yes.

22 Q. Did they help you, when you've looked at those,
23 remember a little bit more about that night?

24 A. Yes.

25 Q. Okay. And maybe some details you'd forgotten, you

1 were able to remember those by the photographs you saw?

2 A. Yes.

3 Q. Okay. Like the exact outfit you had on?

4 A. Yes.

5 Q. Or what somebody else was wearing?

6 A. Yes.

7 Q. And it brought other memories back to you?

8 A. Yes.

9 Q. Now those were accurate memories.

10 A. Yes.

11 Q. But you'd forgotten them.

12 A. Yes.

13 Q. Before you saw the photographs.

14 A. Yes.

15 Q. Something that jogged your memory.

16 A. Yes.

17 MR. CRANE: No further questions, Your Honor.

18 THE COURT: Redirect?

19 - - -

20 REDIRECT EXAMINATION

21 BY MR. WEIS:

22 Q. Miss Griggs, do you remember the lights coming up at

23 By George's on October 31st, 2001?

24 A. Can you repeat that?

25 Q. Do you remember the lights coming up at the By

1 George bar --

2 A. Yes.

3 Q. -- on October 31st, 2001?

4 A. Yes.

5 Q. Is that an accurate memory?

6 A. Yes.

7 Q. Were other people leaving at the same time you were

8 leaving?

9 A. Yes.

10 Q. Lots of people or --

11 A. Yeah. A majority of the people that were there were

12 going out the door.

13 Q. Okay. And was the music still playing when the

14 lights go up?

15 A. No.

16 Q. Did you get any drinks after the lights went back

17 up?

18 A. No.

19 Q. And your experience, you have to leave at 1:30, at

20 bars in Columbia.

21 A. Yes.

22 MR. WEIS: That's all the questions I have.

23 THE COURT: Anything further?

24 MR. CRANE: Nothing further.

25 Thank you, ma'am.

1 THE COURT: May this witness be finally excused?

2 MR. WEIS: Yes, Your Honor.

3 THE COURT: For the state?

4 MR. CRANE: Yes.

5 THE COURT: Miss Griggs, you're excused. You will
6 not discuss your testimony with any other witnesses to be
7 called, but you're free to go.

8 THE WITNESS: Okay.

9 THE COURT: Thanks.

10 You may call your next witness.

11 MR. WEIS: Call Kris Canada.

12 THE COURT: Raise your right hand, please.

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KRISTOPHER CANADA,

being first duly sworn by the Court, testified as follows:

THE COURT: Would you take the witness stand. And you will need to speak up.

THE WITNESS: Okay.

THE COURT: The little flat black metal thing is a microphone. And you don't have to put your mouth right on it, but just move up just close enough so it will pick up your voice.

- - -

DIRECT EXAMINATION

BY MR. ROGERS:

Q. Would you please tell us your name.

A. Kristopher Canada.

Q. Is that Canada like the country up north?

A. Yes, sir.

Q. And Kristopher with a K?

A. Yes, sir.

Q. And Mr. Canada, where do you now live? What town?

A. Columbia, Missouri.

Q. And how long have you lived in Columbia?

A. My entire life.

Q. How old are you?

A. Twenty-six.

Q. Have you ever been convicted of or pleaded guilty to

1 a felony or misdemeanor?

2 A. Yes, sir.

3 Q. And which was it?

4 A. A misdemeanor.

5 Q. What was the name of the misdemeanor?

6 A. First degree trespassing.

7 Q. And where did you plead guilty?

8 A. Here.

9 Q. In Boone County, Missouri?

10 A. Yes.

11 Q. In this building?

12 A. In this building.

13 Q. And what sentence did you receive?

14 A. Six month suspended imposition of sentence and two

15 years unsupervised probation.

16 Q. And did you successfully complete the probation?

17 A. Yes, sir.

18 Q. And when was that? How old were you when it

19 happened?

20 A. Seventeen.

21 Q. Now, I want to call your attention to Halloween of

22 2001. Were you employed at that time?

23 A. Yes, sir.

24 Q. Where -- where did you work?

25 A. By George dance club.

1 Q. By George what?

2 A. Dance club.

3 Q. Dance club? Was that the official name?

4 A. That's the official name.

5 Q. Okay. And what was your job there?

6 A. I was a bartender.

7 Q. And I believe I know this, but in case anybody

8 doesn't, what does a bartender do?

9 A. I serve drinks.

10 Q. All right. Tends bar.

11 A. Tends bar.

12 Q. Okay. And what kind of drinks did By George serve?

13 A. Anywhere from draft beer, bottled beer, mixed

14 drinks.

15 Q. Okay. How long did you work there?

16 A. Five years.

17 Q. And did you work every Halloween that occurred

18 during the period that you worked there?

19 A. No, sir.

20 Q. Which one did you miss?

21 A. I believe it was 2000.

22 Q. And do you know why that was?

23 A. Just not on the schedule. I was still bouncing at

24 the time, so. I was a bouncer for a year and a half before I

25 became a bartender there.

1 Q. Okay. So, as a bouncer, you would not serve
2 alcohol.

3 A. No, sir.

4 Q. And so you didn't need to be 21 to be a bouncer?

5 A. No, sir.

6 Q. But by October 31st of 2001 you were a bartender?

7 A. Yes, sir.

8 Q. How long had you been a bartender?

9 A. Since New Year's Eve of --

10 Q. Between 2000 --

11 A. Right after I turned 21. The December after my
12 birthday.

13 Q. Okay. And By George's, I'm given to understand, is
14 no longer open as a bar; is that correct?

15 A. Yes, sir.

16 Q. When did it close?

17 A. I believe February of 2004.

18 Q. Okay. And were you still working there at that
19 time?

20 A. Yes, sir.

21 Q. And so you worked there Halloween of 2003?

22 A. Yes, sir.

23 Q. Halloween of 2002?

24 A. Yes, sir.

25 Q. Halloween of 2001.

1 A. Yes, sir.

2 Q. As a bartender.

3 A. Yes, sir.

4 Q. And you worked there -- did you work there Halloween
5 1999 as a bouncer?

6 A. I believe so.

7 Q. Okay. With regard to 2001, did George's -- did By
8 George's dance club have a cover charge?

9 A. To my memory, yes.

10 Q. Do you know how much that was?

11 A. Anywhere probably between three and five dollars.

12 Q. Was there live music there?

13 A. No. It was a DJ.

14 Q. A DJ?

15 A. Playing records. Or CDs.

16 Q. A discotheque kind of deal?

17 A. Yes.

18 Q. And do you specifically recall working at By
19 George's Halloween of 2001?

20 A. Yes, sir.

21 Q. Were you there until closing time?

22 A. Yes, sir.

23 Q. What was closing time?

24 A. 1:30.

25 Q. How did that -- how did By George's handle closing

1 at 1:30?

2 A. The lights normally came up around 1:10, 1:15. We
3 -- the bouncers then did a walk-through of the club and told
4 everyone to leave. By 1:30 we had the doors locked.

5 Q. Did you have a last call?

6 A. Oh, yeah, there would be a last call, but I mean --
7 it's a loud -- loud bar. The last call would be right around
8 1:00.

9 Q. Okay. But somebody could easily miss the last call?

10 A. Yes.

11 Q. But they couldn't miss the lights coming on.

12 A. No, sir.

13 Q. Okay. And have you ever worked there when it stayed
14 open after 1:30?

15 A. No, sir.

16 Q. Has By George's ever been the kind of place which
17 would allow a patron to come --

18 MR. CRANE: Judge, I'm going to object to leading
19 nature of the question. I know he's going to complete it,
20 but I would just get that in early.

21 MR. ROGERS: I'll rephrase it.

22 THE COURT: Do that.

23 MR. ROGERS: Maybe avoid the objection.

24 Q. Could you tell us whether or not you've ever been at
25 By George's when patrons were allowed to enter after the bar

1 had closed.

2 A. No sir.

3 Q. No, you can't tell us or no --

4 A. Oh. I've never seen that happen, no.

5 Q. Okay.

6 MR. ROGERS: When I ask a nonleading question, it
7 gets a confusing answer.

8 Q. Specifically, on the early morning of November 1st,
9 2001, could somebody have been admitted to the bar sometime
10 after 2:30 that morning?

11 MR. CRANE: Objection, leading, and he hasn't
12 established that he was there at 2:30 a.m. on November 1,
13 2001.

14 MR. ROGERS: I don't think it's leading, Judge,
15 because I don't think it suggests the answer.

16 MR. CRANE: He asked: "Could somebody have been
17 there?"

18 THE COURT: The objection is sustained.

19 Q. Tell us whether or not someone could have been
20 admitted to By George's as a customer after 2:30 on November
21 1st, 2001.

22 MR. CRANE: Same objection. Virtually no difference
23 from the other one.

24 THE COURT: Well, I -- it is not a leading question,
25 but --

1 MR. CRANE: He hasn't laid a foundation that this
2 man --

3 THE COURT: I haven't finished, Mr. Crane.

4 MR. CRANE: Okay. I didn't mean to cut you off,
5 Judge.

6 THE COURT: He has not -- he has not laid a
7 foundation that this witness was there, to give that answer.

8 Q. Let me ask you this. What would happen after the
9 bar closed at 1:30 on Halloween 2001? With regard to you.
10 What did you do after closing?

11 A. I cleaned up my back bar area. Moved the liquor to
12 the front. Finish wiping everything down. Cleaned out
13 ashtrays. And I was probably out of there by 2:00.

14 Q. Okay. So you're gone.

15 A. Yeah.

16 Q. How about the bartender in the front bar?

17 A. I wouldn't know if they got out of there at 2 or
18 2:15 or 2:30, but.

19 Q. Does the DJ stick around and play music while --

20 A. No, sir.

21 Q. -- this is going on? Are there ever police officers
22 outside By George's when it closes?

23 A. Sure.

24 Q. How often have you seen that happen?

25 MR. CRANE: Well, Judge, I'll object. Relevance.

1 If he knows about this evening, fine.

2 THE COURT: As to this evening, you may inquire. As
3 to any other evening, the objection is sustained.

4 Q. When By George's closed on Halloween, do you know
5 whether or not there were police officers outside?

6 A. No, there were not.

7 Q. Pardon?

8 A. No, there were not.

9 Q. And how do you know that?

10 A. I had to leave through the parking lot. I mean, I
11 would have seen them.

12 Q. Okay. So that would be after -- well, half an hour
13 after closing --

14 A. Yes.

15 Q. -- right?

16 A. Yes, sir.

17 Q. So do you know whether or not there were police
18 officers when the patrons had to leave?

19 A. No, sir, I do not know.

20 Q. Okay. Were you ever the last person to close up at
21 By George's?

22 A. No, sir.

23 Q. So you didn't lock the door?

24 A. No, sir.

25 MR. ROGERS: I don't have any other questions.

1 Thank you.

2 THE COURT: You may inquire.

3 - - -

4 CROSS-EXAMINATION

5 BY MR. CRANE:

6 Q. Hey, Mr. Canada, what's your date of birth?

7 A. 10-3-79.

8 Q. Okay. And you worked at George's from May of '99 to
9 February of 2004?

10 A. Yes, sir.

11 Q. When did George's close?

12 A. I believe in February. I worked until the bar
13 closed.

14 Q. Was it shut down?

15 MR. ROGERS: Objection. Irrelevant.

16 THE COURT: How --

17 MR. CRANE: I don't know. He's brought
18 into issue -- I think this whole case has talked about people
19 going in there under age and maybe -- and whether or not
20 they're in there after hours. You know. I don't know. This
21 witness may not know the answer, but he worked there, right
22 up until it closed.

23 THE COURT: What is your objection?

24 MR. ROGERS: Irrelevant.

25 THE COURT: All right. As to February of 2004, the

1 objection is sustained.

2 Q. Kris, you don't have any specific memory as you sit
3 there today of October 31st, 2001, do you?

4 A. No, sir.

5 Q. Okay. You're basing what you talked to the defense
6 attorney about on what you recall the normal night to be.

7 A. Yes, sir.

8 Q. And that would be when you're supposed to close.
9 Right?

10 A. Yes, sir.

11 Q. You got to answer out loud.

12 A. Yes, sir.

13 Q. And, you know, when you were supposed to get off,
14 things like that; right?

15 A. Yes, sir.

16 Q. And you worked four of these Halloween things;
17 right?

18 A. Yes, sir.

19 Q. And they kind of run together, don't they? I mean,
20 it was all kind of the same money-making proposition: You
21 have a costume deal and the kids show up and you play loud
22 music and drink and charge a cover and make money; right?

23 A. Yes, sir.

24 Q. Okay. So you don't specifically remember this
25 particular night, October 31st, 2001, other than the fact

1 that you went to work.

2 A. Yes, sir.

3 Q. Busy night; a lot of people there?

4 A. Yes, sir.

5 Q. Now, talking about when the place should have
6 closed, you know, you recall that the lights went up at a
7 time and you closed down at a time?

8 A. Yes, sir.

9 Q. 1:30? Some -- thereabouts?

10 A. Yes, sir.

11 Q. Also, nobody under 21 should have been in there;
12 right?

13 A. Yes, sir.

14 Q. Well, I'll let you in on a little secret, Kris.
15 Would it surprise you to know that there was a whole lot of
16 people sounding like they were in there under 21 on October
17 31st, 2001? And I'm not suggesting it's your responsibility.
18 You're just working the bar; right?

19 A. Yes, sir.

20 Q. But that shouldn't have happened, should it?

21 A. No, sir.

22 Q. You don't disagree that it did, do you?

23 A. No, sir.

24 Q. And George's, on a number of occasions, was closed
25 by liquor control, wasn't it?

1 A. Yes, sir.

2 Q. While you worked there.

3 A. Yes, sir.

4 Q. Up to a week at a time. Is that the longest time
5 you remember being shut down?

6 A. Yes, sir.

7 Q. And they were shut down, closed, as a sanction for
8 liquor control violations for maybe shorter periods on other
9 dates; is that correct?

10 A. Yes, sir.

11 Q. While you worked there.

12 A. Yes, sir.

13 Q. Do you know what night of the week it was on October
14 31st, 2001?

15 A. No, sir.

16 Q. Now, you worked the -- you worked the back bar?
17 There's two bars in there?

18 A. Yes, sir.

19 Q. And you worked the back bar, and then there was a
20 front bar.

21 A. Yes, sir.

22 Q. And I want to make sure I'm right. Would the --
23 when it got to closing time, the back bar would close first?

24 A. Both bars would close at the same time, but I would
25 get done quicker because it was a smaller bar area.

1 Q. Okay. Policing up your area didn't take as long.

2 A. No, sir.

3 Q. Okay. And then once you got that done, got your bar
4 shut down, you could leave; right?

5 A. After I cleaned some ashtrays, yes.

6 Q. Okay. Cleaned a few ashtrays.

7 A. (Nodding head up and down.)

8 Q. Okay. Then you could get on out of there.

9 A. Yes, sir.

10 Q. So isn't it true that you were, if all went right,
11 the first of the employees to get out of there.

12 A. Possibly, yes.

13 Q. Well, I mean, the front bar guy's got a bigger bar
14 to deal with, takes him longer; and you weren't responsible
15 for that; right?

16 A. Exactly.

17 Q. And isn't it true -- I know you can't remember
18 specifically October 31st, 2001, but isn't it true that you
19 would get out of there and there would be people still in
20 there. People working, at least.

21 A. Yes, sir.

22 Q. Okay. And you don't know what happened after you
23 left, do you?

24 A. No, sir.

25 Q. By the end of the night, you were ready to get on

1 out of there, weren't you?

2 A. Yes, sir.

3 Q. By the way, George's isn't there any more, is it?

4 A. No, sir.

5 Q. It's a furniture store now; right?

6 A. Yes, sir.

7 Q. No more bar.

8 A. No more bar.

9 MR. CRANE: No more questions.

10 THE COURT: Redirect?

11 MR. ROGERS: Thank you, Your Honor.

12 - - -

13 REDIRECT EXAMINATION

14 BY MR. ROGERS:

15 Q. Let me ask you this, sir. Did you have nights that
16 you usually worked?

17 A. Yes, sir.

18 Q. What nights of the week would you usually work, as a
19 bartender, before you were -- after you were a bouncer?

20 A. Mondays and Thursdays regularly.

21 Q. And would you also work special events such as
22 holidays?

23 A. Yes, sir.

24 Q. Maybe like Halloween?

25 A. Halloween. We would have a Fat Tuesday party on

1 Mardi Gras.

2 Q. And you'd work then whatever -- obviously Fat
3 Tuesday is always Tuesday. Whether Halloween was a Monday or
4 a Wednesday or a Friday or whatever, you'd work it.

5 A. Yes, sir.

6 Q. And on some week nights was there only one bar open,
7 the front one, or --

8 A. Yes, sir.

9 Q. -- was the back bar always open?

10 A. The back bar was not always open.

11 Q. But when you worked, you would usually work the back
12 bar.

13 A. Yes, sir.

14 Q. Now, have you ever worked at By George's for any
15 holiday where it stayed open late, like a private party or
16 something like that?

17 A. No, sir.

18 Q. And you can be sure that that was not happening on
19 Halloween.

20 MR. CRANE: I'll object to that, Judge. He said he
21 was gone and there were other people inside. And I'll object
22 to the leading form of the question and lack of foundation.

23 THE COURT: Well, it is a leading question, Counsel.
24 And there does not appear to be a foundation. But you may
25 rephrase your question.

1 MR. ROGERS: I will rephrase my question.

2 Q. Directing your attention to Halloween night of 2001,
3 October 31st, and the early morning hours of November 1st,
4 2001, please tell us whether or not By George's stayed open
5 after 1:30 as some sort of private party or something.

6 MR. CRANE: Object. Lack of foundation. He says he
7 was gone by 2:00, and he also says he can't specifically
8 remember this night.

9 THE COURT: I'm going to overrule your objection.
10 He may testify to what he saw when he was there.

11 Q. Yes, sir. Go ahead. Answer the question.

12 A. There was no one there left when I left at 1 -- or
13 at 2:00.

14 Q. Okay. Was there, in fact, an employee maybe left?

15 A. Oh, there were employees there still cleaning,
16 but...

17 Q. But no customers.

18 A. No, sir.

19 Q. And would bouncers leave before the bartenders?

20 A. Some would. Depending on what they were doing that
21 night. If they were helping bring beer up to the front or
22 whatnot, they would leave as soon as they got everything
23 cleaned up and the tables wiped off.

24 Q. Okay. So they had some cleaning responsibilities as
25 well.

1 A. Yes, sir.

2 Q. They were not just supposed to get the customers out
3 at closing time and et cetera. Whose job is it to verify the
4 age of individuals seeking to enter the bar?

5 A. The doormen.

6 Q. Is that like a bouncer or --

7 A. It's a bouncer, but it's just a man -- a door guy at
8 the front with a flashlight. He's with the guy at the
9 register.

10 Q. And once somebody goes in and pays the cover and the
11 door man checks their ID or doesn't, as the case may be,
12 how -- are they somehow marked so that they can come in and
13 out of the bar?

14 A. Whenever they leave, they can get -- they can get a
15 stamp, and then whenever they came back into the bar, if they
16 showed the stamp --

17 Q. But all patrons don't get a stamp upon entry?

18 A. No, sir.

19 Q. They didn't use any wrist bands?

20 A. No, sir.

21 Q. At least not when you were a bouncer. Have you been
22 the door man?

23 A. Yes.

24 Q. Okay. Now, Mr. Crane talked about By George's being
25 closed down for liquor law violations one time up to a week.

1 How many times, to your knowledge, was it closed when you
2 were supposed to be working there?

3 A. If I recall correctly, I believe it was four or
4 five.

5 Q. Okay. And do you know why it was closed at any
6 time?

7 A. Because of them finding underage patrons in the bar.

8 Q. Was it ever closed for staying open after hours?

9 A. No, sir.

10 Q. Did -- at any time when you were working there, did
11 the police come in after hours and say, "Wait a minute. You
12 guys are supposed to be closed. Get the hell out of here"?

13 A. No, sir.

14 MR. ROGERS: Thank you. That's all the questions I
15 have.

16 THE COURT: Recross?

17 - - -

18 RE-CROSS-EXAMINATION

19 BY MR. CRANE:

20 Q. Hey, you said that somebody could get back in with
21 that hand stamp?

22 A. Yes, sir.

23 Q. They could get back -- on back in without paying the
24 cover again?

25 A. Yes, sir.

1 MR. CRANE: No further questions.

2 THE COURT: Anything further?

3 - - -

4 FURTHER REDIRECT EXAMINATION

5 BY MR. ROGERS:

6 Q. Couldn't get back in after it's closed, could they?

7 A. No, sir.

8 MR. ROGERS: Thanks.

9 - - -

10 FURTHER RE-CROSS-EXAMINATION

11 BY MR. CRANE:

12 Q. And you left at 2:00, and you don't know what
13 happened after that; correct?

14 A. Yes, sir.

15 Q. But Kris, you're not telling this jury you have a
16 specific memory of October 31st, 2001, or the early morning
17 hours of November 1, 2001, are you? You don't. Isn't that
18 correct?

19 A. Yes, sir.

20 MR. CRANE: No further questions.

21 MR. ROGERS: Nothing further, Your Honor.

22 THE COURT: May we release Mr. Canada?

23 MR. ROGERS: For the defense, Your Honor.

24 THE COURT: For the state?

25 MR. CRANE: Yes, ma'am.

1 Thank you, sir.

2 THE COURT: You're finally released. Would ask you
3 not to discuss your testimony with any other witness. You're
4 free to go.

5 THE WITNESS: Okay.

6 THE COURT: You may call your next witness.

7 MR. ROGERS: Your Honor, there's a matter we need to
8 take up with the Court. May we have a recess at this time?

9 THE COURT: Surely.

10 Ladies and gentlemen, the Court again reminds you of
11 what you were told at the first recess of the Court. Until
12 you retire to consider your verdict, you must not discuss

13 this case among yourselves or with others, or permit anyone
14 to discuss it in your hearing. You should not form or
15 express any opinion about the case until it is finally given
16 to you to decide. Do not read, view, or listen to any
17 newspaper, radio, or television report of the trial.

18 I suspect this will be somewhat a brief recess?

19 MR. ROGERS: I believe so, Your Honor.

20 THE COURT: All right.

21 We'll let you know just as soon as you can come back
22 in.

23 - - -

24 The following proceedings were held out of the presence
25 of the jury:

1 (Mr. Crane not present in the courtroom.)

2 THE COURT: Will Mr. Crane be back brief -- in a
3 short --

4 MR. ROGERS: He's coming back briefly. So he said.
5 He ran out.

6 THE COURT: We have to stop him from drinking all
7 that water. I've noticed that he's emptied those pitchers
8 frequently.

9 MR. ROGERS: I think it keeps him cooler, though,
10 Judge. I'm in favor of it.

11 THE COURT: Let me ask you this. Do you have your
12 witnesses here? Do you have your witnesses that you would
13 intend to call?

14 MR. ROGERS: Yeah. Well, we don't have the ones
15 that I'm going to get denied leave to endorse.

16 THE COURT: Well, I -- yeah.

17 MR. ROGERS: Okay. But yes. Other than that, yes.

18 THE COURT: But as to those other witnesses you
19 intend to call?

20 MR. ROGERS: As to those others, yes.

21 THE COURT: All right.

22 MS. BENSON: Will there be an opportunity after we
23 make the record to use the bathroom, or should I go now?

24 THE COURT: Well, if you can wait just a few moments
25 to make a record --

1 MS. BENSON: I can wait.

2 THE COURT: All right.

3 MS. BENSON: Either way.

4 THE COURT: We will --

5 (Mr. Crane present in the courtroom.)

6 THE COURT: What is it that you needed to indicate?

7 MR. ROGERS: First of all, Your Honor, I would ask
8 leave to endorse at this late date either Officer Rugstadt or
9 Officer Harlan Hatton of the Columbia, Missouri, Police
10 Department as a substitute witness for Officer Todd Alber.
11 And I would like to explain to the -- first of all, we have
12 discussed this in chambers, not on the record, so --

13 THE COURT: That's correct. But you may --

14 MR. ROGERS: -- it's not a surprise to anybody.

15 THE COURT: But you may discuss it on the record.

16 MR. ROGERS: But I did want to make a record on it.

17 And Your Honor, we had caused a subpoena for Officer
18 Albers to be left with the subpoena officer, or whoever they
19 call it, at the Columbia Police Department. It may not have
20 been left before he went on vacation. We contacted him today
21 to learn, to our dismay, that he is pheasant hunting in South
22 Dakota. And I don't know whether he took Cosmo 4 with him or
23 not. But -- and he was not served personally with the
24 subpoena.

25 We're not seeking a writ of attachment for Officer

1 Albers. We are seeking, however, to endorse one of the other
2 officers who are mentioned in the police report as having
3 followed Officer Albers and Cosmo for -- from the scene of
4 Mr. Heitholt's homicide, south on Fourth Street, east to
5 Fifth Street, and south to the area of McDavid Hall at the
6 University of Missouri, which I think has been identified as
7 being at Fifth and Elm.

8 So we're asking leave to endorse whichever one of
9 those people we can find as a substitute witness.

10 And for the record, when we discussed this in
11 chambers, the Court indicated that leave would not be
12 granted, and so we do not have either of them here.

13 THE COURT: For the record, Cosmos 4 is a dog. I
14 don't know a bird dog, but a dog.

15 MR. ROGERS: Right.

16 THE COURT: All right. And the state had objected
17 to that.

18 MR. CRANE: We have no objection to you calling the
19 dog --

20 THE COURT: I'm not talking about the dog. The
21 police officer.

22 MR. CRANE: -- but we object to the new
23 endorsements.

24 And I, just for the record, I want to make sure,
25 Mr. Rogers told me this earlier, but he's not suggesting that

1 we sent Officer Alber pheasant hunting.

2 MR. ROGERS: No. I'm not suggesting that.

3 MR. CRANE: We object to the endorsements at this
4 late juncture of the witnesses suggested by the defense.

5 THE COURT: And as the Court indicated, that
6 evidence has already come in through another police officer.
7 At least the pathway. And although he was not with the
8 tracking unit, he was, in fact, verifying that and was
9 talking about where he was going and where the dog went. And
10 it came in, as hearsay, I assume, but it is before this jury.
11 And so I am going to overrule your request to endorse these
12 police officers at this late date.

13 Are there any other matters that we have to take up
14 now that we could conveniently do so?

15 MR. ROGERS: Yes, Your Honor. I am going to give
16 the floor to Miss Benson at this time.

17 MS. BENSON: I believe we need to make a record as
18 to Mr. Ferguson's right not to testify.

19 THE COURT: All right. Mr. Ferguson, would you come
20 forward.

21 Are you aware that the constitution provides that
22 you have an absolute right not to testify in your trial?

23 THE DEFENDANT: Yes.

24 THE COURT: And you understand that the jury may not
25 consider as evidence of your guilt the fact that you choose

1 to exercise that right.

2 THE DEFENDANT: Yes.

3 THE COURT: And do you also understand that you have
4 a constitutional right to testify, if you and counsel
5 believes that that's in your best interests.

6 THE DEFENDANT: Yes.

7 THE COURT: And your attorney, in fact, has proposed
8 an instruction for me, and I don't know whether or not you're
9 going to testify, and I'm not going to ask you that question.
10 I just want to be aware -- want to be knowledgeable that you
11 are aware of what your rights are. But your attorney has
12 tendered an instruction to the Court, which the Court will
13 give, if you do not testify, informing the jury of the fact
14 that you have a right not to testify, and it may not be
15 considered that you're guilty with any offense that you may
16 have been charged. You understand that.

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Any question about that right?

19 THE DEFENDANT: No.

20 THE COURT: All right. And I assume that through
21 all this you've had time to consult with one or more
22 attorneys in this case.

23 THE DEFENDANT: Yes, I have.

24 THE COURT: And I'm not going to ask you what you
25 talked about, but you've had that opportunity to discuss

1 these issues, if you chose to do so.

2 THE DEFENDANT: Yes.

3 THE COURT: All right.

4 I don't have anything further.

5 MS. BENSON: I have nothing further, other than a
6 request to use the bathroom before we --

7 THE COURT: We will take a brief recess, if you need
8 to use the rest room. Anyone that would need to. Why don't
9 we take about a five-minute break. As quick as we can.

10 MS. BENSON: Okay.

11 THE COURT: Not going to let you drink any more
12 water, Mr. Crane. I've been watching the many pitchers
13 emptied.

14 MR. CRANE: I've got to stay hydrated.

15 THE COURT: All right. We'll take about a
16 five-minute break.

17 (Recess taken.)

18 - - -

19 The following proceedings were held out of the presence
20 of the jury:

21 MS. BENSON: I was going to request that Ryan --
22 we're going to be calling Ryan Ferguson next. I was going to
23 request that he be allowed to go up to the jury -- or, excuse
24 me, to the witness seat now, because he has this leg brace
25 on, which squeaks when he walks. And we'd rather him not do

1 that in front of the jury.

2 THE COURT: I don't -- I want to swear him in front
3 of the jury. I don't want them to assume --

4 MS. BENSON: We can swear him from there.

5 THE COURT: Yeah. He can take the jury box.
6 I don't hear squeaking.

7 MS. BENSON: I can hear it.

8 MR. ROGERS: I can hear it over there.

9 THE COURT: Oh, you can?

10 All right. You can take the witness box.

11 Les, is the jury ready to come back?

12 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

13 THE COURT: You can return them to the courtroom.

14 - - -

15 The following proceedings were held in the presence of
16 the jury:

17 THE COURT: Mr. Ferguson, would you raise your right
18 hand and be sworn.

19 - - -

20

21

22

23

24

25

1 RYAN WILLIAM FERGUSON,
2 being first duly sworn by the Court, testified as follows:

3 THE COURT: You may be seated.

4 THE WITNESS: Thank you.

5 THE COURT: You may inquire.

6 MS. BENSON: Thank you, Your Honor.

7 - - -

8 DIRECT EXAMINATION

9 BY MS. BENSON:

10 Q. Would you state your full name, please.

11 A. Ryan William Ferguson.

12 Q. Ryan, how old are you today?

13 A. I am 21.

14 Q. Just turned 21 yesterday?

15 A. Yes, I did.

16 Q. Okay. Have you ever testified before?

17 A. No, I haven't.

18 Q. Do you understand that you have the right not to
19 testify?

20 A. Yes, I do.

21 Q. You understand that the constitution protects that
22 right for you?

23 A. Yes, ma'am.

24 Q. And do you understand that if you didn't testify
25 today, that the jury would be instructed they could not use

1 that right against you in any way.

2 A. Yes, I do.

3 Q. But you chose to testify today instead; is that
4 correct?

5 A. Yes, I have.

6 Q. Why?

7 A. I just want to let them know me, show my innocence.
8 I think it's the best thing to do.

9 Q. Okay. I think that we've seen earlier that your
10 parents have been here this week. Are they still here?

11 A. Yes, they are.

12 Q. And they are Bill and Leslie Ferguson; is that
13 correct?

14 A. Yes. Mother and father.

15 Q. Okay. Looks like you have a cheering section over
16 there with them as well; right?

17 A. Yeah. I have some family and friends.

18 Q. Okay. What do your parents do?

19 A. My mother is a reading specialist and my father is a
20 real estate agent.

21 Q. And then your sister, Kelly, testified earlier; is
22 that right?

23 A. Yes, she did.

24 Q. What is she doing now?

25 A. She is working at a real estate law firm in Florida.

1 Q. Okay. Tell me a little bit about, and not
2 extensively, but a little bit about your history; where you
3 grew up.

4 A. Where I was born as well?

5 Q. Where were you born?

6 A. I was born in Australia.

7 Q. Okay.

8 A. And didn't stay there very long. Came back to the
9 United States. And I've been living in Missouri the majority
10 of my life. Probably since I was about one. One years old.

11 Q. Did you go to junior high school here in Columbia?

12 A. Yes, I did.

13 Q. Which one did you go to?

14 A. I went to West Junior High School.

15 Q. And did you go to high school in Columbia?

16 A. Yes, I did.

17 Q. And which one?

18 A. I went to Rock Bridge.

19 Q. Okay. After -- did you graduate from high school?

20 A. Yes, I did.

21 Q. Okay. And what did you do after that?

22 A. After that, I took a year off. I worked part of the
23 time. Part of the time I --

24 Q. Where did you work?

25 A. I worked at the Columbia Mall Car Wash first.

1 Then -- I can't really remember most of my jobs.

2 Q. They've been part-time jobs?

3 A. Mostly part-time jobs.

4 Q. Okay.

5 A. And only for a month or two. Probably three, tops.

6 And then I helped my father in his real estate practices.

7 Q. You worked in some fast food restaurants also?

8 A. Yes, I did.

9 Q. Okay. Now ultimately did you go back to school?

10 After high school?

11 A. Yes. I went to college. I went to Columbia College

12 for a trimester, and then I moved to Kansas City in the --

13 for the spring semester 2004.

14 Q. Okay.

15 A. I went to Maplewoods.

16 Q. Maplewood Community College?

17 A. Yes.

18 Q. And did you have a particular course of study?

19 A. Business, but I hadn't declared my major yet.

20 Q. Okay. I want to discuss with you the date that you

21 were arrested in this case, which would be March 10th of

22 2004; is that correct?

23 A. Yes.

24 Q. Okay. Tell me what was going on that day.

25 A. I woke up. Just throw on some clothes. Didn't have

1 time to take a shower. Kind of a late riser. And I --

2 Q. Where were you going?

3 A. I went to school. I went to my -- it was a history
4 class. I can't remember the name of it now. And then --

5 Q. Did you go to class?

6 A. Yes, I did go to class. I think it was an 11:00
7 class. And then I think school was let out. Something to do
8 with a bomb threat. I can't remember.

9 Q. You were at school.

10 A. Yes.

11 Q. And you found out there was a bomb threat?

12 A. Yes. And they dismissed all of us from all our
13 classes. And then I drove home. And I noticed I was being
14 followed. And when I pulled into my apartment complex -- I
15 was living with one of my friends at the time --

16 Q. Who was following you?

17 A. At the time I didn't know who it was.

18 Q. It wasn't a marked police car?

19 A. No.

20 Q. Okay.

21 A. It was -- I believe it was a Explorer maybe or a
22 Tahoe. A green SUV.

23 Q. You went ahead and went to your apartment anyway?

24 A. Yes. I parked in my apartment. And at that time I
25 thought the car had gone by, and it came back, and two very

1 large men pulled up behind me, they jumped out of the
2 vehicle, right as I was getting out of mine, and I can't
3 remember what they said really, but something to the effect
4 that, "Don't move."

5 Q. Okay. Did you comply?

6 A. Yes, I did.

7 Q. Okay. Did they have uniforms on?

8 A. No, they didn't.

9 Q. All right. Did they show badges?

10 A. No, they didn't.

11 Q. Okay. Did you know what was going on at that point?

12 A. I had no idea. I -- I thought that it had something
13 to do with bomb threat, but I was in class.

14 Q. Did you have something to do with the bomb threat?

15 A. No, no, I did not.

16 Q. Okay. All right. And, you know, after they told
17 you, "Don't move," what happened next?

18 A. I can't recall exactly what they said to me, but
19 they said I was under arrest for a crime that had happened in
20 Columbia, I believe. And that was all they told me.

21 Q. They didn't tell you what crime you were under
22 arrest for?

23 A. No, they did not.

24 Q. Okay.

25 A. And they --

1 Q. Go ahead.

2 A. They handcuffed me and put me in an unmarked -- it
3 was just an Intrepid, I believe. And then when -- I asked
4 them why I was being arrested. They wouldn't tell me. They
5 wouldn't tell me anything. And at that time, there had been
6 probably four or five unmarked cars, probably at least ten
7 people, and my roommate walked out. I just told him, you
8 know, "Call my father," and --

9 Q. Okay. Now, at some point did they tell you why you
10 were being arrested?

11 A. Finally, on the way down, I guess it was KCPD or
12 the -- it was downtown, probably 20 minutes away from where I
13 lived, they told me that I was being arrested for a homicide.

14 Q. What went through your mind at that point?

15 A. I mean, I knew I had never hurt anyone, so I wasn't
16 really too worried about it.

17 Q. You just thought it was a mistake?

18 A. I thought it was certainly a mistake. I was worried
19 about taking my test the next day.

20 Q. Okay. All right. At this point, from the point
21 that you were arrested until the point you got to the Kansas
22 City Police Department, had you been allowed to call anybody?

23 A. No.

24 Q. What happened when you got to the Kansas City Police
25 Department?

1 A. They told me that some police were coming from
2 Columbia and wanted to talk to me.

3 Q. All right.

4 A. And that's it. I waited for an hour, and then I
5 believe Mr. Short came in, and we spoke briefly.

6 Q. Okay. All right. Do you remember what he looks
7 like?

8 A. Short.

9 Q. Is he bald?

10 A. Bald man with a mustache, I believe.

11 Q. Okay. In that hour that you were waiting, were you
12 allowed to call anyone?

13 A. No.

14 Q. Okay. Now when Detective Short got there, what did
15 he tell you?

16 A. He asked me if I knew what I was there for.

17 Q. Okay.

18 A. And -- I mean, I told him that on the way there they
19 had said it was for a homicide.

20 Q. Okay. Did he ask you if you would answer some
21 questions?

22 A. Yes.

23 Q. Okay. Did he tell you what your rights were?

24 A. Yes, he did.

25 Q. Did he tell you that you had the right to remain

1 silent?

2 A. Yes.

3 Q. Did he tell you that you had the right to have an
4 attorney?

5 A. Yes.

6 Q. Did he tell you that anything you said would be used
7 against you?

8 A. Yes, he did.

9 Q. Okay. Did he ask you if you wanted to call anyone?

10 A. I don't believe so.

11 Q. Okay. Now you understood what those rights were;
12 right?

13 A. Yes, I did.

14 Q. Okay. But you chose to go ahead and speak with him;
15 is that right?

16 A. Yes.

17 Q. Okay. And you answered all his questions?

18 A. Answered all his questions.

19 Q. Okay. What did you tell him?

20 A. I told him I had absolutely nothing to do with any
21 crime.

22 Q. Okay. Did you tell him that time and time again?

23 A. Yes, I did.

24 Q. Okay. About how long did Detective Short question
25 you on that occasion at the Kansas City Police Department?

1 A. I'd say probably maybe 30 minutes, 45 minutes.

2 Q. Okay.

3 A. Tops.

4 Q. To your knowledge, that was not videotaped, was it?

5 A. No, it was not.

6 Q. Okay. Now, after Detective Short questioned you at
7 Kansas City, what happened?

8 A. Well, he went out, and I think he came back in.

9 Q. Okay.

10 A. And he questioned me some more.

11 Q. All right. And you continued to answer his
12 questions?

13 A. Oh, yes. Yes. The same questions, I believe.

14 Q. And what happened after that?

15 A. I think at that point they said we were going to go
16 back to Columbia. And we drove back in a police vehicle.

17 Q. Okay. Were you in a marked police car at that
18 point?

19 A. Yes.

20 Q. Okay.

21 A. Yes, I was.

22 Q. And were you restrained in any way?

23 A. I was handcuffed and shackled.

24 Q. Your legs were shackled as well?

25 A. Yes.

1 Q. Were you handcuffed in front?
2 A. In front, yes.
3 Q. Okay. And were you in the back seat?
4 A. Yes, I was.
5 Q. Okay. Who else was in the car? Or if you don't
6 know their names, just --
7 A. John Short was. He was either in -- I think he was
8 next to me.
9 Q. Okay.
10 A. And then the other detective, he's a taller man, has
11 hair and a mustache as well.
12 Q. Okay. Was he in the passenger seat, up front?
13 A. Passenger seat, yes. And a police -- and a
14 uniformed police officer was driving.
15 Q. Was driving. Okay. And how long is that drive from
16 Kansas City to Columbia? About.
17 A. About two hours.
18 Q. Okay. So for two hours you were with these three
19 law enforcement officers in the car; correct?
20 A. Yes.
21 Q. And you were shackled?
22 A. Yes.
23 Q. Okay. And they asked you some questions, didn't
24 they?
25 A. Yes, they did.

1 Q. And even though you knew your rights, did you
2 continue to answer their questions?

3 A. Yes.

4 Q. For two hours?

5 A. Yes. Well, we didn't -- they didn't ask questions
6 the whole way, but whatever questions they did have, I
7 answered.

8 Q. Okay. And did you continue to tell them, "I didn't
9 do anything wrong"?

10 A. Yes.

11 Q. Okay. But they kept questioning you anyway?

12 A. Yes.

13 Q. Okay. What was going through your mind at this
14 point in the car?

15 A. I didn't know what to think, really. I mean, I knew
16 I had committed no crime. And I never thought I could be
17 arrested for a crime I didn't commit, so I really wasn't too
18 concerned with it. I thought, you know, get back, clear
19 myself, and then come back to Kansas City. And I had some
20 tests to take for mid-terms the following day, so I was
21 really worried about studying for those, taking my tests.

22 Q. And since you hadn't done anything wrong, you
23 figured that would all get cleared up.

24 A. I certainly did.

25 Q. Now at the point that you got transported for two

1 hours, had you gotten to call your parents or anybody else?

2 A. No.

3 Q. No?

4 A. No.

5 Q. Now, what happened when you got to the Columbia
6 Police Department?

7 A. I believe I was questioned again in the major crime
8 unit.

9 Q. Okay. Was that also John Short, or was that someone
10 else?

11 A. I believe it was John Short.

12 Q. Okay.

13 A. It was one of the detectives that drove me back.

14 Q. Okay. Going back to the ride from Kansas City, was
15 that ride videotaped, to your knowledge?

16 A. Yes, it was.

17 Q. Okay. And then when you got to Columbia and you
18 talked with Detective Short again, was that videotaped?

19 A. Yeah. Yes.

20 Q. Okay. And you knew they were going to videotape
21 both times? Or you knew they were videotaping both times.

22 A. Yes, I did.

23 Q. Okay. So when you got back to the Columbia Police
24 Department, were you allowed to call anybody then?

25 A. No.

1 Q. Okay. But you continued to voluntarily answer their
2 questions?

3 A. Yes, I did.

4 Q. Okay. Did you continue to tell them that you didn't
5 do anything wrong?

6 A. Yeah.

7 Q. Okay. Do you remember how long they questioned you
8 once you were back at the Columbia Police Department?

9 A. I think it was four hours, total. Four or five
10 hours.

11 Q. Okay. However long it was, that entire time you
12 denied any knowledge of this crime; is that correct?

13 A. Yeah.

14 Q. Okay. After you finished talking with Short, did
15 they process you?

16 A. Yes, they did.

17 Q. Okay. Were you then allowed to finally make a phone
18 call?

19 A. Yes.

20 Q. Okay. Who did you call?

21 A. I called my mother and father and I called my
22 sister.

23 Q. Okay. Were you worried about your mother and father
24 and your sister and what they might think?

25 A. I knew that they would know that I would never

1 commit a crime, let alone hurt anyone. And I just -- at that
2 point I was -- I didn't know what to think.

3 Q. Okay. Now, after you got processed, did you get
4 taken to the Boone County Jail?

5 A. Yes, I did.

6 Q. Okay. And have you been there since March 10th of
7 2004?

8 A. Yes, I have.

9 Q. And you currently reside there now.

10 A. Yes, I do.

11 Q. As a result of this charge.

12 A. Yes, I do.

13 Q. Okay. After you got taken to jail, did you go to
14 court?

15 A. Yes.

16 Q. And did you plead not guilty?

17 A. Yes.

18 Q. Is that why we're here today?

19 A. Yes, it is.

20 Q. Okay. Going back real quick to the day that you
21 were followed in Kansas City, you weren't driving your blue
22 Mercedes, were you?

23 A. No, I wasn't.

24 Q. You used to drive that blue Mercedes; is that right?

25 A. Yes, I used to.

1 Q. Okay. And where did you get that car?

2 A. My father gave it to me.

3 Q. Okay. What year was it?

4 A. It was a '93.

5 Q. Okay. You sold that sometime before your arrest; is
6 that correct?

7 A. Yes. I believe I sold it six months prior to my
8 arrest.

9 Q. About five or six months before March 10th of '04.

10 A. I believe so.

11 Q. Okay. Why did you sell it?

12 A. It was -- I -- I didn't treat it so well. It was
13 kind of falling apart. And it had a lot of miles, so -- and
14 I wanted a new vehicle to drive, that was more reliable, so
15 we got rid of that, and I got my mother's old car.

16 Q. What was that?

17 A. A '97 Toyota Camry.

18 Q. What color?

19 A. Maroon.

20 Q. And that's the car that you were driving when you
21 got arrested.

22 A. Yeah.

23 Q. Okay. Let's talk a little bit about Charles
24 Erickson. You obviously know him.

25 A. Yes, I do.

1 Q. Okay. When did you first meet him?

2 A. I met him in junior high school, I believe in track.

3 Q. Okay.

4 A. Or through friends.

5 Q. Did you become good friends?

6 A. Acquaintances. I mean, he was somebody that was in

7 my circle of friends.

8 Q. Okay. Not best friends.

9 A. No.

10 Q. Okay. But you would hang out sometimes together?

11 A. Yeah.

12 Q. Did he ever come over to your house?

13 A. Yes. I -- numerous people come over there.

14 Q. Okay. Did you ever go over to his house?

15 A. Yeah.

16 Q. Okay. And you had -- you shared similar friends.

17 A. Yes.

18 Q. Okay. Could you describe what happened to your

19 friendship with Chuck Erickson over the course of the years

20 from junior high to high school. Did it remain the same or

21 did it change --

22 A. No.

23 Q. -- in any way?

24 A. It changed. In junior high, you know, it's a

25 smaller, closed setting. You only know so many people. You

1 don't have an opportunity to meet other people, because you
2 can't drive. So we were -- probably had like six people who
3 were good friends, I'd say. And then once, you know, high
4 school started, people go different ways. And people change,
5 obviously. Charles was -- my group of friends was really
6 relaxed, laid back, and we liked to have a good time. And
7 Chuck would usually kind of rebel. He was -- he was somebody
8 that -- he caused problems. So we tried to --

9 Q. You started to hang out with other people?

10 A. Yeah.

11 Q. Is that a fair characterization?

12 A. Yes.

13 Q. In high school? Okay. What was the nature of your
14 friendship around Halloween of 2001?

15 A. Acquaintances. We had a class together. And I
16 really hadn't talked to him that much the whole first year of
17 high school. I mean, he was there. I drove him to school a
18 few times if he needed a ride. He didn't live too far from
19 me. And then we had class together, so I talked to him more
20 because of the school setting.

21 Q. In your junior year, you mean?

22 A. Junior year, yes.

23 Q. Okay.

24 A. And when -- the time? Is that what you're --

25 Q. I'm sorry? What?

1 A. That night?

2 Q. Just in that time frame generally.

3 A. Yeah. Just --

4 Q. Okay. We'll get to that night in just a minute.

5 Okay. When did you first become aware that Chuck was

6 suggesting that you and he were involved in this murder?

7 A. Never. Well, on March 10th.

8 Q. Okay. Did you -- had you heard anything prior to

9 that? Had Chuck told you anything?

10 A. Yes. New Year's, between 2002 and 2003 -- or 2003

11 and 2004.

12 Q. Okay.

13 A. I was at a friend's house.

14 Q. Whose house is that?

15 A. John Whitworth.

16 Q. And why were you there?

17 A. It was a New Year's Eve party. Or get-together. We

18 had plenty of people there.

19 Q. Okay. And Chuck was there too?

20 A. No. Well, he arrived with some friends. He's not

21 really --

22 Q. So you were already there --

23 A. Yes, I was there.

24 Q. -- for a while.

25 A. And he showed up. And he asked if I could go

1 outside and smoke a cigarette with him. I said, "Sure." You
2 know. No big deal. And he asked me if I remembered the
3 night of October 2001.

4 Q. October 31st?

5 A. 31st, yeah. Sorry.

6 Q. Okay.

7 A. And he asked if he had done anything to be involved
8 in this crime, of Mr. Heitholt. And I told him no, that he
9 hadn't. And he was like, "You sure? I think I did something
10 to this man." I was like, "Look, man, I don't know. Not
11 with me. I mean, I can't tell you anything about it. It
12 sounds pretty weird." He told me he had a dream about it. I
13 told him he was weird and just to leave me alone.

14 Q. Okay. So, I mean, what was your reaction then to
15 him saying that?

16 A. I mean, Chuck is an odd man. I thought he was
17 weird.

18 Q. How did it make you feel to hear that?

19 A. I mean, it's definitely odd to hear somebody say
20 that he would be involved in something like that. But I
21 didn't think there was any way he would really be involved
22 with something like that. I mean, it didn't even --

23 Q. So what was your reaction to him when he suggested
24 that?

25 A. I was kind of, you know -- I just wanted to get away

1 from him. Sounded kind of sick. I mean, anybody who would
2 suggest being involved in something like that, I don't want
3 to have anything to do with.

4 Q. Okay.

5 A. I just told him to get away from me. I went back
6 inside. And at that point, I never saw him again.

7 Q. Okay. And did you hear anything more about that
8 from him before you were arrested on March 10th of '04?

9 A. No, I hadn't.

10 Q. You said that you drove Chuck to school a few times;
11 is that right?

12 A. Yes.

13 Q. Okay. Did he ever leave clothing in your car, to
14 your knowledge?

15 A. No.

16 Q. Let's talk about October 31st of 2001, into November
17 1st of 2001. Okay?

18 A. Okay.

19 Q. That was Halloween obviously.

20 A. Yes, it was.

21 Q. How old were you?

22 A. I was 17.

23 Q. Do you know how old Chuck was?

24 A. I believe he was 17 as well.

25 Q. Okay. And you were a junior at Rock Bridge High

1 School?

2 A. Yes.

3 Q. And so was Chuck?

4 A. Yes.

5 Q. First of all, let me ask you, why are you able to
6 remember this stuff now?

7 A. I remember it because, I mean, I've been in jail
8 because of that night in question.

9 Q. Have you had to try to piece it together since you
10 got accused?

11 A. There's not a whole lot to piece together, but yeah.

12 Q. Okay. All right. You do remember that night?

13 A. I do.

14 Q. Okay. And you remember it was Halloween.

15 A. I know it was Halloween, yes.

16 Q. Okay. What were you doing earlier in the day?

17 A. I don't recall. I -- I mean, I wasn't really doing
18 a whole lot in the day. I do remember going downtown with my
19 sister; her getting a costume. I don't believe I got
20 anything. And I don't remember --

21 Q. She got a costume?

22 A. I couldn't tell you. I mean, from what she said
23 today, I suppose, but --

24 Q. You don't remember specifically that?

25 A. No.

1 Q. Okay. Did you get a costume?

2 A. No.

3 Q. Okay. About how long were you guys down there at
4 the store to get a costume?

5 A. I'd say 30 minutes.

6 Q. Okay. Do you remember what you did next?

7 A. I believe while we were downtown, stopped at the
8 wilderness store, and I got a backpack for school.

9 Q. Okay. Where did you go next?

10 A. From there, I mean, I guess I went home. Probably.

11 Q. Did you go out that night?

12 A. Yes, I did.

13 Q. All right. Where did you go?

14 A. I went over to Ryan Swilling's house. I heard he
15 was having a party. He was an acquaintance of mine. He's
16 older than me.

17 Q. Did you drive the blue Mercedes?

18 A. Yes, I did.

19 Q. Was anybody with you when you drove over to the
20 party?

21 A. No.

22 Q. Okay. Do you remember what you were wearing?

23 A. I do not.

24 Q. Were you wearing a costume?

25 A. No.

1 Q. Okay. So you went over to Ryan Swilling's party.
2 A. Yes.
3 Q. Okay. Did you go in?
4 A. Yes.
5 Q. Okay. How long were you there?
6 A. I was there for maybe five minutes. I saw one or
7 two people that I know, talked to them. And everyone was
8 wearing a costume. I felt kind of out of place. So at that
9 point I went back to my house to get a costume.
10 Q. And did you get one?
11 A. Yes, I did.
12 Q. You had one at your house?
13 A. Yes.
14 Q. What was it?
15 A. Well -- actually, I'm not sure it was at my house.
16 Q. Okay.
17 A. I might have picked it up earlier that evening or
18 picked it up at that point.
19 Q. Okay.
20 A. I can't remember.
21 Q. But you had it at your house --
22 A. Yes.
23 Q. -- when you went to pick it up; is that right?
24 A. Yes.
25 Q. Okay. What was the costume?

1 A. I think it was a spider costume we borrowed from a
2 friend.

3 Q. Did you put it on?

4 A. No.

5 Q. Okay. What did you do with it?

6 A. I put it in my back seat.

7 Q. Okay. And where did you go then?

8 A. Then I went back to Swilling's house. Or attempted
9 to.

10 Q. Okay. Now, when you got close to Swilling's house,
11 what happened?

12 A. There were a few police out in front and everyone
13 was leaving. People were driving away.

14 Q. All right. Did you see anybody that you knew?

15 A. I saw a few people leaving, and I talked to them.
16 Asked what they were going to do. And I saw Chuck. And I
17 can't remember if he asked for a ride or if I told him I'd
18 give him a ride, but he hopped in.

19 Q. He ended up getting in your car to get a ride.

20 A. Yes.

21 Q. Okay. Had you talked to Kelly at all at this point,
22 about meeting up with her at By George?

23 A. I might have. I'm not sure.

24 Q. Okay. You did at some point that night talk to her.

25 A. Yes.

1 Q. Okay. Just not sure what time?

2 A. I'm not -- yeah, I'm not sure.

3 Q. Okay. What did you and Chuck do after he got in the
4 car?

5 A. I assume we went to By George's right after that.

6 Q. Okay. Do you remember going by his house for him to
7 change clothes or anything?

8 A. No. I mean, it's a possibility, but I don't
9 remember --

10 Q. Okay.

11 A. -- doing that.

12 Q. Do you remember what he was wearing?

13 A. No.

14 Q. You don't remember if he had a costume on or not?

15 A. I mean, after seeing the pictures, that's what I
16 guess, but I still don't remember.

17 Q. You've seen a picture from Ryan Swilling's party?

18 A. Yes.

19 Q. Okay. So you were assuming from that that he had?

20 A. Yeah. But I don't remember.

21 Q. Okay. So at some point you guys head to By George;
22 is that right?

23 A. Yeah.

24 Q. Okay. Do you remember how you made contact with
25 Kelly?

1 A. Either she had called me or I had called her. I
2 think maybe she called me and told me she could get me into
3 By George's if I wanted to go.

4 Q. Okay.

5 A. And if a friend wanted to come with me, then that
6 would be all right. But no more than one.

7 Q. Do you know how she was able to get you into By
8 George?

9 A. Yeah. She said that her or her roommate knew
10 someone that could get us in.

11 Q. Okay. Knew somebody that worked there, I take it.

12 A. Yeah.

13 Q. Okay. All right. How tall are you?

14 A. I'm five seven.

15 Q. Were you five seven back in 2001?

16 A. Five six or five seven. Pretty much the same
17 height.

18 Q. Okay. Do you know how much you weighed then?

19 A. 145. I mean, at tops, 150.

20 Q. How is it that you know that? Remember that?

21 A. From junior high, until about the time I was
22 arrested, I weighed 145 to 150. And I always remember being
23 mad because I couldn't gain weight.

24 Q. Okay. All right. You bigger now?

25 A. Yes.

1 Q. Okay. So when you got to By George, how did you
2 make contact with Kelly in order to get in?
3 A. I believe I called her.
4 Q. Did you call her on your cell phone?
5 A. On my cell phone, yeah.
6 Q. You called her?
7 A. I think I called her when I was arriving.
8 Q. Okay.
9 A. That would be --
10 Q. Do you remember where you parked?
11 A. It was somewhere on First Street, I believe.
12 Q. First Street?
13 A. Yeah.
14 Q. Okay. So did Kelly and Christine come out to meet
15 you?
16 A. Yes, they did.
17 Q. And they got you guys past the bouncer?
18 A. Yes.
19 Q. Do you remember how?
20 A. Yes. I was supposedly Christine, my sister's
21 roommate, I was her boyfriend for the evening.
22 Q. Okay.
23 A. And Charles was my sister's --
24 Q. Okay.
25 A. -- boyfriend.

1 Q. And you guys got past the bouncer and got in the
2 bar.

3 A. Yes.

4 Q. Okay. Did you have any money?

5 A. Yes, I did.

6 Q. Okay. How do you know you had money?

7 A. Because I paid for everything.

8 Q. Okay. Had you gotten any money for your birthday?

9 A. Yes.

10 Q. As we know, your birthday is the 19th of October?

11 A. Yes, it is.

12 Q. Okay. Was that the source of your money, or do you
13 know?

14 A. I mean, I had other sources of money, but it was
15 definitely substantial. I mean --

16 Q. You were also working at the time?

17 A. I think so. I can't be certain.

18 Q. Not sure?

19 A. Yeah.

20 Q. Did your dad give you money sometimes too?

21 A. Yeah. I had an allowance for mowing the lawn and
22 taking out the trash.

23 Q. Okay. Do you know if Chuck had any money?

24 A. I don't believe he did.

25 Q. Okay. What was the cover charge, if you remember?

1 A. I think it was \$2.

2 Q. Not sure?

3 A. I'm not positive.

4 Q. Did -- who paid for Chuck's?

5 A. I'm fairly certain I did. The reason I think it was
6 \$2 is because a lot of clubs you don't have to pay to get in.
7 They said it was \$2. I think I gave them 4, for Chuck and
8 myself to get in.

9 Q. Okay.

10 A. I just remember that.

11 Q. Once you got inside, what did you do?

12 A. I bought some drinks.

13 Q. For you and Chuck?

14 A. I bought myself a drink; I bought Chuck a drink.
15 And then we just kind of went our different ways. Did our
16 own thing.

17 Q. Okay. You saw him sometimes during the evening.

18 A. Oh, yeah. We met up and we'd, you know, talk or try
19 to find some girls maybe.

20 Q. So you were talking to girls as well?

21 A. Yes.

22 Q. Okay. At any time that evening did you have a hat
23 on?

24 A. No.

25 Q. Do you know if Chuck did?

1 A. I've never seen Chuck wear a hat.

2 Q. Okay. How come you're sure you didn't have a hat
3 on?

4 A. I never wear hats either.

5 Q. Okay. Do you know how many drinks that you had?

6 A. I think I had two, maybe three. Possibly three.

7 Q. Mixed drinks or beer?

8 A. Mixed drinks.

9 Q. Okay. And do you know how many Chuck had?

10 A. I can't be certain. Probably two or three.

11 Q. All right. Do you know if he had any of his own
12 money to use for drinks?

13 A. I loaned him -- I think I gave him \$10. After we
14 got in. And whatever you could buy with that. It wouldn't
15 be a whole lot.

16 Q. Okay. At any time during the night did you borrow
17 money from your sister?

18 A. No.

19 Q. At any time during the night did you borrow money
20 from anybody?

21 A. No.

22 Q. Did you run out of money that night?

23 A. I don't believe so.

24 Q. Do you know what time you left By George?

25 A. I left at around 1:20 or 1:30.

1 Q. Okay. And how do you know that?

2 A. Because the lights came on, and they made -- usually
3 I wouldn't stay until closing, so, I mean, it was kind of
4 weird for -- to see the lights come on at closing and all the
5 music stop. At that point everyone left. At the same time.

6 Q. Okay. You think that was around 1:15 or 1:20? Is
7 that right?

8 A. Yes. I remember wanting to stay until 1:30.

9 Q. So the lights came on.

10 A. Yes.

11 Q. Did the bouncers come around?

12 A. Someone -- they kicked everyone out. I can't be
13 sure if it was bouncers or bartenders.

14 Q. Did it look to you like everybody was leaving?

15 A. Everybody was leaving, yeah.

16 Q. Okay. Did you and Chuck leave together?

17 A. Yes.

18 Q. Okay. Between the time that you and Chuck arrived
19 at By George and the time that you left, did you leave
20 between those two times and go anywhere?

21 A. No.

22 Q. Okay. Did Chuck leave between those times and go
23 anywhere?

24 A. Not that I know of.

25 Q. Can you smoke inside By George?

1 A. Yes.

2 Q. Okay. So it's about 1:15 or 1:20, and the lights
3 came on. Did you and Chuck go to your car at that point?

4 A. Yeah.

5 Q. Okay. Did you go directly to the car?

6 A. Yeah.

7 Q. Did anybody go with you guys?

8 A. No.

9 Q. Did you find your sister?

10 A. I remember I was looking for her. I think I tried
11 to call her. And I --I guess I didn't find her.

12 Q. Okay.

13 A. Just to say good night and thank you for letting us
14 in. Or helping us get in.

15 Q. I couldn't hear the last part.

16 A. I just wanted to say thank you for letting us -- or
17 helping us get in. Good night.

18 Q. But you didn't find her.

19 A. No.

20 Q. Okay. So what did you and Chuck do then?

21 A. Went home. I drove Chuck to his home.

22 Q. Okay. Did you all stop to get cigarettes on the way
23 home, do you know?

24 A. No. I'm fairly certain we didn't.

25 MR. CRANE: I'm sorry?

1 THE DEFENDANT: I'm fairly certain we did not.

2 Q. Fairly certain you did not?

3 A. Yeah.

4 Q. All right. I'm going to show you what's been marked

5 as State's Exhibit Number 5. Can you recognize what that is?

6 A. It's a map of downtown.

7 Q. Okay. Do you see the area where you and Chuck

8 lived -- I realize you didn't live together, but you lived in

9 a similar area.

10 A. Oh, yeah. Yes.

11 Q. Okay. And could you perhaps maybe come down here.

12 MR. WEIS: If it's okay with the Judge.

13 THE COURT: Uh-huh.

14 Q. And trace your route that you took from By George.

15 A. Okay. Let me get acquainted here. By George's is

16 here.

17 Q. Right.

18 A. And I believe we were parked right here.

19 Q. Okay.

20 A. Okay. So, I don't know if we went this way or this

21 way, but we ended up on I think it was Garth.

22 Q. Okay.

23 A. And then you go past the library, and Grant

24 Elementary School, and then you hit Stewart.

25 Q. Okay.

1 A. I think it's Stewart.

2 Q. Okay.

3 A. Stewart. And you take a right there.

4 Q. So that road is not depicted here. Stewart Road.

5 A. Stewart would be right about here.

6 Q. Okay.

7 A. Right around -- where's Providence on there?

8 Q. You've got Providence Road right here.

9 A. Okay. Oh, this is Garth. Okay. Yeah. I think

10 Stewart would be right around here.

11 Q. Okay. Where did you go on Stewart?

12 A. On Stewart, we went down to West Boulevard. West --

13 took a left on West Boulevard and hit Stadium.

14 Q. Okay.

15 A. And took Stadium to Forum, and then Forum to Chapel

16 Hill, Chapel Hill to Chuck's house.

17 Q. Okay. Chuck's house is right here on Chinkapin?

18 A. Yes.

19 Q. Okay.

20 A. It's right off of Chapel Hill.

21 Q. Now did you stay any length of time at Chuck's

22 house?

23 A. No.

24 Q. Okay. What did you do after you dropped Chuck off?

25 A. After I dropped Chuck off, I drove to my own house.

1 Q. And how did you get there?

2 A. Down Chapel Hill.

3 Q. Right here?

4 A. Yes. And I can't remember street names

5 specifically.

6 Q. Do you turn down this street --

7 A. I took a right off Chapel Hill --

8 Q. Okay.

9 A. -- on the first street that leads to my house. And

10 I live on Lloyd.

11 Q. Okay. Is that right down here, where it says 2513

12 Lloyd Drive?

13 A. Yes.

14 Q. On Exhibit 5.

15 A. Yes.

16 Q. Okay. You can go ahead and have a seat.

17 About how long does it take to drive that route in

18 the early morning hours?

19 A. I can't be sure. I'd say 10 to 15 minutes. I

20 believe the state said it was about 14 minutes.

21 Q. Does that sound reasonable to you?

22 A. It certainly does.

23 Q. Okay. Were you intoxicated?

24 A. I had drunk, but I was not intoxicated.

25 Q. Okay. You said you had two or three mixed drinks?

1 A. Yes.

2 Q. Okay. Had you had anything to drink at Ryan

3 Swilling's house?

4 A. No.

5 Q. Had you had anything to drink other than at By

6 George?

7 A. No.

8 Q. I mean anything alcoholic.

9 A. No.

10 Q. Okay. Now, did you do anything else after you

11 dropped Chuck off?

12 A. No.

13 Q. Okay. You just drove home?

14 A. Yes.

15 Q. Okay. At some point did you call somebody?

16 A. Yes. I called a few people.

17 Q. Who did you call?

18 A. Just my normal group of friends. I believe Holly

19 Admire was one of those peoples I called.

20 Q. Holly Admire?

21 A. Yes.

22 Q. You heard her testify earlier; is that correct?

23 A. Yes.

24 Q. Why did you call her?

25 A. I guess I kind of liked her at the time.

1 Q. Okay. Do you remember what you talked about?

2 A. Yes.

3 Q. What was that?

4 A. It wasn't my intention of calling, but it had to do
5 with her relationship with someone else.

6 Q. Her boyfriend?

7 A. Yeah.

8 Q. Okay. So you guys had a discussion about her
9 boyfriend.

10 A. Yes. And --

11 Q. Okay. So you initiated that phone call; is that
12 right?

13 A. I believe so.

14 Q. Were you still driving or were you at home already
15 when you --

16 A. I think it was after I dropped Chuck off.

17 Q. While you were still in the car?

18 A. Yes.

19 Q. Okay.

20 A. On my way home.

21 Q. But Chuck was gone already.

22 A. Yes.

23 Q. Okay. And it didn't take you too long to get home,
24 I take it.

25 A. No.

1 Q. Were you continuing to talk with her when you got
2 home?

3 A. I can't be certain of that.

4 Q. Okay. What did you do when you got home?

5 A. I got out of my car and I sat on the curb and made a
6 few more phone calls.

7 Q. Why did you sit on the curb to do that?

8 A. I didn't want to go in the house and wake my parents
9 up. I live -- my room is right below theirs.

10 Q. Okay.

11 A. And I know if I talk, they'll come down and ask me
12 to be quiet.

13 Q. Okay. Do you know how long it was that you sat out
14 on the curb and talked on the phone?

15 A. I think it was 30 minutes probably.

16 Q. Okay.

17 A. No more than that.

18 Q. Who did you talk to during that time frame?

19 A. I know I talked to Holly again. I think I talked to
20 Ann Churchill briefly. They were together.

21 Q. Okay. Holly and Ann were together at the same
22 place?

23 A. Yes.

24 Q. Okay.

25 A. I might have talked to Christy Whiteside.

1 Q. Okay.

2 A. And I know I tried to call my other friend, just guy
3 friends that I call every night before I go home. Or when I
4 go home.

5 Q. Okay. Now what did you do when you got done making
6 these phone calls?

7 A. I went to sleep. I went to bed.

8 Q. Okay. Did you go to school the next morning?

9 A. They say I didn't.

10 Q. Huh? I'm sorry?

11 A. They say I didn't, so.

12 Q. Are you not --

13 A. I don't remember.

14 Q. You don't recall that for sure?

15 A. I don't recall, no.

16 Q. Okay. If you didn't go to school, do you know what
17 you would have done?

18 A. I probably -- I would have gone to the school,
19 probably see some friends or pick them up and possibly go
20 back to their house.

21 Q. Play hooky?

22 A. Yeah. Yeah.

23 Q. Okay. All right. I'm going to show you what's been
24 marked as Defendant's Exhibit V, as in Victor.

25 THE COURT: Have you shown that to the state?

1 MS. BENSON: Oh, I'm sorry. We did discuss it
2 earlier, but I'll show them.

3 THE COURT: All right. As long as they know what
4 you're handing him.

5 (Ms. Benson showing exhibit to Mr. Crane.)

6 MR. CRANE: Okay. Yeah, subject to maybe some
7 irrelevant phone calls that we can deal with later, I don't
8 have any objection.

9 THE COURT: Well, I don't think it's being offered.
10 She's just going to show it to the witness. Or are you
11 offering it?

12 MS. BENSON: I would like to offer it. But if we
13 want -- if we're waiting on all the cell phone records until
14 later, that's fine.

15 MR. CRANE: Well, yeah. I don't have any objection
16 to her -- I think I know the phone call she's going to talk
17 to him about. I don't have any objection to that --

18 MS. BENSON: Okay.

19 MR. CRANE: -- being used by her to do that. It's
20 the issue of the other calls that don't really make any
21 difference, like we were talking about on these. Before that
22 document's published, I think we ought to get together on
23 that. Like Mr. Rogers and I were doing. Or Mr. -- I'm
24 sorry. Mr. Weis.

25 MS. BENSON: That is fine.

1 THE COURT: All right. Then, with that
2 understanding, V -- as in Victor?

3 MS. BENSON: Yes.

4 THE COURT: -- is admitted.

5 - - -

6 Defendant's Exhibit V admitted into evidence.

7 - - -

8 Q. Do you recognize that document? Do you know what it
9 is?

10 A. It's my phone bill.

11 Q. Cell phone?

12 A. Cell phone bill, yes.

13 Q. Okay. I'm also going to refer you to two exhibits
14 that have already been discussed today.

15 (Ms. Benson showing exhibits to Mr. Crane.)

16 Q. I'm also going to refer you to Defendant's Exhibit H
17 and Defendant's Exhibit U and ask you some questions
18 regarding these. First of all, with regard to U, can you
19 look at that and see if you can tell what that is. You might
20 have to look at a couple of pages to determine that.

21 A. I believe this is a portion of Holly Admire's cell
22 phone bill.

23 Q. Okay. And if you could look at Defendant's Exhibit
24 H and see if you can determine what that is.

25 A. It's my sister Kelly Ferguson's cell phone bill.

1 Q. Okay.

2 A. The whole thing.

3 Q. I'm going to refer you first -- if you could look at
4 your own cell phone record, please.

5 A. Okay.

6 Q. Okay. Can you tell if you received a call on
7 October 31st at 10:14 p.m.?

8 MR. CRANE: Just for the record, the defendant now,
9 after being asked that question, just for the record, is
10 holding the exhibit, before he answered the question, and
11 reads it. Okay. Thank you.

12 THE COURT: Are we talking about Exhibit V, as in
13 Victor?

14 THE DEFENDANT: Yes.

15 MS. BENSON: Yes.

16 MR. CRANE: That's his cell phone records?

17 MS. BENSON: Yes.

18 Q. Let me just ask you this. Would you possibly
19 remember the times and every phone call that you made and
20 exactly what time it was without looking at that record?

21 MR. CRANE: I'm going to object to the leading
22 nature of the question, Judge.

23 THE COURT: That is sustained, as to the nature --
24 the form of the question.

25 Q. Do you remember what time you called people?

1 A. No.

2 Q. Do you remember what time they called you?

3 A. No.

4 Q. Okay. Would it refresh your recollection to be able
5 to look at that document?

6 A. It would tell me, but I still wouldn't remember --

7 Q. Okay.

8 A. -- exactly when it was.

9 Q. Just -- before referring to that document, before
10 you went to By George, you talked to your sister Kelly on the
11 cell phone; is that right?

12 A. Yes, I did.

13 Q. Okay. And before you went to By George, did you
14 talk with Holly Admire on the cell phone?

15 A. I believe so.

16 Q. Okay. And after By George closed, did you talk to
17 Kelly on the cell phone?

18 MR. CRANE: Judge, I'm going to object. If he can
19 testify without a leading question, the appropriate way to
20 ask it is: Who did he talk to on the cell phone.

21 MS. BENSON: I can ask it that way.

22 MR. CRANE: She's suggesting the answer.

23 THE COURT: Is your -- what is your objection?

24 MR. CRANE: Form of the question.

25 THE COURT: And are you going to rephrase your

1 question?

2 MS. BENSON: I will rephrase it, Your Honor.

3 Q. After By George, who did you talk to on the cell
4 phone?

5 A. I talked to Holly Admire, Ann Churchill.

6 Q. Was that the same phone call, since they were
7 together?

8 A. I think -- yes. I believe so.

9 Q. Okay. That would have been the same phone number?

10 A. Yes.

11 Q. Okay.

12 A. I believe I talked to Christy Whiteside.

13 Q. Okay.

14 A. And I may have talked to one of my other male
15 friends. I think I tried to call my sister. I don't know if
16 I got a hold of her.

17 Q. Okay.

18 A. I believe that's it.

19 Q. If I could refer you back to Exhibit V.

20 A. Yes.

21 Q. That would be your cell phone record?

22 A. Yes, it is.

23 Q. Okay. What's the time of the first phone call after
24 leaving By George?

25 A. I believe it's 1:19.

1 Q. Is there one before that maybe?

2 A. No.

3 Q. Oh, I'm sorry. You're right. Yeah. 1:19. And who
4 was that to?

5 A. 228-0652.

6 Q. Is that Kelly's number?

7 A. I believe so.

8 Q. Okay. And was that when you were trying to find
9 her?

10 A. Yes.

11 Q. But did you get to talk to her?

12 A. I don't -- I don't recall. I don't think so.

13 Q. Okay. And do you see -- what's the next phone call
14 on there that you either made or received?

15 A. I made a call.

16 Q. What time would that be?

17 A. At 1:41 a.m.

18 Q. Okay. And who was that to?

19 A. That was to 489-1699.

20 Q. Is that Holly Admire's number?

21 A. Yes.

22 Q. And what time did that call end?

23 A. It was five minutes.

24 MR. CRANE: Judge, I mean, he's just reading off the
25 record. I think the record speaks for itself. I guess he

1 doesn't know. He's just looking at the record, and she's
2 going, "Did you call Holly Admire then," and he looks at the
3 record. This isn't -- the whole series of questions is
4 leading, Judge. He's just reading the document.

5 THE COURT: The objection is sustained.

6 MS. BENSON: If I could just briefly respond, Your
7 Honor. He indicated that it was okay at this time to go
8 ahead and testify regarding that record. Since it has --
9 since he has not agreed to its admissibility at this point,
10 and it has not been ruled upon, that is why I was asking in
11 that manner.

12 THE COURT: I thought there was an agreement as to
13 Exhibit V, his cell phone record, except for some matters
14 that might not be pertinent to this particular case.

15 MR. CRANE: That's right, Judge.

16 THE COURT: And that V was admitted subject to that,
17 and --

18 MS. BENSON: Okay.

19 THE COURT: I assume you can ask him questions. If
20 he has a memory, he can answer.

21 MS. BENSON: Okay.

22 Q. Do you recall what time the last phone call you made
23 that morning was?

24 A. Without looking at this? And without having ever
25 seen it? I wouldn't know exactly when, no.

1 Q. Would you have any reason to dispute the cell phone
2 record?

3 A. No.

4 Q. Okay. So whatever's in that record would be
5 accurate as to the last phone call.

6 A. Yes.

7 Q. Okay. Was it in the early morning hours after you
8 got home?

9 A. Yes.

10 Q. Okay. And that would be the series of calls to
11 Holly and Ann; is that correct?

12 A. Yes.

13 Q. And to Christy?

14 A. Yes.

15 Q. And possibly to a male friend?

16 A. Yes.

17 Q. Okay.

18 A. Two or three, probably.

19 Q. Okay. When you went into your house, did you see
20 anybody? Any of your family?

21 A. No. I don't remember.

22 Q. Did Charles leave anything in your car?

23 A. Not that I recall.

24 Q. You said you went to sleep when you got home?

25 A. Yeah.

1 Q. Okay.

2 A. After I made phone calls.

3 Q. Right. Right. Okay. During the entire evening,
4 October 31st, '01, to 11-1-01, from the time you went out
5 until the time you went home and went to sleep, did you go to
6 the Tribune building?

7 A. No.

8 Q. Did you go to the Tribune parking lot?

9 A. No.

10 Q. Did you see Kent Heitholt anywhere?

11 A. No.

12 Q. Did you have any contact with Kent Heitholt
13 whatsoever?

14 A. No.

15 Q. Did you participate in this murder?

16 A. No.

17 Q. Have you ever owned Sketchers?

18 A. No.

19 Q. Have you ever had blackouts where you couldn't
20 remember things that you did?

21 A. No.

22 Q. Okay. Ryan, I'm going to show you what's been
23 marked as Defendant's Exhibit W. That is a -- well, do you
24 recognize what that is?

25 A. A DVD --

1 Q. Okay.

2 A. -- marked -- do you want me to --

3 Q. Go ahead.

4 A. Marked "Ryan Ferguson, Transport to Columbia, July
5 30th." No. I guess that's -- I was reading --

6 Q. That's when it was made. Right. Is that a
7 videotape from your 3-10 interrogation in the car?

8 A. I believe so.

9 Q. In the police car. Okay. Have you seen the video?

10 A. No, I haven't.

11 Q. You don't recall seeing that out at the jail?

12 A. No.

13 Q. Your own video?

14 A. I saw some videos, but not my own.

15 Q. Okay.

16 A. I don't believe.

17 Q. Okay. But you do recall that it was recorded --

18 A. Yes.

19 Q. -- is that correct? Okay. And I'll also hand you
20 Defendant's Exhibits X and Y, which actually kind of go
21 together. Do you recognize what those are?

22 A. Ryan Ferguson interview and Ryan Ferguson interview
23 tape 2.

24 Q. And those are from the Columbia Police Department
25 interview; is that correct?

1 A. That's what I would assume, yes.

2 Q. Okay. And you haven't seen those either?

3 A. No, I have not.

4 Q. Okay. But you do recall that that was recorded.

5 A. Yes.

6 Q. Okay.

7 MS. BENSON: Judge, at this time I'd like to offer
8 Defendant's Exhibits W, X, and Y. However, I would like to
9 approach regarding these items.

10 THE COURT: You may.

11 - - -

12 Counsel approached the bench and the following
13 proceedings were held:

14 MS. BENSON: We would like to offer these. However,
15 Defendant's Exhibit X does have a brief portion regarding a
16 voice stress test. And obviously we don't want that part to
17 be included. We are able to play it and stop it at the point
18 and go past it and play it. We were not able to excise that
19 portion from this CD.

20 MR. CRANE: Well, at this point I'm going to object.
21 I mean, it's self-serving. Now, I'll -- I may play segments
22 of the videos, and at some point one or more of these may
23 become admissible. We've agreed that there's no foundational
24 issue with these with the witness. But I object at this
25 point, in that it's self-serving. In other words, you know,

1 if I bring it up, on a given tape, not all of them, then I
2 can see how the argument could be made that X -- whatever
3 they are. Sorry.

4 MS. BENSON: W, X, and Y.

5 MR. CRANE: -- W, X, and Y could come in. But not
6 at this juncture. Just go, "Hey, are these your tapes,"
7 "right," and they come in, nuh-uh.

8 THE COURT: The objection is sustained at this
9 point.

10 - - -

11 The following proceedings were held in open court:

12 Q. Once again, Mr. Ferguson, did you have any
13 involvement with the murder of Kent Heitholt?

14 A. No, I did not.

15 MS. BENSON: Thank you.

16 THE COURT: Let me ask, before you begin
17 cross-examination, Les, when do you expect dinner to arrive?
18 Since it is five after six.

19 DEPUTY COURT MARSHAL WERNER: It's supposed to
20 arrive here about 6:30.

21 THE COURT: At 6:30?

22 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

23 THE COURT: All right. It probably will interrupt
24 your cross-examination, but you may begin.

25 MR. CRANE: Thank you, Judge.

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CROSS-EXAMINATION

BY MR. CRANE:

Q. Mr. Ferguson, you and Chuck -- can we call him
Chuck? That's what you'd call him; right?

A. Yeah.

Q. Among other things. You and Chuck been friends
since junior high. You agreed with Chuck on that; right?

A. Yeah.

Q. That's what he said. He said you guys were friends.
Met each other at track in 8th grade. You don't have any
disagreement with that, do you, sir?

A. No.

Q. And you were in -- I might have already said this.
You were in track together; is that right?

A. Yes.

Q. You didn't only hang out with Chuck. He testified
-- he said you guys each had your own buddies and sometimes
you'd get together; right?

A. Yes.

Q. You also agree with Chuck that prior to this
incident you guys were pretty good friends, you never had any
problems, no conflicts, no arguments with each other; right?

A. No conflicts or arguments.

Q. Right. You agree with Chuck on that?

1 A. We were acquaintances more or less.

2 Q. Acquaintances. Now are you just saying it was kind
3 of like, "Hey, I know that guy"?

4 A. Not somebody I would call to hang out with usually.

5 Q. Well, you called him that night, October 31st, 2001,
6 didn't you --

7 A. I have called --

8 Q. -- about 8:00?

9 A. I'm not sure, but I have called him before.

10 Q. Well, you wouldn't deny that on October 31st, 2001,
11 about 8:00, you gave him a call, didn't you?

12 A. It's on my cell bill.

13 Q. All right. Well, a minute -- I just wanted to make
14 sure you were accurate there, because a minute ago you said
15 he was not somebody you would call.

16 A. Not on a regular basis.

17 Q. But you called him that night. Isn't that correct?

18 A. That's what it says.

19 Q. Okay. He was over at your house sometimes, and you
20 would visit over at his house; correct?

21 A. Yes.

22 Q. He had met your mother and father before. Had you
23 met his mother and father?

24 A. Yes, I have.

25 Q. And previously, once you got your driver's license,

1 there were occasions when you would go to that location
2 behind his residence and pick him up when he would sneak out;
3 isn't that correct?

4 A. I'd pick him up at his house.

5 Q. You never remember driving back here in the back
6 when he'd sneak out late at night?

7 A. Not back there.

8 Q. Did you ever do it the night -- did you do it the
9 night of October 31st, 2001?

10 A. No.

11 Q. You did not?

12 A. No.

13 Q. Did you go to another location and pick him up?

14 A. I dropped him off in front of his house.

15 Q. Well, no. Did you -- you said you couldn't recall
16 whether or not you took him to his residence after the
17 Swilling party, but before George's. That's what you said on
18 direct.

19 A. Yes.

20 Q. Okay. Did you -- as you sit there right now, are
21 you saying you did not or you did take him by his house to
22 change clothes between the Swilling party and By George's?

23 A. I do not know if I did.

24 Q. Your -- in other words, if Chuck says that is true,
25 that you saw him at Swilling's, and he got in the vehicle

1 with you, and then you drove him to his residence where he
2 changed clothes inside and came back out, you would not
3 disagree with Chuck on that; is that correct?

4 A. To the part about dropping him off there or --

5 Q. No. To take -- let's just make it simple. Taking
6 him to his house before you went to George's. You say you
7 don't remember it; correct?

8 A. I wouldn't disagree with that, no.

9 Q. Pardon me?

10 A. No. I wouldn't disagree with that.

11 Q. So in that instance, Chuck's memory is better than
12 yours. Correct?

13 A. Yes.

14 Q. Would you say that you guys stopped hanging out as
15 much after November 1st, 2001?

16 A. No.

17 Q. Say you were just acquaintances the whole time?

18 A. At that point we weren't -- we had been friends
19 earlier, but in high school we were never really good
20 friends.

21 Q. Never really good friends. This is your junior year
22 in high school; right?

23 A. Yes, it is.

24 Q. Okay. You drove him to school some mornings?

25 A. On occasion.

1 Q. But you really were just acquaintances. Not really
2 good friends.

3 A. If anybody I knew asked for a ride, I would most
4 likely pick them up.

5 Q. Okay. You lived in the same neighborhood.

6 A. Same region.

7 Q. Had some of the same friends; correct?

8 A. Yes.

9 Q. But you're just saying you were acquaintances.

10 A. At that point. In high -- in junior high --

11 Q. You were tighter?

12 A. -- we were friends.

13 Q. You were tighter in junior high than you were in
14 high school?

15 A. I wouldn't say tighter, but we were more friends.

16 Q. Okay. So your suggestion then is, by the time
17 Halloween of 2001 rolls around, you really hadn't seen much
18 of Chuck?

19 A. We had class together, so.

20 Q. Yeah. But I mean, outside of school, you really
21 never got with him? Is that what your testimony is today?

22 A. There would be parties, and everyone would be there,
23 all of my friends and people that I knew from school, so I'd
24 see him around.

25 Q. Okay. But other than that, you guys really were

1 just acquaintances. Not really old friends from 8th grade.

2 Is that --

3 A. Specify that. Old friends from 8th grade?

4 Q. You -- just kind of acquaintances. Just -- didn't
5 really see him that much? Is that what your testimony is?

6 A. If he was with friends, we would hang out together,
7 yes.

8 Q. Okay. Because, you know, there's a lot of high
9 school students that have been interviewed in this case. I'm
10 sure your attorneys have talked to some of them. And --

11 MS. BENSON: Judge, at this point I'm going to
12 object, if he's getting into any kind of hearsay.

13 THE COURT: I don't -- I don't know what you're
14 about to say, Mr. Crane, but avoid talking about hearsay,
15 what other people may have said.

16 Q. Would you disagree with other students from Rock
17 Bridge High School, of this era, if their observation was
18 that you and Chuck were pretty good friends?

19 A. Yes.

20 MS. BENSON: That's the same objection, Your Honor.
21 Hearsay.

22 THE COURT: Well, your client has already answered
23 the question.

24 MR. CRANE: I'm only asking if he would disagree if
25 that was their opinion.

1 THE COURT: The question has been asked and
2 answered.

3 MS. BENSON: That's fine.

4 Q. So you didn't have any problems with him in 8th
5 grade. No conflicts, et cetera?

6 A. No.

7 Q. No falling-outs?

8 A. No.

9 Q. Right? 9th grade, no problems? No falling-outs?

10 A. No.

11 Q. 10th grade, no problems, no falling-outs?

12 A. I mean, I wouldn't -- no problems or falling-outs,
13 no.

14 Q. What's that?

15 A. In -- between 9th and 10th grade, there were no
16 problems or falling-outs, but myself and a few other people
17 stopped hanging around Chuck more.

18 Q. Okay. So Chuck kind of became the odd man out.

19 A. Yeah. More or less.

20 Q. He's kind of -- now we've got him kind of -- your
21 group goes this way, and Chuck's kind of shunned?

22 A. More or less, yes.

23 Q. Okay. Didn't hang out with him?

24 A. No.

25 Q. He was a -- I think you said on direct, he became a

1 problem?

2 A. Yes.

3 Q. But you made an exception October 31st, 2001.

4 A. I wouldn't call it an exception.

5 Q. It wasn't an exception? You had gotten with him

6 before?

7 A. He was still, I mean, the general group of friends.

8 And if he wasn't intoxicated, if he wasn't causing problems,

9 I wouldn't have any problem being with him.

10 Q. Okay. I mean, you didn't think going to the bar

11 would be a problem.

12 A. No.

13 Q. Okay. 11th grade, you didn't have any conflicts or

14 arguments with him?

15 A. No.

16 Q. Junior year?

17 A. No.

18 Q. Okay. And senior year, no conflicts, arguments?

19 A. No.

20 Q. No -- Chuck didn't have any vendetta against you.

21 A. No.

22 Q. Okay. You indicated you had not thought about this

23 crime or anything about this issue that's the subject of this

24 trial until your arrest on March 10, 2004?

25 A. I had not thought about that night, no.

1 Q. You hadn't thought about it at all.

2 A. No.

3 Q. Okay. Until March 10, 2004; right?

4 A. Right.

5 Q. Okay. Now, you testified on direct examination that

6 when Chuck Erickson approached you at the Swilling party --

7 or strike that, at the John Whitworth party in January

8 '03/'04 -- you with me?

9 A. Yes.

10 Q. Okay. -- that he asked you to go smoke a cigarette.

11 Okay?

12 A. Yes.

13 Q. Out -- step outside and smoke a cigarette; right?

14 A. Yes.

15 Q. And that's what Chuck said to us when he testified.

16 So you don't disagree with that.

17 A. No.

18 Q. That was his memory.

19 A. Sorry. I forgot about that.

20 Q. And he said you were at Whitworth's. Correct?

21 A. Yes.

22 Q. And -- he said you were at Whitworth's. You don't

23 have any disagreement about that, do you, sir?

24 A. No.

25 Q. And you said he asked if he had been involved in

1 this crime with Mr. Heitholt, close quote. That's what you
2 said on direct. "Asked if he had been involved in this crime
3 with Mr. Heitholt." That's what you testified to a minute
4 ago. How did you know what in the world he was talking about
5 at that New Year's party?

6 A. I had read the papers. I mean, it's a big crime in
7 Columbia.

8 Q. Now your sister testified that you weren't a real
9 current events kind of guy.

10 MS. BENSON: Objection, Your Honor. She wasn't sure
11 about that. If I recall her testimony correctly.

12 THE COURT: The objection is overruled.

13 Q. She said you didn't -- she never saw you reading the
14 newspaper. Didn't think you did. And that she never
15 remembers you watching the news much.

16 MR. CRANE: Fair?

17 Q. When did you read the newspaper about this murder?

18 A. I don't know if it was newspaper or maybe saw it on
19 TV.

20 Q. Well, now --

21 A. I know I heard about it.

22 Q. You told the police that you read the newspaper
23 about this crime the day after or maybe the day after that.
24 November 2nd or November 1st, 2001. Do you remember telling
25 the officers that?

1 A. I don't know what I said to the police officers in
2 regards to reading or hearing about the crime.

3 Q. You said to the police that -- well, let me ask it
4 this way. Do you remember telling the police that you had
5 read about this murder the day after it happened? And I'll
6 grant you, I don't know if that's the 1st or 2nd of November,
7 2001. And that, when you remembered it, it was like 9/11.

8 MS. BENSON: Judge, if I could object at this point,
9 just to have him clarify which interview he's talking about.

10 Q. Detective Liebhart.

11 A. I don't recall saying that.

12 Q. Would you disagree with saying -- that you said
13 that --

14 A. No.

15 Q. -- if it's on the tape?

16 A. No.

17 Q. Okay. Well, when did you find out this murder had
18 occurred?

19 A. I assume a day or two after it happened.

20 Q. Well, now, don't assume.

21 A. Whenever I had read it or seen it on TV.

22 Q. So you do remember reading it or seeing it on TV.

23 A. Yes.

24 Q. If you read it in the paper, where did you get the
25 paper?

1 A. My parents ordered the paper, I believe.

2 Q. Were they getting the Tribune at their residence?

3 A. They might have been. I know they did at one point
4 in time.

5 Q. Okay. Well, I've -- we've got a record, certified
6 business affidavit, Columbia Daily Tribune, says there was no
7 Tribune subscription at least to your parents' residence at
8 that time. Do you disagree with that?

9 A. I mean, if that's what it says --

10 Q. Okay.

11 A. -- I have no problem with that.

12 Q. Isn't it true that you took Chuck Erickson to school
13 on November 2nd, 2001?

14 A. I might have.

15 Q. You don't disagree with Chuck on that?

16 A. I picked a lot of people up for school, so.

17 Q. No. Took him to school. November 2nd, 2001.

18 A. Picking people up for school implies taking them to
19 school.

20 Q. Okay. Did you take Chuck Erickson to school, like
21 he said he did in front of this jury -- you did in front of
22 this jury, on the morning of November 2nd, 2001, sir?

23 A. It's a possibility.

24 Q. So you don't disagree with Chuck on that?

25 A. No.

1 Q. And he says that he had the newspaper that morning.
2 And it may have been the Tribune from the night before. Do
3 you know when the Tribune is delivered?

4 A. In the afternoon, I believe.

5 Q. You're not sure?

6 A. Actually I'm fairly certain. In the weekday it's
7 the afternoon.

8 Q. Okay. And do you disagree with Chuck when he says
9 you picked him up at his house and he had the newspaper and
10 he talked to you about this murder?

11 A. I had never read the newspaper with anyone in
12 regards to anything that happened on that evening.

13 Q. I never said you guys were both reading it at the
14 same time. Do you remember Chuck Erickson -- you've already
15 said you don't disagree that he picked you up for school,
16 having that newspaper, and telling you, "Hey, look at this."

17 A. Chuck has never brought a newspaper into my car and
18 said, "Hey, look at this."

19 Q. Okay. So you don't -- you are telling the jury that
20 didn't happen. He got in your car November 2nd, 2001, but he
21 did not have a newspaper with him. Is that your testimony?

22 A. He might have gotten in my car, I might have taken
23 him to school, but no, I don't believe he would have shown me
24 a newspaper.

25 Q. Okay. Why not?

1 A. Because he's never shown me any newspapers. He
2 never -- whenever I picked him up for school, he'd get in,
3 and I --

4 Q. So where did you read the newspaper about this?

5 A. I mean, I don't know if it was the newspaper or I
6 saw it on TV. I really don't know. I know I heard about it.

7 Q. And when you were out -- going to Nov -- January
8 2003/'04 -- '03/'04 at Whitworth's, you hadn't been thinking
9 about this murder at all; right?

10 A. Never.

11 Q. But when Chuck said -- he asked you if he'd been
12 involved in the crime with Mr. Heitholt, did you know what he
13 was talking about?

14 A. I actually believe he said "the Tribune guy." I
15 might have said "Heitholt" in my direct.

16 Q. You did.

17 A. Okay.

18 Q. You did. Now he testified that he goes: "Remember
19 Halloween. Being at George's. I think we killed that guy."
20 And he testified you then said: "You mean the Tribune guy."

21 A. I don't know.

22 Q. Could that have happened?

23 A. No.

24 Q. How do you know?

25 A. Because what he said -- he -- he didn't even

1 indicate me ever being involved that evening. He said that
2 he had -- did he do something to hurt the Tribune guy.

3 Q. How do you remember so well?

4 A. Because I remember he said "himself." I was never
5 implicated in his mind, ever. And I remember that when I got
6 picked up on March 10th.

7 Q. You remembered that on March 10th?

8 A. He had said "himself." I don't remember his exact
9 words, other than he said "himself." He never said "we."

10 Q. Did it upset you when he started talking about this
11 murder at Whitworth's party?

12 A. I don't want to be around anyone who talks about
13 doing something like that.

14 Q. You didn't want to be around anybody like that.

15 A. No.

16 Q. People that accuse you of murder?

17 A. Accuse themselves of murder.

18 Q. Okay. I believe you testified on direct you thought
19 Chuck was an odd man.

20 A. Yes.

21 Q. Do you think that's funny?

22 A. I think he's an odd man, yes.

23 Q. Do you think that's funny?

24 A. It's not funny.

25 Q. Okay. I just thought you were smiling. I thought

1 you thought it was funny.

2 A. No, it's not funny, laugh.

3 Q. Okay. I mean, this is America. If you want to
4 laugh, you can.

5 A. No, it's not a laugh.

6 Q. So after he said that, you wanted to get back
7 inside, get away from him, and you never saw him again. Is
8 that correct?

9 A. Not that evening.

10 Q. Did you see him again --

11 A. Not until --

12 Q. -- before your arrest?

13 A. Not until March 10th.

14 Q. Okay.

15 A. So not again until you guys.

16 Q. You didn't -- I think you'd mentioned this on
17 direct. You didn't go to school on November 1st, 2001; is
18 that right?

19 A. If that's what the records say.

20 Q. You don't have any memory of whether you went to
21 school or not.

22 A. No.

23 Q. Have you discussed going to school or not with
24 anybody before your testimony here today? And I'm talking
25 about November 1, 2001.

1 A. I have.

2 Q. Talked about that with your dad?

3 A. Probably.

4 Q. Okay. Now, how is it that you -- well, let me ask
5 you this. Did your folks know you weren't going to school?

6 A. I can't be certain. Probably not.

7 Q. What's that?

8 A. I cannot be certain.

9 Q. Well, you think you might have told them that you
10 weren't going to class in 2001?

11 A. Sometimes I had my mother call in for me, and
12 sometimes I'd call in for myself.

13 Q. Well, now, you don't deny telling your dad that you
14 called it in yourself.

15 A. No.

16 Q. Okay. Do you have a memory of calling in yourself?

17 A. You mean the times? I'm not sure about that exact
18 date.

19 Q. How would you do that? How did you do that on
20 November 1st, 2001? How did you get yourself excused?

21 A. If I did get myself excused?

22 Q. Uh-huh.

23 A. I would call in as my father.

24 Q. Okay. And how would that go? I mean, you'd call
25 the main number at the high school and...

1 A. I called the attendance. And I would say that,
2 "This is Bill Ferguson, and Ryan Ferguson isn't feeling well.
3 He won't be in today."

4 Q. Okay. Is that what you did November 1, 2001?

5 A. I've done it many times. I can't be certain about
6 2001. Or November 1st.

7 Q. Do you know what time it was that you called in?

8 A. If I called in, I don't know.

9 Q. Do you know what phone you had used when you
10 called --

11 A. Again --

12 Q. -- to tell them that you were the father of Ryan
13 Ferguson?

14 MS. BENSON: Judge, again I object at this point,
15 because he said he's not certain that he did or not.

16 THE COURT: The objection is sustained.

17 Q. Were your parents home the morning of November 1,
18 2001?

19 A. I believe so.

20 Q. How do you know?

21 A. They were typically home in the morning.

22 Q. Do you have a memory of that? Are you telling the
23 jury they were home or not? Or do you remember?

24 A. No. I had probably been sleeping, so. I mean, I
25 assume they'd be home until they go to work.

1 Q. So you don't remember what you were doing the
2 morning after you got home at some point the night before,
3 you don't know what you were doing November 1, 2001. Is that
4 correct?

5 A. No. I mean, that is correct.

6 Q. But you agree you weren't at school.

7 A. If that's what the records say. I wouldn't --

8 Q. Kelly, your sister, testified that she didn't see
9 you that morning. You don't disagree with her on that, do
10 you?

11 A. No.

12 Q. You never saw Kelly that morning, did you?

13 A. Again, I don't know. I mean, it's like any other
14 day.

15 Q. But you remembered where you parked the night of
16 October 31st, 2001, didn't you, when you talked to the
17 police.

18 A. Yes.

19 Q. You told them it was down from George's, the bar, on
20 down, across the street, because it was so crowded, didn't
21 you?

22 A. Yes.

23 Q. How is it that you remembered where you parked on
24 October 31st, 2001, sir, and you don't know where you were,
25 whether you went to school, or who you saw hours later at

1 your residence, if you were there.

2 A. I've been in By George's a total of three or four
3 times. And every single time I parked on that street. And
4 because it's crowded, there's not much parking, I've always
5 parked down. So that would be where I would park. My normal
6 parking spot, I guess you could say.

7 Q. That's your normal parking spot when you go there?

8 A. Yes.

9 Q. So it's your testimony that when you were talking to
10 the police about your parking spot, that's just among some
11 details that you discussed, that was just because that's
12 where you park every time you go to George's.

13 A. Are you asking if that's what I told them?

14 Q. Was that what you were saying?

15 A. Right now?

16 Q. Do you have a specific -- you've got a specific
17 memory where you parked that night, don't you?

18 A. I mean, that's where I always parked, so I assume I
19 would park there.

20 Q. You don't disagree with Chuck when he says you
21 parked down at the corner of First and Ash, do you?

22 A. In that area.

23 Q. Okay. You don't dis -- here's this exhibit I'm
24 showing you. 10A. Do you remember this one?

25 A. 10A?

1 Q. Yeah.

2 A. Yeah.

3 Q. We got George's. You go on down First and you're at
4 First and Ash. And here's that street that runs in front of
5 George's in 10C. And on down there is where Chuck said you
6 guys parked. I'm looking at 10C and 10B, down here.

7 A. Okay.

8 Q. You didn't disagree with that. You don't disagree
9 with Chuck's memory of where you guys parked, do you?

10 A. No.

11 Q. And you don't disagree with Chuck that you were
12 driving your Mercedes, do you?

13 A. No.

14 Q. You don't disagree with Chuck when he said that you
15 two got to that parking location, that you remembered in
16 March of 2004, and walked to the bar from the car, do you?
17 You agree with that, don't you?

18 A. Yeah, I'll agree with that.

19 Q. And you agree that -- with Chuck that at the bar you
20 met up with Christine Lo. Isn't that who that is? I'm
21 showing you State's Exhibit 4.

22 A. Yes, I do know her.

23 Q. Okay. Christine Lo and your sister. You don't
24 disagree with that, do you?

25 A. No.

1 Q. And you don't disagree that you, Christine Lo, your
2 sister, and Charles Erickson entered the bar together. And
3 the girls facilitated your getting in when you were under
4 age. You don't disagree with that.

5 A. No.

6 Q. And that there was some cover charge to pay. You
7 don't disagree with that either.

8 A. No.

9 Q. Mr. Erickson testified that that night you were not
10 wearing a costume. You had on regular clothes. You disagree
11 with that?

12 A. No.

13 Q. And you don't disagree that he changed clothes at
14 his residence and put on some other kind of street clothes.

15 A. It's possible.

16 Q. It's possible?

17 A. It's possible.

18 Q. So you'll give him the benefit of the doubt.

19 A. I'm not going to say it didn't happen. I wouldn't
20 give him the benefit of the doubt.

21 Q. Well, he remembers, though, Ryan. Do you?

22 A. He says he remembers a lot. People make up stuff.
23 It's not a memory.

24 Q. So a minute ago you said you wouldn't disagree.

25 A. I don't disagree with, no.

1 Q. Okay. Do you remember what he was wearing?

2 A. No.

3 Q. Do you remember what Christine was wearing?

4 A. No.

5 Q. Do you remember what your sister was wearing?

6 A. No.

7 Q. You went into the bar, you guys hung together, maybe
8 apart for 10, 15 minutes at a time, but generally hung
9 together? Is that correct?

10 A. Part of the time.

11 Q. Okay. He never left for any extended period, did
12 he?

13 A. We were doing our own thing for quite a while. I
14 mean --

15 Q. You testified that you didn't know whether he'd left
16 the bar or not.

17 A. I don't know if he had left the bar or not.

18 Q. Okay. Were you apart for very long while you guys
19 were in the bar?

20 A. Yes.

21 Q. How long?

22 A. I'd say 30-minute stretches.

23 Q. How do you remember that?

24 A. Because I remember going and talking to girls,
25 trying to dance with them or --

1 Q. You have a specific memory of that night and the
2 time that you and Chuck were not together.

3 A. No.

4 Q. You don't.

5 A. No. I remember not being with him the whole night.
6 And I remember going to talk to girls, but I can't tell you
7 what they were wearing or what they looked like or who they
8 were.

9 Q. What did you drink?

10 A. I believe my first drink was an Amaretto Sour. And
11 I didn't really like it too much, so I had a Jack and Coke
12 after that. I might have had a total of three drinks, the
13 third being a Jack and Coke as well.

14 Q. What about Chuck?

15 A. I bought him his first drink, and then I gave him
16 some money so he could buy his own drinks. I don't know what
17 he drank after that.

18 Q. You told the police you had 30 bucks on you that
19 night?

20 A. I said around \$30.

21 Q. Okay. How much were the drinks?

22 A. Four dollars each.

23 Q. And how many drinks did you say you bought for
24 yourself? Three?

25 A. Three. Two or three.

1 Q. And how many drinks did you say you bought for
2 Chuck?

3 A. I only bought him one.

4 Q. And then you gave him ten bucks?

5 A. Yes.

6 Q. How much was the cover?

7 A. Four dollars, I believe.

8 Q. Did you take care of that too? Did you pay that
9 too?

10 A. Yes, I did.

11 Q. Your sister was talking about her recollection.
12 Some of the things she could remember, and some of the things
13 she couldn't, but she indicated that one thing that helped
14 her remember what was going on on October 31st, 2001, was her
15 diary.

16 A. Yeah.

17 Q. She wrote in here, "Ryan came home." This is
18 October 31. This is State's Exhibit 103. "The whole credit
19 card dilemma. He had lost his c/c." I guess that means
20 credit card. "For a week now. I told him he needed to
21 cancel ASAP and call dad." What was that all about?

22 A. I lose things a lot. My cell phone, my wallet, my
23 keys. I probably had lost my wallet or my credit card
24 specifically.

25 Q. You had a credit card back then?

1 A. Yes, I did.

2 Q. What kind of a card was it? Like a gas card?

3 A. It was an American Express, I believe.

4 Q. You had an American Express card?

5 A. It was Gold, yeah.

6 Q. A Gold American Express card?

7 A. Yes.

8 Q. And you lost it.

9 A. I lost it quite a few times.

10 Q. Okay. And was that something that was bothering you
11 on October 31st, 2001?

12 A. No, it never bothered me.

13 Q. Well, Kelly described it as a dilemma. And she was
14 encouraging you to cancel it ASAP. As soon as possible? And
15 tell your dad. So was it -- to you, it was no big deal; "I
16 lost my American Express Gold Card"?

17 A. Well, I lose things a lot, and I always find them,
18 either in my room or in my car.

19 Q. Did you find it?

20 A. I can't be certain I even lost it on that date.

21 Q. Well, here it says you lost it for a week. Is that
22 accurate?

23 A. I did not write that.

24 Q. Huh?

25 A. I did not write that.

1 Q. No, I know. I'm just asking you. Is that accurate?

2 A. Is her writing --

3 Q. Yeah. Had you lost your American Express Gold Card
4 for a week?

5 A. I can't be certain. I have lost it before. It's
6 very possible that I could have lost it in that time frame.

7 Q. Okay. You said when you went to Swilling's party --
8 and this is State's Exhibit 6. I showed that to Chuck, and
9 he said that's Swilling's house. You don't have any
10 disagreement on that, do you?

11 A. No.

12 Q. Okay. And you said you went there for about five
13 minutes?

14 A. Five or ten.

15 Q. And then you just took off again?

16 A. I went to go get my costume.

17 Q. Okay. Where had you been before you went to
18 Swilling's house?

19 A. My parents' house.

20 Q. Okay. And then you got to Swilling's, and you said,
21 "Gosh, I forgot my costume"?

22 A. I felt a little bit out of place. Everyone there
23 except for myself had a costume on.

24 Q. Okay. So you went back home. Did you go back home
25 with anybody?

1 A. No.

2 Q. Got the spider costume?

3 A. Yes.

4 Q. Where had you gotten that?

5 A. I believe I got it from my mother's friend, Cathy
6 Cartwright.

7 Q. Okay. And you didn't put it on.

8 A. No.

9 Q. How come?

10 A. I was going to put it on at the party, I guess.

11 Q. Okay. And you got to the party, and what was
12 happening?

13 A. The police were out front, and everyone was leaving.

14 Q. Okay. So -- Chuck says that he doesn't remember
15 seeing you at Swilling's while he was there. And that's
16 accurate; right? Because you really weren't there but for
17 five minutes; right?

18 A. Yes.

19 Q. Okay. And when you got there, the police were
20 already there. And who did you see?

21 A. I saw quite a few people. And Chuck Erickson.

22 Q. And Chuck. So you don't have any disagreement that
23 Chuck and you linked up for the first time that night outside
24 Swilling's --

25 A. Yes.

1 Q. -- right?

2 A. No disagreement.

3 Q. And he says he remembers you going, "Hey, Chuck,"
4 and there you were, a little bit down the street I think from
5 Swilling's party, and he went and got in the car with you.
6 You don't have any disagreement with that, do you?

7 A. I could have said it or he could have said, "Hey,
8 Ryan." I mean --

9 Q. But I mean, if he said -- he testifies you said,
10 "Hey, Chuck," and you got -- he got in the car with you. You
11 don't have any disagreement with that as you sit here today,
12 do you?

13 A. I can't say. I mean, he's obviously lied numerous
14 times. If that's what he says, I mean, it's a possibility.
15 But one way or the other, one of us had said hello to each
16 other and he got in my car.

17 Q. Okay. But you can't remember.

18 A. No.

19 Q. Okay. Now, when he got in the car with you, you had
20 your cell phone; correct?

21 A. Yes.

22 Q. He didn't have a cell phone that night; is that
23 accurate?

24 A. Yes, that's accurate.

25 Q. That's accurate? He said he didn't have a cell

1 phone. He said you were the one with one. Is that accurate?

2 A. He didn't have a cell phone --

3 Q. Okay.

4 A. -- I don't believe in high school.

5 Q. Okay. And you were making some phone calls while

6 you were in the car with Chuck, right off the bat, right

7 after you guys got together?

8 A. It's a possibility.

9 Q. Okay. Well, that's what he says. You don't

10 disagree with it?

11 A. Again, I mean, what he says sews up the argument,

12 but it's possible.

13 Q. Okay. All right. Did you call Kelly while you were

14 in the car, when Chuck first got in?

15 A. Most likely.

16 Q. You don't have any specific recollection of that?

17 A. No, but I remember calling my sister before going to

18 the bar.

19 Q. Okay. And so does Chuck. Right? You heard him

20 testify to that.

21 A. Yes.

22 Q. And did you call Holly before you and Chuck got to

23 the bar?

24 A. I can't be certain about that.

25 Q. Well, you were looking at the phone records a minute

1 ago. I -- you went over some times when you called Holly.
2 Would you -- would you disagree with the phone records or
3 Chuck that you called Holly before you went to By George bar?

4 A. No.

5 Q. And the reason why you called Holly was to tell her
6 that her boyfriend was cheating on her; isn't that correct?

7 A. No. It is not.

8 Q. You did not call her and tell her that?

9 A. That was not the purpose of the call.

10 Q. No, I didn't ask you what the purpose of the call.
11 Let me -- if I did, let me rephrase it. What was the -- did
12 you tell Holly, when you called her, that you wanted her to
13 know that you had seen her boyfriend cheating with another
14 female. Isn't that true?

15 A. I did not call her and tell her that I wanted her to
16 know that. And I don't know if it was at that point or later
17 in the evening, but sometime that came up.

18 Q. Okay.

19 A. And we talked about it.

20 Q. How did that just come up? You just called to say,
21 "Hi, how you doing?" And then, "By the way, your boyfriend's
22 cheating on you"?

23 A. I don't know how it came up, but no, it wouldn't
24 have come up like that.

25 Q. Okay. Well, Chuck testified he remembers you

1 talking to her about her boyfriend -- I believe it was Dan
2 Dunn? Is that correct?

3 A. Yes.

4 Q. -- cheating on her. Is that true?

5 A. It's in the reports, and he's read the reports, so.

6 Q. No, I'm asking you, do you have any disagreement
7 with that call?

8 A. Yes. I believe the only time we talked about that
9 was later in the evening.

10 Q. How do you remember that?

11 A. Because I remember talking to Holly that evening.

12 Q. Yeah, but how do you remember when you told her
13 about her boyfriend cheating on her? You couldn't testify to
14 the times of the calls without your attorney showing you the
15 records a minute ago.

16 A. I don't know the times of the calls, but when I
17 talked to Holly about that, I was sitting on the curb in
18 front of my house. After the bar. So I know --

19 Q. How do you remember that?

20 A. I didn't remember it two or three days until
21 after -- or after my arrest. And I thought -- you know, I
22 was thinking about that night --

23 Q. That's correct, Mr. Ferguson --

24 A. -- and wanted to prove my innocence.

25 Q. In all the time that you were interviewed by the

1 Columbia police, you never once mentioned that you were on
2 the phone, on the curb, out in front of your residence,
3 during the time frame in question, did you?

4 A. I was never asked, nor did I have the time to think
5 about that evening.

6 Q. Is it your testimony that you never recall being
7 asked what you did after leaving By George's, by the police?
8 Is that your testimony, sir?

9 A. I was asked, yes.

10 Q. You were asked a lot of times, weren't you?

11 A. Yes. I didn't think specifics as in phone calls. I
12 went to my house and went to sleep. I didn't think I should
13 disclose all my phone calls and --

14 Q. You didn't think, when you're being interviewed as a
15 suspect in a murder case, that you wanted to disclose phone
16 calls?

17 A. I'm not involved in a crime. I didn't think I
18 should tell them about everybody I called that evening. I
19 didn't think --

20 Q. You wanted to keep that private?

21 A. No. I just didn't think it would be important.
22 It's not something that crossed my mind.

23 Q. You didn't think, when you were interviewed by the
24 police, that it would be important to figure out where you
25 were after you left George's?

1 A. Where I was was at home. I mean, you know, how --

2 Q. Yeah, but you didn't think it would be important?

3 That's what you just said.

4 A. I knew I was with no one, and if I --

5 Q. No, no, no. The police talked to you about that a
6 lot. A lot when you were interviewed.

7 A. Okay.

8 Q. And you're saying you didn't think it was important
9 and you didn't want to tell them about your personal phone
10 calls?

11 A. I didn't say I didn't want to. I never thought a
12 phone call would have anything -- any relevance in the case.

13 Q. Until three days later?

14 A. It was just one of the things that I had thought of
15 about that evening.

16 Q. Okay. You told --

17 A. So I --

18 MS. BENSON: Judge, I'd object and ask the witness
19 be allowed to answer.

20 THE COURT: If you'll allow him to answer.

21 Q. Sure. I'm sorry. Go ahead.

22 A. Question, please.

23 Q. Are you done?

24 A. I'm asking for the question.

25 Q. I didn't mean to cut you off.

1 A. I'm asking for the question again, please.

2 Q. I can't -- I can't remember what it was. How about
3 if I -- see, I forgot something. How about if I ask you
4 this. Do you remember telling the police that you would have
5 gotten home from George's between 2 a.m. and 2:15?

6 A. Yes.

7 Q. Okay. That's what you said?

8 A. Yes.

9 Q. Okay. And is it your testimony that you don't
10 remember who you called last on the early morning hours of
11 11-1-01? You called him a male friend?

12 A. Who I talked to or who I called?

13 Q. Who you called.

14 A. No, I don't remember.

15 Q. You don't remember who you called, if you made a
16 phone call, at 2:09 a.m. on November 1, 2001.

17 A. I remember the people I talked to. I mean, if I
18 called and they didn't answer, I wouldn't know who I called
19 last.

20 Q. So you've said that you've thought about this since
21 your arrest.

22 A. Right.

23 Q. And phone records have been brought up during this
24 case. Your attorney's asked you about phone records. And
25 it's your testimony that you don't know really -- you didn't

1 really pay much attention to the phone records before today.

2 A. I did about a year ago. I didn't know I was going
3 to be asked about the last person I attempted making a phone
4 call to. They didn't answer; I know that. I never talked to
5 them.

6 Q. Well, you weren't aware, after all this time, of
7 when this crime occurred?

8 A. Of when it occurred? I know what time it occurred.

9 Q. What's the time frame that you think this time --
10 crime occurred in? I realize you're saying you weren't
11 there. What's the time frame?

12 A. I believe the police called -- or the police were
13 called at 2:26 a.m.

14 Q. And -- right. And when did Kent Heitholt log off
15 his computer?

16 A. 2:08, I believe.

17 Q. And what time did you make your last phone call of
18 the night? Allegedly.

19 A. 2:09.

20 Q. And who did you call?

21 A. I can't be certain.

22 Q. But you know where you were.

23 A. I know where I was, yes. On the curb of my house.
24 It's not hard to forget.

25 Q. You forgot it when you talked to the police.

1 A. I never had time to think about it. It wasn't
2 forgotten.

3 Q. Well, now, on direct, you just testified that you
4 had the trip back from Kansas City.

5 A. Yeah.

6 Q. And you knew exactly what they were talking about.
7 The Tribune murder.

8 A. Yes.

9 Q. And you get back to Columbia, and they kept you for
10 hours talking to you about this case.

11 A. Yes.

12 Q. Talked to you about what Chuck said and various
13 things. And you're saying you didn't have time to think
14 about it.

15 A. I never thought I would be arrested for a crime I
16 did not commit. I was more worried that evening about taking
17 my test and getting back to Kansas City for my mid-terms.

18 Q. You're placed in handcuffs.

19 A. Yes.

20 Q. Placed in a police car. At some point they tell you
21 that this is a murder investigation.

22 A. Yes.

23 Q. You're interviewed by police officers and told that
24 there's a guy saying you were with him when this murder was
25 committed, and you're sitting there worrying about your test

1 the next day?

2 A. I never thought I would be arrested for a crime I
3 didn't commit. People make up stories all the time.

4 Q. And so you're kind of sitting there going --

5 MS. BENSON: Again, Judge, he was not allowed to
6 answer that question.

7 MR. CRANE: Okay. I'll let him finish. Sorry.

8 A. If everyone was arrested because of stories that
9 other people made up, I mean, a lot of -- a lot more people
10 would be in jail. It's just -- you can't just believe
11 anything anybody says. I never thought -- I never thought I
12 would be arrested for a crime I didn't commit. Would you?
13 Would you believe you'd be arrested for a crime you didn't
14 commit?

15 Q. I didn't commit one.

16 A. Neither did I.

17 (Applause and outburst from audience.)

18 THE COURT: If there is anything else like this
19 again, you will be removed from this courtroom until the
20 conclusion of this trial. Do you understand that? Do you?

21 SPECTATOR: Absolutely.

22 SPECTATOR: Yes.

23 THE COURT: The jury's dinner is here now and I am
24 going to take a brief -- I'll take a recess in time for them
25 to eat.

1 Ladies and gentlemen of the jury, the Court again
2 reminds you of what you were told at the first recess of the
3 Court. Until you retire to consider your verdict, you must
4 not discuss this case among yourselves or with others, or
5 permit anyone to discuss it in your hearing. You should not
6 form or express any opinion about the case until it is
7 finally given to you to decide. Do not read, view, or listen
8 to any newspaper, radio, or television report of the trial.

9 If you'll let me know when the jury has finished
10 eating.

11 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

12 THE COURT: We'll be in recess.

13 (Recess taken.)

14 - - -

15 The following proceedings were held out of the presence
16 of the jury:

17 THE COURT: State ready?

18 MR. CRANE: Yes.

19 THE COURT: Defense ready?

20 MS. BENSON: Yes. I just want to put him up here
21 before the jury gets back in because of the squeak.

22 THE COURT: Well, that's fine. I noticed that he
23 stepped off the stand. And usually I have pretty good
24 hearing. I didn't hear it.

25 MS. BENSON: You can hear it right now.

1 RYAN WILLIAM FERGUSON,
2 resumed the stand and testified further:

3 THE COURT: You may inquire.

4 MR. CRANE: Thank you, Judge.

5 - - -

6 RESUMED CROSS-EXAMINATION

7 BY MR. CRANE:

8 Q. On direct examination, I believe you indicated that
9 you -- you were asked if you ran out of money, and your
10 answer was: "I don't believe so"?

11 A. Yes.

12 Q. So you're not certain whether or not you ran out of
13 money?

14 A. I can't be certain.

15 Q. Okay. You could have ran out of money.

16 A. Could have.

17 Q. And Chuck indicates that you guys ran out of money.
18 So you wouldn't disagree with him on that?

19 A. What Chuck has to say --

20 Q. I'm just talking about the money now.

21 A. I wouldn't agree or disagree with him.

22 Q. So it's possible you did run out of money.

23 A. Yes.

24 Q. And neither one of you had hats on?

25 A. Neither one of us.

1 Q. Okay. What type of shoes were you wearing that
2 night?

3 A. I was probably wearing sandals or maybe tennis
4 shoes.

5 Q. Sandals?

6 A. I usually wore sandals.

7 Q. Okay. Do you have a memory of what shoes you had on
8 that night?

9 A. No.

10 Q. Okay. Did you have a lot of shoes?

11 A. I had quite a few pair.

12 Q. Tennis shoes?

13 A. Yes.

14 Q. Or athletic shoes?

15 A. Yes.

16 Q. Okay. But you don't remember what type of shoes you
17 were wearing that night.

18 A. If I was wearing shoes.

19 Q. Well, what type of footwear were you wearing that
20 night.

21 A. No, I do not remember.

22 Q. Okay. And I guess you didn't have a pair of
23 Sketchers.

24 A. No.

25 Q. How do you remember that?

1 A. I've -- I've always assumed those to be female
2 shoes. I've never bought them. Never worn them.

3 Q. So you distinctly remember that you didn't have
4 Sketchers.

5 A. Yes.

6 Q. Now, have you gotten the police reports in this
7 case?

8 A. Yes, I have.

9 Q. And have you also read newspaper articles about this
10 case?

11 A. Yes. Both.

12 Q. Okay. And you've been kept up to date with
13 developments in this case; is that correct?

14 A. More or less.

15 Q. Okay. And have you -- you've read all the police
16 reports in this case?

17 A. Not all of them, no.

18 Q. Okay. The ones that were done after your arrest?
19 You read those?

20 A. Concerning the 10th of March, 2004.

21 Q. Right.

22 A. Yes.

23 Q. You've read all of those.

24 A. I read those.

25 Q. Okay. And is it -- is it correct that you remember

1 the exact route that you drove home from George's?

2 A. Not exactly, but more -- more or less. I mean, the
3 main route, yes.

4 Q. Tell us what that was again. Do you need the map?

5 A. Yes.

6 Q. Okay. I'll bring it to you.

7 A. Thank you.

8 I would have gone --

9 Q. Now what -- please don't tell me what you would have
10 done. What you remember. I believe that's what you
11 testified to on direct, is you remembered the route you drove
12 home.

13 A. Okay.

14 Q. I mean -- and if I'm mistaken, tell me.

15 A. Okay. Well, the way I always go, I'll put it that
16 way, because I don't have a specific memory of driving home
17 that evening. But the way I usually drive home, and the way
18 I think I remember it, and the night, it's just like two
19 nights ago for you, I was going down Garth, and then this is
20 Stewart I believe right here, going to West Boulevard, down
21 West Boulevard, taking a right onto Stadium Boulevard, and
22 down Forum, and -- to Chapel Hill, to Mr. Erickson's house.

23 Q. Okay. So you agree that at some point on the early
24 morning hours of November 1, 2001, you took Chuck Erickson
25 home.

1 A. Yes.

2 Q. Okay. Now, I want to ask you, you said, "just like
3 I remember it two days ago." You remember the route you went
4 home.

5 A. Yes.

6 Q. But you said you hadn't thought about the night of
7 October 31st, 2001, until you were arrested in '04.

8 A. Correct.

9 Q. So how is it that you remember that route home?

10 A. The same with the parking spot. I mean, By George's
11 doesn't have much parking. And when I'm downtown, I almost
12 always drive home that way.

13 Q. Did you go to By George's quite a bit?

14 A. I've been there four times, approximately.

15 Q. And was this the first time?

16 A. I can't recall.

17 Q. So you might have been there before October 31st,
18 2001.

19 A. Yes.

20 Q. Okay. And who did you go with then?

21 A. I know I've been there with a friend, John
22 Whitworth. But that was another Halloween.

23 Q. Okay. Wait a minute. That would have been which
24 Halloween? Before this?

25 A. After it. This is the one -- I believe it was 2002.

1 Q. Well, yeah. No, my question was: Had you been to
2 By George's before this night? And you said yes.

3 A. No, I did not.

4 Q. You didn't?

5 A. I said I might have.

6 Q. All right. You might have?

7 A. I'm not sure if I'd been before. I know I've been
8 after.

9 Q. Okay.

10 A. I've been to By George's a few times.

11 Q. Right. So you may have been to George's before this
12 night; you don't remember?

13 A. Yes. I'm not sure.

14 Q. Okay. So the idea that you might remember your
15 first night at a bar, it wasn't that big of a deal. You'd
16 been to bars before this night.

17 A. I had been to bars before that night, yes.

18 Q. Okay. Several bars before that?

19 A. A couple of them.

20 Q. Okay. Here -- I mean, here in town?

21 A. Here in town, yes.

22 Q. And one of them may have been By George's?

23 A. Yes.

24 Q. So the night of October 31st, 2001, wasn't a
25 particularly unique event for you, in that -- just because

1 you went to a bar. Because you'd done that before.

2 A. Yes.

3 Q. So what makes it stand out?

4 A. It doesn't stand out. Other than the fact --

5 Q. How do you remember what you drank?

6 A. Because -- I mean -- I don't know how I remember

7 that. I do remember it, though.

8 Q. How do you remember what Chuck -- how many drinks

9 Chuck had?

10 A. I don't remember how many drinks Chuck had.

11 Q. You said two to three.

12 A. I bought him his first drink, and I gave him \$10, I

13 believe, and he went and bought drinks. He might have kept

14 the money. I assumed that he'd buy drinks.

15 Q. What -- what was in your trunk of the Mercedes --

16 here's a photo of it right here. State's Exhibit 87. That's

17 your Mercedes; right?

18 A. Yes, it is.

19 Q. -- on October 31st, 2001?

20 A. In the trunk was -- I had a six-disk CD changer. I

21 had a speaker system I had purchased the same time I

22 purchased the car.

23 Q. How big were the speakers?

24 A. It took up the majority of the trunk.

25 Q. Okay. But you could still get stuff in there?

1 A. Yes.

2 Q. Your sister said she could put groceries in there?

3 A. Yes.

4 Q. Okay. Let me show you what's marked as State's

5 Exhibit 87 here. 87D and 87E are some photographs of the

6 trunk.

7 A. Yes.

8 Q. Okay. Now, did you ever change a tire on this

9 vehicle?

10 A. I tried to. I attempted to once.

11 Q. Okay. And that was after October 31st, 2001; isn't

12 that correct?

13 A. Yes.

14 Q. Okay. It was after the Heitholt murder; is that

15 correct?

16 A. Yes.

17 Q. Okay. And what did you use in your attempt to

18 change the tire?

19 A. Tire tools.

20 Q. Okay. And where were they from?

21 A. Where were they from?

22 Q. Yeah.

23 A. My trunk.

24 Q. Where in the trunk?

25 A. Under my speaker box.

1 Q. Okay. What gave you -- what did you have to do to
2 get to the tire-changing equipment?

3 A. I had to first open the trunk, and I had to
4 unplug -- it was a complicated process, because I'm not
5 qualified in stereo installation. But I just took out the
6 wires from the amplifier, it was on top of the box, and --
7 well, I had to slide it out, like catty corner. Took out the
8 wires for the amplifier, and take out some more wires for the
9 speakers themselves.

10 Q. Where was the spare tire?

11 A. The spare tire was under stereo equipment.

12 Q. Okay. And you went ahead and took your speakers
13 out?

14 A. Yeah.

15 Q. And what was the location of this?

16 A. It was in the Highlands, but I -- I actually pulled
17 into one of my friend's houses.

18 Q. Okay. And then you tried to change the tire?

19 A. I attempted to.

20 Q. And what happened?

21 A. The tire was actually -- the tire was actually flat.

22 And --

23 Q. The spare?

24 A. Yes.

25 Q. So you were able to get the tire that had gone flat

1 off?

2 A. No. I never even went that far with it.

3 Q. So --

4 A. The tire was flat.

5 Q. Pardon me?

6 A. The spare was flat, so I would take it off and just
7 leave it there. I would have nothing to do with it.

8 Q. So you got the spare out. And how did you find out
9 the spare was flat?

10 A. I didn't even take it out. It was -- you could tell
11 it was flat, because, the way it sits, it was deflated a
12 little bit. And there was something, I can't remember what
13 it was, but there was something sticking out. I believe it
14 was the side of it. I can't remember exactly.

15 Q. Well, was -- had -- was that something that you'd
16 done --

17 A. No.

18 Q. -- previously?

19 A. No. I think my father might have gotten a flat.
20 But I had never -- that was the first time I had ever tried
21 to change a tire.

22 Q. You think your dad had had a flat tire and put it
23 back in the trunk, without getting it fixed?

24 A. I believe so. I mean, I don't know how else --

25 Q. Is that what he told you?

1 A. I never asked him.

2 Q. You never had a conversation about the tire in there
3 being flat and him saying, "I wouldn't have done that"?

4 A. I might have told him it was flat at one point in
5 time.

6 Q. But he said, "I -- I did that. I made it go flat"?

7 A. No, he didn't.

8 Q. Or "It was a flat that I didn't get fixed"?

9 MS. BENSON: I'm objecting based on relevance, as to
10 this changing of a tire. It doesn't seem to be related at
11 all.

12 THE COURT: How is it related, Mr. Crane?

13 MR. CRANE: The equipment in the trunk. Tire tools
14 are relevant to this case, Judge.

15 THE COURT: Well, you may inquire in that --

16 MS. BENSON: He never -- he already testified he
17 never even got out tire tools, because the spare was flat.

18 MR. CRANE: We haven't gotten to that point yet, I
19 don't think.

20 THE COURT: I -- I'll let you proceed a little
21 further. If you're dealing with the tire tools, whether or
22 not his father had a flat tire does not seem to be relevant.

23 MR. CRANE: Well taken, Judge.

24 Q. Now, where were the tire tools in the trunk?

25 A. The tire tools were under the speaker equipment as

1 well.

2 Q. Okay. Did you, on the night you're describing,
3 after October 31st, 2001, try to jack up the car?

4 A. I have.

5 Q. No, did you, on the night we're talking about, when
6 you got a flat, try to jack up the car?

7 A. I think I did.

8 Q. Okay. So you used --

9 A. Yes, I did.

10 Q. You used tire tools in the car to do that.

11 A. Yeah.

12 Q. You did.

13 A. Yes.

14 Q. Okay. And did you have to take the spare out before
15 you got to the tire tools? Was the spare over the tire
16 tools?

17 A. I don't think so.

18 Q. Okay. Where were the tire tools in relation to the
19 spare?

20 A. I think there was a -- like, the mat, and then the
21 tire was, like, upside down, and there's a well, and they're
22 in there.

23 Q. There's a well, like, under the tire?

24 A. It's -- like, that's the tire. The hub is like
25 this. And the tire's like this. And the inside is hollow.

1 Nothing there. Where we connect to the axle. And it was
2 down. And I think the tools were in there.

3 Q. Okay.

4 A. In the hollow of the wheel.

5 Q. So you could get to the tire tools without taking
6 out the spare?

7 A. Yeah.

8 Q. But when you saw the spare, you could immediately
9 tell it was flat?

10 A. I think so.

11 Q. So why did you jack the car up?

12 A. I guess maybe I didn't know it was flat at that
13 point. I can't be certain.

14 Q. Well, now you've testified that it was obvious that
15 the tire was flat when you looked at it; right?

16 A. It was, when looking at it closer. I guess probably
17 what I had done is, assuming that the tire would not --

18 Q. Well, no. Here -- let me stop you.

19 MS. BENSON: Your Honor, I'd ask him be able to
20 answer the question.

21 MR. CRANE: I'm not asking for speculation. I'm
22 asking for what he knows. And he said "probably." I think
23 it's fair that it be what he remembers, Judge.

24 THE COURT: Do you have an objection to his answer,
25 Mr. Crane?

1 MR. CRANE: I --

2 Q. Sir, please just tell me what you remember. How is
3 it that you remember jacking up the car when you knew that
4 the spare was flat?

5 A. Well, thinking back, I guess I didn't know if it was
6 flat before I got the tire tools. I mean, probably --

7 Q. Well --

8 A. Probably I assumed that the tire would not be flat,
9 and why would there be a spare tire if it was flat.

10 Q. Okay.

11 A. So I took it out.

12 Q. And --

13 A. Or I took the tools out.

14 Q. Was there any problem with you getting the other --
15 the tire that was on the vehicle that was flat off?

16 A. I broke the -- it wasn't the tire tool. It was the
17 jack, I guess you'd say.

18 Q. The jack.

19 A. Yeah. Trying to use it, I -- I guess I didn't know
20 how to use it.

21 Q. Okay.

22 A. I messed it up.

23 Q. Okay. But you used the jack that was in the car and
24 the tire tools that were in there.

25 A. Yes.

1 Q. Okay.

2 MS. BENSON: Judge, may we approach?

3 THE COURT: Yes.

4 - - -

5 Counsel approached the bench and the following
6 proceedings were held:

7 MS. BENSON: It's my understanding that these are
8 pictures taken six months or so after he sold the car, when
9 it was in the possession and ownership and control of someone
10 else. They are irrelevant as a result. And prejudicial --
11 more prejudicial than probative.

12 THE COURT: What are you proposing to do?

13 MR. CRANE: I'm going to ask him if those are the
14 tire tools that were in his trunk. That's it. And Judge, I
15 don't think that the condition of a tire tool changes much.
16 It's hard to wear out a tire tool. If these aren't the same,
17 then I'll inquire as to that. And if they are the same, then
18 they should be admissible.

19 MS. BENSON: Judge, same objection. It is more
20 prejudicial than probative. And we're talking about tire
21 tools that were not in his possession. A car that was not in
22 his possession for six months. In addition, it's beyond the
23 scope of direct.

24 MR. CRANE: The foundation's been laid with
25 Detective Nichols. If this witness can answer the question,

1 I can show him photographs.

2 THE COURT: I'm going to permit you to ask him, not
3 display this photograph to the jury, just to ask him. He's
4 testified a long time about this issue, and you can certainly
5 ask him whether they're the same or not.

6 MR. CRANE: Very well, Judge.

7 THE COURT: And if they are not, then you will move
8 on.

9 - - -

10 The following proceedings were held in open court:

11 Q. Mr. Ferguson, let me show you what's marked for
12 identification as 87F and 87G. Are these the items, the tire
13 tools, that -- they appear to be the same as what was in your
14 vehicle prior to the time you sold it? And also, for that
15 matter, on October 31st, 2001.

16 A. The bottom part right here looks to be the same. I
17 think that's the part I broke. But other than that, I can't
18 be certain.

19 Q. Well, take a closer look there. Do you remember --
20 you talked to the police and said the stuff's in the car;
21 right?

22 A. Should be. I mean, when I sold it, it was in it.

23 Q. And does that look any different than when it was
24 when you saw it when you were changing your tire?

25 A. I don't remember what they looked like. I remember

1 this piece, because I broke it. But other than that, I --

2 Q. Okay.

3 A. The red looks familiar.

4 Q. The red?

5 A. The holding things.

6 Q. Okay.

7 A. But the tire tools, I can't testify as to what they
8 looked like.

9 Q. So your testimony is: You don't remember whether or
10 not these are the same ones.

11 A. I do not remember. I know this part right here.
12 This portion. That is --

13 Q. Okay. What did you use, in addition to that?

14 A. I can't recall.

15 Q. Well, how did you take the lug nuts off?

16 A. Well, I mean, when you have it all in front of you,
17 you know how to use it. I didn't take the --

18 Q. It's all in front of you, right there.

19 MS. BENSON: Judge, at this point I'd object. Asked
20 and answered.

21 THE COURT: It's cross-examination. You may
22 inquire.

23 A. I never got so far as taking the lug nuts off
24 because I didn't get the car up. I can't get the car up if I
25 break this portion of it.

1 Q. So you're saying that these may be different.

2 A. They may be the same as well.

3 MR. CRANE: Well, Judge, I'd offer State's Exhibit
4 87F and 87G.

5 MS. BENSON: Judge, I'd object on the basis of what
6 we discussed earlier and the lack of foundation. He does not
7 know. They don't look familiar. Other than the one he
8 pointed out.

9 THE COURT: As to the --

10 MS. BENSON: If I could point out one more thing,
11 Judge. This car had been in the possession of another
12 individual for about six months at the time that this
13 photograph was taken. How's he supposed to know?

14 THE COURT: Mr. Crane, as to the photograph on the
15 F -- on the bottom, which I believe was designated -- was it
16 F?

17 MR. CRANE: This one is G and this one is F.

18 THE COURT: Okay. Mr. Ferguson has identified a
19 tool in F. And as to that tool, I will permit you to admit
20 that into evidence.

21 - - -

22 State's Exhibit 87F admitted into evidence.

23 - - -

24 THE COURT: As to G, he has not identified it as
25 being in the car when he had possession of the car. And I'm

1 going to sustain the objection to that.

2 MS. BENSON: And Judge, just to clarify, we're
3 just -- the only thing he's identified in F is the one tool
4 that broke.

5 THE COURT: The one that he said he broke.

6 MS. BENSON: Right. And that's the only one that
7 he's identified in F.

8 THE COURT: That is correct.

9 MS. BENSON: Okay.

10 MR. CRANE: So now I've got about --

11 MS. BENSON: We'd ask then, Judge, that that would
12 be the only part of the photograph that's admitted.

13 MR. CRANE: So now I've got like a -- I got two
14 photos. I've got about a quarter of one admitted?

15 THE COURT: Well, there are things in the photograph
16 that are not relevant to the tool issue. So -- I mean, if
17 you want to say the area of the photograph -- the tool that
18 is in the lower --

19 MR. CRANE: You mean the tool that he says --

20 THE COURT: Was there and that he broke.

21 MR. CRANE: Okay. Because, I mean, it's not --
22 without going into detail, there's not a relevancy issue --
23 there's not a relevancy objection with respect to the other
24 items.

25 MS. BENSON: Well, yes, there is, Judge.

1 MR. CRANE: I guess now they're just --

2 MS. BENSON: I mean --

3 MR. ROGERS: That's the objection I made days ago.

4 MS. BENSON: And again, we're talking about a car
5 that has been in someone else's possession for six months.
6 Mr. Crane is attempting to make it sound like Mr. Ferguson
7 knows everything in that car. And he hasn't had it for six
8 months, at the point when these pictures were taken.

9 MR. CRANE: That's -- I'm not trying to make it
10 sound like anything, Judge. But I understand your ruling.
11 We'll try to figure out a way to display that portion.
12 Obviously I can't do it now because it's got the other
13 items --

14 THE COURT: That's fine. That's fine.

15 Q. So, your testimony is that you jacked up the vehicle
16 after October 31st, 2001, and not only was there -- the spare
17 was flat, but you broke something.

18 A. Yeah.

19 Q. Okay. Now, how did you get the lug nuts off again?

20 A. I never took the lug nuts off.

21 Q. Okay. So you were jacking up the car and it broke.

22 A. Yes.

23 Q. And you did that with the spare still in the car?

24 A. Yes.

25 Q. You can remember that?

1 A. I don't remember the order in which I did things. I
2 mean, I just tried to change a tire. I don't recall my every
3 action.

4 Q. Okay. And what happened when you -- I guess, A, the
5 thing broke or B, you had a problem with the spare being
6 flat?

7 A. What do you mean, what happened? I believe I took
8 the jack up, broke it, realized the tire was flat, there was
9 no way I was going to get anything, and I think it was a
10 Sunday. So I just remember not being able to get any AAA, I
11 believe it was. I wasn't going to be able to get help; go
12 over to Big O Tire and get my tire changed, so I got it over
13 to Wal-Mart, it was either that night or the next night.

14 Q. Okay.

15 A. I think it was that night.

16 Q. Okay.

17 A. Actually it was the next night, because I left it
18 there overnight.

19 Q. Okay. You guys were -- back to the George's thing.
20 You guys were at George's, and you both left together;
21 correct? You and Chuck?

22 A. Yes.

23 Q. And you went back to the car, and while you were
24 walking back to the car, do you think you made some phone
25 calls?

1 A. It's possible.

2 Q. Okay. Well, I mean, Chuck testifies that you made
3 some cell phone calls from George's back to your car. You
4 don't disagree with that?

5 A. I don't agree or disagree.

6 Q. Okay. You made a number of calls. Did you want to
7 stay out and do something else, find out what else was going
8 on that night?

9 A. Probably.

10 Q. Okay. You wanted to keep -- keep doing something.
11 Right?

12 A. I always call people to see if there's anything
13 worth doing.

14 Q. Okay. And it's your testimony that you did not
15 recall the phone calls that you are testifying you made from
16 the curb at your residence when you were talking to police
17 when they took you down to the police department on March
18 10th. You didn't recall the phone calls while you say you
19 were at the curb because you were distracted about school the
20 next day? Your test the next day?

21 A. I didn't see it as any relevance, and I was worried
22 about taking my test.

23 Q. You don't recall what times or what people you
24 called on the cell phone. Isn't that correct? I mean, it's
25 something that really is --

1 A. Exact times?

2 Q. You know, or the people. I mean, you didn't
3 remember -- you called him a male friend. You didn't
4 remember who it was.

5 A. I know certain people and places that I called
6 people at times. And other individuals I can't be certain
7 about, no.

8 Q. Okay. And yet you remember where you were when you
9 made the call.

10 A. The -- the calls to Holly in particular.

11 Q. Okay. There were no problems between you and Nick
12 Gilpin, were there? You get along with him okay, don't you?

13 MS. BENSON: Judge, I'd object to the relevance of
14 this.

15 THE COURT: How is it relevant?

16 MR. CRANE: Well, I mean, Chuck Erickson says he
17 talked to Nick Gilpin about this incident on the tape that
18 came in with Mr. Erickson. Detective Short says, "Hey," to
19 Erickson, he says, "Nick Gilpin's been in here and told
20 us" --

21 MS. BENSON: Judge, at this point I would object and
22 ask to approach.

23 THE COURT: You may.

24 - - -

25 Counsel approached the bench and the following

1 proceedings were held:

2 MS. BENSON: This is a blatant attempt to get in
3 hearsay from Nick Gilpin.

4 MR. CRANE: Chuck Erickson's also already
5 testified --

6 MS. BENSON: You were going to say what Nick
7 Gilpin --

8 MR. CRANE: -- told Nick Gilpin that -- Nick Gilpin
9 told Short that Erickson had been talking --

10 MS. BENSON: The implication is that Nick Gilpin has
11 said something that's hearsay, and it's not admissible.

12 MR. CRANE: The objection was relevancy; right?

13 MS. BENSON: No. No. The objection is hearsay and
14 relevance.

15 THE COURT: I didn't hear the hearsay.

16 MS. BENSON: I'm sorry. I'll add that at this
17 point.

18 MR. CRANE: The objection is: Did you --

19 THE COURT: If you don't want a record, just keeping
20 talking as fast as you want, three or four at a time.

21 MR. CRANE: I'm establishing that Nick Gilpin,
22 Ferguson almost said it, they don't have any problems.

23 MS. BENSON: How is it possibly relevant, without
24 the possibility that Nick Gilpin has said something against
25 Ryan in this case? That's the clear implication.

1 THE COURT: Is there any evidence that will come
2 into this case in any way that Nick Gilpin has said something
3 that would be adverse to this defendant's interests?

4 MR. CRANE: He told the police that Erickson had
5 said that this defendant and Erickson went down to By
6 George's, did the Tribune murder. He's the guy that the
7 police talked to before they talked to Erickson.

8 MS. BENSON: Double hearsay, Judge.

9 MR. CRANE: I'm not asking about that with this
10 witness. No, Erickson testified to that. In his direct.

11 MS. BENSON: Well, that's -- that's still --

12 MR. CRANE: I'm not asking about the content of the
13 conversation. I go, "Hey, did you have any problems with
14 Nick Gilpin?"

15 MS. BENSON: Again, I think it's only -- the
16 suggestion is that Nick has done something or said something
17 adverse to Ryan's interests, and therefore the hearsay
18 objection is valid. But it's -- whether it's based on his
19 statement or demonstrative hearsay.

20 THE COURT: I'm going to overrule your objection.

21 But you need to ask that one question --

22 MR. CRANE: I understand.

23 THE COURT: -- and move on.

24 MR. CRANE: I understand.

25 MS. BENSON: Thank you.

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The following proceedings were held in open court:

Q. Sir, you didn't have any problems -- well, strike that. You know Nick Gilpin; right?

A. Yes, I do.

Q. And he never -- you and him never had an axe to grind against each other, did you?

A. No.

Q. And you also know Art Figueroa?

A. Yes.

Q. And you and Art --

MS. BENSON: Judge, I'll make the same objection at this time.

THE COURT: The objection is overruled, with the same ruling that I made with respect to --

MR. CRANE: I understand, Judge.

THE COURT: -- the initial question.

Q. And you and Art never had any problems. I mean, you got along okay, didn't you?

A. I mean, I don't really know either one of them well enough to cause problems.

Q. Okay. So they didn't -- he didn't have an axe to grind with you.

A. No.

Q. Okay. Are these fair and accurate depictions of

1 your -- well, let me show you State's Exhibit 17 -- of
2 Charles Erickson in high school.

3 A. Yes.

4 Q. I think that was his junior year.

5 A. I'm not sure of the year, but that looks like him.

6 Q. That's his yearbook photograph?

7 A. Could be.

8 Q. Okay. You're not sure?

9 A. No, I'm not sure.

10 Q. Does it look like he looked back in high school?

11 A. Yes, it does.

12 Q. Okay. And State's Exhibit 18, that's you?

13 A. Yes, that's me.

14 Q. Okay. That's what you looked like back in high
15 school?

16 A. Yes.

17 Q. Okay. And then these, 19 and 20, are upon your
18 arrest; is that correct?

19 A. Yes.

20 Q. Yours and Chuck's; right?

21 A. I guess so.

22 MR. CRANE: Nothing further at this point, Judge.

23 THE COURT: Redirect?

24 MS. BENSON: Thank you, Your Honor.

25 - - -

REDIRECT EXAMINATION

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BY MS. BENSON:

Q. You remember that Mr. Crane asked you about the newspaper and how you might have heard about the murder?

A. Yes.

Q. Okay. And in addition to the Tribune, we also have a paper called the Missourian in Columbia?

A. Yes.

Q. Okay. And that's a free paper delivered occasionally? Maybe twice a week or something?

A. I think the Tribune and the Missourian are both free once or twice a week.

Q. Okay. Now, Mr. Crane also asked you about being uncertain about phone calls or not telling the police that you remembered making phone calls when you were interviewed on March 10th. Do you remember that?

A. Yes.

Q. Okay. And you had just gotten arrested that very day; is that correct?

A. Yes.

Q. Okay. And you had been interrogated immediately upon your arrest?

MR. CRANE: Judge, I'm going to object to the leading nature of these questions.

Q. When --

1 THE COURT: Sustained.

2 MS. BENSON: I'm sorry. I'll rephrase.

3 Q. When were you interrogated?

4 A. I waited for about an hour for the Columbia police
5 to get to Kansas City.

6 Q. And then you were -- were you interrogated there in
7 Kansas City?

8 A. Yes.

9 Q. And were you interrogated also during your transfer
10 to Columbia?

11 A. Yes.

12 Q. And you were interrogated -- or were you
13 interrogated again immediately upon getting to Columbia?

14 A. Yes.

15 Q. Okay. You didn't have much time to really think,
16 did you?

17 A. No.

18 Q. With regard to the car, the blue Mercedes, when was
19 it that you sold that car?

20 A. I believe it was more or less six months before my
21 arrest.

22 Q. Who did you sell it to?

23 A. Corey Gibson.

24 Q. Do you have any idea what he did with this car or
25 kept in his car?

1 A. No.

2 Q. Okay. And Mr. Crane asked you about how you could
3 possibly remember details about changing your tire, didn't
4 he?

5 A. Yes.

6 Q. Is that the only time you've ever changed a tire?

7 A. Attempted to, yes.

8 Q. Okay.

9 MS. BENSON: Judge, at this time I would reoffer
10 Exhibits W, Y, and X, I believe they are. The videotapes
11 from Mr. Ferguson's interrogations.

12 MR. CRANE: Judge, I've got -- well, I guess --

13 - - -

14 Counsel approached the bench and the following
15 proceedings were held:

16 MR. CRANE: First of all, Judge, to my knowledge,
17 the defense is offering this as prior consistent statements
18 of this witness.

19 MS. BENSON: We are offering it for both in that
20 vein as well as due to the fact that he is -- that Mr. Crane
21 has attempted to impeach his credibility. And it would
22 counter the claim of recent fabrication in addition to that.
23 And I would remind the Court that Mr. Crane asked several
24 questions about what he did and did not tell the police in
25 his interrogations.

1 MR. CRANE: I would cite the Court to the
2 defendant's motion in limine with respect to the testimony of
3 Art Figueroa and Nick Gilpin, wherein they argued that prior
4 consistent statements are inadmissible. I would also cite
5 the Court -- let me finish. I would also cite the Court to
6 Courtroom Handbook on Evidence, is what I'm looking at.
7 "Prior consistent out-of-court statements made by a witness
8 who testifies at trial are inadmissible hearsay if offered
9 into evidence to prove the truth of the matters they assert
10 and thereby bolster the witness's testimony." Cite the Court
11 to numerous cases in here. And the defendant's own motion in
12 limine with respect to Art and Nick.

13 MS. BENSON: Judge, this doesn't specify that it's
14 after cross-examination, when a witness has been impeached,
15 particularly with questions relating directly to those
16 interrogations. He has asked multiple questions about what
17 he did and did not tell the police. So it is valid with
18 regard to prior consistent statements; it is valid with
19 regard to rebutting those -- the possibility of recent
20 fabrication. And on those bases, we would offer these.

21 MR. CRANE: Judge, they're talking about, as I
22 understand it, three tapes that encompass a two-hour ride
23 from Kansas City, that also encompasses the however many
24 hours he was at the Columbia Police Department. There has
25 been no identification of what statements they are seeking to

1 rebut with the tape.

2 MS. BENSON: Everything that you asked him about.
3 And if you didn't specify it, that's your problem, not mine.

4 MR. CRANE: No, no, no, no, no. You're offering the
5 exhibit, not me. If you're offering it because there was
6 some reason to rehabilitate him on a given statement, then
7 what was it? Because I asked him if he remembered like 9/11.
8 He said, "Yes, I did." And so you want to get that tape in
9 to show that.

10 MS. BENSON: Judge, he has questioned him specific
11 questions with regard to those tapes; what he said, what he
12 didn't say. He has questioned him with regard to his memory.
13 He has questioned him with regard to why he didn't say
14 certain things to the police. We just -- he has impeached --
15 tried to impeach his credibility, generally, as well as
16 specifically, with statements made or not made.

17 THE COURT: Well, if you can tell me specifically
18 what statements he's been impeached on, and that you wish to
19 prove, that he had prior statements that were inconsistent
20 with that impeachment, I'd certainly be willing to listen to
21 it.

22 MS. BENSON: Judge, I also believe that when a
23 witness generally has been impeached, that prior statements
24 can come in, whether they're based on inconsistency or not.

25 MR. CRANE: Now, Judge, if the defense has it

1 excerpted --

2 MS. BENSON: Yeah, we do. I wasn't proposing to
3 play all of -- several hours of these. I was going to admit
4 them into evidence. If the jury wants to see them, they can
5 see them.

6 MR. CRANE: What Miss Benson told me she wanted to
7 do: We can let them all go back and watch the whole thing in
8 deliberation.

9 THE COURT: We are not letting anything like a DVD
10 or tape go back to that jury. It's like having the reporter
11 come in and read back testimony of a particular witness. We
12 will not do that. If a deposition is offered, they have to
13 remember it. You don't send back the deposition for them to
14 remember it. The same thing would go for something of this
15 nature. They are not going back to the jury.

16 MS. BENSON: Well, we were -- would they be able to
17 see them if they requested it out here?

18 THE COURT: No.

19 MS. BENSON: If you were asked to play an excerpt,
20 ten minutes.

21 MR. CRANE: And he's got to be on the stand, because
22 I got a right to cross-examine, and then I can put on --

23 THE COURT: What were you wanting to play and what
24 does it deal with?

25 MS. BENSON: I may have to call up Mr. Weis.

1 Mr. Weis has the excerpt.

2 What is the excerpt?

3 MR. WEIS: It relates to what he told them; that he
4 went home after leaving the bar and that he took Chuck home.
5 And the officers asked: "Well, you -- where did you stop?"
6 He said, "I didn't stop. I remember passing by the
7 elementary school." And then it ends.

8 MR. CRANE: And that's a prior consistent statement.

9 THE COURT: Well, it's consistent with what he said
10 here in the courtroom.

11 MR. CRANE: How is that inconsistent?

12 MR. WEIS: I wasn't asked that.

13 MR. CRANE: You weren't up here. I thought you were
14 up here.

15 MS. BENSON: Judge, his credibility with regard to
16 those statements was clearly questioned. By Mr. Crane.

17 MR. CRANE: The defense argued that I couldn't do
18 this, with Nick and Art, in the motion in limine. And I'm
19 merely stating their same argument, Judge. And until such
20 time as the defense identifies something that is not in
21 contravention of Missouri law on prior consistent statements,
22 then they can't offer it. And when they do offer the
23 excerpt, he's got to still be on the stand and I get to
24 cross-examine or show an excerpt if I want to. Now I'm
25 getting ready to quit with him, see, so, for the record, he

1 hadn't been shown any videotapes yet.

2 THE COURT: Well, you've -- you've closed your
3 cross-examination.

4 MR. CRANE: Yeah. And I never showed him any video.

5 MS. BENSON: Judge, it also shows that they don't
6 even ask about the cell phone calls. In this. Which he was
7 clearly questioned about. "Why didn't you mention that to
8 the police? Why didn't you tell the police that?" The
9 suggestion was they asked --

10 THE COURT: I suppose you'd have to play all seven
11 or eight hours to show that they didn't ask him about cell
12 phone calls, wouldn't you?

13 MS. BENSON: I understand.

14 MR. CRANE: That's exactly right.

15 THE COURT: And I don't know that he's been
16 impeached if he said they never asked about the cell phone
17 calls.

18 MR. CRANE: I never asked that. I asked him, "What
19 did you tell them about cell phone calls?" And he said,
20 "Nothing." And so if we play all eight hours, he would never
21 say anything about the cell phone calls. That's not going to
22 work.

23 MS. BENSON: The implication was: They asked him.
24 He did not tell them.

25 THE COURT: Well, until such time as the state in

1 rebuttal brings someone in and says, you know, "We asked this
2 kid about those cell phone calls, and he didn't even say a
3 word," if they do, I'll really reconsider what you're
4 offering.

5 MS. BENSON: Okay.

6 - - -

7 The following proceedings were held in open court:

8 Q. Ryan, you testified earlier, again, that you were,
9 in two of your interrogations, you were videotaped?

10 A. Yes.

11 Q. Is that correct? And in all of your interrogations,
12 you repeatedly and consistently denied guilt; is that
13 correct?

14 MR. CRANE: Judge, I'm going to object to the
15 leading nature of this question.

16 THE COURT: The form of the question -- the
17 objection to the form of the question is sustained.

18 Q. In each of those interviews, did you discuss with
19 the police whether or not you were involved in this homicide?

20 A. Yes.

21 Q. And what did you tell them?

22 A. I told them that I had nothing to do with it.

23 MS. BENSON: Nothing further.

24 THE COURT: Recross?

25 MR. CRANE: I think that's all the questions I have.

1 Thank you.

2 THE COURT: You may step down.

3 Further evidence at this time for the defendant?

4 MR. ROGERS: Not at this time, Your Honor. We will
5 have a witness tomorrow morning.

6 THE COURT: And that would be the concluding
7 witness?

8 MR. ROGERS: I -- yes, sir. Yes, ma'am. Excuse me.

9 THE COURT: All right.

10 Ladies and gentlemen, we will take our evening
11 recess. The attorneys will stay with me to do some
12 instruction work so that you will not have to cool your heels
13 while we do that tomorrow.

14 The Court again reminds you of what you were told at
15 the first recess of the Court. Until you retire to consider
16 your verdict, you must not discuss this case among yourselves
17 or with others, or permit anyone to discuss it in your
18 hearing. You should not form or express any opinion about
19 the case until it is finally given to you to decide. Do not
20 read, view, or listen to any newspaper, radio, or television
21 report of the trial.

22 We'll take our evening recess and take up tomorrow
23 morning at 8:30.

24 If counsel will join me in chambers with
25 instructions, we will take care of that.

1 (Recess taken.)

2 - - -

3 The following proceedings were had by Court and counsel
4 in chambers:

5 THE COURT: I have my boilerplate instructions,
6 which are 1, 2, 3, 4, and the last two instructions.

7 Let me see what the state is wanting -- I have some
8 instructions the state has already tendered. I don't know --
9 let's see if we can't -- let me just ask, is the state
10 intending to offer instructions on second degree and
11 voluntary manslaughter?

12 MS. GOROVSKY: Definitely second degree in both
13 felony murder and conventional.

14 Do you want voluntary?

15 MR. CRANE: Are you wanting to go to involuntary?

16 MR. ROGERS: No. I -- we certainly have introduced
17 no evidence that this was --

18 MR. CRANE: Reckless?

19 MR. ROGERS: -- reckless and -- which -- and neither
20 have you. I mean, I don't think there is evidence that would
21 warrant an involuntary.

22 THE COURT: I'm not sure there's evidence for a
23 voluntary.

24 MR. ROGERS: I don't know that there's --

25 MR. CRANE: Well, I was going to say, where's the

1 voluntary?

2 THE COURT: I mean, I think you --

3 MR. CRANE: I mean, I guess --

4 THE COURT: -- if you have evidence that you could
5 acquit on the greater and convict on voluntary -- and I'm not
6 sure there is evidence in this case that a voluntary --

7 MS. GOROVSKY: Sudden passion, adequate cause, I
8 don't think there's been any evidence of that.

9 MR. ROGERS: Let me -- and I'm not urging that --
10 giving this instruction; I'm just trying to run out the clock
11 by hearing myself talk; okay?

12 What if the robbery motive is rejected, and yet
13 there is a belief that Ferguson was there with Erickson, and
14 Erickson goes into a rage, as he's testified at one point,
15 and I think in one of his statements as well. Would that be
16 a voluntary manslaughter? And having said that, the answer
17 is no, because if it's anything -- if they're acting in
18 concert, if anything, it has to be a felony murder.

19 Okay. I'm right. No voluntary.

20 MR. CRANE: Because -- okay. Because they did rob
21 -- I got you.

22 MR. ROGERS: Well, no. Even if -- whether they
23 robbed or not, the acting in concert has to be with the
24 intent of promoting the robbery, whether the robbery happened
25 or not.

1 MS. GOROVSKY: And I just thought of one thing. The
2 one option we didn't make. We have to take the tail -- if
3 we're not doing voluntary, we have to take the tail out of
4 the conventional murder 2 that says that this did not happen
5 under sudden passion arising from adequate cause. Do you
6 know what I'm talking?

7 MR. CRANE: Okay. We can do that.

8 MS. GOROVSKY: I just have to run out and delete
9 one --

10 MR. CRANE: Well, now, she's going to -- Judge,
11 you'll let us make our corrections and get them to you
12 tomorrow, won't you? Because we don't have a secretary or --

13 THE COURT: I don't want you to do them tonight. I
14 want to have a discussion so that we will not have this jury
15 waiting --

16 MR. CRANE: Yeah.

17 THE COURT: -- tomorrow.

18 MR. CRANE: Yeah. You don't have to worry about
19 that. Just put down what you need to get changed, and we're
20 giving her an idea of what we're putting --

21 THE COURT: You understand --

22 MR. ROGERS: Do we need to be on the record for
23 that?

24 THE COURT: We are on the record now because --

25 MR. ROGERS: Everything's on the record.

1 THE COURT: That's why Diana, who can't speak very
2 well, would not want three or four of us talking at the same
3 time.

4 MS. GOROVSKY: Sorry.

5 THE COURT: So, you are wanting to submit murder in
6 the first degree; is that correct?

7 MR. CRANE: Correct.

8 MS. GOROVSKY: That's correct.

9 THE COURT: And murder -- felony murder second
10 degree --

11 MS. GOROVSKY: That's correct.

12 THE COURT: -- is that right?

13 MS. GOROVSKY: Yes.

14 MR. CRANE: Conventional.

15 MS. GOROVSKY: And conventional.

16 THE COURT: And you are wanting to submit second
17 degree. And we're going to take out voluntary manslaughter.
18 We're not going to do that.

19 MR. ROGERS: And I have a question about that, and I
20 don't have the book here for to know the answer. I don't
21 think, though, probably felony murder second degree is a
22 lesser included offense of conventional murder second degree.

23 MS. GOROVSKY: It is not.

24 THE COURT: It is not.

25 MR. ROGERS: So therefore the introductory sentence

1 on the MAI-CR 314.06 should not say, "As to Count I, if you
2 do not find the defendant guilty of murder in the second
3 degree as submitted in Instruction Number blank." It should
4 say, "in the first degree."

5 MS. GOROVSKY: No. Actually the instructions go in
6 the order: Murder first, conventional murder, and then
7 felony murder. And so you have to -- that doesn't
8 necessarily make it -- that sentence doesn't make it a lesser
9 included. It's just informing them: This is the next
10 instruction. If you don't find the last one, you can look at
11 this one.

12 MR. ROGERS: No. I disagree with that. What that
13 sentence says is: You cannot consider felony murder until
14 you have acquitted of conventional second degree murder.

15 MS. GOROVSKY: Okay. And that's basically correct.

16 MR. ROGERS: That's not correct if it's not a lesser
17 included offense.

18 MS. GOROVSKY: Well, how can they do both? So you
19 have to somehow --

20 MR. ROGERS: I think you have to modify it to do
21 both.

22 MS. GOROVSKY: Well, I followed the MAI exactly.
23 Even before this situation, when you offer both, I followed
24 the MAI.

25 MR. ROGERS: And is there note that says, if you

1 offer both, you put that sentence in both?

2 MS. GOROVSKY: (Nodding head up and down.)

3 MR. ROGERS: Okay. I'll be objecting to that one
4 for the record.

5 MR. CRANE: Well -- so basically the logic would be:
6 Even though they're parallel, and mutually exclusive, as they
7 appear in the instructions, one is after the other.

8 MR. ROGERS: And quite frankly, the effect of that
9 is not favorable to the state, in the unlikely event it ever
10 happens, because if, in fact, Mr. Ferguson were convicted
11 under that instruction, and that conviction were set aside,
12 he would have been acquitted of not only first degree murder,
13 but also conventional second degree murder.

14 MS. GOROVSKY: Now that's not true.

15 MR. ROGERS: That is true.

16 MS. GOROVSKY: That's not what that sentence -- it
17 just says -- it just says basically -- all that sentence
18 basically says is that you can't do both murders. You
19 can't -- you can only convict of one thing under Count I.
20 It's just saying you can't convict -- you can't come back
21 with a conviction -- like, for example, if we took it out,
22 they would think that they could come back with conventional
23 and felony murder.

24 MR. ROGERS: It is, however, exactly the same
25 language which is used in the previous instruction, the

1 conventional second degree murder, with regard to murder in
2 the first degree. It says the same thing. And if we're
3 going to assume the legal fiction that juries read
4 instructions and follow them, then the consequence of their
5 following one instruction with that language must be the same
6 as the consequence of their following another instruction.

7 MS. GOROVSKY: So let me make sure I understand what
8 you're saying. You want it to say -- you want both
9 instructions on murder second to say: If you do not find
10 them guilty of murder first, you must consider murder second.

11 MR. ROGERS: That's what --

12 MS. GOROVSKY: That's what you want to --

13 MR. CRANE: Well, what about this? "Of murder
14 first, you must consider conventional?" Or could you put,
15 "Instruction Number blank or blank"?

16 MS. GOROVSKY: That -- I mean, therein lies the
17 problem. They have to go in a certain order. And what --
18 the way you want it -- the way you want it to read, it will
19 say --

20 MR. CRANE: Look at them both at once.

21 MS. GOROVSKY: -- look at -- yeah. Exactly. It
22 will tell them: You have to consider two different -- two
23 different instructions on the same count.

24 MR. ROGERS: Well, the instructions will obviously
25 be in order. And in --

1 MS. GOROVSKY: But, see, they could find
2 conventional murder, and then they'll look at felony murder,
3 and it will tell them they have to do it again.

4 MR. ROGERS: Well -- and that's --

5 MS. GOROVSKY: And then they would have to find --
6 and then if they found the elements of felony murder, they
7 would have to say both, under your --

8 MR. ROGERS: Each of these would have to be
9 modified. And --

10 MS. GOROVSKY: So what you're saying is --

11 MR. ROGERS: So what I'm saying, I'm -- I'm not -- I
12 don't think you ought to submit any of them. Including the
13 first degree. But with regard to -- I think, if you were
14 only submitting conventional felony murder, the instruction
15 you have prepared with the modification leaving the sudden
16 passion language would be the appropriate instruction. And I
17 think that if you were submitting only second degree felony
18 murder, the first sentence in that instruction would read:
19 "As to Count I, if you do not find the defendant guilty of
20 murder in the first degree, as submitted in Instruction
21 Number blank."

22 MS. GOROVSKY: If you are willing to state
23 affirmatively that that's the way you want it on the record,
24 I don't see any problem doing it the way that you want.

25 MR. ROGERS: But I think then they also will need to

1 be modified to -- what do I want to say? To say, at the end
2 of both second degree instructions, "You may not find the
3 defendant guilty of murder in the second degree under this
4 instruction and also guilty of murder in the second degree
5 under Instruction Number blank."

6 MS. GOROVSKY: And, sir, with all due respect, that
7 would be adding language to the instruction that is not in
8 the MAI.

9 MR. ROGERS: That's true. It would be a
10 modification of the MAI instruction. And so --

11 THE COURT: I'm not a real creative writer when it
12 comes to modifying MAI instructions, civil or criminal. I
13 try to use that. And I'm looking at 314.04 in my MAI
14 Criminal. And it submits murder in the second degree. And
15 it does have this paragraph of whether or not he is -- if you
16 don't find him guilty of murder in the second degree under
17 this instruction, you must consider whether he's guilty of
18 murder in the second degree under Instruction Number such and
19 such, which would be the next instruction following.

20 MS. GOROVSKY: Exactly, Your Honor.

21 MR. ROGERS: So do I have these in -- well, in that
22 case, this is in the wrong order.

23 MS. GOROVSKY: They're not in any particular order
24 right now.

25 MR. ROGERS: Okay. But what I'm saying is: If you

1 have that, it makes nonsense out of this -- the one drafted
2 by the state, because it says, "If you do not find the
3 defendant guilty of murder in the second degree as submitted
4 in Instruction Number blank," which must mean the
5 conventional second degree murder, then at the bottom: "you
6 must then consider whether he's guilty of murder in the
7 second degree as submitted under Instruction Number blank,"
8 which is conventional second degree murder. So it's -- the
9 way this instruction is written is if you put murder --
10 felony murder before conventional second degree murder. And,
11 like I say, I don't have the book with me.

12 THE COURT: I have it here. I'm just looking to
13 see --

14 MS. GOROVSKY: As they are now, they're not written
15 as if they have to be in any particular order. They're
16 fill-in-the-blanks.

17 MR. ROGERS: No, no. You got, "If you do not find
18 the defendant guilty of murder in the second degree as
19 submitted in Instruction Number blank," it presumes to have
20 meaning that that instruction's been given before.

21 MS. GOROVSKY: And this is -- this is felony murder.

22 MR. ROGERS: This is felony murder.

23 MS. GOROVSKY: That goes after murder conventional.

24 MR. ROGERS: Okay. But then look at the end here.

25 MS. GOROVSKY: You're right. That part needs to be

1 taken off. Wait. Actually --

2 MR. ROGERS: That part -- either we switch these, or
3 that part goes on the bottom of the other one.

4 MS. GOROVSKY: Actually, I don't know what you're
5 showing me. Because that's not the same version that I have.

6 MR. ROGERS: Okay.

7 MS. GOROVSKY: We don't -- we don't have that line
8 on ours. Did you make that?

9 MR. ROGERS: No. God no. It says, "Submitted by
10 state."

11 THE COURT: I have things that are submitted by the
12 state too. Maybe we should all be playing from the same
13 page, and I should take the state's instructions --

14 MS. GOROVSKY: And actually, Your Honor --

15 THE COURT: -- and put them away.

16 MS. GOROVSKY: I wanted to take a step back anyway,
17 because we changed -- we decided that we were going to go
18 with acting in concert on Count I. And the instructions that
19 you have before you are not acting in concert on Count I.

20 THE COURT: That's correct.

21 MS. GOROVSKY: And so we need new instructions. And
22 I have them right here. So I was going to give you new
23 instructions anyway.

24 THE COURT: Well, why don't you give me new draft
25 instructions so that we can -- and I'll give you back your

1 instructions. And do you also want to take back the other
2 instructions, such as, say, the definition of serious
3 physical injury, submission of more than one count -- let's
4 see.

5 MS. GOROVSKY: I think, just for the sake of not
6 mixing things up, we might as well start --

7 THE COURT: You have a complete set.

8 MS. GOROVSKY: Complete set. Yes.

9 THE COURT: All right. Then let me give you that
10 back.

11 MR. ROGERS: You're not submitting a not guilty?

12 THE COURT: I have a not guilty.

13 MR. ROGERS: That's good. I'm looking here.

14 MS. GOROVSKY: Do you want the jury copy now or just
15 the judge copy?

16 THE COURT: I just want the judge copy. I want the
17 one that's marked. That says what MAI. Or if you're making
18 a creative writing exercise, that it's not in MAI, and I want
19 to see the case that you cite, if you're using non --

20 MS. GOROVSKY: No, we did not, at all.

21 THE COURT: Okay. So why don't we go through, one
22 by -- let's go through the ones that are not controversial,
23 such as --

24 MS. GOROVSKY: Murder first.

25 THE COURT: Well --

1 MS. GOROVSKY: Oh, okay. Sorry.

2 THE COURT: -- I'm not talking about verdict
3 directors. I'm talking about other instructions that surely
4 will not be controversial.

5 Now, we're starting over again; right?

6 MS. GOROVSKY: Okay.

7 THE COURT: "Defendant is charged with two counts."

8 MS. GOROVSKY: Yes.

9 THE COURT: You have that one?

10 MS. GOROVSKY: Yes.

11 THE COURT: And that is Instruction 304.12.

12 MS. GOROVSKY: That's correct.

13 And you have that one in your packet.

14 THE COURT: Does the defendant have an objection to
15 304.12?

16 MR. ROGERS: I'm looking to see if I have 304.12.

17 MS. GOROVSKY: It's the one that says -- it's the
18 multiple count instruction.

19 MR. ROGERS: I have 304.12. And I have no objection
20 to 304.12.

21 THE COURT: All right. Then we will give 304.12. I
22 haven't numbered it yet, but I will make a note there's not
23 an objection to 304.12.

24 Now, are there other instructions similar to that?

25 MR. ROGERS: And by the way, Your Honor, since we

1 are making a record on this, I'm assuming that if I dream up
2 an objection overnight, assuming I ever get to sleep, that I
3 can come in and make it in the morning without having waived
4 it forever by not making it --

5 MR. CRANE: Yeah.

6 THE COURT: Yes. That's fine.

7 MR. CRANE: Yeah. We may want to jack around with
8 something too, so.

9 MR. ROGERS: All right. But I -- I don't anticipate
10 dreaming one up to 304.12.

11 THE COURT: Let's hope you have sweet dreams.

12 MR. ROGERS: Yes.

13 MS. GOROVSKY: Your Honor, I don't think there's
14 anything else that's not going to be controversial.
15 Unfortunately.

16 THE COURT: Well, I thought there were others that
17 were --

18 MR. CRANE: You mean is going to be controversial or
19 is not?

20 THE COURT: Are not.

21 MS. GOROVSKY: She wants to go through the ones that
22 aren't controversial.

23 MR. CRANE: Some we haven't touched on yet?

24 THE COURT: Well, yeah. I mean, are there any
25 others similar to 304.12, like 302 -- I have 302.01,

1 302.02 --

2 MS. GOROVSKY: The Court's instructions.

3 THE COURT: The Court's instructions.

4 So, are there any others, other than this one?

5 MS. GOROVSKY: Everything else is a verdict director
6 or verdict form.

7 THE COURT: All right. Well, let's have the verdict
8 director on murder in the first degree.

9 MS. GOROVSKY: Okay.

10 MR. ROGERS: We're talking about on behalf of the
11 state here; correct?

12 MS. GOROVSKY: Actually --

13 THE COURT: You're free to give me one if you'd like
14 to.

15 MR. ROGERS: Oh, no, I don't have a verdict
16 director. I'm talking about noncontroversial ones. No.
17 That's okay.

18 THE COURT: Well, don't you have one on acting in
19 concert?

20 MS. GOROVSKY: Murder first is not going to be
21 acting in concert. Because you have to have the -- the
22 defendant has to have the mental state.

23 THE COURT: I understand that. But there should be
24 an instruction on acting in concert.

25 MS. GOROVSKY: That will be the next instruction,

1 because every murder after that will be acting in concert.

2 THE COURT: And you're going to give it with each of
3 the verdict directors, instead of a separate instruction?

4 MS. GOROVSKY: No. I have a separate instruction.

5 THE COURT: Okay.

6 MS. GOROVSKY: It just comes after the murder first.

7 THE COURT: All right.

8 MS. GOROVSKY: Does that make sense?

9 THE COURT: I understand that that would be the
10 case, but that would be one of those instructions, acting in
11 concert, which should be an instruction that is not
12 controversial.

13 MS. GOROVSKY: That is true. That is true.

14 THE COURT: All right. Well, let me read murder
15 first and see if the defense attorney has an objection at
16 this time to it. And that's 314.02.

17 MR. ROGERS: And I will have a for-the-record
18 objection, Your Honor.

19 THE COURT: All right.

20 MR. ROGERS: That the definition of deliberation,
21 although mandated by statute, contains language which tends
22 to diminish the defining element of first degree murder,
23 which is deliberation. And I'm speaking specifically of the
24 time -- the phrase "no matter how brief" at the end of
25 Paragraph Third.

1 It seems to me that a correct and sufficient and
2 actually logical -- logically similar definition would be
3 "deliberation, which means cool reflection upon the matter
4 for any length of time." Or for -- when I say "no matter how
5 brief," maybe we should say "no matter how long." "No matter
6 how long or how brief" perhaps. However, I do realize that
7 that tracks the statutory language.

8 So that's my objection. We'll -- or something like
9 that will be my objection to that. And that will be a
10 for-the-record kind of objection.

11 THE COURT: That for-the-record objection is
12 overruled. Until some appellate court tells me differently.

13 All right. Then the next instruction would be
14 acting in concert?

15 MS. GOROVSKY: Yes, Your Honor.

16 THE COURT: And that is Instruction 304.04.

17 MR. ROGERS: And you've given me two copies of each
18 of these? Or is this --

19 MS. GOROVSKY: I've just given you one copy.

20 THE COURT: We'll get you copies.

21 MR. ROGERS: No, you just gave me one copy of this.

22 MS. GOROVSKY: Uh-huh.

23 MR. ROGERS: And my for-the-record objection to this
24 one will be that it omits the -- I griped about the last one
25 for including statutory language. This omits the statutory

1 language of "before or during the commission of the offense."

2 And to shorten things up, Your Honor, appellate
3 courts have rejected that argument as well, saying that you
4 can't aid or -- you can't do something with the purpose of
5 committing something that was already being committed. Which
6 makes logical sense. But the statute defining culpable
7 mental state says "before or during."

8 THE COURT: Well, let me ask you why you haven't
9 included this phrase with the verdict directors that you
10 intend to charge in acting in concert. Because I'm reading
11 the Notes on Use, and it says, "The introductory paragraph
12 beginning 'A person is responsible' will be included in all
13 verdict directing instructions based on MAI 304.04, except
14 when all counts and verdict directing instructions submitted
15 are based on accessorial liability and 304.04 is used."

16 Now, first degree murder is not based on accessorial
17 liability.

18 MS. GOROVSKY: And that's correct, Your Honor. But
19 my interpretation of that has always been: If you use it in
20 more than one instruction, it needs to come out and be its
21 own instruction. But I don't have any problem putting it
22 back into each instruction, if that's the way the Court wants
23 it.

24 MR. ROGERS: I think that would be appropriate,
25 because the only thing that would keep this from being

1 applied to the first degree murder -- erroneously applied to
2 the first degree murder instruction would be the order in
3 which it comes. And I don't think the jury is supposed to
4 use that as the defining term.

5 THE COURT: Well, I mean, I think what paragraph 3
6 says is that it will be included in all verdict directing
7 instructions, except when all counts and verdict directing
8 instructions are based on this type of liability. And if
9 first degree murder is not based on this type of liability, I
10 think second degree conventional, second degree felony, ought
11 to be submitted with 304.04.

12 Your other objection is overruled.

13 MS. GOROVSKY: It's actually better for the state.

14 THE COURT: Because I wouldn't -- you know, I
15 don't -- and if it were, I would give it along with the
16 general instructions at the beginning. And then it would
17 apply to everything along the line.

18 MS. GOROVSKY: Now, I may be jumping the gun here,
19 but on Count II, everything is acting in concert. So will we
20 have to give this separately later?

21 MR. ROGERS: No.

22 THE COURT: No, you put it in --

23 MS. GOROVSKY: In each paragraph.

24 THE COURT: If you're using murder second, whether
25 it's felony or conventional, and that's based on accessorial

1 liability as well as the robbery, then you will have to use
2 that whole 304.04 --

3 MS. GOROVSKY: Okay.

4 THE COURT: -- I believe, with it.

5 All right. Let me see your -- without that
6 paragraph as an introduction, let me see your murder second
7 degree.

8 MS. GOROVSKY: Okay.

9 THE COURT: And does defense counsel have that?

10 MS. GOROVSKY: Here you go.

11 MR. ROGERS: Yes.

12 THE COURT: All right.

13 MR. ROGERS: So that's --

14 MS. GOROVSKY: This is murder second conventional.
15 I will be taking out Paragraph Third.

16 THE COURT: And this is 314.04?

17 MR. ROGERS: You've got serious physical injury
18 defined twice. So maybe if you just dropped the second page
19 entirely, that would solve that problem.

20 MS. GOROVSKY: Oops. We do. Let's see. Well, we
21 don't need the second page -- we will have to drop the second
22 page totally. You're right. Because we're taking out sudden
23 passion.

24 THE COURT: And you're going to add acting in
25 concert?

1 MS. GOROVSKY: That's correct.

2 THE COURT: Before I hear the defense objection,
3 what evidence is it that Charles Erickson caused the death of
4 Kent Heitholt by strangling him?

5 MS. GOROVSKY: For acting in concert.

6 MR. CRANE: Well, there was a -- I don't know that
7 this is -- he testified -- is this on conventional?

8 THE COURT: Yes.

9 MR. CRANE: Murder two?

10 MS. GOROVSKY: Yes.

11 MR. CRANE: Because we're not doing in concert
12 murder one.

13 MS. GOROVSKY: Correct.

14 MR. CRANE: I guess what we might have been thinking
15 was the part about the -- first of all, Dr. Adelstein said
16 that, if it had been a while, his brain could have swelled
17 and he could have died, although --

18 THE COURT: That's from the blows to the head.

19 MR. CRANE: Right.

20 THE COURT: That's not from the strangling.

21 MR. CRANE: And also, also, Chuck says that, after
22 Ryan was strangling him, he goes over and pulls off the belt.
23 And I recognize his -- his testimony would be, you know, "I
24 was getting him off and getting the belt off," but I guess
25 that was --

1 MS. GOROVSKY: I had concern there, because he put
2 his hands on that belt. In his testimony.

3 MR. CRANE: I admit he didn't say he pulled the belt
4 from the part --

5 MS. GOROVSKY: He said he pulled it off.

6 MR. CRANE: Yeah, but he did say he pulled it off at
7 the -- at the part that was connected -- that was at the
8 neck. Not the part he says Ferguson was pulling up on.

9 THE COURT: Well, if you're doing it here, I think
10 you would have to also do it on murder first.

11 MS. GOROVSKY: Murder first is much more
12 complicated.

13 MR. ROGERS: Let me -- let me -- I mean, I think
14 it's a silly instruction even to submit conventional second
15 degree murder, because it seems to me that if Erickson's
16 direct examination in-court account is to be believed, that
17 Erickson never had the culpable mental state required for
18 conventional second degree murder.

19 Having said that, if, in fact, Erickson is, A,
20 either lying about who did the strangling, which is certainly
21 something the jury could believe, or, B, caused the
22 strangulation by the act of force which he claims was him
23 removing the belt, but he also claims that that's when he
24 heard the buckle fall to the ground, which would be kind of
25 interesting, maybe the jury would think that that's what

1 actually caused the death, so.

2 I don't know that, if I were the prosecutor, I'd
3 like to give this instruction. I'm not requesting this
4 instruction, but --

5 THE COURT: I think there has to be evidence that
6 the jury could find --

7 MR. ROGERS: Right.

8 THE COURT: -- that one or the other. And certainly
9 there's evidence that Ferguson --

10 MR. CRANE: Maybe they don't believe Adelstein.

11 THE COURT: Well, if they don't believe Adelstein --

12 MR. ROGERS: Then the guy's still alive and we can
13 go home.

14 THE COURT: Yes, I was going to say --

15 MR. CRANE: No. On the cause of death.

16 MS. GOROVSKY: Yeah, but we put "by strangling."

17 MR. CRANE: Yeah. That's true. There's no other --

18 MR. ROGERS: So maybe you want to go back and mirror
19 your first degree murder on this one.

20 You would have had a two hour shorter voir dire if
21 you'd known all this.

22 MR. CRANE: Well, I voir dired only on -- really I
23 only talked about felony murder.

24 MS. GOROVSKY: Right.

25 We're not talking about --

1 THE COURT: Now if you were -- if you were -- I
2 mean, if you're trying Erickson, it certainly would be
3 accessorial on murder -- either conventional or felony
4 murder. Conventional second or felony murder. I mean, the
5 only evidence we have -- whether -- I mean, the jury may not
6 believe Adelstein, is that he died of strangulation. Of
7 asphyxiation.

8 MS. GOROVSKY: Your Honor, the only reason we put
9 acting in concert is because he put his hands on -- Erickson
10 put his hands on that belt.

11 MR. CRANE: And they're both saying there's no
12 evidence that they can see that that caused the death of the
13 guy, because he said he put it underneath the part that was
14 under the guy's neck and pulled it off. Is what they're --
15 both of them are saying. And that -- I can't argue that that
16 was what was said.

17 I guess I was looking -- I was thinking about the
18 Adelstein idea, that he -- he said, you know, what if the
19 jury could go, "Golly, you know, maybe he was dead because he
20 got strangling."

21 THE COURT: I don't see -- I mean, it was --

22 MR. CRANE: Strangling and beating him?

23 THE COURT: It was basically, you know, if he hadn't
24 have died of this strangling, maybe two months later he might
25 have died of cancer.

1 MR. CRANE: Yeah, I see what you're saying.

2 THE COURT: I mean, that's what he's saying about
3 the brain swelling.

4 MR. CRANE: Yeah. We're -- well, I -- yeah.

5 MR. ROGERS: A little better than that. You're
6 right, it was kind of goofy.

7 THE COURT: Only slightly better.

8 MS. GOROVSKY: Are you telling us you'd prefer it
9 not be acting in concert?

10 THE COURT: Well, I was going to say, as to
11 conventional murder. Now certainly robbery --

12 MR. ROGERS: The felony murder is acting in concert,
13 I guess, if anything.

14 THE COURT: I think it's -- clearly the felony
15 murder is acting in concert.

16 MR. CRANE: Okay. Well, how about this. Just for
17 expediency, we'll draft conventional without acting in
18 concert.

19 MS. GOROVSKY: We already have it.

20 MR. CRANE: And -- well, did we take it back from
21 them?

22 THE COURT: It's not only that you have it, but you
23 have it that Charles -- that defendant or Erickson caused the
24 death by strangling.

25 MR. ROGERS: That's part of the acting in concert

1 thing.

2 MR. CRANE: Yeah. You got to put the "or."

3 MS. GOROVSKY: Yeah. If it was "and," there would
4 be no point --

5 THE COURT: Well, if you're going to draft it so
6 that it could be given as accessorial, then you will have to
7 put in 304.04 as the introductory paragraph.

8 MS. GOROVSKY: Correct.

9 MR. ROGERS: But --

10 THE COURT: After you say, "As to Count I, if you
11 find and believe from the evidence."

12 MR. ROGERS: And if that's the situation, I would
13 follow the Court's lead and make an objection to that
14 instruction. I don't think that there is evidence which
15 would warrant a submission of second degree murder, acting in
16 concert.

17 MR. CRANE: Conventional.

18 THE COURT: Conventional.

19 MR. ROGERS: Conventional. Yes.

20 THE COURT: I really don't think the evidence
21 supports that.

22 MS. GOROVSKY: Would you -- you want us to -- we
23 have it drafted. Would you like --

24 THE COURT: You have it drafted without being --

25 MS. GOROVSKY: Yes.

1 THE COURT: -- accessorial.

2 MS. GOROVSKY: Do you want to give back the --

3 THE COURT: Yes.

4 MS. GOROVSKY: And the one with -- that just has the
5 separate acting in concert language?

6 THE COURT: I'm giving you that back, and I'm giving
7 you conventional murder, acting in concert.

8 MS. GOROVSKY: Well, of course, again --

9 THE COURT: I mean, you're free to offer it if you
10 want. And I might put a letter on it, instead of a number.

11 MR. ROGERS: Then they get to appeal on --

12 THE COURT: They don't get to appeal. But if you
13 get to appeal, and they find whatever, then they might make a
14 gratuitous remark that it should have been given as the state
15 offered.

16 MR. ROGERS: You want a cheap shot at the court?

17 MS. GOROVSKY: Here is murder second conventional,
18 not acting in concert. Now, given that we -- if we're
19 deciding not to submit voluntary, we have to take out the
20 tail in this one as well.

21 Here you go.

22 So Paragraph Third will be omitted.

23 MR. ROGERS: And also the bottom paragraph that
24 talks about sudden passion.

25 MS. GOROVSKY: Exactly.

1 THE COURT: So you would take off Paragraph Third.

2 MS. GOROVSKY: And the definition of sudden passion.
3 And adequate cause.

4 THE COURT: Take off the definition of sudden
5 passion. All right. And also adequate cause?

6 MS. GOROVSKY: Right.

7 THE COURT: But you would include serious physical
8 injury.

9 MS. GOROVSKY: That's correct.

10 THE COURT: And it will probably all end up being on
11 one page.

12 MS. GOROVSKY: Yep. It looks like it.

13 THE COURT: All right.

14 MR. ROGERS: And this will then bring up my -- the
15 "however" paragraph on the first page would bring up my
16 concern about treating second degree murder, felony murder,
17 as a lesser included offense of second degree murder, but.

18 THE COURT: This isn't is a second degree -- a
19 lesser included of second degree -- of -- did you say of
20 second degree murder or first degree murder?

21 MR. ROGERS: I'm saying that this instruction on --
22 oh, this is first degree. I'm sorry.

23 MS. GOROVSKY: No, this is second degree. Second
24 degree conventional.

25 MR. ROGERS: That's right. I'm sorry. I'm

1 confused.

2 It's the same point I made earlier, regarding --

3 MS. GOROVSKY: You want to make that point on the
4 next instruction. I believe.

5 MR. ROGERS: Well -- but it also goes here,
6 because -- if I want to make it. Maybe what I'd rather do
7 is -- I don't think I can, though. I think now the state of
8 the law is I have to object to preserve --

9 THE COURT: You think -- I heard that word "sandbag"
10 just rattling around inside of your head.

11 MR. ROGERS: It was. You know, I'm an old guy, and
12 you've been on the bench quite a while. You remember when
13 lawyers got to sandbag on instructions.

14 THE COURT: Well, I remember that. It hardly seemed
15 fair.

16 MR. ROGERS: Well. But it was one of the few
17 advantages we had.

18 THE COURT: You would take off the word "and" after
19 the second paragraph also.

20 MS. GOROVSKY: Exactly. Okay.

21 THE COURT: We're talking about conventional murder,
22 second degree.

23 MR. ROGERS: You're looking at then the final
24 paragraph remaining on the first page. It says, "You must
25 find the defendant not guilty of murder in the second degree

1 under this instruction, but you then must consider whether
2 he's guilty of murder in the second degree under Instruction
3 Number blank."

4 THE COURT: Yes. And that is referring to felony
5 murder.

6 MR. ROGERS: Referring to felony murder. And so
7 that is treating felony murder in the second degree as a
8 lesser included offense of conventional murder in the second
9 degree. Because it requires an acquittal of conventional
10 second degree before consideration of felony -- of felony
11 second degree.

12 THE COURT: The MAI really does contemplate that you
13 would be giving both, because that paragraph comes right out
14 of the MAI Criminal instruction.

15 MR. ROGERS: You think the committee may have
16 screwed up, Your Honor? It's hard to believe, I know,
17 knowing them as we do.

18 MS. GOROVSKY: I actually -- I think it makes sense.
19 I mean, you have to differentiate between the two of them
20 somehow. You can't -- you can't allow the jury to say, "Yes,
21 we want both."

22 MR. ROGERS: So I have the best of both worlds. I
23 can make an objection; it can get overruled.

24 THE COURT: Well, I'm going to give it, if it's --
25 if the state wants to tender it, I will give it, and overrule

1 your objection based on the fact that the MAI Criminal
2 instruction form has this particular paragraph in it, which
3 is 314.04.

4 All right. Now we are moving on to second degree
5 felony murder. And that one should have the accessorial
6 introduction of 304.04.

7 MR. ROGERS: I call them accomplice.

8 MS. GOROVSKY: And --

9 THE COURT: And you don't have that.

10 MS. GOROVSKY: Well, I'll have to add that. But let
11 me show you what I do have. Okay? I have it -- I have it in
12 two different ways. And you decide which one.

13 THE COURT: Well, why don't you hand me --

14 MS. GOROVSKY: One of each?

15 THE COURT: -- one of each. And hand Mr. Rogers one
16 of each.

17 MS. GOROVSKY: Here's one.

18 Based on our other conversation, I'm not, on the
19 acting in concert, I'm not sure which one you'll want. Or
20 wait. I already gave it to you. This goes here.

21 Specifically, the difference between the two is
22 Paragraph Second.

23 THE COURT: Yes. And again, I don't know that
24 there's any evidence that Erickson --

25 MS. GOROVSKY: If -- if we're doing the other one

1 that does not have "defendant or Erickson," the one that has
2 just "defendant," then the instruction is not technically
3 acting in concert, because the robbery already encompasses
4 the acting in concert. So if there is --

5 THE COURT: Then robbery would be the only one that
6 is acting in concert.

7 MS. GOROVSKY: Right. And because the robbery --
8 they would have to find that the defendant committed a
9 robbery as acting in concert. You don't need to put the
10 acting in concert language in here, but I can, if the Court
11 prefers that.

12 MR. ROGERS: I'm agreeing with the state, strangely
13 enough, that --

14 THE COURT: Well, I agree that -- I think that's
15 true. And I would use the instruction that just says, "As to
16 Count I, if you find and believe from the evidence beyond a
17 reasonable doubt that defendant committed robbery in the
18 first degree as submitted in Instruction Number blank, and
19 that defendant caused the death of Kent Heitholt by
20 strangling him, and Third, that Kent Heitholt was killed as a
21 result of the perpetration of that robbery in the first
22 degree, then you will find the defendant guilty under Count I
23 of murder in the second degree," which is 314.06. Let me
24 give you this one back.

25 All right. And so it is decided that we're not

1 giving voluntary or involuntary manslaughter. That was our
2 discussion before.

3 MR. ROGERS: We're not requesting it.

4 THE COURT: The defendant is not requesting it.

5 MS. GOROVSKY: The state is not requesting it.

6 THE COURT: All right. So then we go to robbery.

7 MS. GOROVSKY: That is a different folder.

8 Okay. Now this one has the acting in concert as a
9 separate instruction, because it is used in every instruction
10 in this count.

11 THE COURT: I think it contemplates every
12 instruction that is given.

13 MS. GOROVSKY: So, in other words --

14 THE COURT: I don't think it means as to each count.
15 I think it means, if you're -- everything is acting in
16 concert. If there are ten counts, and they're all acting in
17 concert, you give one instruction, which is a preliminary
18 introductory instruction. Otherwise, if you have ten counts,
19 and two of them are acting in concert, and the others are
20 not, then you just do one.

21 MS. GOROVSKY: And I have that too.

22 THE COURT: Where is Dallas? Other than in Texas.

23 MR. ROGERS: He was here this morning.

24 THE COURT: He was.

25 MR. ROGERS: And was not called as a witness by the

1 state. He was released from the subpoena.

2 THE COURT: Cutting a line, was he, out in the hall?

3 MR. ROGERS: He was sitting on the bench, like
4 everybody else. And then my understanding, and I didn't even
5 observe this, this is hearsay, my understanding that he was
6 also videotaped and interviewed with the "48 Hours" people.

7 THE COURT: Actually, this is the one that submits
8 robbery in the second degree.

9 MS. GOROVSKY: Oh.

10 THE COURT: And it says, "As to Count II, if you do
11 not find him guilty of robbery in the first degree, you must
12 consider whether he is guilty of robbery in the second
13 degree."

14 MS. GOROVSKY: Here's robbery first.

15 MR. ROGERS: Surely you're not going to submit a
16 lesser included of robbery.

17 MS. GOROVSKY: Right. First and second.

18 MR. ROGERS: You are.

19 MS. GOROVSKY: Uh-huh.

20 MR. ROGERS: Claiming as we do that no serious
21 physical injury was inflicted on the guy that died. Whether
22 or not --

23 THE COURT: I don't know that there is a basis for
24 acquitting on the greater and convicting on the lesser.

25 MR. ROGERS: What she said --

1 THE COURT: Which I believe is the standard for
2 giving a lesser included offense.

3 MS. GOROVSKY: Okay. If the defense states that, on
4 the record, that they don't want it, we will take it out.

5 MR. ROGERS: We don't want it.

6 MS. GOROVSKY: Okay.

7 MR. ROGERS: And if we wanted it, we couldn't get
8 it.

9 MS. GOROVSKY: Okay. And now the instruction that
10 she has in her hand is in the packet I gave you earlier. I
11 had to pull it back out of there.

12 MR. ROGERS: Oh. Oh. Very, very clever.

13 MS. GOROVSKY: Trust me, that was not on purpose.

14 THE COURT: These are the state's instructions. And
15 what you're going to do is: As to Count I --

16 MR. ROGERS: I'm looking for it.

17 THE COURT: -- murder first is not going to be
18 changed. Murder first, conventional, you are going to remove
19 the "and" in the second paragraph and delete the third
20 paragraph and the definition of sudden passion.

21 MS. GOROVSKY: That's correct.

22 THE COURT: And then felony murder, you're not going
23 to do anything to it.

24 MS. GOROVSKY: Correct.

25 THE COURT: But you're going to show that only the

1 defendant caused the death of Kent Heitholt by strangling
2 him.

3 MS. GOROVSKY: And that should be the instruction
4 you have; is that correct?

5 THE COURT: That is correct.

6 MS. GOROVSKY: Okay.

7 THE COURT: And there doesn't look like there needs
8 to be any changes to it. And then robbery in the first
9 degree, which is 323.02, but as acting in concert --

10 MR. ROGERS: Uh-huh.

11 THE COURT: And I'm looking at robbery first degree.

12 MS. GOROVSKY: Uh-huh.

13 THE COURT: What evidence is there that Charles
14 Erickson obtained the car keys and watch?

15 MS. GOROVSKY: And Your Honor, I have to say I wish
16 Kevin would come back, because I haven't been here for the
17 entire trial.

18 THE COURT: All right. Well, do we know where Kevin
19 is? Is he downstairs? Is he in the rest room? Out in the
20 courtroom?

21 MS. GOROVSKY: Would you like me to go see?

22 THE COURT: Sure.

23 (Ms. Gorovsky left chambers and then returned.)

24 MS. GOROVSKY: He's not in there.

25 THE COURT: Maybe he's downstairs.

1 MS. GOROVSKY: I'll go check.

2 THE COURT: I thought I heard a door close, but I
3 didn't know if it was the rest room or the courtroom.

4 (Mr. Crane present in chambers.)

5 MR. CRANE: Sorry about that, Judge.

6 THE COURT: We are on robbery in the first degree.

7 MR. CRANE: Yeah.

8 THE COURT: And the submission that has been
9 presented is that the defendant or Erickson obtained the car
10 keys and a watch in the possession of Heitholt, et cetera.
11 That defendant or Erickson did so for the purpose of
12 withholding it from the owner permanently. Third, that the
13 defendant or Erickson in doing so used physical force against
14 him.

15 Now, certainly the third paragraph would probably be
16 correct.

17 MS. GOROVSKY: She wants to know if any --

18 THE COURT: And the fourth paragraph would certainly
19 be correct. But I don't know, as to the first and second
20 paragraphs, whether there is any evidence at all that
21 Erickson got the car keys. And the watch. As I recall, he
22 denied taking those.

23 MS. GOROVSKY: Are those just attributable to
24 Ferguson?

25 MR. ROGERS: There's no evidence that Ferguson --

1 Erickson didn't claim he saw Ferguson take them either.

2 THE COURT: What he said is he robbed him. He made
3 a legal conclusion, to which there were no objections.

4 MR. CRANE: Well, I thought he said that they put
5 the items in the bag in the back of the car.

6 MS. GOROVSKY: And I did hear car keys and a watch.
7 I did hear that part.

8 MR. ROGERS: There's no question that --

9 MR. CRANE: Yeah, remember, he said that when they
10 got back to the car, that there was a grocery bag in the car,
11 and that Ferguson removed that, and inside it they placed the
12 tire tool, the car keys, the watch, and the belt.

13 THE COURT: I didn't hear about the watch and the
14 keys. I heard about the belt --

15 MR. ROGERS: I think he said that the car keys and
16 the --

17 MR. CRANE: He said it all. He put everything in
18 the bag.

19 MR. ROGERS: Everything, though -- I don't think he
20 said car keys. And I think the evidence is that the guy was
21 wearing a watch earlier in the day when his picture was
22 taken. And there's no watch found on the body. And --

23 MR. CRANE: He obviously --

24 MR. ROGERS: -- he obviously had keys, and there was
25 no keys found on the body.

1 MR. CRANE: Well, so that's why we can say "or."

2 MS. GOROVSKY: And Erickson did say car keys and a
3 watch. I know I heard that.

4 MR. CRANE: Yeah. He --

5 MS. GOROVSKY: I'm pretty sure he said that, at the
6 scene, he saw him take car keys and a watch.

7 MR. CRANE: He was saying -- he was saying he didn't
8 remember seeing them when they were running off.

9 MR. ROGERS: I think --

10 THE COURT: I didn't think you were going to prove
11 your case on robbery, before he made the conclusion that he
12 was robbed. Because I didn't hear anything other -- I mean,
13 the fact that the man had his watch on earlier in the day,
14 for all I know he took it off in the rest room when he washed
15 his hands and left it behind. I don't know.

16 MR. ROGERS: I wasn't watching that close, Judge,
17 quite frankly.

18 THE COURT: Well, I don't know. I mean -- but I was
19 wondering whether you were going to present enough evidence
20 on the robbery to get it submitted. Because I was all ears
21 to hear how the robbery took place. I mean, the assault, of
22 course, is -- was a very brutal kind of thing and does catch
23 your attention. But I was listening for having taken
24 something from him. And yes, they were, if you believe
25 Erickson, they were planning to rob someone, to get some

1 money.

2 MR. ROGERS: So you're looking at an attempted
3 robbery here.

4 MR. CRANE: Judge, I think there's evidence to put
5 in "or."

6 MR. ROGERS: So you think there's evidence that
7 Erickson took the car keys and the watch.

8 MR. CRANE: I think there's -- well --

9 MR. ROGERS: The issue -- we got two different
10 issues going on here. One is: Is there sufficient evidence
11 to submit to the jury that either Erickson or Ferguson took
12 the car keys and the watch?

13 MR. CRANE: You're talking about the specific
14 paragraph in the acting in concert robbery instruction?

15 MR. ROGERS: That --

16 MR. CRANE: That specific paragraph.

17 THE COURT: Well, there are actually two paragraphs.

18 MR. ROGERS: -- specific phrase in two paragraphs.

19 MR. CRANE: Okay.

20 THE COURT: Paragraphs First and Second.

21 MR. ROGERS: The two words: "Or Charles" -- or
22 three words: "Or Charles Erickson."

23 Now, the other issue is whether there's sufficient
24 evidence to submit it at all, which, based upon Erickson's
25 legal conclusion --

1 MS. GOROVSKY: Well, and you shouldn't be nervous
2 about that, because if what you're remembering is true, then
3 they won't find him guilty under it. It's really whether or
4 not they're going to find him guilty under it; not whether or
5 not they should submit it.

6 THE COURT: Well, I mean, there could be all kinds
7 of charges for which there's no evidence, and we would hope
8 the jury would realize they hadn't heard evidence and return
9 a not guilty verdict. But it's not my practice to submit
10 things that are not based on evidence from which they could
11 convict him.

12 MS. GOROVSKY: But I think what we're saying is: We
13 believe there is evidence upon which to convict of this
14 offense.

15 MR. CRANE: Well, absolutely.

16 THE COURT: Well, there may be evidence that the
17 defendant had the car keys and watch. I'm not certain that I
18 remember it that way, but I'll look in my notes. And that
19 the defendant did so for the purpose of withholding it.
20 There clearly is evidence that the defendant or Erickson used
21 physical force against him for the purpose of preventing
22 resistance to the taking of the property.

23 MR. CRANE: Well, at its most basic level, though,
24 Judge, the state's shown circumstantially that the items were
25 gone. I mean, I don't think the state has to, in order to

1 submit its case -- the idea that it could have been left in
2 the bathroom by the guy doesn't mean that we haven't met the
3 burden with respect to its submission on robbery. I mean,
4 we've -- we've proffered testimony that they were both there;
5 that the -- that the motive was robbery. And then we've got
6 the crime scene evidence that talks about how -- oh, Nichols
7 testified his watch and car keys were never found. I mean,
8 that in and of itself is enough to proceed with the robbery.

9 MS. GOROVSKY: And Your Honor, that's why I said I
10 think the issue is whether or not they're going to find him
11 guilty, and not whether or not they are entitled to this
12 instruction. Because, very worst case scenario, it's
13 circumstantial evidence. But I thought there was direct --

14 MR. CRANE: Right. That's what I'm going from. I'm
15 going: Worst case scenario, those basic elements have been
16 shown. And that being the case, the "or" becomes
17 appropriate.

18 MS. GOROVSKY: Right.

19 MR. CRANE: I mean, we've at least met the threshold
20 by showing -- you know, I mean, the photograph that he's got
21 his watch on, in the victim photograph, is -- of the guy with
22 his watch on the day of the murder. I mean, further, his
23 wife says, when he left to go to work at, I don't know, what
24 did she say? 7:30, 8, or whatever, he had his watch on. And
25 then we don't have a watch at the scene. And the car keys

1 have never been found. And the guy's car door was open when
2 the thing started.

3 MS. GOROVSKY: He was about to drive home.

4 MR. CRANE: So -- and we've also got evidence that
5 his -- there's coins around the body. You know, Judge, I
6 think, right there, if that's what the Court agrees was the
7 evidence --

8 THE COURT: Oh, I agree.

9 MR. CRANE: -- then this instruction connected by
10 "or" would be appropriate.

11 MR. ROGERS: Well, the reason for that is because
12 the robbery is being shown by circumstantial evidence --

13 MR. CRANE: At its base, yeah.

14 MR. ROGERS: -- at its base, and that the jury is
15 free to disbelieve the self-serving testimony of Erickson --

16 MR. CRANE: Self-serving.

17 MR. ROGERS: -- that he did not take the watch and
18 the car keys himself.

19 MR. CRANE: That he just took the belt?

20 MS. GOROVSKY: Well, you said a minute ago you
21 didn't think that he said that.

22 MR. ROGERS: I don't think he said that he saw
23 Ferguson with the watch and car keys.

24 MS. GOROVSKY: And so if that's the case, then we
25 don't know which one did it. And that's why we have to put

1 the "or" in the instruction. That's how it works when you
2 don't know which person committed which element.

3 MR. CRANE: Well, frankly, I think the evidence is
4 going to be arguably that -- the argument would be Ferguson
5 had it.

6 MS. GOROVSKY: But that's the argument.

7 MR. CRANE: And it's gone. And thereby you got it.
8 But I think the -- I'm going with what Judge Roper -- you're
9 recalling certainly I think the evidence that I'm describing
10 came in.

11 THE COURT: Absolutely.

12 MR. CRANE: And so therefore this instruction --

13 THE COURT: Would fit that circumstance.

14 MR. CRANE: -- would fit that circumstance.

15 THE COURT: Yes, it would.

16 MR. ROGERS: Let me then say, Judge, that if what
17 we're relying on to make this a submissible case is, in fact,
18 that circumstantial evidence, Ferguson's -- or Erickson's
19 legal conclusion I'm objecting to, that they robbed him, does
20 not necessarily refer to the charged robbery which is
21 submitted in this instruction, the taking of the watch and
22 the car keys. It could refer to the taking of the wallet or
23 the belt.

24 THE COURT: But the wallet --

25 MR. CRANE: The wallet was still there.

1 THE COURT: The wallet was not taken.

2 MR. ROGERS: That's correct.

3 MR. CRANE: There's --

4 MR. ROGERS: If what we're talking about is
5 Erickson's conclusion, he was equivocal even today about the
6 wallet.

7 THE COURT: He didn't -- he didn't testify today.
8 And no, they all -- I know they all seem --

9 MR. ROGERS: He was equivocal even in court about
10 the wallet. Erickson. But the videotape statements are
11 clear that he thought that's what had been taken.

12 MS. GOROVSKY: But all you're saying is that we
13 could have added even more to this instruction. Not that we
14 need to take something out.

15 MR. ROGERS: No, you can't put in --

16 MS. GOROVSKY: I could have said --

17 MR. ROGERS: -- stuff he's not charged with.

18 MS. GOROVSKY: Right. Exactly.

19 MR. CRANE: No, no, no. But I'm saying, you're --
20 we're saying the same thing there, Charlie. Is because if --
21 if, in its most basic level, the stuff's gone after this guy,
22 you know, left the scene, after this guy was killed by the
23 bad guys --

24 MR. ROGERS: I understand what you're saying in that
25 as justifying the --

1 MR. CRANE: "Or."

2 MR. ROGERS: -- in concert submission, the "or
3 Charles Erickson." But what I'm saying is that, given that
4 argument, there is a far more serious argument about the
5 sufficiency of the evidence to submit robbery in the first
6 degree at all, as charged. That's picking up on the hints
7 given me by Judge Roper. But anyway, that's what I'm saying.

8 THE COURT: Well --

9 MR. ROGERS: I don't think it calls for a
10 modification of the language of the instruction. I think
11 it's a question: Are you going to submit it or direct it
12 out?

13 THE COURT: As to robbery?

14 MR. ROGERS: As to robbery.

15 THE COURT: I'm not going to direct it out.

16 MR. ROGERS: All right.

17 THE COURT: With that being said, are there any
18 other instructions that the state would tender?

19 MS. GOROVSKY: Verdict directors.

20 THE COURT: Oh, really.

21 MS. GOROVSKY: Or I'm sorry. I'm sorry. Verdict
22 forms.

23 THE COURT: You're going -- you do have verdict
24 forms.

25 MS. GOROVSKY: We do have verdict forms.

1 THE COURT: All right. Well, let's look at your
2 verdict forms. And let's move along. Because it's almost
3 10:00. I don't want to drive off the road or drive into a
4 deer.

5 MS. GOROVSKY: Okay. We have a murder first guilty.

6 THE COURT: Okay. Do you have a murder second -- I
7 mean a murder second, Count I murder second guilty?

8 MS. GOROVSKY: Yes. And actually, if we give both
9 conventional and felony, there will be two of these verdict
10 forms.

11 THE COURT: No.

12 MS. GOROVSKY: Because it will have to say, "as
13 submitted in Instruction Number blank." And the other one
14 will have to say "as submitted in" --

15 THE COURT: I expect the jury to fill in the number.

16 MS. GOROVSKY: They fill in that part?

17 THE COURT: They're going to tell me which one that
18 they find it under. Otherwise you'd have the possibility of
19 them doing more than one.

20 MS. GOROVSKY: Okay. Okay. So we'll leave that
21 blank then.

22 THE COURT: I'll just leave it blank.

23 MR. ROGERS: That solves that problem. That's very
24 clever.

25 THE COURT: Now, do we have a not guilty verdict on

1 Count I?

2 MS. GOROVSKY: Yes, we do.

3 MR. ROGERS: Yea.

4 THE COURT: All right. Now, as to Count II...

5 MS. GOROVSKY: Count II. This is a guilty of
6 robbery first.

7 THE COURT: All right.

8 MS. GOROVSKY: And the Judge has ruled I'm not
9 giving robbery second; is that correct?

10 THE COURT: Well, the defense has not asked for it,
11 and I don't think there's evidence on that.

12 MS. GOROVSKY: Okay. So then we have a --

13 THE COURT: Not guilty on Count II?

14 MS. GOROVSKY: Yes.

15 THE COURT: All right. And these are the -- all the
16 instructions that the state has.

17 MS. GOROVSKY: That's correct, Your Honor.

18 THE COURT: All right. Now to the defendant's
19 instructions. Oh, let me ask, do you have objections to the
20 form of verdict? I mean to the -- yes, the form of verdict?

21 MR. ROGERS: I do not have objections to the form,
22 Your Honor. I do request that the not guilty be put on top
23 of the guilty verdict forms with regard to each count.

24 THE COURT: Well --

25 MR. ROGERS: I don't think the Notes on Use say how

1 it's supposed to go.

2 THE COURT: No.

3 MR. CRANE: And I haven't heard that one. That's
4 pretty sharp there.

5 THE COURT: All right. The defendant has tendered
6 some instructions that I'm sure one won't be given, because
7 it's the defendant's right not to testify.

8 MR. ROGERS: That one we're withdrawing, Your Honor.

9 MS. GOROVSKY: Take that one off.

10 THE COURT: All right.

11 MR. ROGERS: That was a fake.

12 MR. CRANE: I don't think -- I think I was too tired
13 to notice.

14 THE COURT: All right. Are you submitting the
15 instructions in that you -- which ones are you wanting the
16 Court to give that you've submitted? You have a Not In MAI.

17 MR. ROGERS: The Not In MAI instruction we are
18 definitely requesting. And it might be worth talking about.

19 THE COURT: And that reads: There was evidence that
20 a witness in this case, Charles Erickson, pled guilty to
21 felony murder in the second degree, robbery in the first
22 degree, and armed criminal action. There was evidence that
23 Charles Erickson has not yet been sentenced for those
24 offenses, but will be sentenced after this trial. The
25 evidence concerning Charles Erickson's pleas of guilty may be

1 considered by you solely as it might bear on Charles
2 Erickson's believability, and should not be considered by you
3 for any other purpose. Specifically, you must not consider
4 Charles Erickson's pleas of guilty as any evidence that Ryan
5 Ferguson is guilty of any offense with which he is charged.

6 That is not an MAI instruction.

7 MS. GOROVSKY: State's going to object to that, Your
8 Honor.

9 MR. ROGERS: Your Honor, our position is that it is
10 certainly improper for Mr. Erickson to be able to somehow
11 prove Mr. Ferguson's guilt by his own plea. That the plea of
12 guilty that he has made may be relevant in assessing his
13 believability. And that certainly his testimony can be
14 considered, if believed, with regard to what impact it has on
15 Mr. Ferguson's guilt or not guilt. But I think it would be
16 improper for them to -- for the jury to consider or for the
17 state to argue that, since Charles Erickson pleaded guilty,
18 and he says Ryan Ferguson also did it, Ryan Ferguson must be
19 guilty.

20 THE COURT: Well, you did submit Instruction 310.14,
21 that says, "If you find and believe from the evidence that
22 the -- a witness was convicted of an offense, you may
23 consider that evidence for the sole purpose of deciding the
24 believability of the witness and the weight to be given to
25 his testimony." And we do have one of your witnesses who has

1 a conviction.

2 MR. ROGERS: And we also have Mr. Trump, who has
3 convictions.

4 THE COURT: Yes.

5 MR. ROGERS: And we also have Mr. Erickson, who has
6 convictions. But I think that that instruction, while
7 proper, and we're requesting the Court to give it, I think
8 that it is not as particularly tailored to the situation
9 where a person -- a witness has pled guilty to a related
10 offense, or an offense arising from the same events as the
11 offense.

12 THE COURT: But it makes it sound like if someone
13 pleads guilty and says that "I did this with Charlie, and I'm
14 guilty of this," that you can't use his admissions against
15 the other codefendant.

16 MR. ROGERS: I think that's exactly the law.

17 MS. GOROVSKY: Well, and Your Honor --

18 THE COURT: That's what it sounds like.

19 MR. CRANE: When they acted in concert?

20 MS. GOROVSKY: Hold on. I may have the answer to
21 this. Which is that the Missouri instructions have an
22 instruction on exactly this issue. And I have drafted that
23 instruction.

24 MR. ROGERS: But that instruction --

25 MS. GOROVSKY: It's called 310.18.

1 THE COURT: Uh-huh.

2 MR. ROGERS: Right. Which is the basis of the one I
3 drafted.

4 THE COURT: Why --

5 MR. ROGERS: But that instruction --

6 MS. GOROVSKY: He didn't follow the MAI.

7 MR. ROGERS: -- is not to be given unless requested
8 at the time of the testimony by the party who calls the
9 witness who is being impeached and only is being impeached
10 with the conviction. Mr. Erickson was not impeached with the
11 plea of guilty in this case. Mr. Erickson was, rather -- it
12 was introduced by the state. So it's -- I think it would
13 certainly be error and mistake under MAI to give this
14 particular instruction -- to give MAI-CR 3d 310.18 as it is
15 in the book. I think the Notes on Use make that pretty
16 clear.

17 THE COURT: Well, I'm reading the Notes on Use.

18 Where do you see that it has to be requested at the
19 time?

20 MR. ROGERS: I don't, because I don't have it in
21 front of me and I'm not -- I could have misstated that.

22 THE COURT: There are limitations.

23 MR. ROGERS: Well, I was looking at that, I guess,
24 or remembering that, and that is not what it says.

25 THE COURT: I don't think it has to be requested at

1 the time he testifies.

2 MR. ROGERS: Okay.

3 THE COURT: As a limiting instruction. At that
4 time. Let's say you make an objection to something and it's
5 admissible for one purpose and not for another and I caution
6 the jury, they may only consider this for the purpose of X,
7 and for no other purpose.

8 MR. ROGERS: Let me see the instruction you drafted,
9 please.

10 MS. GOROVSKY: Do you want that instruction as well?

11 THE COURT: Yeah.

12 MS. GOROVSKY: This is my corrected version of
13 310.18. This was his version. This would be my corrected
14 version of the defense instruction.

15 THE COURT: Not your corrected version. You're
16 giving an MAI instruction, whereas the other one is a Not In
17 MAI instruction on the same general topic.

18 MS. GOROVSKY: Exactly. But it's not being
19 submitted by the state. We're just submitting it as the
20 correct version of an instruction being submitted by the
21 defense. Does that makes make sense?

22 THE COURT: In other words, you're not asking --

23 MS. GOROVSKY: We're not asking for that
24 instruction.

25 MR. ROGERS: That solves that.

1 MR. CRANE: She wrote up the correct MAI.

2 MS. GOROVSKY: And I --

3 MR. ROGERS: To help me out if I want to give it.

4 MS. GOROVSKY: And I do believe he's entitled to it.
5 But it's not a state instruction. It's a defense
6 instruction.

7 MR. ROGERS: The Note on Use is clear that I'm not
8 entitled to it. Isn't it?

9 THE COURT: Well, the Note on Use says, This
10 instruction can be given only if the evidence, blah, blah,
11 was admitted solely for impeachment purposes.

12 MR. CRANE: And you just said --

13 THE COURT: "This instruction may be given by the
14 Court only at the request of the party against whom such
15 evidence was admitted."

16 MR. CRANE: And you just said you never impeached
17 him with his plea of guilty.

18 MR. ROGERS: I'm saying, the evidence was admitted,
19 not -- we did not introduce the testimony for impeachment.
20 So I cannot request this instruction.

21 MR. CRANE: He doesn't want to give it, is what
22 simplifies it. Right?

23 MS. GOROVSKY: He's the only -- my interpretation of
24 that is that he's the only one allowed to ask for it.

25 MR. ROGERS: No.

1 MS. GOROVSKY: Is that your interpretation of it?

2 MR. ROGERS: Backwards. You're the only one allowed
3 to ask for it.

4 MS. GOROVSKY: We were the party offering it. He
5 was the party -- wait.

6 MR. ROGERS: No, no. You're the party --

7 MS. GOROVSKY: Can I read it real fast, Your Honor?

8 THE COURT: Well, there are two conditions.

9 MR. CRANE: "Offering it." You mean the
10 instruction?

11 MS. GOROVSKY: Well, we --

12 MR. ROGERS: You're the --

13 MS. GOROVSKY: -- presented that evidence in order
14 to show Ferguson did it as well. Or, in fact, that was our
15 purpose. So he's the party against --

16 MR. ROGERS: I can't believe that --

17 MS. GOROVSKY: -- whom that evidence --

18 MR. ROGERS: -- because that would be an improper
19 purpose for which it was admitted initially. I think it was
20 admissible to keep us from impeaching --

21 THE COURT: I think you one-upped him -- you
22 one-upped him by saying, "Now you pled guilty, and this is
23 the deal you're getting."

24 MR. ROGERS: I did ask about that. But they got
25 into it in excruciating detail. The only thing I did that

1 they didn't do is point out his expectations with regards
2 to --

3 MR. CRANE: Right. And he could have gotten more
4 and stuff like that.

5 MR. ROGERS: Yeah.

6 THE COURT: Well, and that he was going to get out
7 in 12 and a half years --

8 MR. ROGERS: Exactly. Right.

9 THE COURT: -- as opposed to 25.

10 MR. ROGERS: So therefore, I think, with regard
11 to -- if this conviction is admitted solely for the purpose
12 of impeachment, then I'm the impeaching party, and they're
13 the only ones who can request the instruction. That's the
14 way I read it.

15 MS. GOROVSKY: If that's his interpretation, we're
16 not requesting it.

17 THE COURT: It says, "It may not be given at the
18 request of the impeaching party."

19 MR. ROGERS: Right.

20 THE COURT: You are the impeaching party.

21 MR. ROGERS: Okay. We're on the same page there.

22 MS. GOROVSKY: And we're not requesting it.

23 THE COURT: All right.

24 MR. CRANE: That's what I was getting at, is: If
25 it's not coming in in the amended version that the defense

1 wants, and we're not requesting it, then it's not an issue in
2 this.

3 MS. GOROVSKY: Then it shouldn't come in at all.

4 MR. ROGERS: Okay. So having said that, now, back
5 to the non-MAI-CR instruction. Okay?

6 I think that this instruction accurately reflects
7 the law. I think it covers a situation which the MAI
8 instruction on its terms does not cover. And I think it is
9 essential to a fair determination of the issues in this case.
10 And so that's why I'm requesting a non-MAI-CR instruction.

11 And I think it's all -- and I should have, but did
12 not, bring the Eighth Circuit manual that cites some federal
13 cases, obviously, not dealing with MAI and things like that.
14 But basically the basis of this instruction is due process.
15 And the defendant has a right to be tried on the evidence
16 adduced against him and not the evidence -- he's not bound by
17 admissions of somebody else, in some other proceeding to
18 which he's not a party and over which he has no control.

19 And so for Charles Erickson to say, "I pleaded
20 guilty to felony murder or acting in concert with Ryan
21 Ferguson," proves that Charles Erickson has pleaded guilty,
22 but it doesn't prove that Ryan Ferguson acted with him. And
23 cannot. Because that's something that occurs outside of
24 Mr. Ferguson's presence, outside of his control, and he's not
25 being given a chance to defend.

1 MS. GOROVSKY: Your Honor, if he's not entitled to
2 give the Missouri Approved Instruction 310.18, then he can't
3 -- he certainly can't be entitled to present his own version,
4 extending that instruction to his own whim.

5 THE COURT: Well, it seems to me that the
6 instruction that relates to criminal convictions that has
7 been tendered, 310.14, would tell the jury that they could
8 only consider those convictions for the purpose of
9 believability, and for no other purpose. Weight to be given
10 to the testimony.

11 MR. ROGERS: So you're saying that my argument fails
12 because this is covered in MAI-CR 3d.

13 THE COURT: I think the jury would be so instructed.

14 MS. GOROVSKY: And the state has no objection to
15 that instruction.

16 MR. ROGERS: Okay. Well, I take it the Court's
17 going to reject this and mark it A.

18 THE COURT: You can mark that A.

19 MR. ROGERS: Okay.

20 THE COURT: All right. You are offering then
21 310.14?

22 MR. ROGERS: I am offering 310.14.

23 THE COURT: And I will give it.

24 And you have submitted several other instructions.

25 MR. ROGERS: Yes. I have a converse for murder in

1 the first degree.

2 THE COURT: Let me look.

3 MR. ROGERS: 308.02.

4 THE COURT: 308.02. Is there an objection by the
5 state?

6 MS. GOROVSKY: To?

7 THE COURT: The converse.

8 MS. GOROVSKY: The converse of murder one.
9 No objection.

10 THE COURT: All right. And that would immediately
11 follow one. So I'm not going to number it. And you also
12 have a converse for murder in the second degree?

13 MR. ROGERS: Yes. And I'm looking for it.

14 MS. GOROVSKY: And that's murder second degree as
15 felony murder.

16 THE COURT: I don't know.

17 MR. ROGERS: I think I've got one of each.

18 THE COURT: You have two?

19 MS. GOROVSKY: I only see the felony murder. But I
20 could be wrong. Because you conversed the robbery element.

21 MR. ROGERS: That's one, certainly. And I'm sure we
22 have another one someplace that converses --

23 THE COURT: I'm going to take the converse out about
24 voluntary manslaughter.

25 MS. GOROVSKY: Okay.

1 MR. ROGERS: Right. I'm not giving that one.

2 THE COURT: I'm going to throw that away so it
3 doesn't accidentally get in.

4 MR. ROGERS: I am looking, and I don't --

5 THE COURT: I do see several converses as to murder
6 first. One is: That he caused the death by -- if you have a
7 reasonable doubt as to whether he caused the death by
8 strangling him.

9 MR. ROGERS: Uh-huh.

10 THE COURT: One is just: If you have a
11 reasonable -- oh, I do see one that would be for felony
12 murder second. "If you have a reasonable doubt as to whether
13 Ryan Ferguson committed robbery in the first degree."

14 MR. ROGERS: Right.

15 THE COURT: And I sort of think -- don't you think
16 you should say, "as submitted in Instruction Number blank"?
17 "You must find the defendant not guilty under Count I of
18 murder in the second degree as submitted in Instruction
19 Number." That would be the felony murder.

20 MS. GOROVSKY: That's correct.

21 THE COURT: And you should just put: "As submitted
22 in Instruction." And here I do put the instructions number
23 -- the numbers in.

24 MS. GOROVSKY: Okay.

25 MR. ROGERS: I can bring you one of those tomorrow.

1 THE COURT: Okay.

2 MR. ROGERS: And I would -- in terms of the felony
3 murder second degree, conventional, I would use the exact
4 language as used in the first degree, only I'd just change
5 "first" to "second."

6 THE COURT: All right. Let me look at first. "If
7 you have a reasonable doubt as to whether Ryan Ferguson
8 caused the death of Kent Heitholt by strangling him, you must
9 find the defendant not guilty under Count I of murder in the
10 second degree as submitted in Instruction Number blank." Is
11 that right?

12 MR. ROGERS: Yes.

13 THE COURT: Okay. We're going to do that one --
14 okay. And then we have one for robbery.

15 MR. ROGERS: Yes.

16 THE COURT: And that -- I see robbery second degree,
17 which we're not going to do.

18 MS. GOROVSKY: Okay. That's true. So we'll take
19 that out?

20 THE COURT: Take those out.

21 MS. GOROVSKY: Uh-huh.

22 THE COURT: And --

23 MS. GOROVSKY: The robbery first.

24 THE COURT: I don't see if there -- let me just see.
25 All right. Is there one on robbery in the first degree?

1 MR. ROGERS: Yes, there is.

2 THE COURT: All right. Let's see. Did you give me
3 that?

4 MR. ROGERS: Yes, I'm sure --

5 THE COURT: "If you have a reasonable doubt."

6 MR. ROGERS: I don't know why I didn't make Mr. Weis
7 do all this, by the way.

8 THE COURT: I saw it as to second degree. Maybe I
9 inadvertently threw away second and first degree.

10 Here's robbery second degree. Both of these say
11 robbery --

12 MR. ROGERS: Here's first degree right here.

13 THE COURT: Oh, okay. You can have yours back.

14 MR. ROGERS: Thank you.

15 THE COURT: All right. So this one is one that we
16 will give.

17 MS. GOROVSKY: Oh, I do have an issue with it, Your
18 Honor.

19 THE COURT: All right.

20 MS. GOROVSKY: Because the state submitted this
21 instruction as an in concert, I believe the converse has to
22 reflect that same element in the state's instruction.

23 THE COURT: "Whether Ryan" --

24 MS. GOROVSKY: "Ryan Ferguson or Charles Erickson
25 obtained car keys and a watch," I believe is what it should

1 say.

2 THE COURT: A true converse would have to mirror the
3 way the instruction is given.

4 MR. ROGERS: Well -- and -- that's the problem with
5 the acting in concert. It's almost impossible to converse
6 meaningfully without making it way long.

7 THE COURT: Well, you can decide whether you're
8 going to do it, but if it's submitted --

9 MR. ROGERS: Well --

10 THE COURT: -- as acting in concert --

11 MR. ROGERS: -- I think we -- well -- let me look
12 here.

13 THE COURT: Because he's guilty, if he acted in
14 concert, and it was the other one that got the watch and the
15 car keys.

16 MR. ROGERS: But he's not guilty necessarily if he
17 did not act -- let me put it this way. He's not guilty if he
18 did not act in concert.

19 THE COURT: Well, that's another converse.

20 MR. ROGERS: And that could be another converse.

21 MS. GOROVSKY: That's a different element of the
22 offense.

23 THE COURT: That's a different element.

24 MS. GOROVSKY: You can --

25 MR. ROGERS: Exactly. That's what I'm saying.

1 THE COURT: You could converse --

2 MR. ROGERS: And so, not having had the benefit of
3 their verdict directors and their submissions at the time --

4 MS. GOROVSKY: Well, I mean, you're entitled to
5 converse any element that you want.

6 MR. ROGERS: That's true. Or multiple elements.

7 THE COURT: Yes, you can do multiple elements. But
8 if you give this one, it would have to be "whether Ryan
9 Ferguson or Charles Erickson obtained car keys and a watch."
10 Or if you choose not to give this one, and you just want to
11 converse their acting in concert...

12 Well, come to think of it...

13 I think you could draft it in such a way that you
14 can converse --

15 MR. ROGERS: I am going to draft it I think to
16 converse Paragraph Fifth of their verdict director, which is
17 the -- "with the purpose of promotion -- promoting the
18 commission of the robbery."

19 THE COURT: In other words, "If you have a
20 reasonable doubt that, with the purpose of promoting or
21 furthering the commission of the robbery in the first degree,
22 the defendant acted together with Charles Erickson in
23 committing the offense, you will find the defendant under
24 Count II not guilty -- or not guilty under Count II of
25 robbery in the first degree as submitted in Instruction

1 Number blank."

2 MR. ROGERS: That's what I'm --

3 THE COURT: All right. Well, that's fine.

4 MR. ROGERS: And I will omit the word "that," I
5 think, because it makes no sense, since grammatically it
6 refers back to the offense which we found had occurred.

7 THE COURT: All right. Does that take care of the
8 instructions?

9 MS. GOROVSKY: It should, Your Honor.

10 MR. ROGERS: It should.

11 THE COURT: All right. We'll need to go over these
12 and number them when you get them in.

13 MR. ROGERS: You're not submitting your drugs or
14 alcohol condition or your alibi defense?

15 MS. GOROVSKY: Can I have one second to ask Kevin
16 that question?

17 MR. ROGERS: Trust me --

18 (Ms. Gorovsky left chambers and then returned.)

19 MS. GOROVSKY: He does want to give it. He's not
20 completely sure, but he wants to give it to you tonight just
21 in case we decide we're going to use that. And I have that.

22 MR. ROGERS: Which one's that?

23 MS. GOROVSKY: Voluntary intoxication.

24 MR. ROGERS: I'm assuming that, over our
25 objection --

1 THE COURT: Well, this is 310.50.

2 MR. ROGERS: If I asked for it, you wouldn't give
3 it, I'll tell you that.

4 THE COURT: Well, I would. There's evidence that
5 there was booze drunk.

6 MR. ROGERS: There's not evidence sufficient to -- I
7 don't care.

8 THE COURT: I'll think on it also.

9 MR. ROGERS: And how about your alibi?

10 MS. GOROVSKY: No. That was only if you were going
11 to do that. And -- no.

12 MR. ROGERS: Kevin was going to let us put on the
13 unnoticed alibi?

14 MS. GOROVSKY: Well, that's the thing. I drafted
15 these a long time ago.

16 THE COURT: All right. We'll see you tomorrow
17 morning.

18 MR. ROGERS: Thank you, Your Honor.

19 MS. GOROVSKY: Thanks, Judge.

20 MR. ROGERS: 8:30? That's the deal?

21 THE COURT: 8:30 is when they're coming back.
22 That's all too soon, isn't it?

23 (Adjourned for the evening.)

24 - - -

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P R O C E E D I N G S

October 21, 2005

- - -

The following proceedings were held out of the presence of the jury:

THE COURT: Case Number 165368, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: The defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: And I understand the jury is ready?

DEPUTY COURT MARSHAL: The jury is ready.

THE COURT: All right. You may return them to the courtroom.

MR. ROGERS: Your Honor, one preliminary matter. Your Honor, yesterday we had an oral motion for judgment of acquittal at the close of the state's evidence.

THE COURT: You can bring the jury in.

MR. ROGERS: Be supplemented. I would now file the written motion.

(Motion filed.)

MR. ROGERS: Thank you, Your Honor.

- - -

The following proceedings were held in the presence of the jury:

1 THE COURT: Good morning, ladies and gentlemen. If
2 you would be so kind as to answer as the clerk takes
3 attendance here.

4 (Roll call by Julie Smith, Deputy Clerk.)

5 THE COURT: You may be excused.

6 (Clerk excused.)

7 THE COURT: Defendant may call his next witness.

8 MR. ROGERS: Your Honor, defendant calls
9 Dr. Elizabeth Loftus.

10 THE COURT: Would you raise your right hand, please.

11 - - -

12 ELIZABETH LOFTUS,

13 being first duly sworn by the Court, testified as follows:

14 THE COURT: Would you take the witness stand,
15 please.

16 And let's see if we've turned on the mics. We have.
17 The small, flat, black metal device there is a live
18 microphone. And you may need that to amplify your voice.
19 The other mics will not amplify your voice.

20 - - -

21 DIRECT EXAMINATION

22 BY MR. ROGERS:

23 Q. Good morning, Doctor.

24 A. Good morning.

25 Q. Would you please tell us your name for the record.

1 A. My name is Elizabeth Loftus.

2 Q. And I called you doctor. What kind of doctor are
3 you?

4 A. Well, I have a PhD in the field of psychology.

5 Q. I am going to hand you what has been marked for
6 identification as Defendant's Exhibit Z and ask you what that
7 is.

8 A. This is a copy of my vitae as of September 2005.

9 Q. And what's a vitae?

10 A. It's a record of my education, publications, work
11 experience, speeches, and other -- other professional
12 experience.

13 Q. Okay. And that appears to be quite voluminous.

14 A. Well, it's 33 pages.

15 MR. ROGERS: Your Honor, I would at this time offer
16 Defendant's Exhibit Z, with the understanding we are not
17 seeking to publish it to the jury at this time, but that
18 should they have questions concerning Dr. Loftus's
19 qualifications, they might be allowed to request it and look
20 at it during their deliberations.

21 MR. CRANE: Well, I've seen that. It is voluminous.
22 I -- I guess if it's only offered to establish her
23 foundationally, I don't have an objection. I don't think
24 it's appropriate -- I mean, she can testify to her
25 qualifications. It doesn't necessarily go back to the jury.

1 But I guess you're not asking for that.

2 MR. ROGERS: I'm not asking for it to be published
3 at this time. I would want it in evidence so if the jury
4 wishes to review it, they can. I do intend to ask about some
5 excerpts of this, but I'm not going to go through all 33
6 pages.

7 THE COURT: Do you have an objection to the
8 admissibility of Defendant's Exhibit Z?

9 MR. CRANE: Well, with the limitations stated by
10 defense counsel, which I think we can take up later, I don't
11 have any trouble with him showing it to her and having it
12 marked and offered for purposes of foundation.

13 THE COURT: Okay. Do you object to its being
14 admitted so that it would be available to the jury at some
15 future time if they care to look at it? Because it's been
16 offered for that purpose as well as for foundation, to
17 determine this witness being an expert.

18 MR. CRANE: Yeah, I guess I don't mind that.

19 THE COURT: Defendant's Exhibit Z, as in zebra, is
20 admitted.

21 - - -

22 Defendant's Exhibit Z admitted into evidence.

23 - - -

24 Q. You started with telling us you have a PhD in
25 psychology. Would you first go through your formal education

1 for which you have received degrees.

2 A. Well, just starting with college, I went to the
3 University of California-Los Angeles as an undergraduate, and
4 I received a bachelor's degree in mathematics and in
5 psychology in 1966. And then I went --

6 Q. Excuse me. Let me stop you there. Was that degree
7 qualified in any way? In other words, was it just a regular
8 bachelor's degree or --

9 A. Do you mean with honors or --

10 Q. Yes.

11 A. I -- I think I received highest honors, but I --
12 some -- or high honors, or something like that, but --

13 Q. That was 1966?

14 A. 1966.

15 Q. Okay.

16 A. After UCLA, I moved to Stanford. I received a
17 master's degree in psychology in 1967, and then a PhD in
18 psychology in 1970.

19 Q. And what is your current job?

20 A. Currently I hold the title of distinguished
21 professor at the University of California-Irvine. And I have
22 positions in several departments, but the main departments
23 are psychology and social behavior. And my second department
24 is criminology, law, and society.

25 Q. And how long have you been at the University of

1 California-Irvine?

2 A. I'm just going into my fourth year of teaching
3 there.

4 Q. Okay. And before that, where did you teach?

5 A. I taught at -- for a long time at the University of
6 Washington in Seattle. I was on the regular faculty at UW.

7 Q. You said, "for a long time." Do you know when you
8 started there?

9 A. I think my -- I became an assistant professor in
10 1973, and then worked my way up to full professor.

11 Q. And in what departments there?

12 A. In the psychology department.

13 Q. And do you still hold any position on the faculty of
14 the University of Washington?

15 A. I still am an adjunct professor at the University of
16 Washington, in the psychology department, and also an adjunct
17 professor of law, but those are pretty much courtesy
18 positions. I still have some collaborations. I just
19 finished -- one of my PhD students just finished her PhD,
20 still at Washington. So I do still have connections and
21 collaborations.

22 Q. And have you served as a visiting professor at any
23 colleges or universities?

24 A. I have, yes. I -- well, I was a visiting professor
25 at Harvard in 1975. I was a visiting professor at the

1 Georgetown Law Center, which is the law school for Georgetown
2 University, in 1986. And I was a visiting faculty at the
3 National Judicial College at the University of Nevada in
4 Reno. And that is a school for state-level judges. I taught
5 there for -- during -- taught some courses in the summers,
6 for about 13 years.

7 Q. Have you -- and I don't want to go into details --
8 have you also received honorary degrees from various
9 institutions around the world?

10 A. I have. I've -- I have five honorary doctorates
11 from universities in the United States and in Britain and the
12 Netherlands and in Israel.

13 Q. Have you been awarded grants and contracts by
14 various government agencies in the United States?

15 A. I have, yes. I have -- well, the National Science
16 Foundation and the National Institute of Mental Health and
17 some other government agencies have supported my laboratory
18 research in the area of memory.

19 Q. And calling your attention to other awards and
20 honors you have received, and I'm just selecting maybe one or
21 two here, tell us what is the American Academy of -- excuse
22 me, the National Academy of Sciences?

23 A. The National Academy of Sciences is an organization
24 of scientists that I think may have begun in the 18th
25 century. And it is probably the most prestigious

1 organization that an American scientist can be elected to,
2 that we have.

3 Q. Have you been elected to the National Academy of
4 Sciences?

5 A. I was elected in 2004, yes.

6 Q. And I don't think it's on Exhibit Z, but have you
7 read a published article about the 100 greatest psychologists
8 of the 20th century?

9 A. There was an article that ranked the 100 most
10 eminent psychologists of the 20th century -- or influential
11 psychologists or something of the 20th century.

12 Q. And were you ranked in that body?

13 A. I was.

14 Q. What number?

15 A. Well, I happen to have been number 58. But it had
16 Freud and Piaget and B. F. Skinner at the top, so I was proud
17 to be number 58.

18 Q. Were there any women ranked above you?

19 A. No.

20 Q. Moving now to the area of professional memberships,
21 are you a member of the American Psychological Society?

22 A. I am, yes.

23 Q. And have you served in any position as an officer of
24 this organization?

25 A. Yes. I was president of the American Psychological

1 Society in 1998-99.

2 Q. And do you also belong to other professional
3 organizations?

4 A. I do, yes.

5 Q. Have you done any consulting for governmental or law
6 enforcement agencies?

7 A. I've done quite a bit of consulting for different
8 government agencies, yes.

9 Q. And could you name some of those?

10 A. Oh, I did some work for the Department of Justice on
11 the national crime survey, which is a survey of crime
12 victimization, trying to get better information from victims
13 of crimes, to understand crime. I've consulted with the U.S.
14 Secret Service and the Federal Bureau of Investigation and
15 the CIA and the IRS. Those are a few of the agencies with
16 whom I've done consulting over the years.

17 Q. And have you published extensively in the field of
18 psychology?

19 A. I have. I -- it's just an estimate, but
20 approximately 20 books and maybe 400 scientific articles and
21 chapters since I received my PhD.

22 Q. And are some of these books textbooks?

23 A. Well, I do have some textbooks. A textbook in
24 memory that was used in human memory courses. A textbook --
25 content of psychology and introductory psychology textbook.

1 But many of them are books that are more exclusively about
2 the subject of memory.

3 Q. Okay. And with regard to your 400 and some
4 scientific articles that have been published, have these been
5 published in peer-reviewed journals?

6 A. Yes. The majority of them in peer review journals,
7 yes.

8 Q. And have you also, over your career, been invited to
9 address conferences of psychologists or to address university
10 classes or graduate programs and seminars in the field of
11 psychology?

12 A. Well, I do, every year, give lectures at other
13 institutions than the one where I'm primarily teaching. And
14 sometimes they are colleges and universities and sometimes
15 they're organizations of lawyers or judges or police or
16 others that might be interested in the subject of memory.

17 Q. And have you been to Columbia, Missouri, before?

18 A. I have, yes. I was invited and came in the early
19 1980s and spent three days at the university.

20 Q. What were you doing there?

21 A. Lecturing.

22 Q. Okay. Have we basically covered the highlights?

23 A. I think so. Probably more than you really wanted to
24 know.

25 Q. Let me now move to the question of human memory.

1 And is that a focus of your research and study and writing
2 and teaching at this time in your career?

3 A. Well, that -- it has been throughout my career. The
4 study of human memory.

5 Q. Is there a generally accepted theory for how human
6 memory works, in the scientific field in which you practice?

7 A. There is a generally accepted theory. The theory --
8 there's a theory about how memory does not work. That it
9 does not work like a video tape recorder. You don't just
10 record the event and play it back later the way a videotape
11 would work. The process is much more complex than that.

12 And what -- what actually happens when people are
13 trying to remember something is they take bits and pieces of
14 experience and they construct something. So memory is
15 actually a very constructive process.

16 But what that also means is that people will take
17 bits and pieces of information that they pick up, from other
18 times, from other sources, and integrate it into their
19 recollection and construct something, often something that's
20 different from the way things really happened.

21 Q. Okay. What are some of the things that might affect
22 memory?

23 A. Well, what one of the -- and at some point maybe I
24 could have a piece of paper or -- just to illustrate
25 something for the jury.

1 Q. We can do this. Are you used, Doctor, in your
2 teaching work, to using visuals to help teach?

3 A. Well, it does help. Usually works better when I
4 don't have a sprained ankle, but.

5 THE WITNESS: Your Honor, I'm sorry to put my back
6 to you, but.

7 THE COURT: I'd only ask that you speak up enough so
8 that the reporter will be able to take down what you're
9 saying to make a record. And she had and may still have a
10 bad case of laryngitis, so she may not be able to speak to
11 you and ask to you speak up. But if you'd be mindful of
12 that, please.

13 A. In response to your question, when some event
14 occurs, and we lay down information into the memory system,
15 after the event is completely over, individuals are sometimes
16 exposed to post-event information. And when this post-event
17 information becomes available to witnesses, they will
18 frequently incorporate it into their recollection, and it can
19 cause an alteration or a distortion or a change in somebody's
20 recollection.

21 So, this is one of the most important factors that
22 influences the accuracy of somebody's memory, because if
23 post-event information is inaccurate, it's going to make a
24 person's memory inaccurate.

25 Q. And what would happen to someone who -- would

1 someone who had been exposed to post-event information be
2 able to distinguish what portion of the memory was derived at
3 the time of the event and what portion was derived from the
4 post-event information?

5 A. Well, I can give you an answer based on one of my
6 many experiments in this area, studying post-event
7 information.

8 In some of the studies that we've done, what we've
9 done is we've shown people at the event a simulated accident.
10 And let's say at the time of the accident the car goes
11 through a stop sign. But later on we might ask our witnesses
12 a leading or a suggestive question that essentially
13 insinuates that it was a yield sign. We might ask them a
14 leading question that -- such as: "Did another car pass the
15 red Datsun while it was at the intersection with the yield
16 sign?" So we have insinuated this information.

17 And later on -- I've run out of paper here, but when
18 we test our witnesses, say, "What do you remember seeing at
19 the accident," many people will tell us they saw the yield
20 sign. They have succumbed to this post-event information.
21 They claim they saw the yield sign. And they're not even
22 aware that their recollection was influenced by this
23 post-event information.

24 Q. I'm trying to get you a bigger piece of paper to
25 draw on, if you'd like.

1 So the person whose memory has been influenced does
2 not distinguish between the event information and the
3 post-event information.

4 A. That's correct. In these studies, people frequently
5 become convinced that they saw the yield sign. And they are
6 unaware of the fact that it really is something that they
7 were exposed to after the accident was completely over.

8 Q. Let's move this over. Let's move this one up.
9 There's more paper, if you need it.

10 A. Thank you.

11 THE COURT: May she resume the stand now?

12 MR. ROGERS: Yes.

13 Q. And this is part of a generally accepted scientific
14 theory of how memory works?

15 A. It is. It's part of the evidence for the
16 reconstructive nature of memory. And there now have been
17 hundreds of studies of post-event suggestion, showing how it
18 can contaminate or distort or change somebody's recollection.
19 And I've given an example of a study that showed that when
20 you question people in a leading fashion, when you insinuate
21 erroneous details, that people will pick up that information
22 and adopt it as their own memory.

23 But in our studies and in the real world, people
24 pick up information from conversations with other people;
25 they pick up information from media coverage; they pick up

1 information from other sources. And those details can be
2 incorporated into the memory and can cause a distortion, an
3 alteration, or sometimes just a supplementation of the
4 memory.

5 Q. And has this -- I think you've already answered
6 this. Has this phenomenon been frequently documented and
7 replicated in scientific studies?

8 A. Well, my answer is yes. That it's not only been
9 documented and replicated, but you almost will not be able to
10 pick up a textbook in the -- any textbook in the area of
11 human memory or cognitive psychology, or possibly even
12 introductory psychology, and not find some reference to this
13 phenomenon and this basic work.

14 Q. And is there any -- in the experiments that have
15 been done, is there any attempt to determine how confident
16 the experimental subjects are of their memories, in relation
17 to whether they are actual memories from the event or
18 memories induced by some post-event information?

19 A. Well, I can say that when people adopt post-event
20 infor -- when they're exposed to the post-event information
21 and they adopt it as their own recollection, they are often
22 very confident that that's what they personally experienced.

23 And the -- the -- the post-event information
24 problem, I should add, is even more severe when a long
25 interval of time has passed since the event occurred. And --

1 perhaps I could illustrate what I mean.

2 Q. Do you want to move across the board to this other
3 piece of paper?

4 A. Well, I'll move over to this one.

5 So if -- if an event occurs, and we want -- of
6 course, it's a matter of some common sense that when time
7 goes by, our memory is going to fade. Studies have shown
8 that, and personal experience bears that out. So if I were
9 to plot how good a person's memory is likely to be, where at
10 this end of the axis we have good memory, and down here we
11 have poorer memory, and along this X axis time's passing,
12 then you expect to see a forgetting curve. So memory is
13 fading. This is something of a matter of common sense.

14 What's not so much a matter of common sense is: As
15 that memory is fading as time is passing, the memory becomes
16 more and more vulnerable to this post-event information
17 problem. So, if you try to distort somebody's memory here
18 while it's very fresh and good, then it's going to be harder
19 to distort it. Not impossible, but harder. But if you let
20 time pass, then the memory is weaker. It becomes more
21 vulnerable to post-event information. And people then become
22 more likely to embrace the post-event information as their
23 own memory and become confident about it.

24 Q. How does this fit in with the notion that we might
25 have, after the passage of time, a fairly weak memory, but if

1 you're shown a diary that you wrote the next day, then you
2 might be -- you might think that you would remember or remind
3 you of something? How does that work?

4 A. Well, of course people can be reminded of things
5 that they haven't thought about for a long time. They can --
6 a reminder is something that we call a retrieval cue. You
7 can -- you can be shown a retrieval cue of some sort. You
8 can be reminded of something you haven't thought about. You
9 can even be reminded of something that was perhaps
10 unpleasant, that you haven't thought about for a long time.
11 And you just have to go to a high school reunion, and you can
12 experience that for yourself.

13 But that -- that being said, it's also the case that
14 sometimes a true retrieval cue can be inserted into your
15 memory. It can almost feel like it's a memory, but you're
16 actually getting a piece of information that just happens to
17 be accurate information. And you're feeling -- you can feel
18 like you're remembering it. But in a way it's being
19 reconstructed again. It just happens to be accurate.

20 Q. And you've performed and read and analyzed studies
21 that replicate that phenomenon?

22 A. Well, we have -- we have also given people
23 post-event information that's accurate. And it can boost
24 their memory performance.

25 Q. So it wouldn't be inconsistent with anything over

1 here about the erroneous -- deliberately erroneous post-event
2 information interfering with memory and the phenomenon of
3 somebody who gets accurate post-event information, which
4 might either help them retrieve a real memory or create an
5 accurate but interfered-with memory? Is that a --

6 A. Right. There's nothing inconsistent about that.

7 Q. Okay. Now, if somebody had given -- have you done
8 experiments where somebody is given a deliberately false type
9 of retrieval cue?

10 A. Well, of course in my experiments, including the
11 stop sign/yield sign experiment, we are deliberately giving
12 people a detail that we know is false, because we know what
13 they originally saw. We've got the film. We know in this
14 example that it was originally a stop sign. So we know our
15 detail is false. Out in the real world, you don't really
16 know what truly happened. So you can -- you don't usually
17 know what truly happens, so you don't usually know that the
18 detail you're giving is false. In other words, I think
19 things may be happen a little more inadvertently out in the
20 real world, rather than deliberately, the way they do in the
21 experimental situation.

22 But if -- I'm not sure if you were also asking
23 whether we have planted larger false memories than just --

24 Q. That's where I was going to go --

25 A. Okay.

1 Q. -- but I haven't gotten there yet. I'll ask you
2 that. Have you done that?

3 A. Yes. So I've given you an example here. And again,
4 there are hundreds of these studies. And they -- the stop
5 sign/yield sign is just one example of it, where there have
6 been deliberate attempts to change a detail here and there
7 about an event that actually was experienced.

8 In other work that I and other psychologists who
9 study memory have done, we've gone even further than this.
10 We've tried to plant entirely false memories into the mind of
11 people, for things that didn't happen.

12 Q. Could you give an example of that?

13 A. Well, the first -- our first effort to do this --
14 and you have to keep in mind that, as researchers, we have to
15 devise a method for planting an entirely false memory so that
16 we can study the process, but we don't want to harm people.
17 And so the method that we came up with was to convince people
18 that, when they were a child, they were lost in a shopping
19 mall for an extended period of time. That they were
20 frightened; they were crying; and ultimately they were
21 rescued by an elderly person and reunited with the family.
22 And we managed, in our first study, to plant that false
23 memory in the minds of about a quarter of our sample of
24 adults.

25 Q. One in four people who had never experienced that

1 came away from your study with that memory?

2 A. Exactly. Now --

3 Q. How did you do that?

4 A. Well, the way we -- the way we did it is we talked
5 to their family members. So, for example, we talked to their
6 parents. We found out some things that happened to the
7 subject, who's now older. Let's say a young adult.

8 Q. Some real historical events.

9 A. Yeah. We found out some true things that happened
10 when the subject was younger. And then, with the parents, we
11 made up the story about being lost in a particular shopping
12 mall, for an extended time, frightened, crying, and rescued,
13 and so on. We presented the information to the subject, the
14 true memories and then the false one, as if they were all
15 true, and tried to encourage the subject to remember those
16 experiences.

17 Over three suggestive interviews, we succeeded in
18 getting about a quarter of our -- as I said, a quarter of our
19 sample to fall sway to the suggestion and come to remember
20 this made-up experience.

21 Now I should add that the study got criticized, and
22 people said, "Well, getting -- getting lost is so common.
23 Even if it was lost for an extended time. Can't you show us
24 you can do this with an experience that would be less common
25 or more unusual or more bizarre or more painful?" And other

1 investigators came along, used this technique, and planted
2 false memories of being a victim of a vicious animal attack;
3 they planted false memories of being a victim of a serious
4 indoor or serious outdoor accident. One study from the
5 University of Tennessee, they planted a false memory of: You
6 nearly drowned and had to be rescued by a lifeguard.

7 And so these studies showed that it is possible to
8 take a person, and with the right amount of suggestion, to
9 get a significant number of people to come to believe that
10 they had these very rich, false -- rich experiences that are
11 completely made up, by the researchers, with the help of the
12 family members.

13 Q. And what do you mean by "rich"?

14 A. Well, I use "rich false memory" to refer to these --
15 not just changing a detail here and there: Turning a stop
16 sign into a yield sign; making somebody believe that a person
17 who ran from the scene had curly hair instead of straight
18 hair. That's easy. But to build a whole false memory in the
19 mind of someone, rich in detail, that's a little harder.

20 Q. And with regard to the false memories, they are put
21 in the context of actual events that the person has a real
22 memory of?

23 A. In the studies that take the form of the stop
24 sign/yield sign procedure, there really was a real event. We
25 really did show people an accident. A simulated accident.

1 It really did have a stop sign. We changed the memory and
2 converted it into a yield sign. But when we plant these
3 false memories about being lost for an extended time or
4 nearly drowning and have to be rescued by a lifeguard, there
5 you're creating a whole rich experience. You're planting a
6 whole memory. They may draw on bits and pieces of their own
7 life experience to build that false memory, but we talk about
8 those as very whole false memories. Or rich false memories.

9 Q. And once again, of those one in four people who
10 are -- who are made to remember these experiences that never
11 happened, can they distinguish between that false memory and
12 their other real memories?

13 A. Well, sometimes you can find -- in some studies you
14 can find that people are a little bit more confident about
15 particularly some of their real memories than the false one
16 that we've created. Sometimes you'll find they have a little
17 bit more detail about the genuine true memories than they do
18 about the false memory that we've planted. But when you get
19 somebody rehearsing a false memory, you know, over and over,
20 it can become very detailed; people can become very confident
21 about it; and they can even become very emotional about it.

22 Q. And -- I lost my thought there. If someone -- well,
23 let me ask it this way. You've shown us on the diagram the
24 impact of time in weakening memory and making it more
25 susceptible to these types of false memories. Are the

1 studies that you've done all things that people end up
2 remembering happening to them as children? Or does this
3 happen with experiences that people are taught they
4 experienced as teenagers, adults, whatever?

5 A. Well, in many of the examples I just gave, it is
6 taking individuals and planting a childhood memory. But we
7 have other examples where people can be made to believe that
8 they experienced things more recently. So people can be led
9 to believe that, say, two weeks ago they came into a
10 laboratory situation and they performed certain actions that
11 they didn't actually perform.

12 Q. And the accident, stop sign/yield sign, would be
13 something of an adult memory, but a small detail; correct?

14 A. Well, right. And those, if you want to call them
15 the stop sign/yield sign type of study, those are certainly
16 distortions of memory for quite recent experiences.

17 Q. With regard to other studies concerning adult
18 memories, is there still the -- is it easier to distort as
19 time passes?

20 A. Yes.

21 Q. Even if something that somebody experiences as an
22 adult can be distorted with the passage of time.

23 A. Right. If I -- if I want to distort somebody's
24 memory, I know that if I just let a little bit of time pass,
25 I'm going to have an easier time doing it.

1 Q. With regard to the creation of what you referred to
2 as rich false memories -- whole memories of whole events that
3 never occurred?

4 A. Right.

5 Q. -- can you give us an example of a study which shows
6 the creation of that kind of rich false memory of an adult
7 experience?

8 A. Well, actually I -- there is a -- there's a recent
9 study that was sent to me by a professor from Wesleyan
10 University, in which adults were taken on a walk through the
11 campus. These are college-age adults. And later, through
12 imagination, and other techniques, were led to believe that
13 they did things that they didn't do on this walk,
14 including -- I know is going to sound somewhat unusual, but
15 including proposing to a Pepsi machine.

16 Q. Were they under the influence of anything at the
17 time?

18 A. No. But if -- if they walk through a campus and
19 they engage in a lot of behaviors, and then later on they
20 start imagine -- they are encouraged to imagine that they
21 engaged in other behaviors, they will sometimes believe that
22 they actually performed a behavior that they only imagined.

23 So -- this phenomenon is actually called imagination
24 inflation. It's another one of the ways that we get people
25 to believe that they did things they didn't do. You just

1 make them imagine it, and they imagine it -- especially if
2 they imagine it multiple times, they -- they soon start to
3 think they actually did it.

4 Q. Let me move from the creation, if you will, of
5 memory to the destruction or disregarding of memory.

6 A. The idea of repressed memory?

7 Q. The idea of repressed memory. Thank you. See. I
8 don't get to ask leading questions, but you can ask me
9 leading -- give me leading answers. Tell me about the idea
10 of repressed memory.

11 A. Well, there is a kind of hand-me-down Freudian idea
12 floating around our society that people can take horrific
13 experiences, usually it's -- you hear about it in the context
14 of, say, you know, years of brutalization banishes into the
15 unconscious, massively repress these memories, be completely
16 unaware that these things happened, until the person
17 undergoes certain techniques, maybe guided imagery or dream
18 interpretation, what have you, and the person then becomes
19 aware of these horrible experiences. And many individuals
20 have been accused in our society based on such accusations.
21 But, in fact, there really is no credible scientific support
22 for the idea that memory works this way.

23 Q. So you've talked about scientific support that's
24 published and peer reviewed and replicated and looked at and
25 challenged and debated in the profession with regard to the

1 phenomenon -- phenomena you have described in terms of
2 post-event interference or even creation of memory? Correct?

3 A. Yes.

4 Q. Is there anything like that to show that, the day
5 after a horrible event, somebody can decide not to remember,
6 and really won't?

7 A. I have not seen any credible support for the idea
8 that somebody, after some horrific event, a day later they
9 don't remember; two days later they don't remember; one year
10 later, when presented with strong retrieval cues, they don't
11 remember; two years later, with more retrieval cues, they
12 don't remember; and then suddenly they remember. There is no
13 credible scientific support for that, as -- as the way memory
14 works.

15 Q. Then -- by the way, when you say, "the way memory
16 works," is there a term in your field called confabulation?

17 A. Yes, there is.

18 Q. What's that?

19 A. Well, confabulation really just refers to filling in
20 the details of or the gaps in somebody's memory. I mean,
21 it's probably something we all do to some extent when we're
22 telling a story and we -- and we fill in a few details to
23 make the story make sense. But sometimes people confabulate
24 and they, you know, they throw a whole lot of erroneous
25 information into their story in order to tell a good story.

1 And filling the gaps with details is what confabulation is.

2 Q. Is that the same as consciously making up things to
3 try and plug holes in your story?

4 A. Well, when you put it that way, you're raising the
5 idea of deliberate lying.

6 Q. Okay. So there's a difference.

7 A. There's a difference between deliberate lying and a
8 -- kind of a honest effort to fill in gaps in memory that you
9 think might be right, that you draw an inference could have
10 happened, and so you fill in the gap in your memory and
11 suggest that it did happen. But it's often done without any
12 intention to deceive.

13 Q. Whereas if somebody came and deliberately added a
14 detail that they knew was -- they were making up, that would
15 not be confabulation; that would be lying.

16 A. Well, I would -- I would call that deliberate lying.
17 And if -- I study honest errors. And errors that are a
18 product of post-event suggestion or some other process. And
19 if somebody were interested in -- a deliberate liar, I would
20 send them to a different psychologist.

21 Q. Okay. Let me then turn your attention to the case
22 we're here about. Did you receive some materials to review
23 in this case?

24 A. I did, yes.

25 Q. And what did you receive?

1 A. Well, I received a large number of police reports
2 and deposition testimony and interviews and videotapes and --
3 so I -- I'm sure I didn't receive everything about the case,
4 but I did receive a great deal of information.

5 Q. You received, in particular, police reports
6 concerning the interview of Charles Erickson by Detective
7 Short that was not videotaped? Is that correct?

8 A. Well, information about that, yes.

9 Q. Yeah. And then you got three different videotaped
10 interviews of Mr. Erickson; one by a Detective Short, one
11 driving around in the car, and a third one by a Detective
12 Nichols?

13 A. Yes. Well, I have them organized by what time they
14 were done --

15 Q. Okay.

16 A. -- on March 10th.

17 Q. And did you also have a transcript of those
18 videotaped interviews to facilitate your review?

19 A. Yes.

20 Q. And were you able to find in those materials any
21 examples of this kind of erroneous post-event information
22 that you talked about that would create a suggestion?

23 A. Well, of course I don't know exactly what happened,
24 obviously, on the morning of November 1st, 2001.

25 Q. So you don't know what's erroneous and what's not.

1 A. Right. So -- but all -- what is apparent from these
2 materials is: A very long time passes before a key
3 individual purports to be recalling things about the
4 experience. And during that very long time, two years or
5 more, there are ample pieces of post-event information, that
6 come in the form of newspaper articles and other media
7 coverage, that come in the form of suggestive and leading
8 questions. Even if those suggestive and leading questions
9 were posed inadvertently, they contain information, and in
10 that sense, it is post-event information.

11 Q. And did you also view and read in the transcripts
12 and view in the videotapes Mr. Erickson even describing his
13 exposure to post-event information?

14 A. Right. Well, Mr. Erickson did explicitly say that
15 he was exposed to the news and the media -- some of the media
16 coverage, and even occasionally made reference to remembering
17 particular details from the media coverage.

18 Q. Calling your attention to the last interview of
19 Mr. Erickson on March the 10th, which would be the interview
20 with Detective Nichols, and I don't know what time it was
21 right now, but it was the last one --

22 A. 5:01.

23 Q. 5:01. Were you able to look at the interrogation
24 technique used by Detective Nichols after Mr. Erickson tried
25 to say that he might just be fabricating the whole thing?

1 A. Well, now, I don't remember exactly which interview
2 it was, but he did -- Mr. Erickson did receive pressure
3 during at least one interview that day, that the detective
4 didn't want to hear anything about fabrication.

5 Q. What would be the impact of that on somebody who was
6 expressing uncertainty as to the accuracy of their perceived
7 memory?

8 MR. CRANE: Judge, if I might, I'd like to object at
9 this point. The question is, for this witness, who I realize
10 is testifying as an expert, to speculate, though, on the
11 impact of this interview on other people, I don't know how
12 she has -- there's been any foundation laid for her ability
13 to do that.

14 MR. ROGERS: I'll back up a couple of steps, Judge.

15 THE COURT: You may.

16 Q. Have there been scientific studies in your field --
17 and by the way, would it be fair to characterize you as at
18 least one of the leading psychologists in the study of human
19 memory, especially with the aspect of post-event information
20 and those kinds of things?

21 A. Well, I'd prefer it if somebody else would
22 characterize me that way, but.

23 Q. Is that what they did when they put you on the list?

24 A. Right.

25 Q. Okay. Fair enough. Anyway, are you familiar with

1 studies that talk about the impact of various questioning
2 techniques on those kinds of memory things?

3 A. Yes.

4 MR. CRANE: Judge, that question's vague. "Those
5 types of questions on those types of memory things."

6 Q. Studies which would be relevant to your expertise to
7 answer the question to which Mr. Crane previously objected.

8 A. Yes.

9 Q. Okay. And is your analysis of --

10 MR. CRANE: Judge -- wait a minute. There's no
11 foundation. If he's going to ask the same question, there's
12 been no foundation.

13 MR. ROGERS: I'm --

14 THE COURT: I don't know what he's going to ask.

15 MR. ROGERS: I'm getting to the other -- another
16 aspect of the foundation.

17 Q. Is your analysis of the interviews of Mr. Erickson,
18 which you have reviewed both on videotape and in transcripts
19 and in police reports, based upon the knowledge derived from
20 those kinds of studies?

21 A. Yes.

22 Q. At least in part. And many other kinds of studies
23 as well.

24 A. Right.

25 Q. Based upon your entire professional experience and

1 expertise.

2 A. Correct.

3 Q. And based upon the scientific information you have
4 learned and developed and established through experimentation
5 and review of other psychologists' work, and having them
6 review yours, and all of those things, do you have an opinion
7 as to whether the techniques used by the detective who yelled
8 at Mr. Erickson and told him he didn't want to hear any
9 equivocation, he just wanted the straight facts, would have
10 on Mr. Erickson's perceived memory?

11 MR. CRANE: Would renew my objection, Judge.
12 There's been no testimony from this witness that she's ever
13 reviewed any studies that correlate to the set of
14 circumstances here. And that's what he's asking her. And
15 it's been just a real vague: "Have you seen studies?"
16 "Yeah." There's no foundation for this, Judge.

17 THE COURT: The objection as to foundation is
18 sustained.

19 Q. Have you reviewed studies which correlate to the
20 effect -- or which deal with the effect of interrogation
21 techniques, such as those used by Detective Nichols on
22 Mr. Erickson at that point in the videotape you reviewed, on
23 the memory of somebody who's subjected to those kind of
24 interrogation techniques?

25 A. Well, to clarify, I -- many of the studies that I

1 and others have done that show that, if you conduct
2 interviews that suggest details in the course of interviews,
3 that witnesses will pick up -- often pick up those details
4 and claim them as their own memory. And so that aspect is
5 something that I personally have studied. There are other
6 psychologists, I mean, most notably B. F. Skinner, who has
7 published many studies and many theoretical papers on
8 reinforcement and punishment. And so if you reinforce a
9 particular response or punish a particular response, you can
10 change the behavior of subjects. They'll conform to those
11 reinforcements.

12 Q. Is memory a behavior in the context of the kind of
13 B. F. Skinner type of thing?

14 A. Yes. A memory report is a behavior.

15 Q. The report of memory is a behavior.

16 A. Right.

17 Q. And is there any -- any studies which deal with the
18 strength of the suggestion, the forcefulness of the
19 suggestion, and how that might impact its influence on the
20 memory?

21 A. I -- I don't think I can name a study that really is
22 about the strength of the suggestion. There certainly have
23 been studies of repeated suggestion working better than a
24 single suggestion --

25 Q. Okay.

1 A. -- but...

2 Q. Let me ask you this. During your review of the
3 Erickson interview materials, that's shorthand for the police
4 report of the interview with Mr. Short that was not
5 videotaped, the three videotaped interviews and their
6 transcripts. Okay? And I'll also include in that the
7 October 1st police report of an interview that happened
8 October 1st, 2004. Did you see, in your review of those
9 materials, evidence of repeated suggestion by the
10 interviewers?

11 A. Well, I certainly saw evidence of repeated
12 suggestion in the sense that repeatedly details are being
13 introduced into the interview that are coming, not from
14 Mr. Erickson, but coming from the person who's doing the
15 interviewing. And then later on, Mr. Erickson's testimony,
16 or recollection or whatever you want to call it, changes.

17 Q. Okay. Would it help illustrate what you're talking
18 about to show a fairly short clip from one of those videos?

19 A. It -- it might, to illustrate the point of how
20 something can be introduced by the interviewer rather than by
21 the person being interviewed.

22 Q. If you will bear with us, we'll...

23 MR. ROGERS: Your Honor, for the record, we are
24 playing an excerpt of Defendant's Exhibit A.

25 MR. CRANE: This is in evidence?

1 MR. ROGERS: Yes, it's in evidence. They have seen
2 the whole thing before, and they've seen maybe a clip or two
3 before.

4 (Excerpt playing.)

5 THE COURT: Excuse me just a minute. Would you stop
6 it just a second?

7 MR. ROGERS: Stop it, Mr. Weis. Would you stop
8 that?

9 (Playback stopped.)

10 THE COURT: Pardon me. Is this of Short, as opposed
11 to --

12 MR. ROGERS: Yes. This is Short.

13 THE COURT: All right.

14 MR. ROGERS: Could you maybe start over again?

15 THE COURT: You can start over again. It did not
16 look like Detective Short.

17 MR. CRANE: He's got a hat on.

18 THE COURT: I was going to say, I didn't see his
19 shiny head.

20 Okay. You may start it again.

21 MR. WEIS: It's not very long.

22 (Excerpt played.)

23 Q. Now, let's start at maybe the most obvious thing at
24 the end. Did you hear Mr. Erickson say, "I don't remember if
25 I yelled at her or if I told her to go get help." Right?

1 A. Yes.

2 Q. And then what does the interrogator say?

3 A. Well, he gave her information. He gave her
4 post-event information about --

5 Q. Him. Erickson post-event information.

6 A. Right.

7 MR. CRANE: No, I think she was referring to
8 Erickson as a female.

9 MR. ROGERS: Well, right. And I'm trying to clarify
10 that.

11 A. Oh. Yes. I'm sorry.

12 Q. He gave him?

13 A. He gave -- thank you.

14 Q. Okay.

15 A. He gave -- the detective gave Mr. Erickson
16 information about what the cleaning lady supposedly said. Or
17 supposedly heard. So you can -- that is an example -- a
18 clear example of post-event information, where it's the
19 detective giving information to the person being interviewed.

20 That's what I meant by the "she." The cleaning
21 lady.

22 Q. She, the cleaning lady.

23 A. She, the cleaning lady.

24 Q. All right. So that's post-event information for
25 you, I guess. During the event, but.

1 Then you also saw the later interview by Detective
2 Nichols, that we talked about a minute ago.

3 MR. ROGERS: Play the part marked "cleaning lady."

4 THE COURT: What exhibit?

5 MR. ROGERS: For the record, Your Honor, this is
6 Defendant's Exhibit D, which has previously been introduced
7 and shown, and probably shown more than once.

8 (Excerpt played.)

9 Q. Okay. Now, how -- assuming that this was during the
10 5:01 to 5:22 -- or 23 p.m. interview, and that the earlier
11 clip we just looked at was from the 10:05 to 10:57 a.m.
12 interview, both on the same day, how does that reflect the
13 impact of the earlier, suggestive, post-event information
14 given by Detective Short?

15 A. Well, I think it's an example of post-event
16 information when the detective tells Mr. Erickson, "Here is
17 what the cleaning lady said the person said: 'Go get help.'"

18 Later on, if Mr. Erickson now remembers this, he can
19 be remembering it because he was told it during a prior
20 interview. That he picked up the post-event information and
21 accepted and adopted it. And it -- it by no means is a piece
22 of information that he could have only known if he'd been
23 there. Because he could have known it --

24 MR. CRANE: Judge, now I'm going to object to that.
25 That misstates the evidence and invades the province of the

1 jury.

2 THE COURT: That objection is sustained.

3 MR. ROGERS: Can she finish her answer first, Judge?
4 I think that was going to -- I think she had -- is going to
5 explain how she knew that.

6 THE COURT: Well, that objection, that it invades
7 the province of this jury, is sustained.

8 MR. ROGERS: Okay.

9 THE COURT: That is what the jury is to decide.

10 Q. With regard to the information about what was said
11 to the cleaning lady, have you observed at least one point
12 when Mr. Erickson was given that information? Didn't we just
13 see it here?

14 A. Yes.

15 Q. Okay. And so can you thereby assert that he could
16 have obtained that information from Detective Short?

17 MR. CRANE: Object to the form of the question.
18 Leading.

19 THE COURT: Sustained.

20 Q. Where could he have -- based on what you've seen,
21 where could he have gotten that information?

22 A. Well, based on what I've seen, he could have gotten
23 the information from the interview. I mean, anybody in this
24 courtroom could come along and now say, "I told the cleaning
25 lady, 'Go get help.'"

1 Q. And these were just some examples of suggestion,
2 post-event information given to Erickson during the
3 interviews that you reviewed.

4 MR. CRANE: Object to the form of the question.

5 THE COURT: Sustained.

6 Q. Could you tell us whether or not you also saw many
7 other examples of post-event information being given to
8 Mr. Erickson during those videotaped interviews.

9 A. Yes, there were other examples of details being
10 suggested during the course of the interviews. Just one
11 other example in one of the interviews from March 10th: A
12 detective essentially telling Mr. Erickson that car keys and
13 a watch appear to have been missing. Does he remember that.
14 An example of details being supplied and produced that then
15 figure into later versions of the recollection.

16 Q. Did you see any examples of the converse? Of
17 details that Mr. Erickson supplied being dismissed or denied,
18 and then him later remembering different details in their
19 place?

20 A. Well, his recollection certainly did change from one
21 point in time to another point in time. We know that one of
22 the major reasons why somebody's recollection does change
23 from one point in time to another is that they've been
24 supplied with post-event information, even if it's
25 inadvertent. And certainly you can see those changes in

1 numerous areas, with numerous details.

2 Q. Now -- first of all, you were here in Columbia three
3 days, 25 years ago. Right?

4 A. Yes.

5 Q. You're not familiar with the geography of downtown
6 Columbia.

7 A. No.

8 Q. Were you able to distinguish, in your review of the
9 October 1st report of the interview of Mr. Erickson when he
10 talked to the police and the prosecutor and the prosecutor's
11 investigator about this event, were you able to observe
12 different changes in his memory as he reported it at that
13 time?

14 A. Well, there are differences in what Mr. Erickson is
15 remembering in terms of the route that -- of supposedly
16 leaving the parking lot. The direction he had gone from
17 earlier -- from earlier -- from earlier attempts to recall
18 this.

19 Q. And calling your attention to the videotaped
20 interview on March 10th that took place in the police car,
21 the driving-around-town video, do you remember that?

22 A. Yes.

23 Q. Do you recall there being several locations where
24 Mr. Erickson claimed to have no memory of having been there?

25 A. That things did not look familiar, yes.

1 Q. And do you know whether or not those are the
2 locations that, on October 1st, he said that he did go to?

3 A. Well, I -- it's difficult for me to know for sure,
4 because not knowing the exact geography here, but it
5 certainly does appear as if he -- his recollection of that
6 direction's changed, from March to October.

7 Q. And were you able to detect what kind of post-event
8 information he had to lead to that change? Those changes, I
9 should say.

10 MR. CRANE: Judge, I'm going to object to the form
11 of that question.

12 THE COURT: That objection is overruled.

13 MR. CRANE: Object that it invades the province of
14 the jury.

15 THE COURT: That objection is sustained.

16 Q. Do you know whether or not during the intervening
17 time Mr. Erickson had access to police reports and diagrams
18 and things like that?

19 A. I'm not sure exactly how -- there did seem to be
20 some evidence that he was reading things and he was certainly
21 being exposed to information, but I don't know the extent of
22 his exposure.

23 Q. Let me move then to another issue dealing with
24 memory. You're aware that Mr. Erickson now states that he
25 had been drinking and earlier that evening had ingested some

1 cocaine?

2 A. Yes.

3 Q. What kind of effect would that have on accuracy of
4 memory?

5 A. Well, the alcohol is going to affect the formation
6 of new memories. If you are under the influence of alcohol,
7 even as few as two or three drinks is enough to affect the
8 formation of information -- the formation of memories or the
9 storage of an -- information into memory. So, with a lot of
10 drinking you're going to have a poorer memory to begin with.
11 And what a poorer memory to begin with means is that memory
12 is going to be even more vulnerable to post-event
13 contamination.

14 Q. How would that also relate to the concept of
15 confabulation that we talked about a few minutes ago?

16 A. Well, in a way it relates to the forgetting curve
17 that I've drawn. When a memory is in a weakened state,
18 either because time has passed or because not a very good
19 memory got formed in the first place, the memory is more
20 vulnerable to contamination, to picking up details from other
21 sources and filling in the gaps of memory.

22 Q. Would -- if someone actually experienced an event
23 while under the influence of alcohol, could -- to such extent
24 that the memory was not accurately stored, could that memory
25 somehow later be recovered?

1 MR. CRANE: Your Honor, that is so vague factually.
2 I don't know how there's any foundation for her to answer
3 that, based in any scientific studies.

4 MR. ROGERS: Let me rephrase it.

5 Q. Based upon your training, experience, research,
6 studies, basically your professional qualifications, what
7 would happen to a memory of an event experienced when
8 somebody was under the influence of three or four or five
9 drinks of alcohol?

10 MR. CRANE: Judge, here's my objection. This
11 witness is being asked a question, where she's going: "What
12 would happen to a memory?" Now what could happen under
13 certain circumstances is one thing. But for this witness to
14 be asked to answer -- to read someone's mind is impossible,
15 unless she's got a study on that.

16 Q. Would you rather have a different question?

17 MR. CRANE: Well, Judge --

18 THE COURT: The objection is sustained. If you want
19 to rephrase --

20 MR. ROGERS: Okay.

21 Q. You get a different question, whether you like it or
22 not.

23 What is the impact of the consumption of one or two
24 drinks of beer at a party earlier in the evening and the
25 consumption then of two or three or four mixed drinks later

1 in the evening on the formation of memory?

2 A. Well, I can tell you that what the research shows is
3 that as few as -- the equivalent of two or three drinks is
4 enough to affect the formation of new memory. So if you
5 store something in your memory while you're under the
6 influence of that much alcohol, later on you're not going to
7 remember it as well as if you stored it -- that same
8 information when you were sober.

9 Q. And once that information is imperfectly stored as a
10 result of the alcohol, can it be recalled better than it was
11 stored?

12 A. If you have poor storage, it's not going to return
13 later on.

14 Q. Can someone consciously decide to put a memory of a
15 bad event out of their mind?

16 A. Well, it's certainly possible, if something
17 unpleasant happened to you, that you can try not to think
18 about it. That you can -- if somebody dies and you are
19 grieving and you, you know, want to not be plagued by deep
20 feelings of grief, you can try to distract yourself and not
21 think about things. But that's very different from saying,
22 "I had -- have no conscious awareness that the thing
23 happened."

24 Q. Okay. If someone does not want to think about
25 something, would they be unaware of having been involved in a

1 very significant event which they read about in the paper two
2 days later?

3 MR. CRANE: Object to the form of the question,
4 Judge.

5 THE COURT: Sustained.

6 Q. Assume that an individual had been involved and had
7 participated in a very significant and traumatic event.
8 Assume that that person had decided not to think about it
9 because it was uncomfortable. Under those circumstances,
10 during -- based upon your experience, training, expertise,
11 scientific studies, et cetera, would such a person be
12 consciously aware of that event the next morning?

13 MR. CRANE: Judge, I don't think that -- and I'll
14 stand corrected, certainly, I don't think the witness has
15 ever done a study or that there has been a study done with
16 respect to the question being asked. And I would also
17 include the previous question with respect to reading about
18 it in the paper. I'll stand corrected if I'm wrong. So the
19 objection is: Foundation.

20 MR. ROGERS: It's a hypothetical question, Your
21 Honor. It -- I don't think the foundation requires that
22 there has been a specific Chuck Erickson study done, where
23 we've replicated Chuck Erickson somehow and had this --

24 MR. CRANE: No, I'm not suggesting that.

25 MR. ROGERS: But --

1 Q. Let me ask you this, Doctor. Do you think you have
2 enough professional expertise to give a professional -- an
3 answer, within the context of your professional
4 qualifications, to that question?

5 A. I think there is some scientific information that
6 bears on that question.

7 Q. Okay. Tell us what that is and what it may lead you
8 to conclude.

9 A. Well, there have been studies of people's
10 recollections of being in horrible hurricanes. There have
11 been studies of people's recollections of being in fires.
12 There have been studies of people's recollections of being
13 hospitalized or being in serious car accidents. I don't know
14 of any evidence that, one or two days later, people are
15 completely unaware that these things happened to them.

16 Q. And if somebody had been involved in the event, and
17 for some reason was not consciously aware of it, one or two
18 days later, if they read a newspaper article of the event,
19 what would that impact be?

20 A. Well, generally a newspaper article about an event
21 that you experienced ought to be a very good retrieval cue.
22 I mean, it ought to -- if you have a memory, it ought to
23 bring it back to mind. If it's something you haven't been
24 thinking about for a while, it ought to bring it back to your
25 mind.

1 Q. And if, in fact, you were trying not to think about
2 that memory, would that make a difference?

3 A. I suppose it's possible. I -- I just don't know any
4 good evidence for that.

5 MR. ROGERS: Might I have a moment, Your Honor?

6 THE COURT: Surely.

7 MR. ROGERS: Those are all the questions I have,
8 Your Honor.

9 THE COURT: Mr. Crane, is your cross-examination of
10 this witness more than, say, 15, 20 minutes, do you believe?

11 MR. CRANE: Probably, yeah.

12 THE COURT: She has been on the stand almost an hour
13 and a half, so I would anticipate that it would be.

14 We will take our mid-morning break, ladies and
15 gentlemen.

16 The Court again reminds you of what you were told at
17 the first recess of the Court. Until you retire to consider
18 your verdict, you must not discuss this case among yourselves
19 or with others, or permit anyone to discuss it in your
20 hearing. You should not form or express any opinion about
21 the case until it is finally given to you to decide. Do not
22 read, view, or listen to any newspaper, radio, or television
23 report of the trial.

24 Take about a 10- or 15-minute break. You'll let us
25 know when they're ready to come back.

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ELIZABETH LOFTUS,

resumed the stand and testified further:

THE COURT: You may inquire.

MR. CRANE: Thank you, Your Honor.

- - -

CROSS-EXAMINATION

BY MR. CRANE:

Q. Good morning, ma'am. Welcome back to Columbia.

A. Thank you.

Q. You have made a real good living off of this memory thing, haven't you?

A. Well, I do have a successful professional life.

Q. And you testify and have testified over the years frequently in criminal cases; is that right?

A. Yeah -- yes.

Q. You've testified for the defense in most of those cases?

A. I have consulted with the prosecution five or six times and testified once. But the rest of the testimony in criminal cases has been on behalf of the defense.

Q. And you've testified about how many times total?

A. I've testified about 250 times since June of 1975.

Q. And one of those was for the prosecution.

A. Well, those include civil cases as well as criminal cases.

1 Q. And there's no prosecutor in a civil case.

2 A. Right. So in the civil cases --

3 Q. How many criminal cases have you testified in?

4 A. Oh, maybe half of them are criminal cases. Possibly
5 a hundred and -- something over a hundred.

6 Q. You don't remember?

7 A. No. It's over 30 years.

8 Q. But in any event, they were all criminal cases we're
9 talking about. And you'd say half of 250?

10 A. Roughly, yes.

11 Q. Okay. And one of those cases you testified for the
12 prosecution.

13 A. Correct.

14 Q. The rest of the time you testified for the defense.

15 A. Yes.

16 Q. Do you remember how many times you testified in
17 2001?

18 A. In 2001? It would just be an estimate. It might be
19 six times.

20 Q. You've probably got that data somewhere.

21 A. Probably, yes.

22 Q. And if you referred to it, you would remember how
23 many times you testified.

24 A. I'd be able to tell you exactly how many times I
25 testified.

1 Q. And then that thing that you forgot would be
2 accurately recalled.

3 A. Right.

4 Q. But you know, right now, you've always testified for
5 the defense, except for one case.

6 A. Yes.

7 Q. What is your -- well, let me -- I should ask you,
8 you're billing for your services here today; isn't that
9 correct?

10 A. Well, I do expect to be compensated for my time,
11 yes.

12 Q. You don't work for free. That's fair. Right?

13 A. Well, sometimes I do take pro bono cases, yes.

14 Q. Are you working for --

15 A. But not in this case.

16 Q. Not in this case.

17 A. Right.

18 Q. Okay. And what is your rate? How do you bill?

19 A. Well, I -- when Mr. Rogers first contacted me, I
20 gave him an estimate. And I try to stick fairly close to
21 what the estimate is. And so I estimated to him, and would
22 hope to be compensated for the last three months of work,
23 about \$11,000.

24 Q. So what is that an hour?

25 A. Well, it -- I actually do charge \$450 an hour for my

1 time now, but I don't know what it will work out -- there
2 will be more hours involved. But I won't be charging for all
3 those hours, because I don't like to exceed my estimate.

4 Q. You didn't go a full three months working on this
5 case, did you?

6 A. No, no, no. No. But that's how long I've been --

7 Q. Retained?

8 A. Yes. And reviewing materials and consulting and
9 trying to digest the case.

10 Q. And you generated, after all that, about two weeks
11 ago, you generated a two-page report?

12 A. Well, I don't usually write reports, but I --

13 Q. How come?

14 A. I'm not usually asked to.

15 Q. Okay. They just ask you to testify.

16 A. Yes. In this case they asked me if I would write
17 something up so the prosecution would be aware of the gist of
18 the testimony.

19 Q. You used to just bill -- I was thinking -- my
20 understanding was, last year, maybe I'm wrong, you were just
21 billing 400 an hour. When did you go up? Or did you?

22 A. I believe that I raised my rates to 450 a few -- a
23 couple of years ago.

24 Q. A couple years ago?

25 A. Yes.

1 Q. Okay. How much do you make in a given year on your
2 testimony work? Or your defense consultation and testimony.

3 A. It's -- well, it's hard to -- maybe a hundred
4 thousand.

5 Q. A hundred thousand a year?

6 A. Possibly.

7 Q. And that's on top of what you get for working at --
8 where do you -- where's your position?

9 A. I am a professor at the University of
10 California-Irvine, where I make quit a bit more money than
11 that.

12 Q. Okay. What do you make there?

13 A. I think probably this year I may end up with a total
14 salary of about 200,000.

15 Q. Okay. And so if you got a gross of 300,000 a year,
16 a third of that is for your work that you do in the criminal
17 defense area; correct?

18 A. No, that's not true.

19 Q. Okay.

20 A. I mean, that -- that would be -- because I don't do
21 that many criminal cases now. Mostly I work on civil cases.

22 Q. Okay. Well, I was just -- you get a hundred
23 thousand dollars a year, you just said was your estimate.

24 A. I know, but that's -- that's all kinds of consulting
25 in all kinds of cases.

1 Q. Okay.

2 A. Well -- and then there -- well, I did win a prize, a
3 big prize in psychology. That was 200,000. And that's
4 distributed over five years, so...

5 Q. Well, I'm not talking about -- I mean,
6 congratulations. But I'm talking about your work in the area
7 of criminal defense; the preparation, the testimony; like
8 you're doing -- the work you're doing here.

9 A. I don't -- I only work on a few criminal cases,
10 because I'm working on primarily civil cases.

11 Q. Well, suffice it to say, though, your work in this
12 area, in the criminal defense realm, is very lucrative; isn't
13 that correct?

14 A. Well, I don't work on that many criminal cases now.
15 I would say that in the civil cases, yes, things are --

16 Q. Well, how about this, Doctor. I'm not talking about
17 civil cases. I'm talking about criminal cases.

18 MR. ROGERS: Your Honor, I'd ask that the witness be
19 allowed to complete her answer before she gets shut down.

20 MR. CRANE: Oh I'm sorry, Judge, Mr. Rogers. I
21 thought she completed her answer.

22 Q. I apologize, ma'am.

23 A. Well, most of the work I do now, in terms of
24 consulting and litigation, is on civil cases. Occasionally I
25 have criminal cases that I'm working on.

1 Q. I'm talking about criminal cases. Okay? Criminal
2 cases where you testify for the defense. You make \$450 an
3 hour; correct?

4 A. That is my current billing rate.

5 Q. Right.

6 A. Yes.

7 Q. A couple years ago you were just charging 400.

8 A. Right.

9 Q. And before that you might have been charging 350.

10 A. Exactly.

11 Q. And before that, 300. Inflation; right?

12 A. Yes.

13 Q. Okay. Do you remember how much you made when you
14 testified on behalf of the defense in the Hillside Strangler
15 case?

16 A. I don't know. That would have been a long time ago.

17 Q. What about when you testified on behalf of the
18 defense in the Ted Bundy prosecution?

19 A. Well, that would have been 1976, when I might have
20 been charging \$50 an hour. I don't even remember.

21 Q. Okay. But you have those records somewhere, and you
22 could refer to them, and your memory would be accurate of
23 what you were charging when you testified on behalf of Ted
24 Bundy. Is that correct?

25 A. I -- I'm not sure I have records from 30 years ago,

1 but I -- it's possible.

2 Q. What was the Hillside Strangler's real name?

3 MR. ROGERS: I'm going object to this as irrelevant,
4 Your Honor. I think he's done what he's entitled to do, and
5 I think this is just irrelevant and badgering the witness.

6 MR. CRANE: Well, Judge, I certainly don't intend to
7 badger Dr. Loftus. At all. And I apologize if I'm leaving
8 her with that impression. The question that I asked there
9 goes to the memory of this witness. Obviously she said she's
10 testified in the case of the Hillside Strangler. And I was
11 going to ask her if she remembered that particular
12 defendant's name.

13 THE COURT: The objection's overruled.

14 A. I believe it was for Angelo -- in the case of Angelo
15 Buono. I -- there were two individuals who were accused of
16 being the Hillside Stranglers in Los Angeles. And I believe
17 this was for one -- on behalf of one of the defendants in
18 that case.

19 Q. You don't remember his name.

20 A. Angelo Buono.

21 Q. Okay. And did you testify in the O.J. Simpson
22 prosecution?

23 A. I was con -- I consulted on the O.J. Simpson case.
24 I did not testify.

25 Q. Okay. Was that consulting with the prosecutor?

1 A. It was the defense that consulted me.

2 Q. Okay. Ma'am, what is a clinician in your
3 profession?

4 A. The -- the field of psychology is -- one division in
5 the field of psychology is between the individuals who treat
6 patients, and those would be called clinical psychologists or
7 clinicians, and the other group are those who teach and do
8 research. Of course sometimes clinicians also teach and do
9 research. But the nonclinicians are individuals who do not
10 see patients.

11 Q. You're not a clinician, are you?

12 A. Correct.

13 Q. Have you ever seen patients, you know, in the role
14 of: You're a psychologist there to help a patient?

15 A. No. I've studied patients, but I haven't treated
16 them.

17 Q. That's the other category, though; right?

18 A. Right.

19 Q. You've never had a patient that had come in to your
20 office, for instance, with a problem, and you dealt with it
21 as a professional doctor-patient relationship. That's just
22 not what you do.

23 A. Correct.

24 Q. Okay. Have you ever seen a patient?

25 A. No. I've never --

1 Q. Never have.

2 A. -- never been a clinician.

3 Q. So the only sphere that you operate in is one in
4 which you are studying, teaching, that type of thing; right?

5 A. Right.

6 Q. Okay.

7 A. Doing research.

8 Q. And as a part of -- I'm sorry. Did I cut you off?

9 A. Well, doing research, sometimes on patients, or
10 teaching.

11 Q. Right. But you're not -- you're -- with -- they're
12 on patients, but, I mean, generally they're more like, and
13 I'm not trying to denigrate those people, but they're more
14 like a guinea pig type situation; right? I mean, your
15 testimony on direct was your description of various studies
16 you've done with, like, lost in the mall. That -- you
17 wouldn't call those patients, would you?

18 A. No.

19 Q. Okay. And as a part of your work, you've also
20 written a number of books; isn't that correct?

21 A. I see books.

22 Q. I've got some of them here. Do you remember the
23 names of them?

24 A. Yes. But I don't know which particular ones you --
25 that one on top looks like Eyewitness Testimony.

1 Q. You've written one on Eyewitness Testimony, Affect
2 and Accuracy in Recall, The Myth of Repressed -- what was it
3 -- what is that? The Myth of Repressed what?

4 A. Memory.

5 Q. Witness for the Defense. You wrote that book;
6 correct?

7 A. Coauthored, yes.

8 Q. And that was about some of the more notable cases
9 wherein you testified as a defense witness? Your
10 experiences?

11 A. Yes.

12 Q. Like the Bundy case. And there was another homicide
13 out there in California. Was it Franklin?

14 A. Well, George Franklin, who was accused based on a
15 repressed memory, but that's in The Myth of Repressed
16 Memory --

17 Q. Okay.

18 A. -- not in Witness for the Defense.

19 Q. And then you've got another one called Memory. Is
20 the last one I've got. You've got a lot of books and
21 articles; right?

22 A. Yes.

23 Q. These are just some of them that were at the
24 library. Okay. But you've -- you've written --

25 A. That's good to see.

1 Q. -- all those; correct?

2 A. (Nodding head up and down.)

3 Q. Okay. You never met Charles Erickson, did you?

4 A. Correct.

5 Q. Okay. And what did you say you had been given by

6 the defense in this case, to look at and review?

7 A. Lots and lots of documents.

8 Q. Okay. Police reports?

9 A. Yes.

10 Q. Did you get all of them?

11 A. I'm sure I didn't get all of them.

12 Q. Okay.

13 A. But I got many of them.

14 Q. Do you think you got all of the ones generated after

15 the arrest?

16 A. I think I got at least many of the ones that

17 pertained to Mr. Erickson and the development of his report.

18 Q. Okay. Did you look at any records or police reports

19 with respect to the crime scene?

20 A. Well, there -- not in particular, no.

21 Q. Did you look at any photographs of the crime scene?

22 A. Well, only what I've seen around the courtroom here.

23 Q. You did look at the photographs of the crime scene.

24 A. Well, just what I've seen around here.

25 Q. Oh, you mean in here.

1 A. Right.

2 Q. I'm sorry. All right.

3 A. No, I --

4 Q. So they didn't give you any of the photographs in
5 the case at all?

6 A. No.

7 Q. So the only time you've seen them is glancing at
8 them as you're going back and forth to the stand?

9 A. Right.

10 Q. Okay. Did you read any reports about witnesses at
11 the scene?

12 A. Well, yes. There were mentions of people at the
13 scene.

14 Q. Right. And you weren't here for any of the
15 testimony of the people that were at the scene of this crime
16 when it occurred.

17 A. No.

18 Q. You weren't in here. You just got in town, what,
19 last night?

20 A. Yes.

21 Q. Okay.

22 A. Correct. Yesterday afternoon.

23 Q. So you don't know what those individuals recalled,
24 what they remember seeing, et cetera? For instance, these
25 janitors. Does that ring a bell with you at all?

1 A. Yes.

2 Q. Okay. So you read reports on that?

3 A. Well, I read the newspaper.

4 Q. You did.

5 A. Yes.

6 Q. And what impact did that have --

7 THE COURT: Just a second. Before you get into
8 this, I do not want this witness to repeat --

9 MR. CRANE: Right.

10 THE COURT: -- what she's read in the paper, since
11 we've been instructing the jury not to read the newspaper.

12 MR. CRANE: Right.

13 Q. Don't tell us what you read in the paper. Let me
14 ask you this. Did that have -- did what you read in the
15 newspaper have any bearing on what you're testifying here
16 today to?

17 A. No.

18 Q. Okay. In many of the cases where you have testified
19 as a defense witness, isn't it true, ma'am, that in many of
20 those cases the person on trial, or the defendant, is someone
21 who has been charged with abuse of a child?

22 A. Well, in some cases that's true. I worked on
23 Michael Jackson's case, and that was the case. And other --
24 with other defendants, it's not the case. I worked on the
25 Martha Stewart case, and that had nothing to do with abuse.

1 Q. And the Bundy case and the Strangler case, those
2 were obviously not, but -- recognizing that you certainly
3 testified in murder cases and serial murder cases, have you
4 also testified on several occasions, let me put it that way,
5 in cases wherein the defendant is someone accused of child
6 abuse?

7 A. Yes.

8 Q. Okay. And, in fact, isn't it true that your book,
9 The Myth of Repressed Memory, is, in part at least, dedicated
10 to two convicted child abusers?

11 A. No, that's not true.

12 Q. It's not.

13 A. No.

14 Q. You don't know names Raymond and Shirley Souza?

15 A. I do know -- I do know who they are, yes.

16 Q. Okay. And how is it you know who they are?

17 A. Because they were accused based on claims of --
18 involving repressed memory in Massachusetts early in the
19 '90s.

20 Q. Okay. Well, I'm looking here at the acknowledgement
21 section, and -- and maybe it's a matter of semantics that the
22 problem is. But this is your book, The Myth of Repressed
23 Memory?

24 A. Yes.

25 Q. And under the acknowledgement section -- it doesn't

1 have a page number, but that is the acknowledgements;
2 correct?

3 A. Well, you'll have to show that to me.

4 Q. Okay. Acknowledgements?

5 A. Yes.

6 Q. Okay. And I'll give it to you, but I don't think I
7 could read it at the same time. It says, "We would like to
8 express our deep gratitude to the many people who offered
9 their help and support during the three years we worked on
10 this book. We were especially grateful to," and then if you
11 look at the second paragraph here --

12 A. Yes.

13 Q. -- who are those people?

14 A. Well, to put it in context, "We are especially
15 grateful to the families and individuals who told us their
16 stories. Many of the people we interviewed asked to remain
17 anonymous, in order to spare their families further pain.
18 Thus, while we cannot mention them by name, we honor their
19 contribution." And then in the next section, "Raymond and
20 Shirley Souza, Lynn Price Gondolf" --

21 Q. Okay. Let me --

22 A. -- "Laura Pasley" --

23 MR. CRANE: Judge, that's nonresponsive. I was
24 asking her if she -- and they can talk to her about it on
25 direct.

1 MR. ROGERS: He asked: What were those names? And
2 she's reading the names.

3 MR. CRANE: First two names, first paragraph, Judge.
4 I mean, I guess if she wants to read off all the other
5 names -- you want to sit here and have her do it?

6 MR. ROGERS: It's necessary for the context, Your
7 Honor --

8 Q. All right. You want to read them, go ahead.

9 A. "Laura Pasley, Melody Gavigan, Phil and Susan
10 Hoxter, Chuck and June Noah, Jennifer and Pamela Freyd, and
11 Paul Ingram, who taught us so much about the anguish of both
12 the accuser and accused."

13 Q. Now, Raymond and Shirley were the accused; isn't
14 that correct?

15 A. They happened to be a couple, an elderly couple, who
16 were convicted in Massachusetts, yes.

17 Q. Thank you. Did you read Dr. Delaney Dean's report?

18 A. Yes.

19 Q. You would agree that she found -- do you know -- do
20 you know Dr. Dean?

21 A. Not personally, no.

22 Q. Okay. She indicated that when she --

23 MR. ROGERS: Objection. That's hearsay. There's no
24 foundation. There's no indication that this witness relied
25 in any way on Dr. Dean's report in formulating any of the

1 opinions she's expressed. And for him just to have her read
2 it into the record is hearsay and deprives Mr. Ferguson of
3 his right to confront and cross-examine witnesses against
4 him.

5 MR. CRANE: I wasn't just going to read the report
6 into the record. She's an expert witness. She took -- she
7 said she reviewed Dr. Dean's report. I was going to ask her
8 if anything about her report was taken into account, of
9 interest, et cetera.

10 THE COURT: You may ask her that question.

11 Q. Dr. Dean actually did meet with Charles Erickson;
12 isn't that true?

13 A. Yes.

14 Q. And it's your understanding --

15 MR. ROGERS: I'll object to that, Your Honor. That
16 does call for hearsay. She doesn't know that unless she read
17 it in the report. I think the question he is asking is not
18 the question he told the Court he was going to ask.

19 MR. CRANE: Well, Judge, I get to explore -- I can
20 ask her if the report indicates that Dr. Dean actually saw
21 Charles Erickson.

22 MR. ROGERS: Your Honor, before he can ask this
23 witness about something which is clearly hearsay, about the
24 contents of a writing that she reviewed, it has to be a
25 writing that is relevant to the opinions she has expressed in

1 this case. It's not. He knows it's not. And that's the
2 question he said he was going to ask to lay a foundation.
3 And instead, he's trying to skip that so that he can get in
4 the hearsay.

5 MR. CRANE: Well, after -- can I respond to that
6 mischaracterization objection, Judge?

7 THE COURT: You may respond to the objection.

8 MR. CRANE: This expert said she read another
9 expert's reports. Now Mr. Rogers' objection is essentially
10 trying to tell her that it didn't make any difference. I
11 have a right to ask her if she read that and if any of that
12 had anything importance, et cetera. And that's all I'm
13 trying to do.

14 THE COURT: Well, you may ask that question.

15 Q. You read her report; is that correct?

16 A. I did.

17 Q. Okay. And she indicates that she --

18 MR. ROGERS: Objection to the "she indicates" part,
19 Judge. He's halfway there, but he's still trying to do the
20 hearsay first.

21 MR. CRANE: He asked -- Judge, here's my response to
22 that. This witness, on direct, was asked numerous questions
23 reference hearsay. That, in some appropriate circumstances,
24 is the purview of an expert. Now he's -- no? Now, he's
25 suggesting that I can't do the same.

1 MR. ROGERS: All I'm suggesting, Your Honor, is
2 that, as a foundational matter, as the Court has indicated at
3 least twice, he needs to establish that this is one of those
4 appropriate circumstances.

5 MR. CRANE: No, I don't.

6 MR. ROGERS: Therein lies the dispute.

7 MR. CRANE: That's my response.

8 THE COURT: You may ask her if she relied on that
9 report in reaching any of her conclusions. That was what you
10 asked me to inquire. You are entitled to do that. And you
11 may ask that question.

12 Q. You read the report?

13 A. I did.

14 Q. Why?

15 A. It was in the stack of materials that was sent to
16 me.

17 Q. The findings of Dr. Dean, who actually -- another
18 psychologist, who actually met with Charles Erickson, were
19 relevant to your overall understanding of this case, weren't
20 they?

21 MR. ROGERS: Objection, Your Honor. First of all,
22 it assumes facts not in evidence. Second -- that's my
23 objection. I object to the part of the question which
24 assumes facts not in evidence, and, once again, just
25 attempting to get the hearsay in.

1 THE COURT: He's not asked her about what the
2 findings are. And I will allow him to ask if those findings
3 were in any way relevant, which -- I'm going to overrule your
4 objection.

5 Q. Do you want me to ask it again?

6 A. I think I -- I think I understand it. The portion
7 of the report that I found of particular interest was where
8 she described Mr. Erickson as being -- having consumed nine
9 to ten drinks and cocaine on the night of November 1st,
10 October 31st, 2001.

11 Q. Okay. You thought that was of particular interest?

12 A. It -- it certainly confirmed a -- the large amount
13 of alcohol involved.

14 Q. She indicated that she had actually met with Charles
15 Erickson; correct?

16 A. Yes.

17 Q. And you never did, did you?

18 A. That's correct.

19 Q. And you've never seen him testify before this jury,
20 have you?

21 A. No.

22 Q. Okay. And Dr. Dean indicated that he had no
23 indication of delusional thought. Isn't that true? Isn't
24 that -- wasn't that Dr. Dean's finding?

25 A. I believe that was in the report.

1 Q. And she indicated that there was no evidence of
2 brain damage. Isn't that true?

3 A. I don't recall that, but I --

4 Q. You won't dispute it.

5 A. I won't dispute it, no.

6 Q. Okay. No evidence of mania; correct?

7 A. I don't remember that explicitly.

8 Q. If it's in the report, you won't disagree with it?

9 A. Right. I won't disagree with --

10 Q. That she found no --

11 A. -- that that's her opinion, yes.

12 Q. -- evidence of mania? No evidence, in her opinion,
13 when she met with Charles Erickson, of hypomania. Correct?

14 A. If it's in the report.

15 Q. Okay. So you don't remember those sections. You
16 just went right to the drinking part?

17 A. Well, that's what I happened to take a note about.

18 Q. Did you read these other things I'm talking about?

19 A. I read the whole report. It wasn't very long.

20 Q. No. But it doesn't sound like you remember anything
21 but the drinking part.

22 A. I happened to write that down.

23 Q. Okay. And that helps you remember that one portion
24 of the report by Dr. Delaney Dean?

25 A. It does. Yes. It reminds me.

1 Q. And the other parts are out of your mind?

2 A. Well, I don't -- I believe she might -- her bottom
3 line was that she thought he was competent to testify.

4 Q. Okay. No evidence that he was suffering from any
5 mental disease or defect. Isn't that correct?

6 A. I can't remember if she exactly put it that way,
7 but.

8 Q. Okay. So the only thing you jotted down was the
9 drinking?

10 A. And competent to testify.

11 Q. Okay. Do you remember or did you also jot down her
12 finding that Charles Erickson's long- and short-term memory
13 appeared to be intact?

14 A. I don't -- I don't remember --

15 Q. If that was her finding, you wouldn't disagree with
16 that.

17 A. Correct.

18 Q. The cases or studies, some of these things you
19 talked about with Mr. Rogers, the case studies you've
20 conducted deal with inserting a false memory into a person.
21 Or some of your studies. Not all of them. But some of them
22 do; right?

23 MR. ROGERS: I'm going object to that as a
24 misleading question in view of the term "case studies." I
25 don't -- I think that has a specific meaning, which is not

1 what she's talked about.

2 MR. CRANE: Well, we can find that out, if --

3 MR. ROGERS: Please.

4 THE COURT: The objection is overruled. You may ask
5 the question.

6 Q. Isn't that right? I mean, you started -- you said
7 yes.

8 A. Well, in my experimental studies, that's what we
9 examined. Planting entirely false memory or distorting
10 somebody's memory for detail.

11 Q. Right. So you take 12, 50 people, and you lie to
12 them about something that happened -- or strike that, that
13 didn't happen, and see whether or not they adopted it as a
14 memory.

15 A. That's a simple way to put it, but basically
16 accurate.

17 Q. Kind of a redneck way to put it, but, I mean, isn't
18 that basically it?

19 A. That's very close to it.

20 Q. You try to insert a lie, or something that's not
21 true, into somebody's head.

22 A. Correct.

23 Q. It takes a lot of work to get that done, doesn't it?

24 A. Well, it depends. With the stop sign/yield sign, we
25 can do it with a leading question. A single leading

1 question. With the -- getting people to believe they were
2 lost in a shopping mall, we do it with three suggestive
3 interviews.

4 Q. And a relative. Their mom or their dad going, "Now,
5 you remember, Billy. Remember that time you got lost at the
6 store?"

7 A. Well, the relative doesn't actually make contact
8 with the subject. The relative feeds the information to us,
9 and then we do the suggestive interviewing.

10 Q. Okay. So you talk to the relative and find out some
11 information that might be true from the relative, and then
12 you mix in the falsehood.

13 A. Exactly.

14 Q. And when you do that to a hundred people, only 25 of
15 them fall for it. Correct? You said 25 percent?

16 A. Well, that happened to be the figure in -- that we
17 got in our lost-in-the-mall study.

18 Q. Yeah, I'm just talking about lost in the mall right
19 now.

20 A. Right. Because different investigators get
21 different figures.

22 Q. Right. I'm just talking about lost in the mall.
23 Your study.

24 A. Right.

25 Q. So, you got four people, let's say, and you go

1 through three suggestive interviews, going, "Hey, Billy Bob,
2 your mom says you got lost in the mall. Do you remember
3 that? Don't you remember that?" And you go through three of
4 those interviews, and then you go back and you check, and
5 three of them say, "I wasn't ever lost in no mall."

6 A. No, they usually say: "I just don't remember."
7 They --

8 Q. Well, yeah. The --

9 A. They say --

10 Q. -- false memory didn't stick. Right?

11 A. Right. It -- in our study, it happened in just a
12 quarter of the sample. So three-quarters said they just
13 didn't remember.

14 Q. And one of them goes, "You know, I think I was." Is
15 that basically -- I mean -- again, I'm simplifying it with
16 four people, but one of them would say, "You know, I do
17 remember. One time I got lost."

18 A. Well, but sometimes what they'll do is elaborate.
19 They'll tell you what the person looked like who came to
20 rescue them.

21 Q. Been trying to get a pop machine to marry them and
22 all that stuff. I got that. But three of them go, "Huh-uh.
23 That didn't happen."

24 A. No, they don't say it didn't happen. They say, "I
25 don't remember."

1 Q. You've got it documented? All the responses?

2 A. We did, yes.

3 Q. Okay. Now, the memory could be something that
4 happened to them when they were a kid. Before you even start
5 talking to them. Right? I mean, anybody, when they're a
6 kid, could be lost in a shopping center; right?

7 A. But --

8 Q. That's almost a rite of passage for kids, isn't it?

9 A. But in this -- in that particular study, we plant a
10 very specific memory. You were lost in this place, at this
11 age, with this people -- these people present, you
12 disappeared by the pet store. You know, so it's a very
13 specific recollection. We're not -- we're not trying to say
14 you were lost sometime, somewhere, but you were lost in
15 exactly this way.

16 Q. And how old are the people that you're trying to get
17 this memory insert -- this false memory inserted on? How old
18 are they?

19 A. In that particular study, they were ages 18 to 53.

20 Q. And when you're telling them that they were lost in
21 the mall -- in a store, what have you, when were you trying
22 to tell them it happened? The false -- the lie. When were
23 you trying to tell them it happened?

24 A. That it happened when they were about six years old.

25 Q. Really. When they were just a kid.

1 A. Yes.

2 Q. So if you got the guy that was 43 years old, you're
3 talking to him: "Now, when you were five, back when you were
4 five, you got lost at the store." I mean, you couldn't use a
5 mall with me. I don't think we had any malls here by then.
6 But a store. Right?

7 A. Well, for you, we would say a Sears or a K-Mart or
8 some --

9 Q. Yeah. You'd probably need to go K-Mart or Wal-Mart
10 with me, yeah.

11 A. Okay.

12 Q. The issue, though, is: You're trying to get him to
13 remember -- trying to get him to adopt a false memory that
14 may have happened 20, 30 years ago. Or actually didn't
15 happen. Right?

16 A. In that study, yes.

17 (Cell phone ringing.)

18 THE COURT: Excuse me. You will leave -- I want the
19 phone taken. We do not have telephones in this courtroom
20 that go off. If they do, they will be confiscated for the
21 day.

22 Q. Yeah, you better put that up.

23 THE COURT: We're not going to keep your phone,
24 Doctor. Just check and make sure it's off.

25 Q. You got that off?

1 A. It was off.

2 Q. Okay. Let's see. Oh. Did you ever do any studies
3 in the area of suggestion of a false memory wherein no one
4 suggested anything to a -- to a guinea pig. Or what do you
5 want to call them?

6 A. We call them experimental subjects.

7 Q. Experimental subject. Okay. Where you did testing
8 on false memories where no person ever suggested anything to
9 the experimental subject?

10 A. Yes.

11 Q. Okay. What's an example of that?

12 A. Well, for example, I've done studies -- there is
13 literature on people -- spontaneous distortions in memory.
14 When no one has specifically suggested anything. These
15 studies show that people will remember that their kids walked
16 and talked at an earlier age than they really did. In my own
17 studies in this area, we have shown that people will remember
18 that they voted in elections that they didn't vote in.

19 Q. Pretty benign memories, though; right? I mean, even
20 really the -- the lost-in-the-mall thing is really kind of
21 benign, not a traumatic event, wouldn't you agree?

22 A. We chose it because it would have been at least
23 mildly traumatic if it had happened. But you're right, it's
24 not -- certainly not as traumatic as --

25 Q. Combat.

1 A. Well, or being a victim of a vicious animal attack,
2 which is the false memory that was planted by Dr. Stephen
3 Porter in his research.

4 Q. And while we're at it, I mean, some of the other
5 studies you've done, you did one where you tried to get
6 people to think that they saw Bugs Bunny at Disney Land;
7 right?

8 A. Several of our recent studies have looked at that,
9 so that we could be sure we were planting, you know, an
10 impossible experience.

11 Q. Right. Because Bugs Bunny, they wouldn't let him
12 through the gates at Disney Land, would they?

13 A. No.

14 Q. Because he's --

15 A. He's Warner Brothers.

16 Q. Warner Brothers. So you tried -- and that would be,
17 though, a benign memory; right?

18 A. Well, that one. But "You met and shook hands with
19 Bugs Bunny at Disney," which we have succeeded in planting in
20 people, is a -- somewhat of a friendly memory, but it
21 couldn't have happened.

22 Q. Right. And how many -- what was your percentage of
23 success on that one?

24 A. In the very first study that we did, 16 percent fell
25 for the suggestion. In the doc -- the thesis work of my

1 graduate student, with repeated suggestions, she raised it to
2 25 percent in one study and 36 percent in her second study.

3 Q. So if you really get on them, it goes from 16 to 25
4 percent.

5 A. Or -- well, in one of her studies it was slightly
6 over a third.

7 Q. Okay. They thought they saw Bugs Bunny there at
8 Disney Land.

9 A. Correct.

10 Q. The first round you said was 16 percent. Said,
11 "Okay. Yeah, I remember seeing old Bugs at Disney Land."

12 A. Yep -- yes.

13 Q. And another one was having to do with hard-boiled
14 eggs. I remember reading in one of your articles about
15 hard-boiled eggs, trying to insert the memory that they had
16 gotten sick on them before?

17 A. Yes.

18 Q. And you actually did that with Alan Alda, was one of
19 your experimental subjects in that study; isn't that right?

20 A. Well, he wasn't an official subject. He came to
21 film our research for Scientific American Frontiers, his
22 television program that he hosts on science. And we
23 demonstrated our latest research, where we have made people
24 believe that they got sick eating particular foods, and later
25 on they don't want to eat those foods as much.

1 Q. And Alan Alda didn't fall for it, did he? He --

2 A. He was suspicious.

3 Q. He just didn't like hard-boiled eggs; right? Isn't
4 that true, ma'am?

5 A. That's what he said.

6 Q. You couldn't insert a false memory on Alan Alda,
7 could you?

8 A. He did not -- he did not fall for the suggestion and
9 come to develop a false memory, no. He was very suspicious
10 when he came to the lab, because he knew that our research
11 was on planting false memories.

12 Q. Okay. Is there any indication, based on all the
13 materials that you've read, that -- that was provided to you
14 by the defense about this case, that the memory of who
15 committed this crime upon Mr. Heitholt was suggested to
16 Charles Erickson?

17 A. Not that I saw specifically about who, but the
18 suggestions were about other details.

19 Q. Yeah. Other -- right. And you talked about some of
20 those on direct. But who committed this crime was never
21 suggested to Mr. Erickson, based on what you've understood in
22 the three months that you've looked at this case. Isn't that
23 correct, ma'am?

24 A. In one sense, yes. But in another sense, certainly
25 when Mr. Erickson expressed any, you know, uncertainty in

1 some of his earlier interviews, he was punished in some sense
2 for --

3 Q. Wait a minute. Okay. I'm sorry.

4 A. When he expressed uncertainty about whether he
5 actually committed it or whether he dreamed it or was
6 fabricating it --

7 Q. Right.

8 A. -- he --

9 Q. I'm talking about -- I'm sorry. I keep thinking
10 you're done.

11 A. I know. But I'm not quite done.

12 But as he was expressing his uncertainty about who
13 did it and whether he did it or just was imagining doing it,
14 there was suggestion or coercion imposed upon him at that
15 point. So in that sense, there was suggestion about who did
16 it.

17 Q. At that point. That's your opinion. Correct?

18 A. Yes.

19 Q. Okay. Now, I'm talking about before he went to the
20 police.

21 A. Uh --

22 Q. What -- let me ask the question again, if you would,
23 please, ma'am. What suggestion was ever given to Charles
24 Erickson that he and Ryan Ferguson committed this homicide
25 upon Mr. Heitholt?

1 A. Well, I actually don't know that there was any
2 suggestion, other than newspaper and media coverage --

3 Q. Okay.

4 A. -- that placed the two of them --

5 Q. Well, I don't think the Court is going to want you
6 to testify as to the contents of newspaper accounts.

7 A. That's right.

8 Q. But I can ask you a question, understanding that
9 limitation.

10 A. Yes.

11 Q. Okay. Prior to the arrest of Charles Erickson and
12 Ryan Ferguson, what indication did you ever see in a
13 newspaper article or from someone else that there was a
14 suggestion to Charles Erickson that he and Ryan Ferguson had
15 committed this murder?

16 A. Nothing direct that I saw.

17 Q. Nothing indirect either; isn't that true, ma'am?

18 A. Well, no, it's not quite true, because it's my
19 understanding that Mr. Erickson was at the By George club,
20 which was not far from where the Tribune parking lot was,
21 and --

22 Q. And what -- I'm sorry. Go ahead.

23 A. -- was mulling over that fact.

24 Q. What was in any suggestion -- strike that. What
25 suggestion was there in any media or police re -- well, he

1 wouldn't have read the police reports. -- from any person
2 that you reviewed in this case that suggested that the
3 perpetrators of this homicide were at By George's bar before
4 the crime occurred? And I'm talking about prearrest, ma'am.

5 A. No, there was nothing that I saw at all.

6 Q. All right. So that wasn't it.

7 A. No. It was not external suggestion.

8 Q. Until Mr. Erickson talked to the police, that fact
9 wasn't known.

10 A. It -- it was in the mind of Mr. Erickson.

11 Q. Right. Right. And in the mind of Mr. Ferguson. He
12 says they were there as well.

13 A. Yes, but it was --

14 Q. Okay. Thank you. Now, are we in agreement that --
15 and I'm going, first of all, with this core fact that there
16 was no suggestion by anyone or anything -- and we'll take
17 before March 10, '04. You'll agree with me that was the date
18 of the arrest?

19 A. Yes.

20 Q. Are we in agreement that there was no suggestion by
21 anyone or anything to Mr. Erickson that he or Mr. Ferguson
22 committed this crime? Are we in agreement on that?

23 A. The only suggestion was in the mind of Mr. Erickson.

24 Q. That's not a suggestion.

25 A. Yes, it -- it can be auto suggestion.

1 Q. Suggesting it to himself?

2 A. Exactly. It's called auto suggestion.

3 Q. Well, how about this then. There was no external
4 suggestion.

5 A. None that I saw. Correct.

6 Q. And external suggestions are the way that you insert
7 false memories on people, isn't it?

8 A. That's how we do it in our experimental work, yes.

9 Q. Okay. You read that, or maybe you'd been told, that
10 prior to talking to the police, after his retrieval cue, as
11 you call it, or trigger, of looking at a newspaper article,
12 thinking about this more, he talked to two friends, Art
13 Figueroa and Nick Gilpin. Did you read those reports?

14 A. I read about those two individuals --

15 Q. Okay.

16 A. -- and those conversations, yes.

17 Q. And is -- you didn't see any indication that Art
18 Figueroa or Nick Gilpin suggested to Mr. Erickson, before
19 Mr. Erickson told them about his memories, that he'd done it.

20 A. I didn't, no.

21 Q. Okay. Do you recall that, when you read those
22 reports, that Mr. Erickson, when he was talking to Nick
23 Gilpin and Art Figueroa, recalled attacking the victim,
24 recalled Ryan Ferguson strangling the victim. This is prior
25 to talking to the police. Isn't that correct, ma'am?

1 MR. ROGERS: I'm going to object, Your Honor, to
2 details of what reports say Erickson -- reports say Gilpin
3 and/or Figueroa say Erickson told them. That's hearsay.
4 They haven't been called by the state to testify. And I
5 think it's improper to get into the details of what was told.
6 She's already said that there's no claiming there was undue
7 suggestion there.

8 MR. CRANE: Your Honor, this witness has testified
9 that Mr. Erickson had the recollection of this crime
10 suggested to him. They played tapes. They asked various
11 questions about that. The state has confirmed via the
12 witness that she has, in fact, read those reports. The state
13 is entitled to inquire with respect to those reports the same
14 as defense counsel.

15 THE COURT: The objection's overruled.

16 Q. Isn't it true, ma'am, that the reports indicate
17 that, prior to talking to the police, Chuck Erickson told
18 Nick Gilpin and Art Figueroa that he and Ryan Ferguson had
19 been at George's. Do you remember that? That's the bar.

20 A. No, I know. I -- I -- I believe that -- it's my
21 impression from what I remember reading that, at least when
22 he talked to Mr. Figueroa, he wasn't sure whether it was real
23 or a dream.

24 Q. That's correct. But what did he tell him he
25 remembered?

1 A. Well, that -- some of the details that --

2 Q. So you forgot the details of what you read about his
3 discussion with Art Figueroa, but you've retained the
4 uncertainty and dream part.

5 A. Well, that he -- that he believed that -- or he was
6 starting to either have real memories or have dreams that he
7 was involved.

8 Q. Right. And that he was at By George's Halloween of
9 2001 with Ryan Ferguson. Correct?

10 A. Well, I don't remember exactly which details he told
11 which friend, but --

12 Q. If your records that you reviewed for three months
13 prior to today reflect that Chuck Erickson told Art Figueroa
14 that, "Yeah, I'm not sure, but Ryan Ferguson and I were at By
15 George's, and we killed that guy on the Tribune parking lot,
16 and that I beat him and Ferguson strangled him," would you
17 have any argument with that?

18 A. No. If -- I would accept that he -- that may have
19 been part of that discussion, if I -- if you showed it to me.

20 Q. And that he told essentially the same thing to Nick
21 Gilpin. You wouldn't have any argument with that, would you?

22 A. Yeah. If you refreshed my memory with documents
23 that he discussed those facts, I wouldn't disagree.

24 Q. Okay. You'd accept that as occurring.

25 A. Yes.

1 Q. Okay. And you would also accept, if it's in those
2 statements, that he said he remembered a cleaning lady and
3 telling her to go get help. If it's in there. Correct?

4 A. If it's in there, yes.

5 Q. Okay. Before he talked to the police.

6 A. If it's in there, yes.

7 Q. And Nick and Art never suggested anything before he
8 confided in them, did they?

9 A. I don't -- didn't see any evidence that they did at
10 all.

11 Q. And ma'am, most of your cases that you have dealt
12 with in defense cases of people who have recalled a child
13 abuse incident from their childhood, once they've reached
14 adulthood, you have been critical of memories being brought
15 out, if you will, via therapy; isn't that correct?

16 A. Suggestive psychotherapy, yes.

17 Q. In other words, you've given caution to other
18 therapists against even accidentally bringing forth a memory
19 that isn't accurate. Or isn't true. Right?

20 A. Well, I've tried to caution people to be careful
21 about using techniques that are prone to lead to false
22 memories.

23 Q. There's no indication that any psychologist or
24 psychiatrist or any mental health professional or any human
25 being prior to the time that he was talking to Nick Gilpin --

1 strike that, prior to the time he talked to the police,
2 there's no evidence that he was ever suggested by a therapist
3 to have been involved in this crime; isn't that correct?

4 A. I didn't see any evidence of that, no.

5 Q. Okay. He was never given dream therapy.

6 A. No, I didn't see any evidence --

7 Q. Never given sodium pentathol.

8 A. Not that I know of.

9 Q. Okay. Nothing was done by any therapist or any
10 human being to suggest that he committed this murder. Isn't
11 that true?

12 A. When he initially started pondering the idea, it
13 came from him. Apparently.

14 Q. Not suggestion. Correct?

15 A. Right.

16 Q. Now, in terms of detail versus the core of an event,
17 you use those terms, don't you?

18 A. Yes.

19 Q. Somebody could witness a shooting, could witness one
20 person shooting another one, and they may remember the core
21 details, will tend to remember the core detail, that somebody
22 was shot, but sometimes the peripheral details they're not as
23 able to recall. Correct?

24 A. Yes.

25 Q. So in the car crash, for instance, the two cars

1 crash together, and they may remember that impact and
2 describe the vehicles, but they might not remember what the
3 car looked like that was not involved in the accident parked
4 across the street. Correct?

5 A. Correct.

6 Q. So people tend to remember the core or the essence
7 of the traumatic event. Isn't that correct?

8 A. Yes.

9 Q. And isn't it true that people who are actually
10 involved in the event tend to remember the core, or the
11 essence, better than those who are nonparticipants?

12 A. Well, there's one study that does show -- at least
13 one that shows somewhat better memory if you're a participant
14 than just an observer. All other things being equal.

15 Q. Well, I mean, you've testified and written before
16 that people who are a participant in the event remember the
17 core details better than observers, haven't you?

18 A. I -- well, that's what I just said. There is a
19 couple of studies that show that you're somewhat better.

20 Q. Well, you agree with that too --

21 A. Yes.

22 Q. -- don't you? You agree with that. Correct?

23 A. All other things being equal. I mean...

24 Q. Do you agree, ma'am, that people can have awful
25 things happen to them, and not think about them for a long

1 time, and be reminded of them later?

2 A. Yes.

3 Q. In fact, those are your words, aren't they?

4 A. Sounds very familiar.

5 Q. They can have an awful thing happen to them, not
6 think about it for a long time, and then remember it again.

7 A. That can happen.

8 Q. What is a retrieval cue?

9 A. It's just some sort of stimulus in the environment
10 that causes you to be reminded of something.

11 Q. Maybe the anniversary of an event?

12 A. Well, usually, in the research on retrieval cues,
13 that hasn't exactly been looked at, but --

14 Q. Well, that's in the DSM-IV, isn't it? That -- under
15 -- at least -- take post-traumatic stress syndrome.

16 A. Well, one -- I suppose one way that an anniversary
17 could be a retrieval cue is: When we have a -- the
18 anniversary of the assassination of President Kennedy, it
19 does sometimes remind people about what they were doing on
20 that day when they learned the news about the Kennedy
21 assassination. Assuming they were over the age of eight at
22 the time.

23 Q. Right. They would remember what they were doing
24 maybe when they heard about President Kennedy being
25 assassinated; right?

1 A. Right.

2 Q. But you wouldn't expect them to remember where they
3 were when President Kennedy was assassinated, would you? You
4 see the difference?

5 A. Yes, I do.

6 Q. In other words, we can remember where we were when
7 we heard about 9/11.

8 A. Yes.

9 Q. When we heard about it. Or read about it. But
10 not -- you don't think of where you were when the first
11 terrorist jet hit the building; correct? That's not what
12 happens, is it?

13 A. Well, that's the -- that is not exact -- that's not
14 the best example, because that went on for more than an hour,
15 and people became aware of it while it was -- some people
16 became of aware of it while they --

17 Q. Well, I mean --

18 A. -- in the middle of it.

19 Q. Let's say you were on a trip and you didn't hear
20 about it for -- you were on a camping trip and you hear about
21 it two days later. You would remember when you got the news.
22 Right?

23 A. Right.

24 Q. Not where you were when it was happening.

25 A. That would -- that would -- that would make sense.

1 Q. Thank you, ma'am. Would you agree, Doctor, that
2 retrieval cues sometimes trigger unpleasant or traumatic
3 memories?

4 A. Yes.

5 Q. And you said, "Hey, go to your high school reunion."
6 Right?

7 A. Yes.

8 Q. May have a retrieval cue happen. Okay? Would you
9 agree that people can push information out of their conscious
10 mind and not think about it?

11 A. Yes.

12 Q. You would agree with that.

13 A. Yeah -- that people cannot think about things, yes.

14 Q. Okay. They can push information out of their
15 conscious minds and not think about it. That thing. That
16 event. Isn't that -- do you agree with that?

17 A. Right. I think people do that primarily by
18 distracting themselves.

19 Q. Okay. They're consciously putting something out of
20 their memory because they don't want to think about it.

21 Right?

22 A. Well, they are trying not to dwell on it constantly.

23 Q. Right. People don't -- it's a bad thing. They
24 don't want to think about it. Right?

25 A. Right.

1 Q. And you agree that people -- I think we've already
2 established this. People can forget something and remember
3 it later.

4 A. That can happen.

5 Q. Everybody knows that can happen.

6 A. Correct.

7 Q. And people -- would you agree, ma'am, people can
8 experience something so painful, so terrible, that they avoid
9 thinking about it. Isn't that true?

10 A. Yes.

11 Q. In fact, it happens, that people experience a
12 terrible event, and if you ask that person if they remember
13 whether it happened or not, they might not remember. Doesn't
14 that happen?

15 A. That -- that can happen, yes.

16 Q. In fact, you've testified to that before; correct?

17 A. Well, it can happen. And I -- if I've been asked
18 about it, I might have testified about it.

19 Q. So you agree that people can experience a terrible
20 event and tell you they don't remember it.

21 A. Well, that's correct. There's even one government
22 study: A year after being in an auto accident, people are
23 asked, "Were you in an accident?" And they tell the
24 interviewer, "No."

25 Q. Most certainly people can forget horrible things

1 that happen to them. Correct?

2 A. That can happen.

3 Q. In fact, those are your words, in an article,
4 "Memory Distortion and False Memory Creation"; correct?

5 A. Well, you'll have to -- I'll take your word for it,
6 but.

7 Q. You forgot writing that?

8 A. That could have been a hundred articles ago. And I
9 don't remember the exact wording I used in every article.

10 Q. You don't disagree that those are your words, do
11 you, ma'am?

12 A. Well, if you'd like to show me the article, I can
13 confirm it.

14 Q. Do you disagree?

15 A. I don't really disagree with it, no.

16 Q. All right. In fact, in that same article, "Memory
17 Distortion and False Memory Creation," you said, quote, "We
18 should be able to concede that it is possible for people to
19 forget traumatic experiences and later remember them." Your
20 words, ma'am?

21 A. Well, that sounds -- it sounds familiar, and I would
22 agree with that.

23 Q. You'd also agree that traumatic memory can come back
24 with a retrieval cue. Isn't that correct?

25 A. Yes.

1 Q. Ma'am, did you also -- well, strike that.
2 "Traumatic memories take many forms. Sometimes they are
3 repressed, and sometimes they are repressed and return." Do
4 you recall who wrote that?

5 A. That sounds like something I might have been
6 speculating about in 1990 or 1991. Some --

7 Q. Speculating?

8 A. -- 15 years ago. Yeah.

9 Q. Okay. Your words.

10 A. I believe that, before really investigating this
11 whole repressed memory controversy, I thought maybe there was
12 such a thing as repression.

13 Q. Okay. Well, you do agree that people forget.

14 A. Yes. That's not the same thing as repression.

15 Q. Okay. That's cool. They forget a traumatic memory,
16 and they remember it again.

17 A. That -- that can happen, yes.

18 Q. Okay. And you agree -- I think you started to say
19 that if you don't like something, you don't want to think
20 about it, it's painful, you can distract yourself when
21 thoughts of it start to come to your conscious mind? You
22 agree with that?

23 A. Sure. People can do that.

24 Q. Because you've said that too. Do you remember
25 saying that?

1 A. I would agree with that.

2 Q. Okay. You agree that if someone can distract
3 themselves and not think about something, they can forget
4 about the event. You agree with that?

5 A. Well, they can certainly not think about it, yes.

6 Q. I mean, if you're -- that's a direct quote out of
7 another case you testified in under oath. You do agree with
8 that? That, quote, "Eventually, if you can distract yourself
9 and not think about something, you can forget about it"?

10 A. You'll have to show me that.

11 MR. ROGERS: Your Honor, for the record, could we
12 have the case and the date?

13 THE COURT: If you want to -- yes.

14 MR. CRANE: Actually, Judge, all the -- all of the
15 questions that I've been drawing from are from -- not --
16 strike that. The last series of questions, three of them,
17 Commonwealth of Massachusetts versus Paul Shanley. February
18 3rd, 2005. Testimony of Dr. Loftus.

19 Q. And Doctor, there's -- well, do you agree you
20 testified in that case?

21 A. I did, yes.

22 Q. Okay. Do you agree you've said the things, going
23 back through the last series of questions -- let's just take
24 the last three. Do you agree with those propositions?

25 A. They sounded familiar, but you just read me

1 something that didn't sound quite right, so I'm asking you to
2 show it to me.

3 Q. Page 37, line --

4 MR. CRANE: Do you want it see it?

5 Q. 37, line 8. I think I got it highlighted.

6 A. Well, it says -- I'm being asked the question:
7 "Eventually, if you can distract yourself and not think about
8 something and not rehearse it, then maybe you can forget
9 about it at that way. Do you remember saying that at this
10 deposition as well?" And my answer was: "I don't remember
11 exactly that, but you can show it to me. I mean, I would
12 agree with that."

13 Q. Okay. That's what you said in that case? Do you
14 agree with that?

15 A. That, if you can distract yourself and not think
16 about something and not rehearse it, then maybe you can
17 forget about it at that -- I think I probably was saying "in
18 that way." That might be a typo.

19 Q. And then you later said you agree with that.

20 A. Yeah. I would -- I would agree. You can just not
21 rehearse something and --

22 Q. And they were --

23 A. -- may be one way that you can kind of forget about
24 something.

25 Q. And on that question, the prosecutor in that case on

1 cross-examination was referring you to a deposition; is that
2 right?

3 A. It appears that way, yes.

4 Q. Yeah. Now that brings me to another question. What
5 is the DSM-IV?

6 A. Well, that is a document used -- developed by the
7 American Psychiatric Association to aid mental health
8 professionals in terms of being able to diagnose patients.

9 Q. Right.

10 A. And their conditions.

11 Q. Okay. And you rely on the DSM-IV and other -- I
12 realize not the only thing, but you do consult and are
13 familiar with the DSM-IV?

14 A. I'm not that familiar with the DSM-IV. It's used
15 for diagnosis and classifying patients. Being able to
16 communicate about the conditions of patients.

17 Q. You're not that familiar with the DSM-IV?

18 A. Well, I know what it is, but I don't use it in my
19 day-to-day research, no.

20 Q. Well, do you agree that the DSM-IV accepts the
21 diagnosis -- or the idea that people can lose a memory of a
22 traumatic event and then later recover it?

23 A. Well, there's something in there about -- about
24 amnesia and so on. Although there is a caution about not
25 using it for forensic purposes.

1 Q. Right. This -- but you're not really that familiar
2 with this?

3 A. No. I -- that is a document prepared by the
4 American Psychiatric Association. I'm not a psychiatrist,
5 and I --

6 Q. Yeah, but this isn't just for psychiatrists, is it?

7 A. Well, people who deal with patients, who treat
8 patients, use that for communication and classification.

9 Q. Okay. I mean, the DSM-IV says in the beginning,
10 "The purpose of DSM-IV is to provide clear descriptions of
11 diagnostic categories in order to enable clinicians and
12 investigators to diagnose, communicate about, study, and
13 treat people with various mental disorders." Right?

14 A. Right.

15 Q. And you communicate about -- you may not treat
16 people, but you communicate and study people; right?

17 A. I study the memories of people, yes.

18 Q. Are you familiar with dissociative amnesia?

19 A. I've probably read the section, yes.

20 Q. Do you remember reading out of the DSM-IV that
21 "dissociative amnesia most commonly presents as a
22 retrospectively reported gap or series of gaps in recall for
23 aspects of an individual's life history"? Does that sound
24 right?

25 A. It sounds right.

1 Q. "These gaps are usually related to traumatic or
2 extremely stressful events." Sound right?

3 A. Well, you'll have to show it to me.

4 Q. Okay. And defense attorney can ask you about the
5 rest of this section. I'm looking at page 520 and the
6 highlighted portion I have here.

7 (Mr. Crane showing the manual to the witness.)

8 A. Well --

9 Q. You've had an opportunity to read the highlighted
10 portion, ma'am?

11 A. Yes.

12 Q. Okay. And that is the DSM-IV; correct? Can I see
13 it? Because I can't -- I don't have it memorized.

14 A. Yes. DSM-IV. Yes.

15 Q. And you agree that in its discussion of dissociative
16 amnesia, these gaps are usually related to traumatic or
17 extremely stressful events. Some individuals may have
18 amnesia for various episodes, and it includes violent
19 outbursts.

20 Now, it also indicates that "The main manifestation
21 in most individuals is a retrospective gap in memory. The
22 reported duration of the events for which there is amnesia
23 may be minutes to years."

24 A. You'll have to show me that.

25 Q. Okay. Right there. Highlighted right there.

1 (Mr. Crane showing the manual to the witness.)

2 Q. Doesn't it say that, Doctor?

3 A. It does, yes.

4 Q. Okay. Thank you. You don't disagree with that, do
5 you?

6 A. I don't disagree with the sentences in there. I
7 just don't know what evidence they're really using for it.

8 Q. Well, you accept the idea that a person could lose a
9 memory of a traumatic event and recover it later. Correct?

10 A. I accept that someone cannot think about something
11 for a long time or can distract themselves by thinking other
12 things and then be reminded of it. That is ordinary
13 forgetting and remembering. There's -- there's nothing fancy
14 about it.

15 Q. All right. That's fine. Ordinary remembering or
16 forgetting.

17 A. Right.

18 Q. I'm going to ask if you recall your deposition in
19 Jane Doe versus Schultz Lewis (phonetic), back in October of
20 2000. And I'll just tell you, ma'am, this is the deposition
21 that they were talking about in the 2005 trial transcript.

22 A. Okay.

23 Q. You don't disagree with that?

24 A. I don't know. I don't remember that.

25 Q. Okay. And do you remember being asked in that

1 deposition, which we've referred to in the Shanley trial --
2 which, by the way, was a case in which you were testifying
3 for the defense on behalf of somebody accused of child abuse;
4 right?

5 A. That was -- I don't remember the details of that.

6 Q. That was just back here in February of this year.

7 A. Oh, Shanley.

8 Q. Yeah.

9 A. Oh. I thought you were talking about this Schultz
10 case.

11 Q. Yeah.

12 A. Yes.

13 Q. Okay.

14 A. Yes. Repressed memory.

15 Q. And you were asked the question: "The organization
16 that created the DSM," that's the DSM we've been talking
17 about, "basically accepted the idea that the person could
18 lose a memory of a traumatic event and then later recover
19 it." You were asked that question. Do you remember
20 answering: "Well, I think lots of people would agree with
21 that. You can not remember and then remember." Then you
22 were asked the question: "Do you agree with that?" And your
23 answer was: "Of course."

24 Do you need to look at this?

25 A. Well, I -- it sounds very familiar, and I agree with

1 it.

2 Q. Okay. That people can not remember, and then
3 remember.

4 A. Yes.

5 Q. Is it your opinion that false memories are more
6 prone to be adopted by someone who will receive favorable
7 consequences if they adopt the false memory?

8 A. I think that's probably correct.

9 Q. Okay. You would agree then that someone who may
10 perceive their remembering this falsehood and getting some
11 benefit from it, like, "Now I can justify why I'm, you know,
12 in this position," maybe in a mental institution, or
13 whatever, and somebody, maybe a therapist, starts suggesting,
14 "Hey, maybe you got -- had this bad thing happen to you when
15 you were a kid."

16 A. Right.

17 Q. That might be something that the patient, if you
18 will, would view as a favorable consequence for them. "Hey,
19 this will answer the questions about why I was -- you know,
20 why I'm in a mental" -- whatever. You understand what I'm
21 saying?

22 A. I do, yes.

23 Q. Okay. Would you agree that it is more unlikely for
24 someone who would have negative consequences to adopt a false
25 memory? Would you agree with that?

1 what it is. I mean, I don't know either, but --

2 THE COURT: If he wants to ask a question, he may.

3 Q. Well, you understand that that's kind of an
4 intermediate revision of the book, since the original DSM-IV
5 came out.

6 A. Well, I -- the DSM I understand is -- goes through
7 all kinds of evolutions, as diagnoses come in and drop out.

8 Q. All right.

9 A. And so this is just maybe the latest version.

10 Q. I always thought the DSM was the DSM-III, and then
11 we had the DSM-III-R during the '80s, and then the DSM-IV
12 came out sometime?

13 A. Yes.

14 Q. That's your memory?

15 A. Yes.

16 Q. And now we have the DSM-IV-R -- TR. Excuse me. And
17 according to the Library of Congress
18 Cataloging-in-Publication Data here on the inside, this is
19 officially known as the DSM-IV, 4th Edition, Text Revision.

20 A. Okay.

21 Q. Correct? But we don't know what revisions were made
22 when.

23 A. I don't, no.

24 Q. And the part that Mr. Crane read to you and showed
25 to you and had you read and stuff, you don't know whether

1 that was in the original DSM-IV or not.

2 A. I don't really know.

3 Q. And you were read some excerpts from an article that
4 you wrote called -- I lose things.

5 A. You could ask me.

6 Q. I'm sorry. What was the article that he was reading
7 you quotes from?

8 A. It -- he mentioned one article by name, which I
9 could find on the vitae, but I -- it appears as if he was
10 reading different sentences from different articles at
11 different times.

12 Q. What's the one he mentioned by name?

13 A. If you hand me the vitae, sir, then --

14 Q. That would be easier, because you lived these
15 events.

16 MR. CRANE: I can try to speed it up by finding out
17 which one of them you're talking about. What was the
18 question? Do you remember?

19 MR. ROGERS: No. I don't take that detailed of
20 notes.

21 A. In answer to your question, I believe that he was
22 reading some sentences from my article "Memory Distortion and
23 False Memory Creation," published --

24 Q. That's the one.

25 A. -- in the bulletin of the American Academy of

1 Psychiatry and Law.

2 MR. CRANE: 1996.

3 A. 1996. But I also believe he read some quotes from
4 something that I may have written back in 1990 or --

5 MR. CRANE: '93. "Why Do Traumatic Experiences
6 Sometimes Produce Good Memories and Sometimes No Memory."
7 Page 222. 1993 article.

8 MR. ROGERS: Anything else?

9 A. Well, I see, "Why" -- in 1992, "Why Do Traumatic
10 Experiences Sometimes Produce Good and Sometimes Poor." That
11 was published in 1992. So I would have probably written that
12 in 1990. And that's why I said that, you know, that's a view
13 from 15 years ago that has evolved in light of the last 15
14 years' worth of scientific evidence.

15 Q. Okay. And that's what I was going to ask you. What
16 have you done since writing the quote that he read to you to
17 investigate the propositions expressed in that quote?

18 A. Well, back in the early 1990s, when people were
19 claiming that they had, for example, been molested in Satanic
20 cults for years and repressed these experiences into their
21 unconscious, and some clinicians were believing and
22 discussing this whole issue of repression and people were
23 being accused based on it, I thought there was -- was
24 repression. I had heard the word used. I possibly even used
25 it in some of my own writings. But I had never really

1 investigated the evidence for it. And once I did, in the
2 very early 1990s, I was actually quite shocked that there was
3 no good, credible support for the idea that we take this
4 horrible brutalization and banish it into the unconscious,
5 and that we are, by some process, beyond ordinary forgetting
6 and remembering.

7 And so I have -- I have examined the lack of
8 evidence, the subsequent attempts to produce evidence, the
9 flaws in those attempts, and have come to an opinion, that is
10 shared by many other clinicians and memory scientists, that
11 there's a real problem here.

12 Q. Okay. And that, therefore, is the genesis of the
13 title of your book, *The Myth of Repressed Memory, False*
14 *Memories and Allegations of Sexual Abuse.*

15 A. Yes.

16 Q. And that book was published in 1994.

17 A. Correct.

18 Q. So it would have been written after you wrote the
19 article that he questioned you about and as a result of the
20 research you did in response to the issues discussed in the
21 earlier article.

22 A. Correct.

23 Q. And have you, since writing the 1994 book, continued
24 an interest in that field?

25 A. Yes.

1 Q. And you've been doing your own studies and looking
2 at everybody else's.

3 A. That's correct.

4 Q. Anybody come up with any evidence supporting the
5 theory of repressed memories?

6 A. Well, they keep trying, but they haven't produced
7 any -- any really credible scientific support for this idea
8 of massive repression, no.

9 Q. Okay. Now, you were asked by Mr. Crane at the very
10 end about the notion of a positive consequence being --
11 making it more likely to, what do I want to say, adopt a
12 false memory?

13 A. Yes. That's my -- that's the impression that I
14 have. That it would be easier to plant a false memory if it
15 would lead it to positive consequence. That it would be
16 easier for me to convince somebody that they were owed money,
17 for example, rather than that they owed someone else money.

18 Q. Okay. And, of course, what is a positive
19 consequence and a -- what's a negative consequence might
20 differ, might it not?

21 A. Well, that's true. I mean, even in the -- some of
22 the sex abuse cases where people have developed these
23 memories of Satanic ritual abuse, I have been asked many
24 times, "Why would anybody want to make up something so
25 awful?" And the answer, of course, is: If there's a cost to

1 it, because they now are estranged from their family and so
2 on, there must be a very big benefit. And the benefit in
3 those cases can sometimes be obscure, but it's a desire for
4 attention or a desire to have some of your problems explained
5 or some -- a sympathy or empathy you get from other people
6 who are making the same claims. So there's your -- there's
7 your benefit, even if there is a cost.

8 Q. And if there might be a negative consequence, if
9 that negative consequence is not as negative as some other
10 consequence, then it might be positive in relation to the
11 other one. See what I'm talking about?

12 A. Well, I --

13 MR. CRANE: Judge, I'm going to object. Leading and
14 compound.

15 THE COURT: You may rephrase your question.

16 Q. Can the individual's assessment of consequences be
17 viewed in relative terms?

18 MR. CRANE: Object to the form of the question.

19 THE COURT: Sustained.

20 MR. ROGERS: I thought the last one was the bad
21 question.

22 Q. Could you tell us whether or not, in assessing the
23 ease with which a false memory can be induced, the relative,
24 positive versus negative, consequences might be a factor.

25 A. Well, of course -- now this is kind of an extreme

1 case, but it will make the point that I want to make to
2 answer this question. If -- if planting one false memory
3 means that you're going to have a bad consequence and go to
4 jail for life, and planting -- or a jail for ten years, and
5 another memory will put you in jail for -- or give you the
6 death penalty, then maybe the lesser negative is the better
7 of those two. And that's why somebody might be susceptible
8 to having a memory be planted that has a negative
9 consequence.

10 MR. ROGERS: Mr. Weis, would you play the clip,
11 please?

12 THE COURT: Tell me what you're going to be playing.
13 I assume --

14 MR. ROGERS: I'm going to ask her: Is that an
15 example of consequences of possibly planted memories.

16 THE COURT: And this is something that's been
17 admitted?

18 MR. ROGERS: Something that's been admitted. It's
19 Defendant's Exhibit D.

20 THE COURT: All right. D has been admitted.

21 (Excerpt played.)

22 MR. ROGERS: That's enough. Thank you. Thanks.

23 Q. Is that an example of a relatively positive
24 consequence being offered for the memory, as opposed to the
25 relatively negative consequence of being the one on the

1 chopping block hanging out here?

2 MR. CRANE: I'm going to object as to her
3 interpretation of that in that context, Judge.

4 THE COURT: What is your specific objection,
5 Mr. Crane?

6 MR. CRANE: Relative to what? There's no evidence
7 that he -- are you talking about -- the range of punishment
8 issue was what this witness just brought up a minute ago. I
9 mean, relative to what?

10 THE COURT: Please rephrase your question.

11 Q. Let me do it -- did that clip give an example of
12 what we're talking about? Something which might be a
13 false -- or a negative consequence independently might be
14 positive in relation to something else?

15 A. Well, I -- I -- it's hard to know. But what is
16 clear is that there is reinforcements and punishments being
17 offered in the course of that -- you know, being communicated
18 to Mr. Erickson. That he'd be better off if he responds in
19 certain ways than in other ways.

20 Q. Now let's go back to some earlier things that
21 Mr. Crane asked you about. First of all, about what -- these
22 days, within the last couple three years, about what
23 proportion of your income is derived from testifying in
24 criminal cases?

25 A. Maybe a seventh or a sixth or --

1 Q. And I realize Southern California is not a cheap
2 place to live, but if you didn't do cases like this, would
3 you starve?

4 A. No, I wouldn't.

5 Q. Okay. And if you did cases which put your
6 professional reputa on the line, and your testimony was not
7 accurate or reliable, would that cost you a whole lot more?

8 MR. CRANE: Judge, I'll object to form of the
9 question. Leading.

10 THE COURT: Sustained.

11 Q. What would be the economic impact of you being a
12 witness for hire who will say whatever somebody wants to pay
13 her wants to hear?

14 A. Well, I -- I don't really need economically to work
15 on criminal cases at all, since I have so many other happily
16 professional opportunities in my life right now.

17 Q. Are you proud of your professional reputation?

18 A. Yes, I am.

19 Q. Are you going to sell it for whatever you're getting
20 paid in this case?

21 A. No.

22 Q. You understand, of course, that every time you
23 testify, somebody down the road is going to have a
24 transcript.

25 A. Well, I'm sure there are many, many transcripts of

1 my prior testimony floating around and available to people.

2 Q. Now, after I quit objecting to Dr. Dean's report,
3 Mr. Crane asked you several things about it; is that correct?

4 A. Yes.

5 Q. And those are not things that were really germane to
6 your determination in this case, were they? I mean, whether
7 he was delusional or dissociated or all that stuff?

8 A. Well, it might have made a difference if he had a --
9 if he were retarded, for example. Because we know that
10 levels of retardation are associated with even greater
11 suggestibility. It might have -- but, of course, we get
12 suggestible -- suggestibility effects with normal IQ people,
13 so.

14 Q. Even high IQ people.

15 A. Even high IQ people, yes.

16 Q. Possible exception of Alan Alda.

17 A. Yes.

18 Q. I haven't tested his IQ. He looks smart on TV.

19 I believe Dr. Dean's report indicated that long-term
20 and short-term memory were intact? Is that what you remember
21 him saying?

22 A. That was the suggestion, yes.

23 Q. And -- first of all, was there anything in the
24 report that you saw that said how that was evaluated?

25 Through any type of --

1 A. I don't --

2 Q. -- testing instrument?

3 A. I don't remember, no. I don't.

4 Q. Secondly, does that have anything to do with the
5 veracity or nonveracity of his claimed memories?

6 MR. CRANE: Judge, that invades the province of the
7 jury.

8 THE COURT: That objection is sustained.

9 Q. Let me ask you this. The presenting problem to
10 Dr. Dean, from her report, which you reviewed, which
11 Mr. Crane questioned you extensively about, was what? Why
12 was Mr. Crane having Dr. Dean evaluate Erickson?

13 MR. CRANE: Well, hold it. Judge, the questions
14 that I asked her about dealt with Dr. Dean's evaluation of
15 Mr. Erickson at the request of Erickson's defense attorney,
16 Mark Kempton. And then thereafter he was seen by Dr. Dean
17 again, at my request. He's suggesting that the only time
18 Dr. Dean saw Chuck Erickson was with respect to my request.
19 That's not the case.

20 MR. ROGERS: All right. Well, let's do both.

21 Q. Did you have more than one report from Dr. Dean?

22 A. Well, I have information that she saw Mr. Erickson
23 on two occasions, before writing her report.

24 Q. And you have one report that you got basically --
25 and when did you get that? When was that report written?

1 Can you tell me?

2 A. The report was dated September 14th, 2005.

3 Q. Okay.

4 A. It indicated that she had seen him on two separate
5 occasions.

6 Q. Right. And with regard to that, when she wrote the
7 report, did it say what she was evaluating him for?

8 A. I thought it was to see if he was competent to
9 testify.

10 Q. Okay. And did it say that that was at the request
11 of Mr. Crane, the prosecutor?

12 A. Yes.

13 Q. Okay. So she was asked by the prosecutor to
14 evaluate him, to see if he's competent to testify. Right?

15 MR. CRANE: Well, Judge, for the record, that
16 request to see Mr. Erickson and evaluate his competency and
17 whether or not he suffered from mental disease or defect was
18 also made by Mr. Kempton, Mr. Erickson's defense attorney.

19 MR. ROGERS: I'm asking about the report that she
20 reviewed that you questioned her about.

21 MR. CRANE: Right. And you're couching it in terms
22 of my request. I'm only, for the record, stating --
23 accurate -- it is request of defense attorney first, and then
24 later me.

25 Q. In any event, there's nothing there to evaluate --

1 well, let me ask it: Is there any testing that can determine
2 whether a memory is, after the fact -- obviously if you film
3 the event, then you can see what really happened. But after
4 the fact, is there psychological testing that can determine
5 whether a memory, a claimed memory or a reported memory, is
6 false or accurate?

7 A. No. You need independent corroboration to tell the
8 difference between a memory that is real, genuine, authentic,
9 or one that's a product of some other process.

10 Q. So when you read in that report, "long-term and
11 short-term memory were intact," that did not go anywhere to
12 answering the question that you were looking at.

13 A. Correct. No.

14 Q. Okay. And there were many -- various mental
15 conditions that Mr. Crane asked you that apparently were not
16 diagnosed by Dr. Dean? Do you remember that?

17 A. Yes.

18 Q. Okay. And were any of those conditions that would
19 relate to a person's susceptibility for the implantation or
20 suggestion of false memories?

21 A. Well, I -- I don't know. I see false memories in
22 normal, healthy, you know, intact people. I can't tell you
23 whether, if somebody's diagnosed as being delusional, that
24 they would be more susceptible. I could imagine that might
25 be true, but I don't know for sure.

1 Q. Because a delusion is kind of already an accepted
2 auto suggestion?

3 A. Yes.

4 Q. Okay. So that brings us to -- we'll get to that in
5 a minute. You were also asked a question -- I made an
6 objection about case studies. And just to explain that, what
7 is a case study? In your profession.

8 A. Well, usually a case study is just one individual or
9 one patient. And so -- you can see examples in the
10 literature where a mental health professional, for example,
11 will say, "I had a patient. Here were the patient's
12 symptoms. Here was my diagnosis. Here's the treatment I
13 did." And usually they -- the article ends with: "And the
14 patient got better," or they wouldn't be writing the article.
15 But that would be a case history or a case example.

16 Q. Do you do that?

17 A. I -- I use occasional anecdotes, but I don't really
18 use case histories, because I've written about them, and they
19 are subject to misrepresentation by the person who is the
20 only one who possesses the information.

21 Q. The patient? Or the --

22 A. Or the therapist.

23 Q. -- the clinician?

24 A. Yes.

25 Q. And so what kind of studies do you use?

1 A. I do experimental studies where we run, for example,
2 groups of people, groups of individuals, some of them are
3 given one treatment or one manipulation, and the others are
4 given a different manipulation, and then you compare their
5 behavior.

6 Q. And are these studies carefully constructed?

7 A. Yes.

8 Q. Is that part of what you do to be one of the most
9 eminent psychologists of the past century?

10 A. That shows you I'm a has-been already, but yes, we
11 use the experimental scientific method.

12 Q. Okay. And you do a study that will be controlled
13 with regard to the relevant variables; right?

14 A. Yes.

15 Q. And that can be replicated by somebody else who
16 wants to check your results.

17 A. Yes.

18 Q. You can't do that kind of thing with a case study,
19 by definition.

20 A. That's the problem with case studies. One problem.

21 Q. Okay. And the problem with experimental studies is
22 creating test conditions which will replicate traumatic
23 events, subject to some kind of ethical constrains; right?

24 MR. CRANE: Form of the question.

25 THE COURT: Sustained. As to the form of the

1 question.

2 Q. What is the challenge with constructing a case study
3 like the kind you've described -- excuse me, an experimental
4 study, not a case study, like the kind you've described?

5 A. Well, you try to design an experimental situation
6 that kind of captures the essence of something that happens
7 in the real world. And sometimes that's the challenge.
8 Because you don't want to do anything in your experimental
9 study that's going to create permanent harm for a subject.
10 Or even temporary harm.

11 Q. Or somebody who's not really a subject, just a
12 bystander. For example, you can't have a hundred people,
13 half of them go out and kill somebody, half of them just go
14 get drunk; right?

15 A. Right.

16 Q. That would be unethical.

17 A. Yes.

18 Q. Okay. Now I noted, when somebody's cell phone went
19 off in the courtroom, you checked your cell phone to make
20 sure you turned it off.

21 A. Yes.

22 Q. Is that -- what would you call that, in the context
23 of memory?

24 A. I forgot whether I turned it off.

25 Q. Okay. And did you retrieve a memory after the cue?

1 Or did you just take action to make sure?

2 A. I just took action. And then I saw that it really
3 was off.

4 Q. Okay. Did you now remember having turned it off?

5 A. No, not exactly.

6 Q. All right.

7 A. But I -- you know, I -- not exactly.

8 Q. All right. Now, you talked a little bit about what
9 you called auto suggestions? Tell me about those.

10 A. This is where people suggest things to themselves.
11 So you can -- you can draw inferences about what might have
12 happened in the past situation. And those inferences and
13 thoughts can act like post-event information. And you can
14 then come to believe that you actually experienced what you
15 were really merely speculating about. And that's an example
16 of auto suggestion. There's no external suggestion coming
17 in. Nobody's telling you it was a yield sign instead of a
18 stop sign, but you're inferring it or assuming it or
19 speculating about it.

20 Q. And how do you study that scientifically?

21 A. Well, there are a number of different ways. I mean,
22 one is to look at the spontaneous distortions that occur,
23 some of which I mentioned, where people remember voting in
24 elections they didn't vote in and try to analyze why that
25 happened. The other is to do studies where you know that

1 people are likely to draw inferences, and see whether they
2 later on misremember the inferences actually having been
3 presented.

4 So, for example, in one study, when subjects heard,
5 "John -- John hammered the nail into the wall" -- or wait,
6 "John pounded the nail into the wall," later on, what people
7 remember hearing is "John hammered" -- I even messed up the
8 example. They hear "John pounded," but they later remember
9 hearing "John hammered the nail." Well, no one ever said
10 "hammered." No one ever said anything about a hammer. He
11 could have pounded the nail into the wall with his shoe. But
12 it's a natural inference for people to draw, that when they
13 hear "pounded the nail," that he was using a hammer. And
14 later on people will indeed misremember and think they heard
15 "hammer."

16 Q. Now, you were asked about police reports concerning
17 conversations Chuck says he had with Nick Gilpin and Art
18 Figueroa? Do you remember those?

19 A. Yes.

20 Q. Okay. First of all, you've looked at a lot of
21 police reports in your life, I assume?

22 A. Yes.

23 Q. Are they always accurate?

24 A. No.

25 Q. Secondly, you don't know whether those reports were

1 generated before or after Mr. Erickson had the conversations
2 with the police on March 10th that you viewed, do you?

3 A. I don't know.

4 Q. Thirdly, was it after the -- you I think agreed with
5 Mr. Crane that those -- the conversations with Nick and Art
6 happened before Erickson's arrest. Correct?

7 A. Yes.

8 Q. But it was after Erickson's arrest that the
9 interview with Mr. Short concerning the cleaning lady, where
10 Short told Erickson what the cleaning lady told the police
11 happened. Right? The one we saw earlier?

12 A. Yes.

13 Q. And you also have reviewed a police report of
14 Mr. Short's initial interview with Erickson. The one that
15 was not tape-recorded or videotaped. Correct?

16 A. Yes.

17 Q. Tell us whether or not in that report -- tell us who
18 in that -- according to that report, first introduced the
19 notion that one these suspects told the cleaning lady to get
20 help?

21 A. Well, I'd have to just refresh my memory, but in
22 that interview, it was Detective Short doing the interview,
23 and the report does say, "He stated he saw a female standing
24 between the two doors near the loading dock or on a loading
25 dock at the back of the business. He stated he yelled at her

1 and he got mad at her because she just stood there."

2 MR. CRANE: Well, Judge, she -- we don't have any
3 argument with that. She can read from the report. I mean,
4 that's all well and good, what she's reading there. Would it
5 be okay, though, on recross if I were allowed to -- I may not
6 object, if I were allowed to have her read from Art and
7 Nick's statements?

8 MR. ROGERS: I believe what you did was ask her
9 leading questions about what was in them over my objection.

10 MR. CRANE: And on cross-examination I can lead.

11 MR. ROGERS: Right.

12 MR. CRANE: My objection then, if there's no
13 agreement to that effect, is that this witness should not
14 read from the police reports, although I realize she already
15 did that, and that much is fine.

16 MR. ROGERS: Well, so far we're trying to give some
17 context to the answer to the question.

18 A. Yes. But it -- it is --

19 THE COURT: Well --

20 MR. CRANE: Judge, can I get a ruling on my
21 objection?

22 THE COURT: Yes. The question was: Did she
23 remember in the report a certain matter.

24 MR. ROGERS: Right.

25 THE COURT: And she said she'd have to refresh her

1 memory by looking at the report.

2 MR. ROGERS: Right.

3 THE COURT: And so she's looking at the report. And
4 she's beginning to read into the record what the report says.
5 And if the objection is that she should not continue to read
6 the report into the record, that objection would be
7 sustained.

8 MR. ROGERS: Okay.

9 THE COURT: But she certainly may answer the
10 question that you've asked her.

11 Q. And reading to yourself the report to refresh your
12 recollection, have you got there yet?

13 A. Yes, I do. This refreshes my recollection, that it
14 was the detective explicitly telling Erickson that the
15 cleaning lady told the police that someone asked for help.
16 And that Erickson then said that was him.

17 Q. Okay. And does that occur before there is any
18 attribution in the report to Erickson of that statement?

19 MR. CRANE: Judge, I'm going to object. What part
20 of that statement? Because what the witness has previously
21 read, in the report that she had very handy right beside her,
22 was that Erickson told Short that he had yelled at the
23 cleaning lady. Now, if the question is -- and I believe
24 that's what's on the table right now. Mr. Rogers has asked:
25 "If all together yelled at the cleaning lady to go get help,"

1 may be another question, but there should be a distinction,
2 based on the information that's in the report.

3 MR. ROGERS: Let me rephrase the question, and maybe
4 that will make it clear.

5 Q. When that -- in the context of that report, and this
6 is the report by somebody who the state chose not to call, so
7 we don't know --

8 MR. CRANE: Equal opportunity, Your Honor.

9 MR. ROGERS: Excuse me.

10 Q. In the context of that report, when the words or the
11 gist of the statement made to the cleaning lady first
12 appeared, who is credited with speaking those words?

13 A. Well, it is my impression from this report that
14 Erickson himself may have first reported that he said
15 something to the cleaning lady, but it was Detective Short
16 who informed him that the cleaning lady had told the police
17 that the person had asked for help. So --

18 Q. That's fine. Now, you were asked a bunch of
19 questions about somebody trying to forget an unpleasant
20 event, and you talked about how that could happen when
21 somebody tries to distract themselves from thinking about it;
22 is that correct?

23 A. Yes.

24 Q. If, based upon your knowledge and research and
25 expertise in the field of psychology with -- specifically in

1 the realm of human memory, if an individual had successfully
2 distracted themselves from thinking about an event, a very
3 serious and traumatic event which had occurred on November
4 1st, would reading a newspaper account of that event on
5 November 2nd tend to maintain that distraction?

6 MR. CRANE: Judge, that is -- if that's a
7 hypothetical, it -- I mean, there is no way that this witness
8 can answer that question, under any realm of scientific
9 authority. How in -- can that question be answered? I mean,
10 she may be, Judge -- it's a foundational question.
11 Dr. Loftus has been qualified as an expert by the defense,
12 but she is not a mind reader. And that question is exactly
13 what she's being asked to do. And, you know, I don't -- I
14 don't think she'll disappoint, but there's no -- no
15 foundation for that in science, that she can in any way
16 answer that.

17 THE COURT: You may respond if you care.

18 MR. ROGERS: Oh. Seems so obvious to me that that
19 is what we're talking about. He asked her question after
20 question, with quotations out of context from other cases or
21 other articles or whatever, about distraction and forgetting
22 and self distraction, and eventually if you self-distract
23 long enough, you can forget. Now the question is: If you're
24 self-distracting that so you'll forget, what would be the
25 impact of reading a newspaper two days ago?

1 MR. CRANE: Judge, I never used the term
2 self-distraction.

3 THE COURT: I will permit her to answer generally.
4 She may not answer with respect to the individual in this
5 case, because I don't know that she could know, in his mind,
6 what happened. But she may generally testify to her
7 expertise in that area.

8 Q. Let me see if I can formulate a question that works.

9 In the context of the things Mr. Crane was asking
10 you and the quotations he was reading to you from various
11 times over the last 15 years about self-distraction and -- or
12 distracting yourself, your mind from things, so that you
13 won't be confronting the memories, do you remember those
14 questions?

15 A. (Nodding head up and down.)

16 Q. Is that a fair way of stating it?

17 A. Well, the -- given that -- given everything we know
18 about people who have been through horrific experiences, I
19 have seen no evidence that you could remind a person of the
20 experience one day later and they'd be completely unaware
21 that it happened.

22 Q. And if somebody were consciously trying to ignore an
23 experience, would they seek out such a stimulus? A news
24 report?

25 A. Well, you -- if they're trying to avoid thinking

1 about something, you would think they would avoid reminders
2 of it.

3 Q. It seemed that way to me, but...

4 THE COURT: Mr. Rogers, I don't know how much longer
5 you have in redirect. The jury's lunch is here. And if it
6 were very brief, I would permit you. And I'm sure there may
7 be some recross also. I don't know how much longer you care
8 to go.

9 MR. ROGERS: I -- it may be brief, but I can't
10 guarantee it.

11 THE COURT: All right.

12 MR. ROGERS: It seems to be laborious at this point.

13 THE COURT: All right. If -- I don't know where our
14 marshal went, but Harold, can you -- will you get them out of
15 here? Ah, here he is. Les.

16 Ladies and gentlemen, we will take our noon break.
17 A little bit late, but we will.

18 The Court again reminds you of what you were told at
19 the first recess of the Court. Until you retire to consider
20 your verdict, you must not discuss this case among yourselves
21 or with others, or remain in the presence of anyone who is
22 discussing the case when the Court is not in session. Do not
23 read, view, or listen to any newspaper, radio, or television
24 report of the trial.

25 Take about an hour break for lunch.

1 DEPUTY COURT MARSHAL WERNER: Yes, ma'am.

2 THE COURT: If you'll let me know when the jury's
3 finished.

4 DEPUTY COURT MARSHAL WERNER: Yes.

5 THE COURT: And the witness may be excused for lunch
6 also. Just come back within an hour.

7 - - -

8 The following proceedings were held out of the presence
9 of the jury:

10 THE COURT: Mr. Rogers, do you intend to rest with
11 this witness, when her testimony is --

12 MR. ROGERS: Yes. We have a couple of exhibits to
13 offer, but that's it.

14 THE COURT: All right. And will there -- Mr. Crane,
15 will there be rebuttal evidence?

16 MR. CRANE: I don't think so.

17 THE COURT: All right. We did have an instruction
18 conference last evening. And counsel was going to be busy --
19 or staff was going to be busy getting together some drafts of
20 instructions. Do you have those here in the courtroom?

21 MR. CRANE: I'll get them. I don't think we got
22 them here. Yeah, we do.

23 THE COURT: You want to give me just a marked copy?
24 I guess I need an original -- I will need an original of all
25 of them.

1 That's murder one. And murder second.

2 MS. GOROVSKY: Your Honor, I made complete new sets
3 for everybody.

4 THE COURT: Okay. And did -- you didn't include the
5 ones defense was going to do.

6 MS. GOROVSKY: I did not.

7 THE COURT: Okay.

8 MR. ROGERS: The other murder second, the only
9 distinction is the number the Court writes in.

10 THE COURT: I will write numbers in the
11 instructions. I did not intend to write them in the forms of
12 verdict.

13 MR. ROGERS: That makes a certain amount of sense.

14 MS. GOROVSKY: And Your Honor, he -- I'll wait a
15 minute.

16 THE COURT: Just a minute.

17 DEPUTY COURT MARSHAL WERNER: They asked that that
18 be placed in the file.

19 THE COURT: Who did?

20 DEPUTY COURT MARSHAL WERNER: Eileen from the
21 clerk's office brought it up.

22 THE COURT: Okay.

23 The little old lady that let her phone go off and
24 didn't even turn it off, but continued to walk out with it,
25 was here on several occasions when I made the announcement.

1 She is the only person in that audience that has stood every
2 time the jury has come in. I've noticed that as well. I
3 take it she's probably not real pleased that you've checked
4 her telephone.

5 DEPUTY COURT MARSHAL WERNER: She didn't really
6 indicate that she was upset. She just didn't understand who
7 would be calling her, because not very many people had that
8 phone number. Her name is Carston or something.

9 THE COURT: Carston?

10 DEPUTY COURT MARSHAL WERNER: Carston.

11 THE COURT: I assume you'll get her name so you can
12 return the phone?

13 DEPUTY COURT MARSHAL WERNER: Jack took care of that
14 for me --

15 THE COURT: Okay.

16 DEPUTY COURT MARSHAL WERNER: -- because he was out
17 -- back there. We'll get that taken care of.

18 THE COURT: All right.

19 I have the robbery. If you have a reasonable doubt,
20 with the purpose, together with Charles Erickson, and -- this
21 is robbery in the first degree. I have -- so you have
22 conversed murder one, conventional murder two, and felony
23 murder two. Yes?

24 MR. ROGERS: That's correct. Although they are
25 identical for the two second degree murders.

1 THE COURT: No.

2 MR. ROGERS: The converses. The language is
3 identical.

4 THE COURT: I don't think it is.

5 MS. GOROVSKY: No.

6 MR. ROGERS: No, you're right. I'm sorry. I'm
7 sorry. I misspoke. What I mean is the first degree murder
8 and the second degree conviction are --

9 THE COURT: Are the same.

10 MR. ROGERS: That's what I meant to say.

11 THE COURT: Okay. Were there any others, other than
12 those converses, that you were going to prepare for me?

13 MR. ROGERS: I think the other ones -- one is
14 Instruction A, rejected.

15 THE COURT: Yes.

16 MR. ROGERS: And the other one we intend to give as
17 submitted last night.

18 THE COURT: And you have the state's instructions?
19 And you have a complete set for me, and also for the -- one
20 for the jury? All right. I'll take a look at them during my
21 lunch hour. Hopefully I won't get stains on them. We'll
22 come back to it.

23 Did you see anything in the defense --

24 MS. GOROVSKY: I did not.

25 THE COURT: You didn't see them, or you didn't see

1 anything that you --

2 MS. GOROVSKY: I did not see anything that I want to
3 object upon.

4 MS. BENSON: Your Honor, the jail is wondering if
5 they can take Ryan down.

6 THE COURT: Sure. This is just an instruction
7 conference.

8 MS. BENSON: Okay.

9 THE COURT: I'm just looking at these right now to
10 see if I have a question.

11 (The defendant left the courtroom.)

12 THE COURT: Are you looking through the state's?

13 MR. ROGERS: I just have, Your Honor.

14 THE COURT: And were any -- anything that you --
15 other than the one you've already -- other objections that
16 you've made on the record, did you have any additional
17 objections?

18 MR. ROGERS: Objections? I -- I don't know whether
19 I made this on the record or not, Your Honor, but I did make
20 on the record last night my objections to the wording of
21 their -- their second degree murder instructions, and I think
22 if the Court views the record made last night as sufficient
23 on that issue, I don't think we need to repeat it.

24 THE COURT: All right. And my recollection is that
25 also last night you had objected to the definition of cool

1 reflection in the murder first degree instruction, 314.02.

2 MR. ROGERS: And I renew that objection as well,
3 Your Honor.

4 THE COURT: Okay.

5 MR. ROGERS: And with regard to 310.50, I would
6 object to submission of 310.50. Not to the language of it,
7 but to giving it at all.

8 THE COURT: And the reason that the state is
9 offering this is because there's evidence that at least
10 Erickson was intoxicated.

11 MS. GOROVSKY: That's correct.

12 THE COURT: And they're acting in concert.

13 MS. GOROVSKY: I think there is even evidence that
14 the defendant was intoxicated as well, considering he was at
15 a bar.

16 THE COURT: Well, not everyone at a bar is
17 intoxicated.

18 MS. GOROVSKY: True. But I think there is some
19 circumstantial evidence there.

20 THE COURT: All right. Your objection's are
21 overruled, if those are all your objections.

22 MR. ROGERS: With regard to the earlier one, Your
23 Honor, I just want to comment that I do not believe that
24 Erickson's intoxication is relevant to Ferguson's mental
25 state. I think -- I don't think it would be a defense that,

1 "I had the intent to further the commission of a robbery;
2 that the guy who I was having help do it was too drunk to
3 know what was going on." So I don't think that Erickson's
4 intoxication warrants the submission of this instruction.
5 And I don't think that the evidence of Ferguson's
6 intoxication, such as it is, is sufficient to warrant the
7 giving of this instruction. So I'm objecting.

8 MS. GOROVSKY: Your Honor, we have tons of testimony
9 from the codefendant that the defendant was drinking. That's
10 not to be ignored evidence.

11 THE COURT: Well, I think it's up to the jury to
12 decide whether or not he was intoxicated and whether someone
13 of his size and age, consuming the amount of alcohol there
14 was testimony about, whether he was intoxicated or not. So,
15 I think it's a jury issue on that, in that regard.

16 With that understanding, I guess we need to talk
17 about the time that you would be allowed for closing, but
18 Mr. -- Mr. Crane is not here. And you're not doing the
19 closing argument on the case.

20 MS. GOROVSKY: No, I am not.

21 Bill. We need Kevin.

22 THE COURT: I will give -- assuming that you rest,
23 and that the state rests and doesn't call any kind of
24 witnesses, I will take a break to allow you to collect your
25 thoughts, and if you need to use the rest room or whatever

1 you need to do.

2 MR. ROGERS: Actually what I'm hoping -- well, I'll
3 go get something to eat between now and then, because the
4 jury is eating now.

5 THE COURT: They are eating now. Yes. But I'm just
6 telling you that --

7 MR. ROGERS: I was thinking of waiting to get
8 something then, because Dr. Loftus needs to be at the airport
9 at 3:18. I don't think I will have any problems. It's not
10 that far to the airport and it's not that big of place. But
11 she's got the world's worst flight schedule. Three different
12 flights.

13 (Mr. Crane present in the courtroom.)

14 THE COURT: My inclination is, since punishment is
15 not to be discussed in the first part of this case, and I
16 trust you have other instructions in the event --

17 MS. GOROVSKY: We do.

18 THE COURT: -- that there are guilty verdicts
19 returned on one or more --

20 MS. GOROVSKY: We do.

21 THE COURT: -- of the counts, that it seems to me
22 that 45 minutes on each side should be sufficient, on the
23 guilt phase of this trial. If you don't think you need 45
24 minutes, that's fine.

25 MR. CRANE: I might not use 45 minutes, but I -- I

1 mean, what do you think, Charlie?

2 MR. ROGERS: 45 minutes is sort of what I was
3 ball-parking anyway, so I think I can do it in 45 minutes. I
4 have never yet not consumed all of the time. That's just me.
5 That's --

6 THE COURT: So if I gave you an hour and a half, you
7 would consume that as well.

8 MR. ROGERS: Right. Or three days or whatever.
9 I've never had three days.

10 THE COURT: Well, no, I don't -- we're not in
11 California.

12 How do you want to split your time?

13 MR. CRANE: Let me do the math here. 23 minutes --
14 and the back end's got to be less; right?

15 THE COURT: That would be 22 or less. And 22 and 23
16 is 45.

17 MR. CRANE: Yeah. That's --

18 THE COURT: The last time I counted.

19 MR. CRANE: -- the only way I can get the most at
20 the back end; right?

21 THE COURT: Yes. 22 is the long --

22 MR. CRANE: 23 and 22. Yeah.

23 THE COURT: Do you need any kind of reminder?

24 MR. CRANE: Can you give me a two-minute bell, Fred?

25 DEPUTY COURT MARSHAL BAER: Uh-huh.

1 MR. ROGERS: You actually ring a bell?

2 DEPUTY COURT MARSHAL BAER: Uh-huh. A little school
3 bell.

4 THE COURT: It sounds like when you go into an old
5 shop and you go ding ding ding.

6 MR. ROGERS: Cool.

7 DEPUTY COURT MARSHAL BAER: Does he want two minutes
8 on both sides, Judge?

9 THE COURT: Two minutes on both sides, Kevin?

10 MR. CRANE: Pardon me?

11 THE COURT: Two minutes on both sides?

12 MR. CRANE: Yeah. At the front and the back, yeah.

13 THE COURT: Do you need a warning before you -- you
14 can't split yours, unfortunately.

15 MR. ROGERS: Come on, Judge. How about if he has
16 leftover? I want probably five-minutes warning and then a
17 two-minute warning.

18 DEPUTY COURT MARSHAL BAER: Okay.

19 THE COURT: I think we can figure that one out. We
20 do have a stop watch. We do not count time if there is a --
21 if there should there be an objection, we don't count that in
22 your time.

23 MR. ROGERS: Okay.

24 THE COURT: We stop the watch.

25 MR. ROGERS: That's fair.

1 THE COURT: All right? With that understanding,
2 well, maybe you can get a bite to eat.

3 MR. ROGERS: Thank you, Judge.

4 THE COURT: Uh-huh.

5 (Recess taken.)

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: State ready to proceed?

10 MR. CRANE: Ready, Judge.

11 THE COURT: And the defendant ready to proceed?

12 MR. ROGERS: Ready, Your Honor.

13 THE COURT: And the witness is here and ready to
14 proceed as well.

15 The jury is ready? Yes?

16 DEPUTY COURT MARSHAL: Yes.

17 THE COURT: I see a little crack in the door there.

18 - - -

19 The following proceedings were held in the presence of
20 the jury:

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ELIZABETH LOFTUS,

resumed the stand and testified further:

THE COURT: Mr. Rogers, you may continue your
redirect examination.

MR. ROGERS: Thank you, Your Honor.

- - -

RESUMED REDIRECT EXAMINATION

BY MR. ROGERS:

Q. Dr. Loftus, before lunch we had some conversation
about favorable consequences or positive consequences and
negative consequences of adopting a memory. Correct?

A. Yes.

Q. If someone had a feeling of guilt about an incident,
would resolving that guilt -- could resolving that guilt be a
favorable consequence?

A. Well, given that guilt's often an unpleasant
feeling, any -- something that might reduce it could be
considered some positive benefit, yes.

Q. Okay. And you were asked on cross-examination about
some criminal cases in which you had testified. Turning all
the criminal and civil cases together, since you received
your doctorate -- back in 1970?

A. Yes.

Q. -- about how many court cases have you been involved
in?

1 A. Well, I've actually testified in approximately 250
2 or 260 trials in the last 30 years, but I have consulted on
3 additional cases, even though I haven't actually testified in
4 those cases.

5 Q. Some civil, some criminal; just --

6 A. Right.

7 Q. -- a variety of things. And with regard to criminal
8 cases, you mentioned that you had testified on behalf of
9 Michael Jackson, who was found not guilty.

10 A. Well, I consulted in that case.

11 Q. Consulted.

12 A. I didn't actually testify.

13 Q. Okay. And Martha Stewart?

14 A. I consulted in that case.

15 Q. Consulted? What other high profile, non murder,
16 serial killer, sexual abuse kind of cases have you testified
17 in? Just give a couple.

18 A. Oh, I -- well, I consulted in Oliver North's case in
19 the late 1980s. I've consulted in numerous -- well, other
20 kinds of cases.

21 Q. Okay. Thank you. You were also asked about the
22 dedication of your book, *The Myths of Repressed Memory*. And
23 as I recall, you were asked about two peoples whose names do
24 not appear in the dedication, but who appear along with many
25 others in the acknowledgement.

1 A. Correct.

2 Q. And you read that one paragraph of the
3 acknowledgement, which goes on for another page and a half or
4 so?

5 A. Well, we acknowledged the help of quite a few
6 people, yes.

7 Q. Some are persons who had been accused; some were
8 persons who were accusers; some were psychotherapists; some
9 were researchers such as yourself; and just a bunch of
10 people.

11 A. Yes.

12 Q. Editors, publishers, family members.

13 A. Yes.

14 Q. Your own family members.

15 A. Yes.

16 Q. Okay. But did you also have a dedication of that
17 book?

18 A. I did, yes.

19 Q. Would you tell us to whom that book was dedicated.
20 Or to what.

21 A. We dedicated the book to the, to quote, principles
22 of science, which demand that any claim to truth be
23 accompanied by proof.

24 Q. Okay. Now, in that regard, Doctor, in the study you
25 have done over the past many years and the techniques you

1 have developed for investigating memories in the
2 nonexperimental situation, the noncontrolled situation, what
3 techniques are there for distinguishing a true memory from a
4 false memory?

5 A. Basically, since both kinds of subjective
6 experiences can be felt with a lot of confidence or delivered
7 with a lot of detail and emotion, it really is virtually
8 impossible to tell the difference, without some independent
9 corroboration.

10 Q. And what -- what do you mean by independent
11 corroboration?

12 A. Well, some -- some piece of ind -- you know, it
13 could be some DNA evidence or some photographs or some --
14 some truly independent eyewitness testimony that's credible.
15 Some piece of independent corroboration.

16 MR. ROGERS: Thank you.

17 THE COURT: Are you through?

18 MR. ROGERS: Yes, Your Honor.

19 THE COURT: Recross?

20 - - -

21 RE-CROSS-EXAMINATION

22 BY MR. CRANE:

23 Q. You testified on re -- or excuse me. I can't
24 remember. You testified when he was talking to you, how
25 about that, that you wouldn't expect somebody to have been

1 engaged in a traumatic event and then not remember it the
2 next day? Did you say that to him?

3 A. Well, I believe that before lunch we were talking
4 about whether somebody could -- that it would be within the
5 usual workings of memory to have a horrific experience, and
6 then a day or two later have no idea it even happened to you.

7 Q. That could happen.

8 A. I think it --

9 Q. Is that what you're saying?

10 A. -- would be very unlikely.

11 Q. Really? Well, see, when I was talking to you,
12 though, on cross, you said that you agreed that people can
13 have awful things happen to them, and not think about them
14 for a long time, and be reminded of them later. And you also
15 said, it happens that people experience a terrible event, and
16 if you ask that person whether or not it happened to them,
17 they might not remember. You said, yeah, that happens.

18 A. That happens, yes. That wasn't one or two days
19 later.

20 Q. Well, you also said, when I showed you the DSM-IV,
21 under dissociative amnesia, you said that you agreed with the
22 idea that the main manifestation of dissociative amnesia in
23 most individuals is a retrospective gap in memory; the
24 reported duration of the event for which there is amnesia may
25 be minutes to years. You agreed with that idea, didn't you?

1 A. I agreed that the sentence is in there, but I -- I
2 don't know of any -- any evidence for dissociative amnesia
3 after minutes.

4 Q. Well, that's in this book compiled by other
5 psychiatrists and psychologists and mental health
6 professionals in your very field, and you haven't followed up
7 on why that's in there?

8 A. That is a book for clinicians, to be able to discuss
9 diagnoses.

10 Q. And so if you don't see patients, you just ignore
11 this book?

12 A. Well, I don't -- I don't deal with it in my daily
13 teaching and research, no.

14 Q. And it says that it's not just for treatment of
15 patients; it's also a book compiled by agreement, between
16 numerous mental health professionals, for the discussion of
17 and the study of mental health issues in people, isn't it?

18 A. Well, it's certainly used to communicate, but it's
19 primarily for classification and diagnosis. And there's a
20 caution in there that's its dangerous to use it in forensic
21 situations.

22 Q. Well, isn't it also dangerous not to refer to and
23 consider a book like this? You don't even know what's in
24 here?

25 A. Well, I know -- I happen to know some of it. But I

1 don't use it in my daily teaching and research, no.

2 Q. Well, you don't disagree with that phenomenon, do
3 you? That somebody can have a traumatic, terrible event and
4 consciously put it out of their memory or not think about it
5 and have it remembered again. You don't disagree with that,
6 do you?

7 A. People can not think about something for a long time
8 and then be reminded of it. I agree with that.

9 Q. Okay. The example that's in here is: A soldier,
10 with localized amnesia, may go through several days of
11 intense combat, not remember it, and then regain it later.
12 After he's off the battlefield. This book indicates that
13 that's an example of how a traumatic event can be forgotten,
14 and then it may be remembered again. Is that correct? You
15 don't disagree that that can happen with a -- somebody that's
16 been in combat.

17 A. Well, I have -- in fact, I'm teaching a course on
18 this right now. We are reviewing some of the work on memory
19 of war veterans and people who've been through wars. I
20 don't -- I don't see a single situation where they totally
21 forgot they were in a war.

22 Q. I never suggested that they forgot they were in a
23 war. And you know that, Doctor. I'm talking --

24 MR. ROGERS: I'm going to object to the form of this
25 question, Your Honor. That's totally improper.

1 THE COURT: The objection is sustained as to the
2 form of the question. You may rephrase your question.

3 Q. Do you understand I'm not talking about somebody
4 that was in Vietnam, and when they were put on the plane and
5 brought back to the United States, they forgot they were even
6 overseas. Now, you understand that's not what I'm talking
7 about, don't you?

8 A. I don't know what you're talking about. It's --

9 Q. I'm talking about a situation where somebody in
10 combat, for instance, goes through a traumatic event, and
11 they suffer from dissociative amnesia, that may last for
12 minutes or years. You don't refute that that can occur, do
13 you?

14 A. Well, there certainly are -- there are a few cases.
15 There are cases where people, for example, claim that they
16 have absolutely no memory of who they are or where they grew
17 up --

18 Q. That's not --

19 A. -- or anything about --

20 Q. -- dissociative amnesia, is it?

21 A. Yes, it is. It's -- it's an example of a supposed
22 dissociative amnesia called a fugue state. And it's in the
23 DSM.

24 Q. And you think that's disassociative.

25 A. Dissociative, yes.

1 Q. Dissociative.

2 A. Yes. It's an example of dissociative amnesia.

3 Q. All right. Let me ask you this. Are there other
4 cases, do you agree, where a person can experience a
5 traumatic event, not remember it, and remember it later?

6 A. Well, there -- there are certainly cases where
7 people can not think about something awful that happened to
8 them and be reminded of it later.

9 Q. And be asked at some point if they remembered it and
10 say no. You've already testified to that. That you agree
11 with that idea.

12 A. Well, I have seen situations where people were asked
13 if they were sexually abused, and they say no. And then you
14 give them a few examples of what you might mean, and they'll
15 say, "Oh, yeah. Now that I think of it, that particular
16 thing did happen to me."

17 Q. And it did. Correct?

18 A. Well, it presumably did.

19 Q. You know, the term "repressed memory" is one thing.
20 And I'm not even asking you whether or not repressed memory
21 is relevant in this case. I want to ask you about what we'll
22 call deliberate forgetting of a traumatic event and simple
23 forgetting. You've already agreed that people can experience
24 a traumatic event, and deliberately forget it, and then
25 remember it again. On a retrieval cue. Correct?

1 A. Yes. They can not think about -- try not to think
2 about it and not think about it for a long time and be
3 reminded of it, yes.

4 Q. All right. And then there's also what we can refer
5 to as simple forgetting, where you just forget something like
6 how many times you testified in a criminal case in 2001.
7 Right? That would be an example of simple forgetting.

8 A. Well, you could call that simple forgetting.

9 Q. Okay.

10 A. Yes.

11 Q. And you've testified that the core or the essence of
12 a memory, a traumatic memory, is what is -- usually the part
13 that's retained. And that was your car crash example.

14 A. Right. That -- well, people will remember, you
15 know, that it was an accident, and not a fire, for example.

16 Q. And they might forget some of the details.

17 A. That happens.

18 Q. Like what color the light was.

19 A. Sure. That happens.

20 Q. Whether it was red or flashing. A detail.

21 A. Yes.

22 MR. CRANE: I think that's all the questions I have.

23 THE COURT: Redirect?

24 - - -

25

1 FURTHER REDIRECT EXAMINATION

2 BY MR. ROGERS:

3 Q. I'm a little bit confused, because this book here,
4 the DSM-IV-TR, is called the Diagnostic and Statistical
5 Manual of Mental Disorders, isn't it?

6 A. Yes.

7 Q. And actually, what it does is it gives code numbers
8 for various diagnoses so that psychiatrists can bill
9 insurance companies; right?

10 MR. CRANE: Well, Judge, I'm going to object. Form
11 of the question. Leading. If he wants to look in the --
12 some of the descriptive portions of the book at the front, he
13 can do that. And further, it's form of the question.

14 THE COURT: The objection is sustained. You may
15 rephrase your question.

16 MR. ROGERS: I'm not going to bother, Judge.

17 Q. What is the purpose -- well, I will bother. What is
18 the purpose of the numerical formulation in the DSM-IV?

19 A. Well, it's my understanding that it can allow people
20 to communicate with each other about which mental disorder
21 they are referring to.

22 Q. And when you say "people," is that also people in
23 organizations and stuff like that?

24 A. Certainly you see it on medical records, where
25 people will actually put down a number and say, "This is my

1 diagnosis of the mental disorder that this patient has."

2 Q. And you've never been in clinical practice where you
3 saw patients and diagnosed them and tried to get paid for
4 doing your work.

5 A. That's correct.

6 Q. And you do still try to get paid for doing your
7 work.

8 A. Well, I try.

9 Q. We already went through that.

10 A. Yes. I try.

11 Q. Okay. And in all of the information you saw
12 concerning Mr. Erickson, which was I guess Dr. Dean's
13 reports, report or reports, one report, two interviews, or
14 something, was he ever diagnosed with a mental disorder by
15 Dr. Dean?

16 A. Not that I saw, no.

17 Q. Did you ever see that he had been diagnosed --

18 MR. CRANE: Judge, I'm going to object. Leading
19 question. Suggests the answer. We can approach.

20 THE COURT: The witness has answered the last
21 question.

22 MR. CRANE: Right. I'm talking about this question
23 is objectionable. Leading. I think I know where he's going.
24 It's improper.

25 THE COURT: Well, you may approach, if you wish to,

1 or if --

2 - - -

3 Counsel approached the bench and the following
4 proceedings were held:

5 THE COURT: I don't know where he's going.

6 MR. CRANE: He said, "Do you remember him being
7 diagnosed by Dr. Dean for a mental disorder?"

8 THE COURT: And she said --

9 MR. CRANE: She goes, "No." Now he is going to go,
10 "Do you remember him being diagnosed for OCD?"

11 MR. ROGERS: No, I'm not. That's not where I'm
12 going.

13 MR. CRANE: Okay.

14 THE COURT: Okay. Just try not to ask a leading
15 question, so we can move along, please.

16 MR. ROGERS: Asking leading questions is how we move
17 along.

18 THE COURT: They do help you move, but not in this
19 case.

20 - - -

21 The following proceedings were held in open court:

22 THE COURT: You may inquire.

23 Q. In any of the materials which you have reviewed in
24 connection with Charles Erickson, could you tell us whether
25 or not there has been any indication that he was ever

1 diagnosed with dissociative amnesia?

2 A. To my knowledge, he wasn't, no.

3 Q. So whether or not you agree or disagree or don't
4 know if there's any evidence for or know that there's
5 evidence for the lines in this part of the book, what does
6 that have to do with Mr. Erickson?

7 A. Well, maybe you could ask the prosecutor. I'm -- I
8 don't know.

9 Q. I don't get to ask him.

10 A. I don't think it has much to do with it, but...

11 MR. ROGERS: Thank you.

12 - - -

13 FURTHER RE-CROSS-EXAMINATION

14 BY MR. CRANE:

15 Q. Doctor, you testified that people can forget a
16 traumatic event and remember it again, years later, upon a
17 retrieval cue. Is that correct?

18 A. That happens, yes.

19 Q. And would you agree that that phenomenon is also
20 recognized in the DSM-IV?

21 A. That's normal forgetting. I'm not sure -- I mean,
22 I'm sure most people would accept that.

23 MR. CRANE: No further questions.

24 MR. ROGERS: Nothing further. Thank you, Your
25 Honor.

1 THE COURT: May the witness be finally excused?

2 MR. ROGERS: From the defense, Your Honor.

3 THE COURT: For the state?

4 MR. CRANE: Yes.

5 THE COURT: Thank you, Dr. Loftus. You're excused.

6 Would ask you not to discuss your testimony with any other

7 witnesses. But you're free to go.

8 THE WITNESS: Thank you.

9 THE COURT: Hopefully you'll make your plane.

10 THE WITNESS: Thank you.

11 THE COURT: Does the defendant wish to present

12 further evidence?

13 MR. ROGERS: Briefly, Your Honor.

14 Your Honor, at this time the defense would offer

15 Exhibit AA, which is a business record supported by affidavit

16 of the Missouri Department of Transportation, showing the

17 signal phasing and timing for the traffic signals at

18 Route 163/Providence Road and Locust Street, and Route 163

19 and Ash Street in Columbia, Missouri, as it existed on

20 October 31st, November 1st, 2001.

21 THE COURT: Do you have an objection to Defendant's

22 Exhibit AA?

23 MR. CRANE: No.

24 THE COURT: Defendant's Exhibit AA is admitted.

25 - - -

1 Defendant's Exhibit AA admitted into evidence.

2 - - -

3 THE COURT: And when I don't have a list, I usually
4 write on it. Are you going to read this to the jury or --

5 MR. ROGERS: I will read a very small part of it to
6 the jury and explain to them, Your Honor, if I might, kind of
7 what it is.

8 THE COURT: You may explain. It's admitted into
9 evidence.

10 MR. ROGERS: Ladies and gentlemen, as the affidavit
11 reflects, this is a business record of the Missouri
12 Department of Transportation. It has to do with the timing
13 of traffic signals at two intersections in Columbia. One is
14 Route 163 at Locust. That's a two-page exhibit that shows
15 the timing on different times of day for the signal at 163
16 and Locust. The other is for the signal at 163 and Ash. And
17 it shows the -- it's only one page, but it shows the same
18 information.

19 Both of these reflect, in the lower right-hand part,
20 that from 12 a.m. to 6 a.m., the light is yellow on 163,
21 which is Providence, and it is red on Locust. And that's
22 under the category "flash time." In other words, from
23 12 a.m. to 6 a.m., midnight to 6 in the morning, there's a
24 flashing yellow light for traffic on 163 and a flashing red
25 light for traffic on Locust.

1 Defendant's Exhibits B-1, B-2, and B-3 admitted into
2 evidence.

3 - - -

4 MR. ROGERS: At this time, Your Honor, defendant
5 rests.

6 - - -

7 DEFENDANT RESTS

8 - - -

9 THE COURT: Does the state intend to call rebuttal
10 evidence?

11 MR. CRANE: No rebuttal, Judge.

12 THE COURT: Ladies and gentlemen, the evidence in
13 this case is closed. Last night, after you left, the
14 attorneys and I spent a couple of hours talking about
15 instructions, so that you wouldn't have to sit here today for
16 that discussion. I do want to give them a brief recess, as I
17 indicated before to them, before we take up instructions and
18 closing arguments. And it should be no more than ten
19 minutes.

20 The Court again reminds you of what you were told at
21 the first recess of the Court. Until you retire to consider
22 your verdict, you must not discuss this case among yourselves
23 or with others, or permit anyone to discuss it in your
24 hearing. You should not form or express any opinion about
25 the case until it is finally given to you to decide. Do not

1 read, view, or listen to any newspaper, radio, or television
2 report of the trial.

3 If the jury would be in recess.

4 And counsel may remain just briefly. I need to ask
5 you a question that relates to this matter.

6 - - -

7 The following proceedings were held out of the presence
8 of the jury:

9 THE COURT: The question that I have is: What to do
10 with the alternates when we send the 12 out to deliberate.
11 And I'm going to ask them how they're feeling or if there are
12 family problems. Some courts in the past have -- I mean,
13 we're not going to take them back to Troy. The question is
14 whether we keep them in a private place and instruct those
15 jurors not to talk about the case, in the event someone were
16 to have a heart attack or do something like that and we might
17 want to use one.

18 MR. CRANE: Yeah.

19 THE COURT: And it may be that you wouldn't agree to
20 that at all, in which case -- we're not going to take them
21 back, but we will not keep them as segregated as we might
22 otherwise.

23 MR. ROGERS: I haven't actually given it any
24 thought, Judge, and certainly --

25 THE COURT: I've never had the occasion where I had

1 to use a juror like that, but there have been judges that
2 have in this state.

3 MR. CRANE: Yeah, I think that's a good idea.

4 THE COURT: I know it's been approved by the
5 appellate courts, depending on how you keep them apart and
6 tell them not to discover it -- discuss it, and to begin anew
7 their discussions about the case. I mean --

8 MR. ROGERS: Hopefully we won't need that.

9 THE COURT: I've never had that happen. But we do
10 have two alternates.

11 MR. ROGERS: You're not -- you're not seeking my
12 assent or consent to substituting an alternate, so without
13 waiving any possible objection I might have to that, I think
14 keeping them separate --

15 THE COURT: And apart.

16 MR. ROGERS: -- and apart --

17 THE COURT: And telling those jurors not to discuss
18 the case among themselves or with others.

19 MR. ROGERS: Right. Is probably the best move. But
20 I --

21 THE COURT: Okay. Well, I --

22 MR. ROGERS: Like I say, I don't want to, without
23 having talked about it --

24 THE COURT: I'm not asking you --

25 MR. ROGERS: God knows I don't want to have retry

1 this case.

2 THE COURT: You may certainly reserve any objection
3 that you would have, if we were to have a situation where
4 someone would become ill and be unable to continue in
5 deliberations. I just don't want to let them out -- let them
6 talk to the press. If you don't care.

7 MR. CRANE: Hey, Judge. I tell you what. I'm -- I
8 understand we want to move the case along. I'm asking you
9 for 20 minutes, to get -- to get -- to look over some closing
10 items. I mean, hey, I think that's fair.

11 THE COURT: Are you saying you want a 20-minute
12 recess as opposed to a 10-minute recess?

13 MR. CRANE: Yeah. Can we get a little bit more than
14 10 minutes before we kick off a closing on this thing?

15 THE COURT: How about a compromise. How about 15?
16 Does that sound all right?

17 MR. CRANE: Well, if that's -- if --

18 MR. ROGERS: And then compromise with me and get up
19 to 17 and a half.

20 MR. CRANE: Yeah, I mean --

21 THE COURT: I have never had a jury that wanted to
22 work as hard as this jury.

23 MR. CRANE: Yeah. And we've been working --

24 THE COURT: I mean, they've been pushing us -- I'm
25 willing to work as hard as they are, but I realize I'm not

1 trying the case and preparing it like you are. And I know
2 it's difficult for attorneys.

3 MR. CRANE: And I'm only asking for 10 more minutes.

4 THE COURT: Well, why don't we see you at a quarter
5 after 2. How about that? We'll see you at 2:15.

6 MR. CRANE: Very good.

7 THE COURT: We will be in recess until 2:15.

8 (Recess taken.)

9 - - -

10 The following proceedings were held out of the presence
11 of the jury:

12 THE COURT: Mr. Crane, are you ready to proceed?

13 MR. CRANE: Yeah. I'm still kind of screwing around
14 here with these exhibits, but I'll be ready real quick.

15 THE COURT: Well, I have some instructions to give
16 the jury. Hopefully you'll --

17 MR. CRANE: That's fine, Judge. Go ahead.

18 THE COURT: Is the defendant ready?

19 MR. WEIS: We have one motion we need to take up.

20 THE COURT: All right. You may file your motion.
21 Are you wanting to argue it?

22 MR. WEIS: No, Your Honor.

23 (Motion for Judgment of Acquittal at the Close of
24 All the Evidence filed.)

25 THE COURT: Okay. Have you provided a copy to the

1 state?

2 MR. WEIS: We're going to provide them a
3 file-stamped copy, Your Honor.

4 THE COURT: All right.

5 MR. WEIS: Thank you.

6 THE COURT: The motion then is submitted without
7 argument? Yes?

8 MR. WEIS: Yes, Your Honor.

9 THE COURT: Mr. Crane, do you wish to be heard?

10 MR. CRANE: No.

11 THE COURT: The motion is overruled.

12 You may return the jury to the courtroom.

13 - - -

14 The following proceedings were held in the presence of
15 the jury:

16 THE COURT: Thank you for your patience, ladies and
17 gentlemen. I have some instructions for you, and then the
18 attorneys may argue the case to you.

19 (Instructions 3 through 17 read to the jury.)

20 THE COURT: Mr. Crane, you may address the jury.

21 MR. CRANE: Please the Court. Counsel.

22 THE COURT: If you need to use the Court's
23 instructions, on either side, I'll put them on the bench
24 here.

25 MR. CRANE: Thank you, Judge. I've got a copy.

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OPENING ARGUMENT

BY MR. CRANE:

Well, ladies and gentlemen, after all you've heard about Columbia in this trial, I bet you are ready to get back to Troy.

The instructions that the Court gave you are all very important. Some of them, though, are going to be where ultimately you're going to focus your attention. And those are what's called the verdict directors. Those -- remember in jury selection, when I talked about the elements that you got to find beyond a reasonable doubt of given crimes? Those verdict directors set out the elements. Okay?

Now, I'm going to start with one of the last verdict directors the Court read you. And that's the robbery charge. That's robbery in the first degree. And you remember we talked about the concept of acting in concert, where two people act together to commit a crime? That robbery is that way in the verdict director. It's both the defendant and Charles Erickson, acting together, committed this crime of robbery.

Now, the elements are going to be set out for you. There's a lot of things in all these instructions that aren't in dispute. The date. November 1, 2001. That's not in dispute here. The location, being in Boone County, that's

1 not in dispute. The victim was Kent Heitholt. There's no
2 dispute as to that. Obviously this case is about a whodunit.

3 Now, the elements of robbery in the first degree
4 require that there be some type of physical force used to
5 steal from the victim. And also that serious physical injury
6 was inflicted on the victim during the course of the
7 stealing. Okay? Well, you've seen the photographs probably
8 too many times of what happened to Mr. Heitholt. Obviously
9 serious physical injury was inflicted upon him during the
10 course of this robbery.

11 Now, what was stolen? The evidence has been, ladies
12 and gentlemen, that when they worked the crime scene, the
13 victim's watch was not on his person, not at the crime scene,
14 and never found. We've got evidence that the victim was at
15 home before he went to work. His wife Deborah testified that
16 she saw that watch. Remember, she said she gave it to him.
17 We've got a photograph in State's Exhibit 1B of the victim
18 with his watch on that day, October 31st, '01. And he went
19 back to work later and then left early morning November 1,
20 2001. There's the watch.

21 The belt is, I might add, not a charged item, but it
22 is also in this top picture, 1A, and identified by his wife.

23 Car keys were missing. Ladies and gentlemen, you've
24 heard the evidence. He was at his car. The door was open.
25 He was getting ready to leave. The keys are not at the

1 scene. The evidence is clearly, at its most basic, that his
2 watch and his keys were taken in this robbery. Those items
3 were taken by the use of force, and serious physical injury
4 was inflicted on the victim.

5 You've heard the testimony of Chuck Erickson, ladies
6 and gentlemen. He said he was there with Ryan Ferguson, and
7 they, acting together, engaged in those elements and
8 completed that robbery in the first degree.

9 Now, that's going to be one of the last ones you're
10 going to see. I'm going to start back with the murder
11 charges.

12 The first verdict director for murder is murder in
13 the first degree. And remember, I told you in jury selection
14 that murder in the first degree has an element of
15 deliberation. Not only do you kill somebody, but you do it
16 after deliberation. Cool reflection on the matter, for any
17 period of time, no matter how brief. Okay?

18 Now, how was he killed? You heard the evidence.
19 The medical examiner testified what caused Mr. Heitholt's
20 death was that belt around his neck. You've seen the
21 photographs. You've seen the imprint. You've seen the
22 buckle.

23 That belt was removed from Mr. Heitholt's pants.
24 During the course of this murder, Mr. Heitholt, down, his
25 belt is ripped off. That's an act done in contemplation of

1 putting it around his neck. Rip it off of him. The belt
2 loop's ripped. Then affix the belt around the neck. And
3 then yank up on it hard enough, not only to kill him,
4 strangle him to death, which remember, it took some time
5 before that could completely be accomplished, but it's so
6 hard that it broke his neck.

7 Ladies and gentlemen, that was intent to kill, after
8 deliberation. And you've heard the evidence, ladies and
9 gentlemen. That was done by Ryan Ferguson. The defendant in
10 this case. Murder in the first degree is the appropriate
11 charge for you to come back with on a guilty verdict. As is
12 the robbery.

13 Now, there are other instructions. In the event you
14 should decide -- and by no means talking about this do I mean
15 you should. Should you, though, decide that for some reason
16 there is no deliberation after all that conduct with the
17 belt, then you have two other options.

18 One option is what's called conventional murder in
19 the second degree. That doesn't have deliberation as an
20 element. That's just that the defendant knowingly caused the
21 death of the victim in this case by strangling him. Okay.
22 So there isn't a deliberation element in there. All right.

23 Now, the second form of murder, as you go on through
24 these instructions, that you may consider, is that felony
25 murder. And remember, I talked about that, where you got the

1 wheelman in the robbery, and his buddy goes inside and shoots
2 somebody? And the wheelman can be charged with the robbery,
3 because he was helping his buddy on the murder -- on the
4 robbery, but also charged with murder if his buddy shoots
5 somebody. Do you remember all that, when I was talking to
6 you about that in jury selection? Okay. That also is an
7 option in here for you to consider.

8 But the state submits to you that this case does
9 have deliberation, and the appropriate thing to convict the
10 defendant of in this case is something that he did do. And
11 he did commit murder in the first degree and robbery in the
12 first degree.

13 Ladies and gentlemen, another instruction talks
14 about the burden of proof. Beyond a reasonable doubt. And
15 there's a part of that instruction that says, A reasonable
16 doubt is a doubt based upon reason and common sense, after a
17 careful and impartial consideration of all of the evidence in
18 this case.

19 And you all have been very attentive. You've heard
20 it. You've listened to it. You've carefully considered the
21 evidence in this case. And you're also equipped with reason
22 and common sense.

23 Ladies and gentlemen, if you look at this case,
24 let's talk about what Chuck Erickson says and for a moment
25 compare it to what the defendant testified to yesterday.

1 If you noticed, ladies and gentlemen, the events of
2 the night that Chuck Erickson described for you were
3 virtually, without any exception, agreed to by the defendant.
4 He picked him up at Swilling's. He was driving his Mercedes.
5 He took him over to Erickson's house. Remember, he agreed
6 with that. They left Erickson's. They went to George's.
7 They met his sister. They met Christine Lo, the Asian
8 friend. They got into the bar, with the assistance of the
9 older girls. They drank in the bar. Even what they drank.
10 Amaretto Sours. Chuck Erickson says that they ran out of
11 money. The defendant testified that he spent \$12 total on
12 drinks. He gave Chuck Erickson \$10. And they paid for the
13 cover charge. And we added that up. He said he had 30 bucks
14 on him. That was 30 bucks. They're in agreement. They're
15 in agreement that they were together at George's.

16 You know, ladies and gentlemen, there is no evidence
17 at all that Chuck Erickson did this crime on his own, by
18 himself. That couldn't have happened. Do you remember the
19 map? Both of them agree that at some point Ferguson took
20 Erickson home. There's no way that Erickson can make it back
21 down to the Tribune, commit this crime by himself. Further,
22 do you remember what the janitor said? In their most basic
23 interpretation, two young white males. Two.

24 Now, their -- their conduct inside the bar. They
25 say they pretty much hung together. Saw each other off and

1 on. They left the bar. Together. No dispute, was there?

2 They left the bar together.

3 The location of the car. First and Ash. They're in
4 agreement. Right?

5 And right there, what happens? Charles Erickson
6 tells the truth. And that was what led to this offense.
7 That they left the car, with that weapon, and they went down
8 to the Tribune and committed the crime.

9 The description of the scene by Chuck Erickson,
10 consistent with the scene. Again, in its most basic sense,
11 ladies and gentlemen, the homicide, the beating, and the
12 strangulation of the victim occurred on the driver's side of
13 the victim's car. It appears, it was not disputed by the
14 defense, through their expert, that the victim was standing
15 by his car, with the car door open. And there was blood
16 inside the car. Consistent with Chuck Erickson standing
17 beside the car when he delivered that first blow.

18 Now, the defense expert -- there was maybe some back
19 and forth a little bit about whether something was mud, what
20 have you, but he agreed the victim went to: Standing, down,
21 knees, finally on the pavement. Same as Jeff Nichols, the
22 detective that worked the crime scene. And consistent with
23 Chuck Erickson.

24 Chuck Erickson said, after he was down -- remember,
25 he heard that moan? By the way, there wasn't any police

1 reports for him to read about that moan of the victim.
2 That's burned into his memory.

3 The victim's down. He feels sick. He drops the
4 tire tool. He goes and sits down at the front end of the
5 vehicle. During that period, Charles Erickson's, "Hey, I
6 didn't -- wasn't looking at that point." Whether or not the
7 defendant struck him additional blows, he had the weapon over
8 there. It's possible. Charles Erickson can't account for
9 that period of time. But when he looked up, what was going
10 on? What did he say before he talked to the police? That he
11 saw Ryan Ferguson over the victim, strangling him.

12 MR. ROGERS: I'm going to object to that. There's
13 no evidence whatsoever that Mr. Erickson ever said that
14 before he talked to the police.

15 MR. CRANE: Judge, there's -- our -- we've talked --
16 the witness, Charles Erickson, testified as to saying that to
17 Art Figueroa and to Nick Gilpin, and he told that to the
18 Columbia police.

19 THE COURT: The jury will recall what the evidence
20 is.

21 MR. CRANE: I've only touched on a few of the
22 things, backing up, that defendant and Chuck Erickson agree
23 on. I mean, they weren't wearing costumes when they were at
24 George's. It goes on and on and on. The agreement. Until
25 we get to that one period of time.

1 Defense is arguing that he didn't have a gap at all.
2 That he just imagined this occurrence. Why would anybody do
3 that? It wasn't suggested to him.

4 You know, ladies and gentlemen, they can't tell
5 Chuck Erickson what he thinks. What's in his mind is his.
6 And he remembers. No matter how hard they try to convince
7 him otherwise, he knows. And it was eating at him. And just
8 like the defense expert testified, he put it out of his mind,
9 because it was painful to think about. And he couldn't do
10 it. And he remembered. And he told people about it.

11 And then the police got onto it. And he talked to
12 them. And no, he couldn't remember every detail. And yes,
13 some things came back to him. Some things didn't. You
14 remember all the witnesses that testified in this case? That
15 said they had forgotten things about that night? Or about
16 the past? And they remembered it again when something
17 refreshed their memory? I mean, that goes from anybody from
18 the gal, the 16-year-old that was in the bar; Kelly Ferguson;
19 the defendant; even Dr. Loftus, remembered a fact they'd
20 forgotten when they looked at something. A record or a
21 photograph. But that's nothing. No big shock to you.
22 That's just the way it is when you're a human being.

23 The defense wants you to think that if there is
24 something that he forgot, and then remembered again, that the
25 whole essence of this event can't be believed.

1 The defense expert today testified that the core of
2 that traumatic event, once recalled, due to a -- she called
3 them retrieval cue. I was calling it a trigger before that.
4 The core thing. The two cars hitting each other. Somebody
5 being shot. That's what you remember. You may not remember
6 whether the light was flashing or solid red, but, by golly,
7 you remember that event. And you remember it more when
8 you're a participant. Even though you've tried to forget it.

9 The janitors. Again, at its most basic level, two,
10 not one, two people on the driver's side of the car. Okay?

11 There's no dispute that the time was after Kent
12 Heitholt had gone out and before 2:26. Remember now.
13 Remember that time thing. Kent logs off his computer at 2:08
14 and obviously leaves a few minutes after that. The
15 defendant's last phone call of the night, even though he
16 couldn't remember who he called, couldn't remember that when
17 he talked to the police, was at 2:09. Do you remember how
18 long it takes to get from First and Ash down to the Tribune?
19 3 minutes 20 seconds. 3 minutes 20 seconds. Walking at a
20 regular pace. 2:09 cell phone call. 3 minutes 20 seconds;
21 you got to 2:26 to do this and get out of there.

22 Two; not one. Males. Not women; males. Two. And
23 not Hispanic, not African-American, not Asian, not Indian.
24 White males. Two white males. What else? Two young white
25 males. Late teens, early twenties. And then -- that's the

1 basics. That's the basics.

2 You all get back there in deliberation, holler for
3 these exhibits. Take a look at this second composite. You
4 can take a look at the first one too. Done by Shawna. She
5 said, "This is the guy that yelled." You all take a look at
6 that when you get back there, will you?

7 And Jerry Trump. Jerry Trump, in front of you all,
8 in court, said, "I saw those photos, and they were the ones."
9 And in court, he pointed him out.

10 Ladies and gentlemen, you know, if Chuck Erickson
11 was wanting to get back at Ryan Ferguson for something, we
12 sure haven't heard anything about it. Neither one of them
13 said they had any problems with each other. Neither one of
14 them. Now, Ferguson tried to distance himself from Erickson
15 yesterday, but then he admitted, "Well, yeah, earlier that
16 night I called him. And yeah, we hung out together. No
17 problem."

18 And further, ladies and gentlemen, if Chuck Erickson
19 was going to make this up to get back at Ryan for some
20 unknown indiscretion, he sure didn't do himself any favors,
21 did he? 25 years in the penitentiary. Talk about cutting
22 off your nose to spite your face. Nobody would do that,
23 ladies and gentlemen. He remembers.

24 You'll remember the route.

25 One thing I want to ask you to do, ladies and

1 gentlemen. I'll have a chance to visit with you a little bit
2 longer in a minute. One thing I'm going to ask you. You
3 know, I was talking about the exhibits going back. You're
4 going to have the memory of Erickson's testimony in front of
5 you in your memories, but you won't have a videotape of that.
6 If you've got the videotapes of what Erickson talked to the
7 police, will you also remember his testimony to you,
8 collectively? Will you remember what he said and how he
9 appeared before you? And will you also remember the
10 defendant's testimony when you go back there? Because
11 remember, I asked you during jury selection, said, "You know,
12 if anybody's got a problem, anything from a backache to
13 worrying about something, tell me now," because we're going
14 to have to have everybody's memories, listening, retaining,
15 because when you go back there in the deliberation room,
16 yeah, you're going to have exhibits potentially, but it's
17 just going to be what you remember, in some cases, on that
18 testimony. Will you take back those memories of his
19 testimony? He was up there for, what? Eight hours?

20 MR. ROGERS: May it please the Court.

21 THE COURT: You may proceed.

22 MR. ROGERS: Counsel.

23 - - -

24

25

1 CLOSING ARGUMENT

2 BY MR. ROGERS:

3 Ladies and gentlemen of the jury, on behalf of Ryan
4 Ferguson, his defense team, his friends and his family, I
5 want to express our appreciation for the sacrifice you have
6 made coming far from your homes to hear a case about a tragic
7 situation that didn't happen in your community, but happened
8 here.

9 To the friends and family of Kent Heitholt,
10 co-workers, I want to express, on behalf of Mr. Ferguson, the
11 defense team, his friends and family, our condolences for
12 your loss. We feel your pain. Ryan Ferguson did not cause
13 that loss, but he feels it. And from everything that we have
14 heard, it is a great loss indeed for this community.

15 If I say anything that you resent or disagree with,
16 please, it is not my intention to cast any aspersions on Kent
17 Heitholt. I have none to cast.

18 You have heard a lot about memory in this last week.
19 And so let's look at our memories of a week ago, when we met
20 for the first time in the courthouse in your community, in
21 Troy.

22 Each one of you assured us then that you would
23 follow the Court's instruction. And especially we talked
24 about the principles of law in Instruction Number 4. And the
25 reason we spent such a long time on that is because that's

1 the cornerstone of our legal system. It's what makes America
2 different than Afghanistan or Iran or Korea or someplace. It
3 says -- I'm going to read just parts of it, because my time
4 is limited. "The defendant is presumed to be innocent,
5 unless and until, during your deliberations upon your
6 verdict, you find him guilty. This presumption of innocence
7 places upon the state the burden of proving beyond a
8 reasonable doubt that the defendant is guilty." That is what
9 you all promised you would do before we left Troy. That is
10 what we ask you to do today.

11 And if you do that, this is not a difficult case.
12 This is not a close case. This is not a troubling case, from
13 the point of view of your decision. Of course it's troubling
14 when we know what happened to Kent Heitholt. But this case
15 is open and shut in terms of: Has the state met its burden
16 of proof?

17 You know, what do you do if you have somebody who
18 claims to have a memory of an event? How do you tell if that
19 is a true, accurate memory or a false memory? You can look
20 at outside indicia of how things may have been placed there.
21 You've seen a whole lot of things like that. But underneath
22 it all, what did Dr. Loftus say? And I don't think the state
23 disagrees with it. You look to the external evidence. And
24 so let's look to the external evidence.

25 Let's look, first of all, to the physical evidence.

1 Because the physical evidence, that's what the state spent
2 half of their time on. Physical evidence. And you heard a
3 lot of evidence that details in some -- to some extent what
4 happened there at that scene. You heard evidence about the
5 relationship of places together. You saw physical evidence
6 that had been tested by the Columbia Police Department, with
7 their luminol tracking; by the Missouri State Highway Patrol
8 laboratory; by the FBI laboratory. Not one iota of physical
9 evidence in this case indicates that either Chuck Erickson or
10 Ryan Ferguson was ever present at that scene or ever had any
11 contact with Kent Heitholt or ever had any contact with Kent
12 Heitholt's car.

13 The scientists at the laboratories selected hairs to
14 be examined. And they selected those which were the most
15 dissimilar to the ones that they had that they knew were from
16 Mr. Heitholt. Of those hairs that they examined further,
17 they found one which they could definitely say did not come
18 from Kent Heitholt. That was a hair which was recovered from
19 the evidence bag placed around his I believe right hand.

20 That hair -- and by the way, they put the evidence
21 bags around the hand for the purpose of recovering trace
22 evidence. That's what the bags are for. That's what they're
23 used for. And the whole idea is: Before we move this body,
24 let's make sure that anything that falls off the hand is
25 caught. It is ludicrous to suggest that that hair was

1 somehow already in the bag. It is even more ludicrous to
2 suggest that of all of the hairs and hair fragments that
3 ended up in that bag, all the rest came from Kent Heitholt
4 just by coincidence, and this one came from someplace else
5 unrelated to the crime scene. That hair was in Kent
6 Heitholt's hand when he died. Now, I don't know. I went to
7 the rest room after lunch. I washed my hands. I don't have
8 any hairs. I didn't have any hairs on them when I washed my
9 hands. Except the ones that are growing there on the back of
10 my fingers.

11 Yes, we do live in a -- you cannot show to a
12 certainty, by excluding everyone else that Mr. Heitholt had
13 ever come into contact with or that has ever been anywhere
14 where he's ever been, that that hair came directly from the
15 crime scene, but why did they test it? They tested it
16 because it was a hair in his bloody hand at the time of his
17 death that wasn't his.

18 And sure, there are a lot of cases, maybe nine out
19 of ten, when they don't have any hairs from the suspect that
20 are found on the victim. But here we have a hair that is
21 found on the victim. A hair that is not his. Is it just a
22 coincidence that that hair happens to be found there at the
23 time of his death? That every other hair that has been
24 tested that was found on him, on his clothes, near him, is
25 his?

1 Let's talk about what else does the physical
2 evidence show? Because, in fact, the way they handled the
3 scene that night, the prosecutor made it look as if they were
4 doing some sort of Keystone Cop routine and everybody was
5 bent over, trying to contaminate the evidence by shedding
6 hair and stuff. That's not the way they did it. They did it
7 professionally. The first officer there securing the scene.
8 Aside the from the paramedics, they kept everybody else away.
9 The paramedics are trained. They're professional. There's
10 no indication that they would be depositing hairs. Besides,
11 who has the burden of proof? If, in fact, it's a paramedic's
12 hair, "Okay, state, you've got the burden. Prove it."

13 MR. CRANE: Judge, I'd argue equal opportunity with
14 respect to the hair.

15 MR. ROGERS: We don't have a crime lab.

16 THE COURT: The objection is overruled.

17 MR. ROGERS: Thank you.

18 We don't have a crime lab. And we don't have a
19 burden. What they're attempting to do is create a smoke
20 screen and argue away a powerful piece of exculpatory
21 evidence.

22 Fingerprints are a little less obviously connected
23 to the murder. But there are fingerprints which are found.
24 Useable fingerprints. Fingerprints of value. Whatever you
25 want to call it. And unknown. Not the fingerprints of Kent

1 Heitholt; not the fingerprints of his family; not the
2 fingerprints of any police officer whose fingerprints are on
3 file; not the fingerprints of anybody whose fingerprints are
4 in their computer system; and certainly not the fingerprints
5 of Erickson; and absolutely not the fingerprints of Ryan
6 Ferguson.

7 What else do we see? Well, we see the blood stain
8 spatter, whatever you want to call it, evidence. And that is
9 significant. And I will partially agree with Mr. Crane, that
10 there's not a whole lot of dispute on many issues between
11 Mr. Nichols, their witness, and Mr. Singer, our expert.
12 Nichols was there. Singer had only the photographs and
13 reports. But one thing that Singer says -- and it's not
14 disputed by Nichols; he just doesn't say it as forcefully --
15 at least one and probably more of the blows that were struck
16 on Kent Heitholt were struck while his head was at or near
17 the ground.

18 And remember what we went through with this
19 photograph of the hubcap and tire and the upwards angle of
20 the spatter on some of those stains; the fact that the --
21 there's kind of a vertical angle on some, and this obviously
22 large transfer stain?

23 So what does Chuck Erickson say here in court when
24 he claims now that he remembers everything, because he's
25 accepting responsibility? What does he say? He says, this

1 time, "I hit him. I don't know how many times I hit him. I
2 remember I hit him, and he went to his knees. And he made
3 this moan. This noise that I'll never forget. And it made
4 me sick. And I hit him one more time, and he went to the
5 ground. I dropped the implement and went over and sat on the
6 curb of the retaining wall" or the parking lot block,
7 depending on which time he said it, "and threw up."

8 Where's the other blow while the guy's on the
9 ground? Or the other two blows or three? The assault as
10 described by Charles Erickson is not borne out by the
11 physical evidence, the blood stain pattern analysis,
12 whichever account you give.

13 And when the state says, "Oh, it's consistent with
14 the scene," that's just not so. It is not consistent. None
15 of his accounts are consistent. And certainly the account
16 that he gave initially, where he said, "I only hit him once,"
17 the account that he gave later, where he says, "I went into a
18 rage and hit him," none of these are consistent with the
19 scene.

20 Let's talk about other aspects of the physical
21 evidence. Because you remember, when Erickson first was
22 questioned by the police and he is driven around by Jeff
23 Nichols and they're videotaping the drive-around, talking
24 particularly with his exit from the scene, he says: They
25 leave the parking lot; they come in this direction, past this

1 service station, the Break Time, across Providence, cutting
2 through here. And you see -- saw where he was pointing out a
3 big wooden fence. He said, "No, I don't think that's what I
4 climbed over. I thought it was this retaining wall, with the
5 railroad ties." That's what he said when he was driving
6 around with Jeff Nichols.

7 But then what do we know? We know that he got
8 police reports. And the police reports had two different
9 things in them. They had not only the account of Jeff
10 Nichols, of how he, on two separate nights, followed the
11 luminol trail from the alley south to Walnut, and then from
12 Walnut south to Broadway; they also had the report that Jeff
13 Nichols was ordered by Sergeant Monticelli to verify with the
14 luminol the report of Officer Albers and the dog. And you
15 recall that Erickson had access to that report as well.

16 That -- you recall Officer Nichols testifying that
17 he was sent to the area behind this Flat Branch Brewery
18 place, to process that for luminol, because he was verifying
19 where the dog had gone. And you recall he went to this area
20 that's kind of off the map here, by McDavid Hall, which is a
21 part of the University of Missouri, where he testified that
22 the trail that he was supposed to be verifying had ended.
23 The scent trail followed by the dog. And he said that he
24 processed with luminol, not only the steps leading up to that
25 building, but also the interior of that building where the

1 scent trail had ended. Those were with negative results.

2 Then he came back the next night with more luminol.
3 Did from Walnut to Broadway. And he said that by the time he
4 got to Broadway, the luminol trail was exhausted. This was
5 three days later, after the dog initially followed, not a
6 trail of droplets which chemiluminesced, but a scent trail
7 with the nose of a trained canine.

8 So that information is given to Erickson. And what
9 does he do? Well, he accommodates part of it. He follows
10 the luminol trail now in his October 1st account. The
11 account where.

12 He says, "Okay, government. I'm going to take my
13 lumps. Give me my 25 years. I'm going to tell you the truth
14 finally." He says, "Okay. I went over here. I went behind
15 the Broadway Diner." But then he comes, not where the dog
16 went, and we don't know, because there's no luminol here,
17 comes down across the creek, places where Nichols had driven
18 him the day before -- or not the day before. The day of his
19 arrest. Places where Nichols had driven him. Instead of the
20 Break Time, now he says, "It's the Phillips 66," even though
21 he specifically excluded the Phillips 66. And then he says,
22 "We went back to By George's this way."

23 Well, let's wait a minute. What is there, other
24 than the say-so of Charles Erickson, to give any credence to
25 that account at all? First of all, why does he have to get

1 from up here where the dog went down here to the Phillips 66
2 station? Because he's told the police, "Oh, yeah. I saw
3 this guy, Dallas Mallory. Dallas Mallory was there. He was
4 wearing the same police officer uniform he wore at the
5 Halloween party. And he's sitting there at the red light."
6 Remember that?

7 And what does he tell Short? He says, "It was the
8 light by the Break Time." And what does he tell Nichols? He
9 says, "I think it was this light right here. But it might
10 have been this one here at Walnut." And what does he say on
11 October? "Oh, I'm sure it's here. Providence and Locust.
12 Dallas Mallory stopped at the red light." That's what he
13 said under oath at the deposition. Do you remember when I
14 read him the questions and the answers? And he said, "Yep,
15 that's what I said"? Stopped at the red light. Comes up to
16 him. "Oh, me and Ryan, we just beat a guy down back there.
17 Can I have a hit of your marijuana zeppelin?"

18 Well, wait a minute. What corroborates that? Where
19 is Dallas Mallory.

20 MR. CRANE: Judge, I'll object. Equal opportunity
21 to call Mr. Mallory.

22 MR. ROGERS: We don't have any burden of proof.

23 MR. CRANE: I didn't say that. I said they have an
24 equal opportunity to call him as a witness, Judge. They
25 can't comment on our --

1 MR. ROGERS: We can certainly comment on their lack
2 of corroboration of their main witness.

3 THE COURT: That is a fair argument, and in that
4 limited area, the objection's overruled.

5 MR. ROGERS: For that matter, where's John Short?
6 The lead detective in the case.

7 MR. CRANE: Judge, I'm going to have to object
8 again. Equal opportunity. The defense could call John
9 Short.

10 THE COURT: The objection's overruled.

11 MR. ROGERS: If there's anything at all that makes
12 you wonder whether it corroborates Charles Erickson, it's not
13 our burden to corroborate Charles. It's their burden. He's
14 their witness. They're supposed to prove that he's telling
15 the truth.

16 Where is anybody in the whole round world, other
17 than Chuck Erickson, who claims that By George's stayed open
18 past closing time Halloween 2001? Where is there anybody,
19 under 21, over 21, bouncer, bartender, patron, police officer
20 outside, anybody in the whole round world to say, "Oh, yeah,
21 just on this particular night, this place stayed open till
22 4:00 in the morning," when it's supposed to close at 1. And
23 that at 4:00 in the morning, there's a police officer outside
24 making sure that, two and a half hours late, they're having a
25 peaceful exit.

1 You know, we did bring you some witnesses. We
2 brought you witnesses like Melissa Griggs, who was in a bar
3 under age. Still is. Probably is even as we speak. She's
4 getting closer, though.

5 She was there. She saw Chuck. She saw Ryan. She
6 knows them both. She's not a particularly close friend of
7 either of them, but she talked to them. She had been at the
8 same party earlier, at Ryan Swilling's house. Ryan Swilling
9 is her former boyfriend.

10 She stayed a little later, because, by the time she
11 got to the bar, she knew that Ryan had been -- Ryan Swilling
12 had been arrested for having the underage drinking at the
13 party. She says they closed at 1:30.

14 We had Kris Canada, a convicted trespasser, who said
15 that the bar always closed at 1:30. They never stayed open
16 late, even for Halloween. He never worked a Halloween where
17 they had a private party after hours. That what they did --
18 he did, as the back bartender, was close up his bar. The
19 lights come on around 1:15. The bouncers start moving
20 through to get everybody out by 1:30. He cleans up his bar.
21 He takes his liquor up to the front bar, where it's kept. He
22 wipes out the ashtrays.

23 By the way, obviously Chuck had not spent too much
24 time in bars, because he claims they went outside to smoke.
25 I don't spend much time in bars either these days, but I have

1 never been in a nonsmoking bar in the State of Missouri. Let
2 me put it that way. And we have Mr. Canada cleaning out the
3 ashtrays.

4 We called the witness. We called Kelly Ferguson.
5 We called Holly Admire.

6 And let's look at the time line the way things
7 really happened. 1:15 the lights come on. By -- before
8 1:30, customers are out. There's no dispute that Chuck and
9 Ryan left with the crowd. The crowd is leaving between 1:15
10 and 1:30. They go to Ryan's car. They drive to Chuck's. He
11 drops Chuck off in front of his house. He goes to his house.
12 Now it is 1:37, 1:41, something like that. We know it's
13 almost 1:42, because that's when he calls Holly Admire. For
14 the second time. Or third or something. Not the first time
15 that night, but the first time after By George's. And we
16 know that because it's on Ryan's cell phone record and it's
17 on Holly's cell phone record. That that's when it happened.
18 They don't remember when it happened, but the records show
19 when it happened. And the records are evidence. What the
20 records don't show was where Ryan was when he made it.

21 But let me ask you this: Is it reasonable to think
22 that if you are told to leave the bar, and you do, you then
23 make a bunch of cell phone calls for some 20, 30 minutes, 40,
24 and then you decide, "Okay, even though the bar closed 40
25 minutes ago, let's go get some money to go back to the bar"?

1 It doesn't make a whole lot of sense.

2 But it makes perfect sense that Charles Erickson is
3 left at his house sometime before 1:40; that Ryan Ferguson
4 gets to his house, not that far away, sometime around 1:40;
5 that Ryan Ferguson then makes the phone calls that are shown
6 on his cell phone records, ending with a call to a male
7 friend that he doesn't remember who, and doesn't remember the
8 number on the records. A male friend at 2:09. And I think
9 -- and I'm a little confused on this. You remember the
10 evidence. He may have said, "I called, but I don't know. I
11 don't think I actually talked to anybody." Whatever.
12 Anyway, that call is at 2:09.

13 Now, yes, if that call is made while they're at By
14 George's, then there's no time to drop Chuck off and get
15 home, et cetera, before the murder. But if Chuck was dropped
16 off at By George -- at his house half an hour before, before
17 the phone call to Holly Admire, Ryan has no idea what Chuck
18 did after he was dropped off at his house. And neither do
19 we, except based on what Chuck tells us. So it's not
20 undisputed that Chuck had opportunity to get back downtown.
21 He's got half an hour. It takes 14 minutes, or whatever
22 Mr. Hawes said.

23 Compare the manner while -- look at the instructions
24 on how you're supposed to judge the credibility of witnesses.
25 And that's Instruction Number 1, the first instruction that

1 was read to you by the Court before the case, so you'd have
2 some rules to play by when the -- when you heard the
3 testimony. And it says, in the third paragraph, "In
4 determining the believability of a witness and the weight to
5 be given to testimony of the witness, you may take into
6 consideration the witness's manner while testifying; the
7 ability and opportunity of the witness to observe and
8 remember any matter about which testimony is given; any
9 interest, bias, or prejudice the witness may have; the
10 reasonableness of the witness's testimony considered in the
11 light of all of the evidence in the case; and any other
12 matter that has a tendency in reason to prove or disprove the
13 truthfulness of the testimony of the witness."

14 Now, you saw Ryan Ferguson testify. And he does
15 have an interest in this case. Depending on your decision,
16 he will go home to his family, a little late to go take the
17 test, but he'll get back in school and get on with his life.
18 Or he will be incarcerated, imprisoned, for the rest of his
19 life. So he has an interest.

20 But you saw his testimony. You saw his manner. You
21 saw what he said. He didn't try to guess what Mr. Crane was
22 trying to get at. He wasn't evasive. He wasn't combative.
23 He was telling things as best he could.

24 And you saw his testimony. And based on that alone,
25 you should know that he is not guilty. His testimony has

1 been corroborated, to the extent it can be, after all these
2 years, with the cell phone records, by his sister Kelly, by
3 Melissa Griggs, Kris Canada.

4 Think of the other things. The same day they were
5 questioning Ryan Ferguson -- excuse me, Chuck Erickson. And
6 you saw those videotapes. And we'll talk about them in some
7 length in just a minute. They also went and arrested Ryan,
8 in Kansas City, where he's going to school. They questioned
9 him in Kansas City; they questioned him all the way in
10 between Kansas City and Columbia; they questioned him again
11 in Columbia.

12 There is absolutely no evidence whatsoever that Ryan
13 Ferguson has ever in this world told anybody, any place, any
14 time, that he was involved in the murder of Kent Heitholt.
15 None. He's never said it, 'cause he never did it. And you
16 saw the way that Nichols went after Erickson when Erickson
17 was trying to express his uncertainty. Look at it again.

18 (Excerpt played.)

19 MR. ROGERS: If he goes that hard after Charles
20 Erickson, who he views as somebody who just walks in off the
21 street to confess to a murder, what do you think they're
22 doing to Ryan Ferguson? Ryan is one of the 75 percent who
23 has a strong enough memory that he's not going to accept the
24 false memory. But you saw how they treated Chuck. You
25 haven't seen the videotapes of how they treated Ryan.

1 The officers who interrogated Ryan Ferguson have not
2 been called. By either side. And they have not been called
3 by the side that has the burden of proving beyond a
4 reasonable doubt that Ryan Ferguson committed this murder.

5 What else? Well, let's look at Chuck Erickson.
6 You've seen his story change. That very day it changed to
7 fit detail that he was fed by the police. And you can look
8 at these videotapes on the DVD player in your deliberations
9 if you want to. Those videotapes are in evidence. You can,
10 again, see how it changed. But it was pointed out pretty
11 much for several hours during the examination of Erickson and
12 other witnesses.

13 What else has changed, after he gets the police
14 reports? Well, he finally figured out -- oh, by the way,
15 when you look at those videotapes, never once does any police
16 officer interrogating Erickson ever let him know what time
17 the murder took place. If he had said, "We left during the
18 evening and came back and left By George's at closing time,"
19 and they had said, "Wait a minute, closing time's 1:30, the
20 guy's still alive and well," we might not be here. And they
21 never, ever mentioned the time the bar closed or the time of
22 the murder to Erickson, until later on when he gets the
23 police reports.

24 Then he goes back in October. And again here in
25 court. He's got a problem. Because now he understands,

1 unlike the videotapes, where he's thinking, "Ryan must have
2 taken the wallet. After all, it was a robbery. You do a
3 robbery to get money. Money is in a wallet. He took the
4 wallet." But then he has been told, by October: "No wallet
5 missing. Wallet's in the car." The guy didn't keep his
6 wallet on his person; he kept it in the car. "Oh. Wait a
7 minute. I already said we went back and drank. Didn't have
8 any money; went back and drank. Got to come up with
9 something." Then for the first time we have the notion:
10 "Oh, Ryan gets back there, gets into the bar, which we go
11 back into, knowing we don't have any money, because there's
12 no wallet involved, we're going in the bar anyway to drink
13 some more, knowing we don't have any money, but inside the
14 bar, opens up Ryan's wallet, "Oh, lo and behold, here's
15 another \$20 bill I forgot I had." Give me a break. Give us
16 a break. Give the criminal justice system and the search for
17 the truth a break.

18 What else does he do to change his story? Well,
19 like Mr. Crane pointed out when he examined Ryan Ferguson.
20 The day Ryan's arrested, Ryan didn't sit down and stop in the
21 middle of the interrogation and being questioned by police
22 about this and that and say, "Oh, wait a minute. I'm sure I
23 made some cell phone calls. I'll have cell phone records.
24 Those cell phone records will show that I was talking on the
25 phone after we left By George's," and et cetera. He didn't

1 say that. But by the time -- and you'll notice also, nothing
2 on any of the March 10th interrogations of Chuck Erickson in
3 any way mentions Ryan making cell phone calls after leaving
4 By George's. Either time. Nothing.

5 So what happens? Show up in October. Lo and
6 behold, "He stopped. We went out there. He was talking on
7 the phone as we walked to the car. He was talking on the
8 phone in the car. Well, he hung up the phone and we went and
9 did the crime." That is false. I don't think it's a false
10 memory, but it's false. And that is something which has a
11 tendency in reason to disprove the truthfulness of Chuck
12 Erickson.

13 Think of the most significant disproof of Chuck
14 Erickson. He didn't stop in October. He came right in here,
15 and on the witness stand, having reviewed police reports,
16 having met with prosecutors, having found out that Michael
17 Boyd left in the red car, he improved his story. For the
18 first time now he said, "Oh, we got there. We saw Heitholt.
19 We were going to go do it, but then some other guy came out,
20 walking around the parking lot, doing stuff, and so we hid
21 behind the Dumpsters until the other guy got in his red car
22 and left." Do you remember? "Can you describe that
23 individual?" "Oh, he was just a regular, you know, a regular
24 white guy. Regular height. Regular build. Regular dark
25 hair. Middle-aged." A regular, white, middle-aged

1 30-year-old black man. That was the evidence.

2 That's not confabulation. That's not false memory.
3 That's not suggestion. That is a damned lie. And what does
4 he say? "But I wouldn't lie. I wouldn't lie. Oh, I'm
5 taking responsibility. I wouldn't lie." He would rather go
6 to prison for 25 years, assuming that he at all believed
7 Mr. Crane's offer to dismiss it if he said it wasn't right,
8 than to admit that he talked himself into this case; that he
9 was confronted by Jeff Nichols with the choice of: You're in
10 it now, and you're going to either stay in it worse, or put
11 it on Ryan Ferguson.

12 You heard me ask him about his conversations with
13 his father, where his father -- before they ever saw the
14 evidence, before they ever know what the videotapes are like,
15 before he's had the ability to discuss them with his lawyer
16 and point out, "Hey, I was trying to tell them I didn't do
17 it," his father is telling him, "Look, you're going to get
18 twice as much time if you don't cooperate. If you don't come
19 up with some details. You got to increase your value. We're
20 not going to pay for Mr. Kempton if all you're going to do is
21 plead guilty. We'll get you the public defender."

22 This is the man that Shawna Ornt says looks like the
23 person she saw that night. The best she could do. 8.5 on a
24 scale of 10. It doesn't look like Ryan Ferguson. It doesn't
25 look like Chuck Erickson.

1 CLOSING ARGUMENT

2 BY MR. CRANE:

3 Not one time during that argument did you ever hear
4 why would Charles Erickson tell his friends on two separate
5 occasions that he was the one that beat the victim and Ryan
6 Ferguson was the one that strangled him on the Tribune
7 parking lot and that he yelled at a cleaning lady to go get
8 help on Halloween 2001 after they had left George's. Why
9 would he do that?

10 MR. ROGERS: Objection, Your Honor. That misstates
11 the evidence. There's no evidence from Mr. Erickson or
12 anybody else that those lies were told to anybody.

13 THE COURT: The jury will remember that evidence.

14 MR. CRANE: Why? The state can answer that.
15 Because he did it. With Ryan Ferguson. They never answered
16 that. They want you to think that this kid just walks in and
17 says, "I did it, and gosh, now I'm going to continue to talk
18 about it, I'm going to get an attorney, eight months later
19 I'm going to talk about it some more, and then I'm going to
20 plead guilty and go for 25 years." You know, ladies and
21 gentlemen, when Charles Erickson testified before you, this
22 jury, and after pleading guilty he testified before you all,
23 he was certain. He was under a grueling cross-examination.
24 He was certain. Why? Why? Because he did it, ladies and
25 gentlemen.

1 A little bit response to some of the arguments by
2 the defense. You remember all that hair stuff? I counted in
3 opening statement -- and, you know, I don't mean to denigrate
4 Mr. Rogers at all. He's a smart guy, doing his job. But he
5 told you five times, I counted them, five times in opening
6 statement that the evidence would be that there would be a
7 bloody hair in the bloody hand of the victim that wasn't
8 Ferguson's or Erickson's or the victim's. Okay?

9 Number one, ladies and gentlemen, and we went
10 through excruciating detail on this, there's no evidence that
11 that hair was ever in his hand. And there was no evidence
12 that it was bloody. Think about that. Think about that when
13 you go back there.

14 Fortunately, unfortunately, however you want to look
15 at it, it's reality. A bunch of people showed up at the
16 scene. After his death.

17 Robert Thompson, remember him, Russ Baer, they run
18 out there, they're turning him over, they're checking his
19 pulse, shaking him, et cetera. They get him turned over.
20 Police officers show up. A lot of cops show up. And then
21 the paramedics show up.

22 You talk -- they talked about how many hairs
23 people -- hair people lose. 80 to 120. With the exception
24 of defense counsel. But, ladies and gentlemen, that's a
25 fact. Okay? That happens. The fact that there's a foreign

1 hair in that bag does not mean it's the real bad guy's.
2 Remember on jury selection, we talked about those things. We
3 talked about the CSI show stuff.

4 You know, we accept the burden of proof in this
5 case. We accept it. We understand that. But just because
6 we've got the burden of proof doesn't mean that they can tell
7 you a cock-and-bull story and you have to believe it.

8 The fingerprints. We've got -- when you go back
9 there, if you want to look at the evidence, remember this
10 chart we've got with the fingerprints? It's got the car and
11 then the diagrams and the blue and the red; some are inside,
12 some are outside? It will talk about where the prints were,
13 et cetera? Okay? There were some unknown prints back in the
14 back of the car, on the inside, and there was one on the rear
15 view mirror. Okay? The rest of them, you couldn't tell --
16 you couldn't use them. They were smudged or screwed up in
17 some fashion, or they were identified as the victim's, as
18 Kali Heitholt, his daughter's. Remember we had testimony:
19 Other people rode in the car. Coworkers. Friends of Kali.
20 Red herring, ladies and gentlemen.

21 You know, also at opening statement, defense counsel
22 said that Ryan Ferguson's story had never changed. He said
23 he left with Chuck, went home from the bar, and got home, and
24 then got on the phone, sitting out front on the curb.

25 Well, that's not the case, ladies and gentlemen.

1 Mr. Ferguson sat on the stand and told you he didn't tell
2 that story when he was first interviewed. He didn't think of
3 that until later. Remember? And he said the reason why he
4 didn't think of it: "I was worried about the test the next
5 day." Mr. Rogers is implying that the cops -- the police
6 were awful rough on him, is his implication. Well, it
7 doesn't sound like it. Ferguson said all he could think
8 about was getting back for that exam. He didn't really want
9 to tell them about the phone records. That wasn't none of
10 their business. Remember that? Unbelievable --

11 MR. ROGERS: That misstates the --

12 MR. CRANE: -- ladies and gentlemen --

13 MR. ROGERS: Excuse me. Objection. That misstates
14 the evidence. There is no evidence that he thought his phone
15 records were none of their business. That's made up by the
16 prosecutor --

17 MR. CRANE: No, it's not.

18 MR. ROGERS: -- and that's improper.

19 MR. CRANE: That's not coming off my time, is it?

20 THE COURT: No. We don't count argument.

21 MR. CRANE: Okay.

22 THE COURT: The jury will remember the evidence.

23 MR. CRANE: Now, sitting on the curb. Again, we've
24 got the burden of proof. We accept that. But I tell you
25 what. Think about this. What evidence is there that he was

1 sitting on the curb, while this crime is going on, out in
2 front of his house? One guy. The defendant. Holly Admire,
3 she said she didn't know where he was. Kelly Ferguson said
4 she didn't know where he was. Now, we got evidence about
5 where he was between 2:09 and 2:26 a.m.? Yeah. Chuck
6 Erickson. He accounts for the whereabouts of Ryan Ferguson.
7 And also the janitors. Two white males.

8 You know, Mr. Rogers spent a little bit of time
9 talking about how Charles Erickson's stories changed. You
10 know, he read the police reports and all that. Hey, you
11 know, he read the police reports apparently about that dog
12 going up above the Flat Branch area. You know, going a
13 different way. Not going over Flat Branch and over the Osco
14 lot. Well, if Chuck Erickson wanted to, I guess when he came
15 back for his proffer in October, he could have said, "Hey,
16 I'm going to go the way the dog went. The dog went" --
17 nuh-uh. He goes, "No, I didn't go that way." If he was so
18 hell-bent on adopting this story the way -- why doesn't he
19 say he had Sketchers on? He could have done that. Could
20 have said, "Yeah, I got rid of them." No, he didn't do that.

21 And ladies and gentlemen, I mean, with all due
22 respect to the dog, it didn't testify. There's no evidence
23 that that dog was on the trail of the real killer. That's
24 what they want you to think. Chuck Erickson and Ryan
25 Ferguson, ladies and gentlemen, they're the real killers.

1 For that matter, I guess Charles Erickson could have
2 said, "You know, I change my mind. We didn't go back inside
3 the bar after we got done with the murder." You know, he
4 said that originally, to the police. He said, "I -- you
5 know, we went back and we went inside." Okay? If he's
6 trying to please law enforcement, I guess he could have gone,
7 "Well, no, I'm going to take that part out. I didn't go in
8 there."

9 But you know what, ladies and gentlemen? What do
10 you think about that bar? How do you think they're running
11 that place? 16, 17-year-olds all over the place, drinking
12 alcohol. And you know, they never called one person that
13 testified that they were there during the time Chuck Erickson
14 talks about. Now, understandably --

15 MR. ROGERS: I'll object to that as either
16 misstating the evidence or ludicrous. I mean, the evidence
17 was that the bar was closed, so nobody was there.

18 MR. CRANE: No. No. We can argue the evidence,
19 Judge.

20 MR. ROGERS: We had evidence of who was there when
21 the bar was open.

22 THE COURT: The jury will remember the evidence.

23 MR. CRANE: Melissa Griggs, Kelly Ferguson, and that
24 Canada guy, the guy with the beard, the big guy? Okay? They
25 testified that they left when the lights came on. Canada

1 said, "I was one of the first workers out of there." He's
2 the guy that said, "Man, we got shut down all the time for
3 liquor control." He's the guy that said, "We should have
4 closed and nobody been in there that late." Then I said,
5 "Well, you shouldn't have had kids in there either." He
6 goes, "Yeah, that's right." Did he have an exact memory of
7 that night? No. No. He didn't. He's gone. He thinks.

8 You know, he's right. Ryan Ferguson never said he
9 did this killing. Because he doesn't want to get caught. He
10 doesn't want to have judgment passed on him. And that's why.

11 And you know, Charles Erickson, he's a killer too.
12 He did a horrible, horrible thing. My gosh, it's a terrible
13 crime. Running up and ambushing, not giving him any warning,
14 and beating this guy down with a tire tool. Having him die
15 in his own blood. Being strangled with his own belt. And
16 Charles Erickson was a big, big part of that, ladies and
17 gentlemen.

18 And you know, let's not forget, Mr. Heitholt, he was
19 a real guy. Don't think these photos of the crime scene are
20 abstractions. Because that's the way they left him.

21 And Erickson, for his part, did a horrible thing.
22 But you know, he has risen up from his very worst moment,
23 and, over time, admitted to himself, that was step number
24 one, and then admitted to his friends -- he had to talk about
25 it, it was eating him up -- and then to the police, and then

1 to the prosecutor, and then to a judge in open court, and
2 then to you, what he did. And that is the difference between
3 Charles Erickson and Ryan Ferguson.

4 Charles Erickson and the defendant are both killers.
5 And robbers. But the difference is: Charles couldn't take
6 it. It was eating at his very soul. And even -- even at the
7 cost of his youth, which is what he's going to pay, what he's
8 been paying since March 10th, 2004, even at the cost of his
9 own freedom, he's going to do the right thing. The defense
10 wants you to think that anybody that does the right thing has
11 got to be a nut. They got to be a dreamer. Nobody comes in
12 and does this. Are you that cynical? Are you that cynical
13 that you think that, in this day and age, nobody has a
14 conscience? If you are, we may not have any hope.

15 He knew when he pled guilty that there wasn't any
16 evidence at the crime scene. He knew that. But he made the
17 choice to do the right thing.

18 Yeah, those tapes, he's hesitant; he tries to back
19 out. But why wouldn't you? You know what he said, what
20 Erickson said. He said, "The cost of remembering, the more I
21 remembered, the more I was going to embarrass my family, have
22 to admit to myself that I had done this terrible thing to
23 this guy that didn't deserve it." And also, he was going to
24 go to prison.

25 Their expert testified in front of you that there

1 was no evidence Charles Erickson ever had it suggested to him
2 that he held that weapon and that he beat that victim down.
3 Never had it suggested that Ryan Ferguson held that belt and
4 jerked it up and held it there long enough to break his neck
5 and strangle him. Nobody ever suggested that, ladies and
6 gentlemen. And that is the essence of this case. The
7 newspaper didn't say it. His buddies that he talked to, they
8 didn't say it. He never went to some doctor that said, "Let
9 me get into your head and convince you you've done this
10 terrible thing." He said it, he remembered it, because it
11 happened. And it was torturing him not to talk about it.

12 Folks, this is a sad, sad situation. And
13 Mr. Ferguson obviously has a lot of people that love him.
14 And Charles Erickson has a lot of people that love him too.
15 And a lot of people loved Kent Heitholt.

16 This defendant, ladies and gentlemen, is a dangerous
17 individual. This conduct (indicating), this conduct
18 demonstrates it. You have the evidence beyond a reasonable
19 doubt to convict on murder one and robbery first.

20 And you know, we talked about this when we were in
21 -- back in Troy. Nobody said this was going to be easy. My
22 gosh, it's not easy. But you all have got good sense. And
23 you're all reasonable. And you know what the truth is.
24 Guilty. Both counts.

25 Thank you.

1 THE COURT: Are all the bailiffs sworn? Are all the
2 marshals sworn in this case?

3 DEPUTY COURT MARSHAL: Yes, Judge.

4 THE COURT: I know we have over a period of time.

5 Ladies and gentlemen -- may I have -- I don't have
6 all the instructions together. I need to put in some verdict
7 forms.

8 Ladies and gentlemen, I know this has been a
9 hardship for all of you. And I need to know if there's
10 anyone here who either is not feeling well, or has some
11 serious problem back at home that you've learned about that
12 maybe you've not shared with us, that would prevent your
13 deliberation in this matter, because we do have two
14 alternates. And very frequently we have to use those
15 alternates, because things happen during a trial of this
16 length, and we would have to start all over again, without
17 alternates. And even though -- and let me just ask: Is
18 there anyone who wants to speak now about a circumstance that
19 we don't know about? That you've not informed our marshals
20 about. And I don't see anyone saying anything.

21 But I will say that from time to time during
22 deliberations something happens to an individual. They
23 become ill. Can't continue. And we yet sometimes use
24 alternates to begin again and deliberate on the case. And so
25 the two alternates that I'm going to indicate, and I will

1 thank those individuals in advance. I need to find my notes
2 to see those that are. I'm going to ask that those
3 individuals be kept in a separate place. I'm looking for the
4 list. All right.

5 Those two alternates will be kept in a separate
6 place. And I will ask you two to stay in the courtroom,
7 because I do have further instructions for you.

8 As to the other jurors, you may begin your
9 deliberations. The previous caution about discussing the
10 case, talking about the case, is certainly no longer in
11 effect.

12 The exhibits that have been admitted into evidence,
13 most of them are available for you to take back into your
14 room. Any CDs or DVDs, we do not send those back. But
15 anything else -- and you don't have to tell us that it's
16 Exhibit 88C. I wouldn't expect you to remember those
17 numbers. If you just sort of describe what it is, then we
18 will have those sent back to you.

19 I would ask Juror 48 and 51 to remain in the
20 courtroom. I don't know if you remember your numbers. But
21 it is Juror Miller and Gaines. If you would remain here,
22 because I do have another instruction for you. And the other
23 jurors may begin their deliberations.

24 (The jury went into deliberations at 4:06 p.m.)

25 - - -

1 The following proceedings were held out of the presence
2 of the jury:

3 THE COURT: As to the two alternates, gentlemen,
4 again I want to thank you so much for your careful
5 consideration of this case. You yet might have to
6 participate in it as a juror.

7 The Court again reminds you of what you were told at
8 the first recess of the Court. Until you retire to consider
9 a verdict, you must not discuss this case among yourselves or
10 with others, or permit anyone to discuss it in your hearing.
11 You should not form or express any opinion about the case
12 until it is finally given to you to decide. Do not read,
13 view, or listen to any newspaper, radio, or television report
14 of the trial.

15 I've arranged for a separate place for you to be
16 while the jurors begin their deliberations. And if it is
17 necessary that one or more of you be substituted for the
18 jurors that are deliberating, you will be notified.

19 You may be excused at this time.

20 And I'd ask the attorneys to remain in the courtroom
21 so that we might organize the exhibits.

22 (Two alternates excused from the courtroom.)

23 (Noise in the courtroom.)

24 DEPUTY COURT MARSHAL LANE: Please remain quiet. We
25 are still in session.

1 THE COURT: You may step outside if you want to
2 talk. I am just going to deal with getting exhibits in
3 order, in case the jury should request those.

4 I'd ask the deputy, if you need to take Mr. Ferguson
5 to some secure location, you may do that, but he needs to
6 remain in the courthouse in case some issue comes up.

7 SHERIFF'S DEPUTY: Yes, ma'am.

8 THE COURT: I don't know what your plans are.
9 Mr. Crane.

10 MR. CRANE: Sorry.

11 THE COURT: Yeah. Would you mind -- I realize you
12 need to talk to these folks. If you wouldn't mind -- if
13 you're not able to, if Mr. Knight would gather up these
14 exhibits.

15 MR. CRANE: Yeah, get them all lined out. Yeah, we
16 can do that. Let me grab the exhibit list.

17 THE COURT: And if you might get them in some form
18 of order.

19 MR. CRANE: Yeah. I think what we'll do is --

20 THE COURT: We went over which ones you had admitted
21 and which ones you had not. And I do not usually allow tapes
22 or videos or DVDs to go back into the jury room, because we
23 don't have a way of, first of all, of playing it back there.
24 And secondly, I believe it emphasizes some testimony more
25 than others, just like -- and I forgot to tell them they

1 couldn't ask for the court reporter. Sometimes they'll do
2 that. And I know that Diana's probably a little miffed that
3 I didn't tell them that, but it's like having testimony two
4 or three or four times back in the jury room, and it -- I
5 believe it unduly emphasizes that. Photographs, other items,
6 they may have.

7 And I had -- if you would go into that side room; I
8 think I had a legal pad that I'd written down which of the
9 defendants exhibits have been admitted.

10 MR. CRANE: Judge.

11 THE COURT: Yeah.

12 MR. CRANE: Jeremy.

13 MR. WEIS: Yeah.

14 MR. CRANE: We're going to get all the exhibits
15 together, from both sides, that we agree that don't --
16 there's no alteration that needs to be done to it. But I've
17 still got that photo to mess with. You know, those two
18 photos on that board.

19 THE COURT: Yes.

20 MR. CRANE: And we also need to -- Mr. -- actually,
21 Mr. Rogers and I were talking about how we're going to do the
22 phone records, just with the ones that were testified to.

23 (Defendant left the courtroom.)

24 THE COURT: Yes.

25 MR. CRANE: So we haven't done that yet. And was

1 there something else? There's something I was forgetting.

2 Oh, I know what it was. The jail tape.

3 MR. ROGERS: Jail tapes.

4 MR. CRANE: Are we okay with sending in the one
5 that's got the portion of yours and mine on it?

6 THE COURT: Well, I don't know that -- are they --
7 how are they supposed to hear this?

8 MR. ROGERS: Their DVD player will also play a CD.

9 MR. CRANE: Yeah, we can give them a CD player.
10 They can have the same CD player they listened to the 911
11 call. The jail tape was just a CD.

12 MR. ROGERS: Was that the only one we actually
13 published to them? The rest basically I think I read from
14 transcripts or notes or whatever I had.

15 MR. CRANE: Yeah. All I'm saying is, there's some
16 things that --

17 MR. ROGERS: But I don't care --

18 MR. CRANE: -- we'll get squared away --

19 THE COURT: Wait. There's a reporter here, taking
20 this down. You can't both talk at the same time.

21 MR. ROGERS: I forgot we're on the record.

22 MR. CRANE: There's some things that we're going
23 to --

24 DEPUTY COURT MARSHAL LANE: We need everybody to
25 hold it down, please.

1 MR. CRANE: -- get to yet, and then there's a few
2 things that we're still going to work on.

3 THE COURT: All right. Well, this is a hard-working
4 jury, and I suspect that we will have a note before long.

5 MR. CRANE: They're doing it right now. They're
6 doing it right now. There are just some things that are
7 going to take us a couple seconds, that --

8 THE COURT: All right.

9 MR. CRANE: Well, longer than that, probably.

10 THE COURT: But I also want to hear, as to items
11 that are in evidence, if there is a specific objection to the
12 jury receiving it, either from the state or the defense. And
13 let me -- let me go with Mr. Weis, because I've done this
14 with the prosecutor.

15 Mr. Weis, I show that Defendant's Exhibits -- and
16 I'm not saying they all go back, but I want to know ones that
17 have been admitted. A, B, B-1, B-2, and B-3, C, D, E, F, G.

18 MR. WEIS: Yep.

19 THE COURT: H.

20 MR. WEIS: Yeah, I got that.

21 THE COURT: I.

22 MR. WEIS: I --

23 THE COURT: Did I come in?

24 MR. WEIS: I don't even know what it is. I don't
25 have it in front of me. I was --

1 THE COURT: All right. Why don't we come back to I.
2 J.

3 MR. WEIS: And that one I don't have either. That's
4 another one I skipped.

5 THE COURT: All right. I show that Q, R, S, T, U,
6 V, and Z are admitted. That W, X, and Y are not admitted.
7 And that I don't show that there was ever any mention of K,
8 L, M, N, O, P.

9 MR. WEIS: And those were -- those were the CDs that
10 we used with Mr. Singer, and we didn't move to admit those.

11 THE COURT: You didn't use those.

12 MR. WEIS: No.

13 THE COURT: So those definitely are not in. We need
14 to look at I and J. And as I say, I didn't have --

15 MR. ROGERS: Also, Your Honor, AA. That was this
16 morning.

17 THE COURT: We had a AA as well. We did have a AA.
18 And I initialed that. That's why I try to do that, if we
19 don't have an exhibit list that I can check things off on.

20 Let me see if I can, from my notes, figure out --

21 MR. ROGERS: I and J were --

22 THE COURT: I can tell you that it was on
23 cross-examination, I believe. Let me see who it was.

24 MR. WEIS: Well --

25 THE COURT: I think it was Mr. Singer who was

1 testifying. And it must have been either on direct or
2 redirect that I and J were handed to him. And it was in the
3 inquiry relating to the luminol. It related to that subject
4 matter. Because I made a note in the margin of my notes that
5 you were questioning him in that area.

6 J is the enlargement of the Sketchers shoe.

7 MR. ROGERS: Oh, that's right. And I is the
8 photograph with the footprints and the smaller thing --

9 MR. WEIS: Right, right, right. We'll find it.

10 MR. ROGERS: We'll find it. That's exactly what
11 they are.

12 THE COURT: Well, if we try a case again, would you
13 mind doing an exhibit list?

14 MR. ROGERS: I --

15 THE COURT: Hopefully it won't be this one.

16 MR. ROGERS: That's why I have this extensive staff,
17 but apparently they're letting me slide down.

18 THE COURT: Well, you may need to talk with them
19 about that. They seem to be very well organized in all
20 others, so they --

21 MR. ROGERS: I haven't shown up naked, so they're
22 doing their job.

23 THE COURT: All right. So the only two that you
24 have an issue with were I and J. And --

25 MR. ROGERS: And those are in --

1 THE COURT: They are in evidence.

2 MR. ROGERS: Yeah.

3 THE COURT: All right. If you would gather those
4 together, and let me know about -- if there needs to be some
5 redacting, particularly, and I don't remember the exhibit
6 number, but it was the picture of the Mercedes. The last
7 two. The last one was not admitted, which was G. F, part of
8 it was admitted, which was identified.

9 MR. ROGERS: And that one we probably need to --

10 MR. KNIGHT: What number is that?

11 MR. ROGERS: Kevin had it. He probably took it with
12 him.

13 THE COURT: I don't know if he did. It's possible
14 -- I guess it's possible to take those off of the board and
15 to redact the one. Because he did have separate ones of
16 those two exhibits. Of the tools.

17 MR. ROGERS: He did have separate ones. And what I
18 was suggesting was that somebody other than me, who can get
19 through security with a pocketknife, just splice the bottom
20 one off and leave the bottom part on, and then --

21 MR. HAWES: He might have taken that downstairs,
22 Judge.

23 MR. ROGERS: He may have taken that down to work on
24 it.

25 THE COURT: All right. This is a hard-working jury,

1 so I know that they probably will ask for things. If they
2 don't, and return a very quick verdict, I assume that the
3 defense will be delighted to hear that.

4 MR. ROGERS: We will if it turns out right, that's
5 for sure. And I would predict that a quick one would be like
6 that.

7 THE COURT: Well, I was going to say, a quick
8 verdict, without looking at anything, I assume would have to
9 be a defense verdict, but I don't know. I'm not --

10 MR. ROGERS: A quick guilty would not delight me, I
11 can tell you that.

12 THE COURT: You don't have a note or anything; is
13 that right?

14 DEPUTY COURT MARSHAL BAER: No, Judge.

15 THE COURT: And do I assume that counsel will be
16 available if the jury comes back with a note? At least one
17 person on a side? Yes, Mr. Knight?

18 MR. KNIGHT: Yes, Your Honor.

19 MR. ROGERS: Yes. Yes.

20 THE COURT: Someone will be here. I know you
21 mentioned something about eating.

22 MR. ROGERS: I --

23 THE COURT: You're not going to eat.

24 MR. ROGERS: I had a salad over at the Grinder
25 place, so I'm okay.

1 THE COURT: Okay. All right.

2 With that, we'll be in recess then. You'll just let
3 me know about how you're getting things together.

4 (Recess taken.)

5 - - -

6 At 4:29 p.m. a note was received from the jury, and the
7 following proceedings were held out of the presence of the
8 jury and the defendant:

9 THE COURT: We have a note. Quicker than a speeding
10 bullet.

11 That's interesting, who the foreperson is. I'll
12 tell you in just a moment.

13 "All cell phone records" is what they would like.
14 We can figure out what those are. "The diary page."

15 MR. WEIS: That's theirs.

16 MR. CRANE: Yeah. It's in.

17 THE COURT: "Photo" -- and as we go through this, I
18 want to write down what exhibits we're talking about.

19 The diary page is State's Exhibit what?

20 MR. CRANE: 103.

21 THE COURT: State's 103. All right. And the cell
22 phone records are?

23 MR. WEIS: H, U, and V.

24 THE COURT: H, U, and V?

25 MR. WEIS: That's correct.

1 MR. CRANE: And those are going to be subject to us
2 trying to get the --

3 THE COURT: Well, they want it now, so you --
4 whatever you need with a black marker to take it out, I
5 suggest to do that. But let me finish telling you.

6 "Photos of Ryan's car."

7 MR. CRANE: Right here. That's 87.

8 THE COURT: Yes. And you've taken off those two
9 bottom ones, except for that one there. All right.

10 "The inside of Kent's car."

11 MR. CRANE: I put that over here. That's 34.

12 THE COURT: All right.

13 MR. ROGERS: Well, there were others of the inside
14 of Kent's car too.

15 MR. CRANE: Oh. Okay. Yeah, you're right.

16 MR. WHITE: 74.

17 MR. CRANE: Okay. There's something on the back of
18 it there.

19 THE COURT: Had you written something?

20 MR. CRANE: Okay.

21 THE COURT: 74 --

22 MR. CRANE: This is a photo of the -- right, Judge?
23 I agree with him. He says there's another -- there's two
24 photos.

25 THE COURT: All right. 34 and 74?

1 MR. CRANE: Got it.

2 THE COURT: All right.

3 Now they ask for the inside car video. And I don't
4 recollect that there was a video inside the car. There was a
5 video outside in the parking lot.

6 MS. BENSON: When Charles was driven around by the
7 officer inside the car.

8 MR. CRANE: Yeah.

9 THE COURT: Oh, that's what they're talking about?

10 MS. BENSON: Uh-huh.

11 MR. CRANE: Yeah.

12 THE COURT: Let me move on to the others, and then
13 maybe we can come back to that one.

14 "Parking lot layout drawing."

15 MR. CRANE: Okay.

16 MR. WEIS: Right behind you.

17 MR. CRANE: That's 12.

18 THE COURT: Exhibit 12?

19 "Color photo of city." That has to be the state's
20 exhibit, not yours.

21 MR. CRANE: That's Number 9.

22 MR. ROGERS: Because ours comes next. "Misleading
23 old photos."

24 THE COURT: All right.

25 And then something that was not admitted, which was

1 Detective Short's interview which was not videotaped.

2 MR. CRANE: Oh.

3 THE COURT: And that was not admitted.

4 MS. BENSON: But there was one that was videotaped.

5 MR. ROGERS: No, it says --

6 MS. BENSON: Oh, they want the first one that

7 wasn't --

8 THE COURT: They want the police report, is what

9 they want. Which was not admitted.

10 I would have to say that Detective Short's

11 interview, which was not videotaped, I would just have to put

12 "not admitted."

13 MR. ROGERS: Correct.

14 THE COURT: Is that agreeable with the state?

15 MR. CRANE: Uh-huh. Well, there wasn't -- they're

16 talking about the report?

17 MR. ROGERS: Yes.

18 THE COURT: Yes. Which was not videotaped.

19 MR. CRANE: Yeah. "The report was not admitted into

20 evidence"?

21 THE COURT: Can I say, "Report not admitted"?

22 MR. ROGERS: Yes, Your Honor.

23 THE COURT: Would that be agreeable for the state?

24 MR. CRANE: Okay.

25 THE COURT: And the -- because I don't want them to

1 believe that what was testified to was not admitted. But the
2 physical report was not admitted.

3 MS. BENSON: Uh-huh.

4 THE COURT: Correct?

5 MR. ROGERS: Yes.

6 MR. CRANE: I mean, the actual report, do you want
7 to clarify that or --

8 THE COURT: I'm going to write, "Report not
9 admitted."

10 So there are the redaction on those cell phone
11 records that we need to do. And then there's the issue of
12 the car video, which I don't have any way of playing. And I
13 guess I need to have at least the reaction of both the state
14 and the defense to that particular piece of evidence --

15 MR. ROGERS: Your Honor, I --

16 THE COURT: -- going back. I mean, I can give them
17 the DVD. But they certainly, unless they have unusual
18 talents, I don't think they'd be able to look at it.

19 MR. ROGERS: Earlier I saw Mr. Hawes and Mr. White
20 with the cart, with a television and a DVD player on it. And
21 I figure, if you send that in there, they can play what they
22 want to play. The whole thing was played in evidence. And I
23 think it's a significant piece of evidence.

24 THE COURT: What is the state's position?

25 MR. CRANE: We have a player and a TV. It's up to

1 the Court.

2 THE COURT: Are you in agreement that it can go
3 back? Because I will tell you normally interviews,
4 depositions, things of that nature that come in, I don't send
5 back to the jury. That's why there are 12 of them to
6 collectively remember the issues. Otherwise, we can send the
7 reporter back and have her read the whole trial over to them.
8 And I'm certainly not going to do that.

9 MR. ROGERS: They couldn't hear her.

10 THE COURT: She'd have to do sign language. I mean,
11 to me, it opens up the issue of all the other videos.

12 Why don't we do this. Why don't we take back those
13 things to which there is no dispute about. Which would be
14 Exhibit -- are those the ones? 103, 87, 34, 12, and 9.
15 Those can go back. And you can tell them we're getting --
16 we're working on the others.

17 (Exhibits sent back to the jury room.)

18 THE COURT: Because to me, if I let in the video
19 that took place inside the police car, I think what would
20 naturally follow would be the other videos that were offered
21 and admitted.

22 MR. ROGERS: The only difference being that we
23 played a lot more clips from the other ones than we did from
24 this one. But this one is I think unique, in that it shows
25 the scene when he was being shown it by the police and his

1 reaction to those places, to some extent. You're right, it
2 is an interview statement. Although, I don't know that
3 statements like that, which are, in fact, in evidence in
4 their entirety, are analogous to depositions or read-backs,
5 because they are, in fact, physical objects, which there is
6 no confrontation issue with. Depositions, even though
7 they're filed with the court, they're not admitted in
8 evidence. They're only used for impeachment or
9 rehabilitation kinds of purposes in a case like this.

10 THE COURT: Sometimes there might be a medical
11 examiner who has been deposed, who won't be available, and
12 the defendant is present and defense counsel and the state,
13 and we offer those into evidence. And we would not do that.
14 I have to say that if it were a written statement that the
15 defendant made, or a codefendant, I would let that back.

16 MR. ROGERS: That's --

17 THE COURT: That type of thing I would let back.

18 MR. ROGERS: My position, Your Honor, is that these
19 particular videotapes are more analogous to that than they
20 are to a -- certainly a deposition to preserve testimony. A
21 deposition to preserve testimony is admitted as evidence just
22 as if the testimony occurred in court. And Missouri being a
23 non read-back kind of state, I think it's correct that those
24 should not be treated -- testimony should not be given from
25 some witnesses and not from others. But with regard to

1 statements which are introduced in evidence, whatever the
2 means of recording is, once they are in evidence, they are, I
3 think, items of evidence like any other, and they're not like
4 testimony.

5 THE COURT: Mr. Crane, do you have a position on
6 whether the car videotape goes back? Because I can tell you
7 that I'm going to rule consistently on other videos that have
8 been admitted. I don't think it would be right to admit --
9 to send this one back and not send the others, should they
10 ask for them. I'm not sending them back unrequested.

11 MR. CRANE: Well, they saw it in court; right?

12 THE COURT: Yes.

13 (Discussion off the record between Mr. Crane and
14 Mr. Knight.)

15 MS. BENSON: The other problem is that since, during
16 Charlie's closing, he assumed that they would go back, since
17 they're in evidence, he told the jury.

18 THE COURT: Well, he did tell them that, but we had
19 a discussion before he made that statement, at the bench,
20 that I wasn't allowing -- when you were suggesting you
21 weren't going to play W, X, and Y, now maybe you weren't at
22 the bench at that time, but I suggested that even if they
23 were admitted, I wasn't going to permit them to go back.

24 MS. BENSON: That was about Ryan's videos.

25 THE COURT: That's true. And that's a different

1 issue.

2 MR. ROGERS: If the state had offered --

3 MR. CRANE: Judge, I'm going to defer to the Court.

4 THE COURT: And it is the defendant's position that
5 you'd like the videos that have been admitted as statements
6 of the codefendant, if you want to call him that, he's not
7 charged in the same instrument, but obviously charged as
8 acting in concert with --

9 MR. ROGERS: Right. It's my --

10 THE COURT: -- to go back?

11 MR. ROGERS: Our position, Your Honor, is that all
12 statements which are in evidence in some sort of physical
13 form, recorded form, whether it be by written or
14 tape-recorded or videotaped, are in evidence. They're
15 statements like -- like themselves, and not in-court
16 testimony, like other kinds of statements, and therefore I
17 think they're -- the defendant has a right to have the jury
18 consider any item which is in evidence, which -- and by
19 "item," I mean other than testimony -- which they request.

20 THE COURT: Now, there was testimony in court about
21 what Short's statement with the codefendant was. But, of
22 course, that's quite different.

23 MR. ROGERS: Exactly.

24 THE COURT: That was a witness's -- a witness
25 testifying as to that.

1 MR. ROGERS: Right.

2 THE COURT: And you're not suggesting that ought to
3 go back.

4 MR. ROGERS: No. And that's not -- and the short
5 answer is: It's not in evidence. And the reason it's not in
6 evidence is because it was used for impeachment and
7 rehabilitation and cross-examination of experts who relied on
8 it and stuff like that, and not as evidence itself. And
9 Short didn't come to testify to be cross-examined about it.

10 THE COURT: All right. I will allow the car video
11 to go back, as long as we have some way to play it.

12 MR. ROGERS: Okay. We do have.

13 MS. BENSON: Okay. Bill, can you get us that TV
14 thing that will play the DVD?

15 THE COURT: And what is the exhibit letter for the
16 car video?

17 MR. ROGERS: That is Exhibit C.

18 THE COURT: All right. Have you redacted those
19 parts of the phone records that don't appear to be relevant?

20 MR. CRANE: You know, I think we're getting to where
21 we're so wore out, we may just go ahead and --

22 MR. ROGERS: They can figure it out.

23 MR. CRANE: Yeah, I -- you know, what we really
24 ought to do is highlight the ones that were pertinent.

25 THE COURT: I'm not going to allow you to do

1 anything to that exhibit that was not already there when it
2 was admitted.

3 MR. CRANE: Oh, then we can't redact it.

4 THE COURT: Well --

5 MR. CRANE: I guess that answers that question.

6 THE COURT: No.

7 MR. ROGERS: No, no. When it was admitted, you
8 talked about redacting it.

9 THE COURT: You actually talked about redacting it.
10 And there were references to particular times and to
11 particular places. The other ones were not. So I think it
12 might be different to redact those that were not part of the
13 testimony -- part of the exhibit and to which there was an
14 objection reserved. Unless you wish to withdraw your
15 objection to the entire exhibit, in which case we can have it
16 all go back.

17 I don't want you to take that back. I'll get one of
18 our marshals in.

19 MR. HAWES: All right, Judge.

20 THE COURT: Hopefully there's someone who's handy
21 with electronics and can read stuff.

22 And by the way, one of the three women is the
23 foreperson of this jury.

24 MR. ROGERS: Which one?

25 THE COURT: Carol Ieppert.

1 MR. ROGERS: Ieppert.

2 THE COURT: Ieppert?

3 MR. ROGERS: Uh-huh. She was actually my second
4 pick for foreperson.

5 THE COURT: Who was your first pick? The gentleman
6 that seemed to know everyone in the city of Troy?

7 MR. ROGERS: Yes. Brown? Is that his name?

8 THE COURT: I don't know if it was Brown. Maybe.

9 MR. WEIS: Kevin and I wanted to --

10 THE COURT: All right. Are you agreeing that they
11 all go back?

12 MR. WEIS: Yes. And the only thing we did with
13 respect to Defendant's Exhibit H was we took out -- well,
14 this is a full month. It goes into September. We took out
15 all the dates before October 31st and then after -- well, it
16 looks like November 5th.

17 THE COURT: All right.

18 MR. WEIS: All those extra, superfluous pages.

19 THE COURT: Mr. Crane, then, you're agreeable that
20 this could --

21 MR. CRANE: Yeah. We didn't do anything to it. He
22 pulled a couple pages off of it.

23 You didn't do anything else to it?

24 MR. WEIS: No.

25 THE COURT: All right. You can send the note back,

1 so they'll know. I definitely don't want the note to get
2 lost. I want it to be in the file eventually.

3 MR. ROGERS: Your Honor, we have found duplicates of
4 the missing exhibits, which I am sort of guessing Mr. Singer
5 may have taken with him, because we can't find them. And so
6 the state has agreed that we can have these marked.

7 THE COURT: One was J and one was I.

8 MR. ROGERS: And use your list to say which is
9 which.

10 THE COURT: Well, I'm not the court reporter. It
11 just happens that I wrote down -- I have J as being the
12 enlargement of the Sketchers shoe. No. That's -- no, no.
13 The enlargement is the other one. That's the enlargement.

14 MR. ROGERS: I is the enlargement? Or J?

15 THE COURT: J. So I has to be the other one. It is
16 a combination of State's Exhibit 39E and 39F, with the
17 Sketchers running shoe. That's what I had indicated.

18 MR. ROGERS: That's my --

19 THE COURT: Aren't you glad I take good notes?

20 MR. ROGERS: Yes, Your Honor, I am.

21 THE COURT: All right.

22 MR. ROGERS: And I don't claim to rely on --

23 MR. CRANE: That came -- that actually came into
24 evidence? That Sketchers shoe came in.

25 MR. ROGERS: It did.

1 MR. CRANE: I don't remember that.

2 THE COURT: It says "Part of 39," in your records,
3 because I see it somewhere around here. 39. It's your
4 Exhibit 39.

5 MR. HAWES: Right here.

6 MR. CRANE: Oh, they want that?

7 THE COURT: No, no. They had lost their exhibit.
8 They think maybe their witness took it. But there were two
9 pictures of 39, and then there was a picture of the bottom of
10 the Sketchers shoe.

11 All right.

12 MR. CRANE: You want to just give them that board?

13 THE COURT: No, no. They haven't asked for that
14 yet.

15 MR. CRANE: Yeah, but I thought you couldn't find --

16 MR. ROGERS: We're just remarking these two. They
17 haven't asked for these either.

18 MR. CRANE: Oh.

19 MR. ROGERS: Don't be having a cow.

20 THE COURT: They haven't asked for that.

21 MR. CRANE: Oh, I thought you -- they had asked for
22 the Sketchers shoe.

23 MR. ROGERS: No, no. We're --

24 THE COURT: No. He just lost it.

25 MR. CRANE: Oh. Okay. I apologize. I thought they

1 said they wanted that. Okay.

2 THE COURT: All right. I am going to run to the
3 post office, real fast.

4 (Exhibits sent back to the jury room.)

5 (Recess taken.)

6 (Defendant's Exhibits I and J remarked.)

7 - - -

8 At 5:04 p.m. a note was received from the jury, and the
9 following proceedings were held out of the presence of the
10 jury and the defendant:

11 THE COURT: Okay. Nothing really exciting. All
12 right. Kevin? Do you care to hear?

13 "Photo of lit parking lot with dock doors."

14 MR. CRANE: Lit parking lot?

15 MS. BENSON: Like night time?

16 THE COURT: "Lit parking lot with dock doors."

17 MR. CRANE: Well, that's -- there's this.

18 THE COURT: That's what I have to feel that they
19 were talking about.

20 MR. CRANE: That's 16. Now wait a minute. Here's a
21 lit parking lot. There's dock doors. And there's dock
22 doors.

23 THE COURT: How about if I send both 16 and 13.

24 All right. "Sketches and photos of Ryan and Chuck."

25 MR. CRANE: Here.

1 Did you check off 13 and 16?

2 THE COURT: I have 13 and 16. Clearly the
3 photographs would be 17, 18, 19, and 20? Is that correct?

4 MR. CRANE: Uh-huh.

5 THE COURT: And then I don't know -- this composite
6 is Number 26.

7 MR. CRANE: It was right there. Did it fall over?

8 MR. ROGERS: Yes.

9 MR. CRANE: That's Number --

10 THE COURT: 26 and 27.

11 MR. CRANE: Okay, Ben, 16, 17, 18, 19, 20.

12 THE COURT: And then --

13 MR. CRANE: 26 and 27.

14 MR. WHITE: What about 13?

15 THE COURT: Where is 13?

16 MR. CRANE: Right here. Right here.

17 THE COURT: Okay.

18 MR. CRANE: What else, Judge?

19 THE COURT: That's it.

20 MR. CRANE: And that's going back; correct?

21 THE COURT: Yes. Without objection from either
22 side.

23 MR. ROGERS: Subject to any objections we may have
24 made at the time, which I have lost that memory. It's beyond
25 retrieval, I can tell you that.

1 (Exhibits sent back to the jury room.)

2 MR. ROGERS: Your Honor, we have to go back to our
3 hotel and change rooms. Ms. Benson will be here, though.

4 THE COURT: Is it agreeable, if a note comes out,
5 she can handle it?

6 MR. ROGERS: It's more than agreeable. It's a known
7 fact.

8 MR. CRANE: You're doing what?

9 MR. ROGERS: We're going back to change hotel rooms
10 and leaving Kathryn at the helm of the ship. She's licensed.

11 MR. CRANE: Okay.

12 THE COURT: And do you have -- should there be a
13 conviction on one or both of the counts submitted, do you
14 have those instructions that deal with submitting punishment?

15 MR. CRANE: No.

16 MR. ROGERS: Me either.

17 THE COURT: I think that --

18 MR. ROGERS: Not my problem.

19 THE COURT: -- someone in your office does.

20 MR. CRANE: I'll check it out.

21 THE COURT: Another note:

22 "Black and white photo with all overlays." Well,
23 that's yours.

24 MR. WEIS: Yea.

25 MR. ROGERS: Yea.

1 THE COURT: Is that agreeable? That's B and B-1.
2 Just a minute. Let me write it down. That's B.

3 MR. ROGERS: And B-1 and 2 and 3.

4 THE COURT: B, B-1, B-2, and B-3.

5 (Exhibits sent back to the jury room.)

6 THE COURT: Let me just ask, there was -- there were
7 two photographs of the parking lot. I believe one was 13 and
8 one was 16. And both sides agreed that we could send both of
9 those back, because we didn't know which one they exactly
10 wanted.

11 MR. ROGERS: Exactly. One was of the right of the
12 parking lot and one was of the dock doors.

13 THE COURT: And some of the dock doors were apparent
14 on the lighted parking lot, but some were not.

15 MR. ROGERS: That's correct.

16 THE COURT: So we sent back both, by agreement.
17 Yes?

18 MR. CRANE: Yes.

19 THE COURT: Okay.

20 (Recess taken.)

21 - - -

22 The following proceedings were held out of the presence
23 of the jury:

24 THE COURT: Let me suggest that it's come to my
25 attention that the instruction on murder in the first degree

1 -- I'm going to look for the number here.

2 MR. ROGERS: 314.02, Your Honor.

3 THE COURT: No, that's the number there. But I'm
4 talking about what we gave the jury. That the jury -- and
5 I'll make you copies of all of these. That the jury
6 Instruction Number -- I believe it was 7. But I'll look and
7 see.

8 As to jury Instruction Number 7, which is MAI
9 314.02, neglected to have the last paragraph regarding
10 punishment and -- on the tail. But that the agreement
11 between the state and the defense attorney is is that the
12 Court not give them a new Instruction Number 7, with the
13 proper tail, which was eliminated, which was, "If you do find
14 the defendant guilty under Count I of murder in the first
15 degree, you are to assess and declare the punishment at
16 imprisonment for life without eligibility for probation or
17 parole," not be given at this point. That if they return a
18 verdict finding him guilty under Count I of murder in the
19 first degree, they be given a direction that that is the
20 punishment that they are to return. Is that correct?

21 MR. ROGERS: That is correct, Your Honor.

22 THE COURT: Have I stated it correctly? That's what
23 you would want to do.

24 MR. ROGERS: Yes, Your Honor. From the defense it
25 is.

1 THE COURT: And is the state willing to accede to
2 that request?

3 MS. GOROVSKY: Yes, Your Honor.

4 THE COURT: All right. Then I will not do that.
5 But then you will have to draft, for the punishment phase,
6 "You have found defendant guilty under Count I of murder in
7 the first degree. You are to assess and declare his
8 punishment at imprisonment for life without eligibility for
9 probation or parole." And then we would have an appropriate
10 form of verdict on that as well.

11 MS. GOROVSKY: Okay.

12 THE COURT: On punishment.

13 MS. GOROVSKY: That's correct.

14 THE COURT: Okay.

15 MS. GOROVSKY: Wait. I'm sorry. The verdict form?

16 THE COURT: Yes.

17 MR. ROGERS: "Having found the defendant guilty."

18 THE COURT: They're given an instruction -- you're
19 giving an instruction telling them what to return a verdict
20 on. And then they will make --

21 MS. GOROVSKY: And we have to type it in as it is,
22 and then just -- so this won't be blank any more. It will
23 have that filled in.

24 MR. ROGERS: Right.

25 MS. GOROVSKY: And then this will be the same.

1 MR. ROGERS: Right.

2 MS. GOROVSKY: Essentially.

3 THE COURT: Well -- I don't understand. We need a
4 separate instruction.

5 MS. GOROVSKY: Right. A new one, that looks like
6 this, except it will say, "murder in the first degree." And
7 then here --

8 MR. ROGERS: You would say this (indicating).

9 MS. GOROVSKY: -- it will say --

10 MR. ROGERS: "Assess and declare the punishment for
11 murder in the first" --

12 THE COURT: That is what the verdict will say. You
13 need another instruction.

14 MS. GOROVSKY: Right. Right. I thought we had
15 already talked about that one.

16 THE COURT: Okay.

17 MS. GOROVSKY: And then we were talking about the
18 verdict form.

19 THE COURT: Okay.

20 MS. GOROVSKY: We need two new ones.

21 THE COURT: Yes.

22 MS. GOROVSKY: Okay.

23 THE COURT: A new verdict form to go with the
24 instruction dealing with a finding of guilt of murder in the
25 first degree.

1 MS. GOROVSKY: Yes. Okay.

2 THE COURT: All right.

3 MS. GOROVSKY: Got it. I will get that. And I
4 apologize, Your Honor.

5 THE COURT: With that understanding -- I don't know
6 if dinner has arrived for Mr. Ferguson or not.

7 SHERIFF'S DEPUTY: Not yet, Judge.

8 THE COURT: Well, the jurors have not asked for
9 dinner. We've offered to order it, but they've not asked for
10 dinner yet.

11 All right.

12 (Recess taken.)

13 - - -

14 At 7:30 p.m. a note was received from the jury, and the
15 following proceedings were held out of the presence of the
16 jury and the defendant:

17 THE COURT: We have a note.

18 The only thing I can say is: "You must consider the
19 instructions." Or, "I can give you no further instructions."
20 What would you --

21 MR. ROGERS: I think the first -- maybe "be guided
22 by"? "You must be guided by the instructions you've already
23 been given"?

24 MR. CRANE: Huh? What's that?

25 MR. ROGERS: "Must be guided by the instructions

1 you've already been given."

2 MR. CRANE: Okay.

3 THE COURT: Is that agreeable?

4 MR. ROGERS: That would be agreeable with us.

5 THE COURT: Well, normally I would say, "I can give
6 you no further instructions."

7 MR. ROGERS: That's okay. I don't care. Either
8 way.

9 THE COURT: I'll just say, "You should be guided by
10 the instructions you have been given."

11 MR. ROGERS: Yes.

12 THE COURT: Mr. Crane?

13 MR. CRANE: Yes.

14 THE COURT: This is what I'm sending back.

15 MR. CRANE: Which is what Mr. Rogers suggested.

16 MR. ROGERS: Right.

17 THE COURT: Okay.

18 (Recess taken.)

19 - - -

20 The following proceedings were held out of the presence
21 of the jury:

22 THE COURT: Has the jury reached verdicts in this
23 case?

24 DEPUTY COURT MARSHAL BAER: Yes, Your Honor.

25 THE COURT: Are they ready to come into the

1 courtroom at this time?

2 DEPUTY COURT MARSHAL BAER: Yes, Your Honor.

3 THE COURT: Okay. You may return them to the
4 courtroom.

5 And I would ask that -- pardon?

6 DEPUTY COURT MARSHAL BAER: The two alternates?

7 THE COURT: The two alternates may come into the
8 courtroom as well. But I would have them sit perhaps here,
9 rather than in the jury box, please.

10 DEPUTY COURT MARSHAL BAER: Okay.

11 THE COURT: Would ask there be no demonstration of
12 any kind.

13 - - -

14 At 9:42 p.m. the jury returned with their verdicts, and
15 the following proceedings were held in the presence of the
16 jury:

17 THE COURT: Madam Foreman, has the jury reached
18 verdicts on both of the counts submitted to you?

19 JURY FOREMAN: Yes, we have.

20 THE COURT: If you would give those, together with
21 the instructions, to our marshal here, please.

22 As to Count I, we, the jury, find the defendant Ryan
23 William Ferguson guilty of murder in the second degree as
24 submitted in Instruction Number 11.

25 Madam Foreman, is this the verdict of the jury on

1 Count I?

2 JURY FOREMAN: Yes, it is.

3 THE COURT: As to Count II, we, the jury, find the
4 defendant, Ryan William Ferguson, guilty of robbery in the
5 first degree as submitted in Instruction Number 13.

6 Madam Foreman, is this the verdict of the jury with
7 respect to Count II?

8 JURY FOREMAN: Yes, it is.

9 THE COURT: Would defense counsel want to have the
10 jurors polled as to their verdicts as to Count I and Count
11 II?

12 MR. ROGERS: Yes, Your Honor, please.

13 THE COURT: Let us take each count separately, if
14 you would. As the clerk calls your name, if the verdict that
15 I have just read with respect to Count I is your verdict,
16 would you please signify by answering yes. If it is not,
17 would you signify by answering no.

18 (Each juror, upon being polled by Deputy Clerk Julie
19 Smith, responded in the affirmative.)

20 THE COURT: Thank you. You can keep that. I have
21 another one.

22 Ladies and gentlemen, in this case the jury is
23 required to fix punishment, because of certain laws that our
24 General Assembly has passed. We separate the issue of guilt
25 from that of punishment in this case. I need to confer very

1 briefly with the attorneys to see if they wish to present
2 further evidence. They may, or they may not. But I need to
3 discuss this matter with them.

4 We will take about a 5-minute break and come back.
5 You may be excused at this time.

6 Would ask you not to discuss any issue concerning
7 punishment among yourselves or with others or remain in the
8 presence of anyone who might be discussing this issue.

9 We will excuse the alternates at this time finally,
10 and thank them very, very much for their time and
11 consideration. Without your participation, if we'd had an
12 illness or a problem in our jury, we would, again, not be
13 able to reach a conclusion today. And we do thank you very
14 much. But you are excused and discharged, as to the
15 alternates.

16 And if you would return the jury to the deliberation
17 room, briefly.

18 - - -

19 The following proceedings were held out of the presence
20 of the jury:

21 THE COURT: They were polled on Count I. When they
22 return, I am sleepy myself, I will have them polled on Count
23 II.

24 Let me ask the state if the state intends to present
25 any further evidence on the issue of punishment.

1 MR. CRANE: Could I talk to Mr. Rogers just a
2 moment, Judge?

3 THE COURT: Yes.

4 (Discussion off the record between Mr. Crane and
5 Mr. Rogers.)

6 MR. ROGERS: Your Honor, may I have a moment to
7 consult with my co-counsel and my client?

8 THE COURT: Surely.

9 (Discussion off the record between Mr. Rogers and
10 co-counsel and the defendant.)

11 MR. ROGERS: We've consulted. I believe the
12 question pending was addressed to the government -- or to the
13 state, as to whether or not they intended to adduce evidence.

14 THE COURT: That is correct.

15 MR. CRANE: We do, Judge.

16 THE COURT: All right. Do we have the proposed
17 instructions on the issue of punishment in the second stage
18 of the trial then? I think that --

19 MR. CRANE: We do, Judge.

20 THE COURT: Have you provided copies to defense
21 counsel?

22 MS. GOROVSKY: Not yet, Your Honor.

23 Your Honor, would you like me to do this here?

24 THE COURT: Pardon?

25 MS. GOROVSKY: Do it here?

1 THE COURT: Yes.

2 MS. GOROVSKY: Okay.

3 MR. CRANE: I got to run down and get my files.

4 I'll be right back.

5 (Mr. Crane left the courtroom.)

6 MS. GOROVSKY: Judge, this is the clean -- one clean
7 and one dirty for each instruction.

8 THE COURT: All right.

9 (Mr. Crane present in the courtroom.)

10 THE COURT: Initially the Court read Instructions
11 through Number 17, I believe, which was 302.06. I will let
12 defense counsel take a look at 305.01, which would be the
13 first instruction to be read after a finding of guilt. And I
14 will certainly poll this jury on Count II before we proceed
15 with this.

16 As to 305.01, the first instruction at this stage,
17 is there an objection to the form of that instruction?

18 MR. ROGERS: No objection to the form of the
19 instruction, Your Honor.

20 THE COURT: It will be numbered Number 18.

21 Number 19 would be instruction number 305.02. Would
22 the defendant have an objection to the form of that
23 instruction?

24 MR. ROGERS: No objection to the form of that
25 instruction, Your Honor.

1 THE COURT: All right. That would be Number 19.

2 At the conclusion of the presenting of evidence, the
3 Court would propose to read instruction number 305.03, which
4 would be numbered as Number 20. Is there an objection to the
5 form of that instruction?

6 MR. ROGERS: No objection to the form, Your Honor.

7 THE COURT: And finally -- the final instruction
8 would be 305.04, which would be Number 21. Is there an
9 objection to the form of that instruction?

10 MR. ROGERS: No objection to the form.

11 THE COURT: The state has provided forms of verdict
12 for Count I and for Count II, based on 304.40. Are there
13 objections to the form of those instructions -- of those
14 forms of verdict?

15 MR. ROGERS: No, Your Honor.

16 THE COURT: The Court would also be giving and
17 returning to the jury Instructions 1 and 2, which go along
18 with this packet.

19 Let me ask about closing arguments at this point, on
20 the punishment phase. Court is inclined to give you 15
21 minutes each on punishment.

22 MR. CRANE: How long?

23 THE COURT: 15 minutes. Would that --

24 MR. CRANE: Yeah. I'm not sure what the defense is
25 putting on, but, I mean, that's probably sufficient.

1 15?

2 MR. ROGERS: I have no clue as to what evidence the
3 state will adduce or attempt to adduce, Your Honor, but that
4 certainly should be --

5 THE COURT: I'm not limiting you on time for
6 presenting evidence. I'm talking about the time you would be
7 allowed --

8 MR. CRANE: Well, no, I know. I guess I'm saying, I
9 don't know how long my closing will be, not knowing what
10 all's coming on.

11 THE COURT: All right. Why don't I reserve that
12 until the conclusion --

13 MR. CRANE: Right now, 15 minutes sounds all right.

14 THE COURT: All right. If it looks like that would
15 be not sufficient based on the evidence adduced on either or
16 both sides, you'll let me know. And the state will let me
17 know how you're going to split your time.

18 Is there anything further at this point?

19 MR. CRANE: Oh, I thought you were asking me
20 something else. No. You got the instructions; right?

21 THE COURT: I have the instructions.

22 MR. CRANE: Okay. And -- no. I guess we're --
23 yeah, we're ready to go, Judge.

24 THE COURT: Is the defendant ready to go at this
25 point?

1 MR. ROGERS: Yes, Your Honor.

2 THE COURT: All right.

3 If you would return the jury to the courtroom,
4 please.

5 - - -

6 The following proceedings were held in the presence of
7 the jury:

8 THE COURT: Ladies and gentlemen, due to the
9 lateness of the hour, I neglected to have you polled on Count
10 II, which was the robbery first degree. If the verdict read
11 by the Court as your verdict is your verdict, would you
12 signify on Count II by saying yes. And if it is not, would
13 you say no, please.

14 (Each juror, upon being polled by Deputy Clerk Julie
15 Smith, responded in the affirmative.)

16 THE COURT: I have two instructions to read to you,
17 ladies and gentlemen, and then the parties may present
18 evidence to you if they wish to do so.

19 (Instructions 18 and 19 read to the jury.)

20 THE COURT: Mr. Crane, do you wish to make a
21 statement at this time to the jury, outlining what evidence
22 you will present?

23 MR. CRANE: Yes, Judge. Thank you.

24 - - -

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OPENING STATEMENT

BY MR. CRANE:

Ladies and gentlemen, thank you for your verdicts. Certainly this is a difficult process. You have one more task. And that is to decide the appropriate punishment on the charges that you've returned verdicts of guilty on. Both of those have a range of punishment that's the same: 10 years up to 30 years, or life in prison. Each one of those offenses has the same range.

In this part of the trial, you'll hear from Mrs. -- Deborah Evangelista, the victim's wife; and daughter, Kali Heitholt; and also a friend of Mr. Heitholt's, Jim Robertson. They will present to you victim impact testimony.

With that, I have nothing further.

THE COURT: Does defense counsel at this time wish to make an opening statement on the issue of punishment? Or do you wish to reserve?

MR. ROGERS: I wish to make an opening statement.

May it please the Court.

THE COURT: You may proceed.

- - -

OPENING STATEMENT

BY MR. ROGERS:

We trust that you have done your duty as you see it. We disagree with your verdicts. We would like to adduce

1 evidence of the effects, not your verdicts, but this charge
2 had upon Ryan Ferguson and upon his family. We will attempt
3 to persuade you that it would be a grave miscarriage of
4 justice to sentence Mr. Ferguson to more time in the
5 penitentiary than the state saw fit to give Mr. Erickson.

6 Thank you.

7 THE COURT: State may call its first witness.

8 MR. CRANE: Judge, before I do that, I'd like to
9 offer all evidence admitted in the guilt stage of the trial,
10 all exhibits, documents, photographs, or things that were
11 admitted in the guilt stage.

12 THE COURT: And this is for the state's -- as far as
13 the state's exhibits go; is --

14 MR. CRANE: Yes.

15 THE COURT: -- that correct?

16 MR. CRANE: That's correct, Judge.

17 THE COURT: Is there an objection?

18 MR. ROGERS: Yes, Your Honor. I think that's
19 superfluous. I think everything that's in evidence already
20 stays in evidence. And I think the Court's instructions
21 indicate that. And will indicate that.

22 THE COURT: I'm going to sustain the state's request
23 to admit all the evidence. They may consider the evidence
24 that they heard in the guilt stage of the trial, as well as
25 any additional evidence that they are to hear now.

1 MR. CRANE: State calls Deborah Evangelista.

2 THE COURT: Would you be sworn by the clerk, please.

3 - - -

4 DEBORAH LYNN EVANGELISTA,

5 being first duly sworn by Julie Smith, Deputy Clerk,

6 testified as follows:

7 - - -

8 DIRECT EXAMINATION

9 BY MR. CRANE:

10 Q. The jury remembers you, but can you give us your
11 name again?

12 A. Deborah Lynn Evangelista.

13 Q. Deborah, are you holding up okay?

14 A. I'm fine.

15 Q. In the -- when you testified the first time, there
16 were some things that we -- weren't appropriate to get into
17 in the guilt stage of the trial. And this is your
18 opportunity now to let the jury know what effect losing your
19 husband Kent had on you. Can you talk about that?

20 A. Yes.

21 Q. Okay.

22 A. I wanted to thank you.

23 This is hard. I'm not good at speaking. They told
24 me I could write things down, but I thought it was best if I
25 just talk from my heart.

1 My husband, Kent William Heitholt, was and always
2 will be the love of my life. On November 1st, that day, All
3 Saint's Day, my life changed completely. I had a good
4 marriage, fine children, a good job. I had dreams.

5 I had known Kent for almost 25 years. I met him in
6 college. We traveled. I went with him when he got different
7 jobs. I told him, I said, "I'll follow you. Wherever you
8 find a job, we'll go." And we did.

9 And we had two children. We had dreams. We were
10 going to stay in Columbia, but we were going to find a little
11 place out in the country, kind of outskirts.

12 Q. Deborah, what's -- since Kent's murder, what's
13 happened? I mean, you lost Kent. Did you stay in Columbia
14 or what did you do?

15 A. I waited until Kali graduated from high school. And
16 then I felt like I needed to leave here. I felt like I
17 couldn't live here any more. Too many memories. There's too
18 many things that reminded me of my husband. My husband was
19 known by so many people. He was loved by so many people.
20 Because he had that way about him. He was a much better
21 person than I'll ever be. There was no one that he
22 treated -- that was -- he treated as being sub -- being under
23 him. He treated everybody with dignity and respect. And you
24 loved to be around him, because he had a love for life. And
25 you just loved to be around him.

1 Q. Ma'am, what is your life like now?

2 A. I moved to Texas, to a little small town. I thought
3 it would be best. I do like where I live. I have a nice
4 neighborhood, nice people that live around me, but my life is
5 empty.

6 MR. CRANE: Approach the witness, Judge?

7 THE COURT: You may.

8 Q. Ma'am, I want to show you what's marked for
9 identification as State's Exhibit 104, 104A through 104G. Do
10 you recognize these photographs?

11 A. I do.

12 Q. And these are generally photographs of your husband
13 at various times during his life; is that correct?

14 A. That's correct. I gave these to you. I told you I
15 kept the best ones for myself, but these are some good ones.

16 MR. CRANE: Judge, I'd offer State's Exhibit 104,
17 104A through 104G.

18 MR. ROGERS: No objection, Your Honor.

19 THE COURT: State's Exhibit 104, 104A through 104G,
20 are admitted.

21 - - -

22 State's Exhibits 104, 104A through 104G, admitted
23 into evidence.

24 - - -

25 Q. Can you just tell us a little bit about what's in

1 these photographs? Can you see that okay?

2 A. Sure.

3 Q. Here. Why don't you --

4 MR. CRANE: Can she step down, Judge?

5 THE COURT: She may.

6 A. This is after -- we were all together. We had eaten
7 dinner. This is my father's house in Warrenton, Missouri,
8 out in the country. That's my father. And this is my
9 family. And there's Kent. And there's Kali, clowning around
10 with her dad.

11 Q. Are there some of the family members here with you
12 today?

13 A. My mom's passed away, but everybody else is here.
14 There's Kali. There's me. There's Vanessa, who's
15 here. And Robin's not in there.

16 Q. What about this photograph here?

17 A. This was in --

18 Q. Where's Kent on that one?

19 A. He's right here. He was coaching Little League
20 baseball. And there's Vince. And there's Kali. She thought
21 she was the cheerleader.

22 Q. And Vince is your son; right?

23 A. Yeah.

24 Q. And who's this little guy right here?

25 A. That's Kent when he was a baby.

1 This is when we went to Disney World. We saved up
2 our money. We put our change in this big milk jar, and we
3 saved to go to Disney World.

4 Q. Is that Kali?

5 A. There's Kali. And Vince is taking the picture. She
6 was getting aggravated, because he was taking so long.

7 This is Kent, and there's Vince, in front of our
8 house where my kids were born.

9 Q. And the bottom two?

10 A. This is Kent and Vince.

11 And this is Kent and Kali and Vince at a friend's
12 Christmas party. And they had a Santa there.

13 Q. Ma'am, did you have anything you wanted to add to
14 your testimony?

15 A. Yes.

16 I'm going to speak a little bit until I can't speak
17 any more, because I need to let you know how wonderful my
18 husband was.

19 When he died, I remember telling the police
20 officers, I just didn't want him to be afraid and I didn't
21 want him to be in pain.

22 I had dreams. I miss my husband every single day of
23 my life. And I always will. He and I just got along so
24 well. We were so -- we got -- we were a lot alike. Except
25 he had the good sense of humor.

1 JIM ROBERTSON,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CRANE:

6 Q. Give us your name, sir.

7 A. My name is Jim Robertson.

8 Q. What's your occupation?

9 A. I'm managing editor of the Columbia Daily Tribune.

10 Q. This is a strange set of circumstances for you and
11 me.

12 A. Yes, sir.

13 Q. How did you know Kent Heitholt?

14 A. I hired Kent to be sports editor at the Tribune in
15 1996, I believe.

16 Q. And he had applied for an opening there at the
17 Tribune?

18 A. Yes. We had an opening for a sports editor. I
19 advertised nationally to fill it, and Kent applied.

20 Q. He met with you, and did you -- you interviewed him?

21 A. Uh-huh.

22 Q. Okay. And hired him.

23 A. Yes, I did.

24 Q. And did you know him before that?

25 A. I did not.

1 Q. And after that, how did you guys get along?

2 A. We got along great. He had two young kids, and I
3 had two young kids. We were about the same age. Same --
4 contemporaries at the School of Journalism, although I didn't
5 know him. And we just -- he was an easy guy to like.

6 Q. Around the office, around the workplace, how do you
7 remember -- you were his boss; right?

8 A. Right.

9 Q. And he was a supervisor of the other people in the
10 sports department.

11 A. That's correct.

12 Q. How do you recall Kent getting along with people at
13 work?

14 A. Everybody at the Tribune loved Kent. You know, he
15 would come in in the morning, put out the section. We're an
16 afternoon paper, so he'd have to get there fairly early in
17 the morning, get the sports section together. And then he'd
18 go home, meet the kids after school or whatever, and come
19 back in the evening, because most sports coverage happens in
20 the evening and on weekends. So Kent was always there. He
21 knew everybody in the building. Everybody knew him. And
22 he'd always speak to them; he'd joke with them. He was a big
23 jovial Teddy Bear of a guy, you know, and everybody loved
24 him.

25 Q. How did he treat his subordinates, if you will?

1 People that worked under him?

2 A. They were like a family in the sports department.
3 You know, those guys aren't overpaid, but they were there all
4 the time, and Kent was the -- sort of the center of
5 attention. He had been at various newspapers, over at
6 Southeast mostly. Covered big-time sports, pro sports.
7 Knew, you know, all the famous coaches and all that. And
8 these guys who worked with him ate that up. You know. It
9 was -- he was like a Pied Piper almost.

10 Q. We talked -- Bob Thompson testified earlier. How
11 did Bob Thompson come to work at the Tribune?

12 A. You know, Bob was a perfect example, I think, of
13 Kent's magnetism and his goodness. I think in Shreveport,
14 Kent was an editor down there, a sports editor and columnist,
15 and Bob was just a kid who wanted to get his foot into
16 sports. I think he was in -- like a copy boy or something at
17 the newspaper. And he asked Kent if he could work in sports.
18 And so Kent gave him his first job. And nurtured him, bought
19 him along. And then when Kent came to Columbia, Bob pretty
20 soon was up here. And he gave him another chance to cover
21 prep sports. And he worked as a -- Bob's a good sports
22 writer now.

23 Q. So he helped him develop.

24 A. He definitely did.

25 Q. And that would be the case with other people that

1 worked with Kent?

2 A. Yeah. Mike Boyd, who might have been the last --
3 undoubtedly was the last Tribune employee to see him alive, I
4 remember Kent gave him -- he hired him. Mike had a family,
5 young family. Didn't have any money. Kent loaned him shirts
6 to wear to work.

7 Q. We've seen this photograph that's in 1B quite a few
8 times during this trial. And we've talk about the little guy
9 next to Kent there. Who is that guy?

10 A. He just makes me look little in comparison.

11 Q. All right.

12 A. That's me.

13 Q. What do you remember about that day? That's
14 Halloween of 2001?

15 A. Yeah. That's his fifth anniversary at the Tribune.
16 And you know, when you get five years longevity, you get to
17 go through a catalog and pick out a fabulous gift. And he
18 picked out some golf balls.

19 Q. All right. So that is, in fact, what that is. That
20 was the fabulous gift he picked out of a catalog?

21 A. That's right.

22 Q. Okay.

23 A. And we have a little ceremonial, where I go present
24 him with his gift that he already knows what it is, and then
25 they snap a picture of it to put in the company newsletter.

1 And, you know, usually I stick out my hand and we do a
2 grip-and-grin and he shakes hand and they take the picture.
3 I stuck out my hand, and he grabbed ahold and hugged me, so I
4 just hugged him back.

5 Q. What about his work ethic?

6 A. He was there all the time. I mean, he wasn't there
7 all the time, because I know that he went home and spent time
8 with his kids and his family, but he was there early in the
9 morning and he was there late at night; he was there
10 weekends.

11 Q. He loved his job?

12 A. Oh, he loved it.

13 Q. And he loved sports.

14 A. He lived sports.

15 Q. Was Kent the kind of guy that just wanted to cover
16 the big-time, high profile, like an MU basketball game?

17 A. You know, that was -- people -- I mean, people still
18 talk about Kent. And no disrespect to the staff we've got
19 now, but Kent made time, and many, many times did it himself,
20 he'd cover little girls softball games. The marathon -- we
21 have a marathon that happens every Labor Day. One of the
22 last times I saw him covering something, he was out on a
23 Saturday morning, covering that. It starts at 6:30 in the
24 morning. These are lonely sports. You know, they're not the
25 kind of sports that draw fifty, sixty thousand people to a

1 football game or twenty thousand to a basketball game. But
2 he gave them as much attention and gave them as much respect
3 as he would a Big 12 game.

4 Q. You miss your friend.

5 A. Yeah. Absolutely.

6 MR. CRANE: No further questions.

7 THE COURT: You may inquire.

8 MR. ROGERS: Thank you, Your Honor.

9 - - -

10 CROSS-EXAMINATION

11 BY MR. ROGERS:

12 Q. Good evening, sir.

13 A. Hi.

14 Q. You mentioned Mike Boyd. Correct?

15 A. Yes.

16 Q. Somebody that was close to Kent?

17 A. He worked with Kent.

18 Q. Kent not only helped him out professionally, but
19 personally with some things.

20 A. Yes, sir.

21 Q. And how did you feel sitting in this courtroom when
22 the state's star witness called Mike Boyd a regular-sized,
23 regular-build, middle-aged white guy?

24 A. Well, he was regular size. I wouldn't disagree with
25 that. His skin color is not how it was described, but it was

1 dark.

2 Q. It's clear that the witness was making up
3 characteristics.

4 A. I don't have any opinion about that, sir.

5 Q. And you don't have an opinion about Ryan Ferguson
6 either, do you, sir?

7 A. No, sir.

8 MR. ROGERS: Thank you.

9 THE COURT: Redirect?

10 - - -

11 REDIRECT EXAMINATION

12 BY MR. CRANE:

13 Q. Do you know what Boyd's car looked like?

14 A. No.

15 Q. That's fine.

16 MR. CRANE: No further questions, Judge.

17 THE COURT: Anything further for the defendant?

18 MR. ROGERS: No, Your Honor.

19 THE COURT: You may step down, sir. Thank you.

20 State may call its next witness.

21 MR. CRANE: Kali Heitholt.

22 THE COURT: Would you please raise your right hand
23 and be sworn.

24 - - -

25

1 KALI ROSE HEITHOLT,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CRANE:

6 Q. Could you give us your name, ma'am?

7 A. Kali Rose Heitholt.

8 Q. And what was your relationship to the late Kent
9 Heitholt?

10 A. I'm his daughter.

11 Q. And how old are you now?

12 A. I'll be 19 Monday.

13 Q. Kali, how old were you when your dad was murdered?

14 A. I just turned 15.

15 Q. How did you find out about it?

16 A. I had just gotten home like a couple hours before,
17 probably around 10:00, from being with some friends at
18 Shakespeare's Pizza eating, for Halloween. And I remember I
19 still had all of my makeup on from Halloween. And I heard
20 the doorbell ring, and I went downstairs to go answer the
21 door. And our house was a split-level. So there were stairs
22 in front of the door, leading up. And my mom came out, and
23 she was standing behind me on top of the stairs, and I
24 answered the door, and it was two police officers. So my mom
25 asked them to come in. And they came and they sat down with

1 my mom. And they told me that I might want to go to my room.
2 So I went to the hallway, and I kind of idled. I didn't know
3 why they were there. I was like, "Oh, I wonder what the cops
4 are doing here so late. That's really weird." And then they
5 said, "There's been a horrific act committed against your
6 husband" to my mom. And I remember thinking, "I'm not going
7 to cry; I'm not going to cry." And then I just started
8 balling. And my mom came and consoled me. And that mind --
9 I mean, that moment in my mind sticks out. I just can never
10 forget it. I just think about it all the time.

11 Q. What did you and your dad used to do together?

12 A. He used to take me to concerts and we'd go to movies
13 together and we'd go out to eat and --

14 Q. Did your dad eat quite a bit?

15 A. Yes. He ate so much. But he was just a great guy.
16 He just wanted to spend so much time with me. And --

17 Q. How would he -- I'm sorry.

18 A. That's all right.

19 Q. How would he help you?

20 A. Well, he'd help me with school papers, because I'm
21 not that good of a writer. So he'd sit down with me when I
22 had a big essay due and like help me revise it and see what
23 kind of things I was stating wrong and help me cite things.
24 And he'd also come to our school, both me as well as my
25 brother, and he'd talk and give everyone a look on how it was

1 like to be a sports editor. And that was always really,
2 really awesome to have him come and talk to our school.

3 Q. After your father's death, did you finish up high
4 school?

5 A. Yeah. I was a sophomore when it happened, and so I
6 graduated when I was a junior in 2003. So we didn't have to
7 stay in Columbia any more.

8 Q. What happened? Where did you go?

9 A. I moved to Sweden, because I -- I didn't want to be
10 anywhere near Columbia any more, because it was just too
11 tough to be here.

12 Q. What were you -- what are you doing there?

13 A. I went to art school for a year.

14 Q. And then what?

15 A. And then I moved to Boston. And then after Boston I
16 moved to Chicago, where I currently reside.

17 Q. Okay. Kali, what -- what are you thinking about the
18 future?

19 A. I just -- I want to finish school. And I just -- I
20 want other people to be able to know my father, but they
21 never will, and that just -- it hurts so bad for me, because
22 it's not fair that his life was taken away so early and then
23 not everyone can know how great he was.

24 Q. You know, you heard some testimony -- you've sat
25 through most of this trial, haven't you?

1 A. Uh-huh.

2 Q. There was some talk about a cat.

3 A. Uh-huh.

4 Q. That your dad was feeding or used to feed out there.

5 Is that --

6 A. Yeah.

7 Q. -- something you were aware of?

8 A. Yeah. There was a stray cat that lived in the

9 Tribune parking lot and around the Tribune area. And my dad

10 always kept cat food in his car. And so every night before

11 he left to go home, he would put some cat food on the ledge

12 and let the cat have some food to eat so it would survive.

13 Q. What happened to the cat after your dad was killed?

14 A. I think the Humane Society, I'm not sure who, but

15 someone caught the cat for us and now we own it.

16 Q. You got the cat?

17 A. Yeah.

18 MR. CRANE: No further questions.

19 THE COURT: You may inquire.

20 MR. ROGERS: No questions.

21 Thank you.

22 THE COURT: You may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Further evidence for the state?

25 MR. CRANE: No further evidence, Judge.

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STATE RESTS

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THE COURT: The defendant may present evidence.

MR. ROGERS: Thank you, Your Honor.

Defendant would call Leslie Ferguson.

THE COURT: Would you be sworn, please.

- - -

LESLIE FERGUSON,

being first duly sworn by Julie Smith, Deputy Clerk,

testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

Q. Tell us your name, please.

A. Leslie Ferguson.

Q. And get kind of close to that flat black microphone,
if you will, because I'm having trouble hearing.

You're Ryan's mom?

A. Yes.

Q. How did you feel when you heard that he had been
arrested and accused of this?

A. I couldn't believe it. And I still can't believe
it. Ryan is innocent. And I know that some day his
innocence will be proven. I have faith that the truth will
come out. God will reveal the truth one day.

1 Q. Let me ask you, tonight, when you heard the
2 verdicts, the opposite of what you just told us, how did you
3 feel about that?

4 A. I feel that the truth hasn't come out. I feel that
5 the real murderer is still out there. And I feel that Ryan
6 is a victim. I feel our family is a victim.

7 Q. What has it done to your family?

8 A. I can't even tell you what it's done to us. It has
9 been horrific. I feel very bad for the Heitholt family. I
10 can't imagine what they've had to go through this week. But
11 there's no reason for my family or for Ryan to have had to go
12 through any of this. We shouldn't be sitting here.

13 Q. Is there anything else you'd like to say?

14 A. I just -- I'm just in a state of shock. I don't
15 even know how to respond, because I know he's innocent. And
16 I believe very strongly in his innocence.

17 Q. Thank you.

18 MR. ROGERS: I have no further questions, Your
19 Honor.

20 MR. CRANE: No questions.

21 Thank you, ma'am.

22 THE COURT: You may step down, Mrs. Ferguson.

23 MR. ROGERS: Defendant calls Bill Ferguson.

24 THE COURT: Would you be sworn, sir.

25 - - -

1 BILL FERGUSON,
2 being first duly sworn by Julie Smith, Deputy Clerk,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. ROGERS:

6 Q. Tell us your name, please.

7 A. Bill Ferguson.

8 Q. And what's your relationship to Ryan?

9 A. He's my son.

10 Q. Calling your attention back to March of 2004, when
11 you learned that Ryan had been arrested and accused of this
12 murder, how did you feel?

13 A. I didn't believe it. I was shocked. Devastated.
14 It just could not be possible. They must have a different --
15 the wrong -- the right name, wrong person.

16 Q. And then when you realized it was, in fact, your son
17 who was accused, what did you think?

18 A. I thought -- the first couple of days I was in total
19 shock. And then I started -- I remembered, when we lived in
20 Australia, where a woman was falsely accused, manipulated by
21 the police and the prosecutor and the media. And it was
22 later found that she was totally innocent and released from
23 prison. And I thought, "Oh, my gosh. I have a duty to check
24 this out." And I started investigating on my own. And I'm
25 totally convinced that he is innocent.

1 Q. And have you done what you could to get information,
2 bring it to people, and try and demonstrate Ryan's innocence?

3 A. You know, I thought up to a few minutes ago I had.
4 But apparently I -- obviously since I'm an amateur at this,
5 I'm going to learn a lot more about this, and I'm going to
6 prove my son's innocent, and so will my family. And so we're
7 going to learn how to do this. And so we're going to --
8 we're going to go back through it and we're going to learn,
9 and we're going to come out just like that lady in Australia
10 did. We're going to be vindicated.

11 Q. You understand this jury has found Ryan guilty on
12 both those counts?

13 A. Yes.

14 Q. And that they now have the duty of fixing
15 punishment. Is there anything you would like to say to them
16 in that regard?

17 A. Well, I'd like to say two things.

18 One, we feel very, very badly for the Heitholt
19 family. I mean, that was a horrible thing that they had to
20 experience. They have a beautiful family, wonderful friends,
21 a great future. They had everything going. And an innocent
22 man's life has been taken away. But it was not my son that
23 took it away. And I feel very sorry for them. And there's
24 nothing I can do about that. I feel very badly about that.
25 So I just want that to be on the record. I feel very bad.

1 Q. And was there --

2 A. But in regards to my son, he just turned 21 here in
3 court. He had a great future ahead of him. He graduated
4 from high school early. He was an Eagle Scout. And he was
5 my best friend.

6 And it's going to be really very difficult. And if
7 he gets the jail sentence that I'm hearing, I'll never live
8 long enough to see him outside of jail. I was there when he
9 was born. I was right there when he was born. And if he
10 goes to jail, the time we're talking about, I'm never going
11 to see my son again. I mean, I'm going to see him, but he's
12 been in jail 19 months. I haven't even been able to touch
13 him. Haven't been able to touch my own son. He's my best
14 friend.

15 And he'd be out in the mall, out with his friends,
16 and he'd see me, with his friends, with his peer group, and
17 he'd stop, he'd come over and give me a hug, with his peer
18 group there. How many teenagers do that? I don't think very
19 many. I tell you what, moms and dads, that's a good feeling.
20 And I want that feeling back.

21 And I know you've made your decision. I think it
22 was wrong, but I respect it. I'm going to prove that, just
23 like that lady in Australia.

24 But please, when you consider the sentence, putting
25 my son in jail for X number of years is not going to help the

1 Heitholt family one bit. Let's get my son back out here,
2 make him a productive person. Some benefit to society.
3 That's what would be good. That would be a better legacy for
4 the Heitholt family, for our family, and for my son. Putting
5 a good person in prison for X number of years will serve no
6 benefit to anybody at all.

7 And if anybody would ever bother to check his high
8 school record, or his friends, he never, ever, ever was in a
9 fistfight, any kind of altercation that I've ever been aware
10 about, ever came out in court. He got along with everybody.
11 He was a peacemaker, not a troublemaker. And he's always
12 been like that.

13 And you saw how he spoke. When he was harangued
14 and -- which I presume is the job of the prosecutor, he never
15 raised his voice. Much cooler than I am. He kept the same
16 demeanor, same voice, and was very respectful. That is my
17 son. That's not a murderer. That's not a person who goes
18 out and kills people.

19 This is a nice kid that got caught up -- I think
20 that Erickson was just an abused person that got taken
21 advantage of by the state.

22 And now here we find: No blood in the car. How
23 could that possibly happen? How could you have a bloody
24 crime scene like this and, in the car, not one drop of blood?
25 How can you go to the victim's house -- I mean, Erickson's

1 house, and do a luminol test of his entire house, bedroom,
2 carpet, not one drop of blood.

3 I tell you what, I know my son is an Eagle Scout,
4 but I don't believe he got a badge called crime, where he
5 became a master crime-master, to be able to commit a crime
6 like that, that was so bloody, and not transfer any of the
7 blood to his car, Erickson's house, our house, anywhere.
8 That's magical.

9 And it's beyond me how anybody could ever find him
10 guilty just on that, never mind By George being closed at
11 1:30. Never mind Dallas Mallory not even showing up. Now,
12 why did the state not call him? I think that's kind of
13 interesting. Dallas Mallory was not even anywhere around --

14 Q. Mr. Ferguson, I think --

15 A. Sorry.

16 Q. I realize it's a pretty broad question.

17 A. Sorry. Sorry. Sorry.

18 Q. In terms of the length of sentence to the jury, the
19 jury has imposed -- is to impose or will choose to impose, do
20 you have anything to say concerning that? Concerning not
21 issues already decided, but punishment.

22 A. Please just make it as short a time as possible.
23 I'd like to be able to hold my son before I die. I'd like to
24 just give him a good hug. I'd like to spend some more time
25 with him. We spent an inordinate amount of time together.

1 Give him the shortest sentence possible. It will serve no
2 purpose to keep him in jail. What purpose would that
3 possibly serve?

4 His mother and myself, his sister, we love him so
5 much and we want him back so badly. And we do feel sorry for
6 the Heitholt family. It's a horrible situation for the
7 community. But if just will, please, the shortest sentence
8 possible, please.

9 MR. ROGERS: Thank you.

10 THE COURT: Mr. Crane, do you have any questions?

11 MR. CRANE: No.

12 Thank you, sir.

13 THE COURT: You may step down, Mr. Ferguson.

14 THE WITNESS: Thank you.

15 THE COURT: Defendant wish to call any further
16 witnesses or present any further evidence?

17 MR. ROGERS: May I have a moment, Your Honor?

18 For the record, Your Honor, out of an abundance of
19 caution, we would at this time offer all exhibits offered by
20 the defense during the guilt or innocence phase of the trial.

21 THE COURT: Is there an objection?

22 MR. CRANE: No objection.

23 THE COURT: All of the exhibits received in evidence
24 during the guilt phase on behalf of the defendant will be
25 received at this time.

1 Anything further then?

2 MR. ROGERS: No, Your Honor. Thank you.

3 - - -

4 DEFENDANT RESTS

5 - - -

6 THE COURT: Rebuttal, Mr. Crane?

7 MR. CRANE: I'm sorry?

8 THE COURT: Rebuttal?

9 MR. CRANE: No.

10 THE COURT: We spoke about the time for your closing

11 argument. And I spoke to both counsel about that.

12 MR. CRANE: I think Mr. Rogers has a suggestion.

13 MR. ROGERS: I think five minutes per side should be

14 sufficient.

15 THE COURT: Is that agreeable?

16 MR. CRANE: Yes, ma'am.

17 THE COURT: How would you like to split your five

18 minutes?

19 MR. CRANE: Three and two.

20 THE COURT: You may address the jury.

21 - - -

22 OPENING ARGUMENT

23 BY MR. CRANE:

24 Ladies and gentlemen, it's late. I know it's been a

25 long day and a long, tough week.

1 doubts that in any way, shape, or form. There is nothing you
2 can do to Ryan Ferguson that will in any way bring back Kent
3 Heitholt. There's nothing you can do to Ryan Ferguson that
4 will in any way take away the pain and suffering that his
5 widow and his daughter and his son have undergone.

6 Whoever killed Kent Heitholt on November 1st, 2001,
7 put an end to a very worthwhile life; put an end to a
8 beautiful relationship; put an end to the completeness of a
9 beautiful family.

10 In a sense, your verdicts tonight have also put an
11 end to the completeness of a good, worthwhile family. And I
12 don't mean to compare things here, because those aren't --
13 comparisons would not be appropriate.

14 But you do have at least one remaining decision that
15 might perhaps mitigate, lessen the devastation that your
16 verdicts have brought to the Ferguson family. There's no way
17 we can mitigate or lessen the devastation that the murder of
18 Kent Heitholt brought to his family. But this young man
19 here, who turned 21 the day before yesterday, who had turned
20 17 a couple weeks before Halloween in 2001, still could have
21 a future, despite your verdicts. We ask you to let the
22 devastation end as much as it can. Do as little harm as you
23 can with the punishments you impose.

24 The range is a minimum of 10 years, maximum of 30
25 years, or life imprisonment for each count. You don't have a

1 choice as to whether the sentences are consecutive or
2 concurrent. That's up to the Court. But you do have the
3 opportunity to at least mitigate, insofar as possible, the
4 effects of your verdicts on Ryan Ferguson, on his family, by
5 assessing the minimum sentence.

6 That is not to say that Kent Heitholt is not -- was
7 not a very valuable, wonderful, warm, and loving person. His
8 worth is measured in the family he leaves behind and friends,
9 not in the years of Ryan Ferguson's life.

10 Thank you.

11 THE COURT: Is it over? Thank you.

12 You may reply briefly, Mr. Crane.

13 - - -

14 CLOSING ARGUMENT

15 BY MR. CRANE:

16 Ladies and gentlemen, obviously Ryan Ferguson's got
17 a mom and dad that love him. He had a good life. A
18 privileged life. But he should receive the same punishment
19 for a crime of this nature as anybody else.

20 Total disregard for human life.

21 Ladies and gentlemen, make no mistake. Ryan
22 Ferguson is not a victim of circumstance. He is the creator
23 of the circumstances he's in right now. And ultimately it's
24 up to the individual person not to do things like this. Not
25 to leave a man like that (indicating).

1 Ladies and gentlemen, the maximum. That's what he
2 deserves.

3 Thank you.

4 THE COURT: I have two more instructions to read to
5 you.

6 (Instruction 20 read to the jury.)

7 THE COURT: And indeed, this matter should have been
8 read to you before. And I apologize. And I'm certainly
9 willing to give counsel additional argument, if you wish,
10 because there is an instruction regarding the argument.

11 (Instruction 21 read to the jury.)

12 THE COURT: You did not receive this instruction
13 before argument, and I'm more than happy to allow state and
14 the defendant to have closing arguments, to have the last
15 word with this jury, if you wish to do so.

16 Mr. Crane.

17 MR. CRANE: I think we're both through.

18 MR. ROGERS: I'm through.

19 THE COURT: All right. With that, ladies and
20 gentlemen, I'll hand you the instructions.

21 If you wish to see any of the exhibits, you may
22 request that. If you become weary and wish to retire for the
23 evening and resume your deliberations tomorrow, you will let
24 me know.

25 Jury be in recess.

1 (Jury went into deliberations at 10:50 p.m.)

2 - - -

3 The following proceedings were held out of the presence
4 of the jury:

5 THE COURT: We'll be in recess.

6 (Recess taken.)

7 - - -

8 At 11:05 p.m. a note was received from the jury, and the
9 following proceedings were held out of the presence of the
10 jury and the defendant:

11 MR. ROGERS: Kevin, we have a question.

12 THE COURT: The note is: "Can you supply us a
13 reminder of what Charles Erickson's agreement was?"

14 There was an exhibit offered of the agreement." I
15 don't know where that is. I don't remember the number.

16 MR. CRANE: Yeah. I bet I ran downstairs with that.
17 Should that exhibit come in?

18 MR. KNIGHT: Let me go find it.

19 THE COURT: You've offered all exhibits.

20 MR. CRANE: Yeah, I know. Do you want me to get the
21 agreement?

22 THE COURT: Well, let me just suggest --

23 MR. CRANE: Is that the way you want to do it?

24 THE COURT: I'm not going to give them -- I'm not
25 going to write them and tell them what I think the agreement

1 is.

2 MR. CRANE: Okay. I'll go get the letter.

3 (Mr. Crane left the courtroom and then returned.)

4 MR. CRANE: It would be State's Exhibit 25.

5 THE COURT: Is the plea agreement. State's
6 agreement with Charles Erickson. It is Exhibit 25. And the
7 Court would intend to send that back, unless there's an
8 objection by the state or the defendant.

9 MR. CRANE: No objection.

10 MR. ROGERS: No objection.

11 (Exhibit sent back to the jury room.)

12 (Recess taken.)

13 - - -

14 The following proceedings were held out of the presence
15 of the jury:

16 (The defendant not present in the courtroom.)

17 THE COURT: Would you care to withdraw these
18 depositions that you filed? And --

19 MR. ROGERS: Yes.

20 THE COURT: -- the clerk --

21 MR. ROGERS: If that's the local practice, I'm happy
22 to do that.

23 THE COURT: We don't normally keep them, unless they
24 become of issue. I don't know if they would be needed in
25 case of appeal.

1 (Depositions withdrawn.)

2 (The defendant present in the courtroom.)

3 THE COURT: Has the jury reached verdicts on the
4 issue of punishment?

5 DEPUTY COURT MARSHAL: Yes, Your Honor.

6 THE COURT: Would you return the jury to the
7 courtroom, please.

8 - - -

9 At 11:42 p.m. the jury returned with their verdicts, and
10 the following proceedings were held in the presence of the
11 jury:

12 THE COURT: Madam Foreman, has the jury reached
13 verdicts on the issue of punishment on Counts I and II in
14 this cause?

15 JURY FOREMAN: Yes, we have.

16 THE COURT: Would you hand those, together with the
17 instructions that you have. And I don't know if you have the
18 exhibits, but we'll get those from the jury room.

19 As to Count I, we, the jury, having found defendant
20 Ryan William Ferguson guilty of murder in the second degree,
21 assess and declare the punishment for murder in the second
22 degree at imprisonment for a term of 30 years.

23 Madam Foreman, is this the verdict of the jury with
24 respect to punishment on Count I?

25 JURY FOREMAN: Yes, it is.

1 THE COURT: As to Count II, we, the jury, having
2 found defendant Ryan William Ferguson guilty of robbery in
3 the first degree, assess and declare the punishment for
4 robbery in the first degree at imprisonment for a term of 10
5 years.

6 Is this the verdict of the jury with respect to
7 punishment on Count II?

8 JURY FOREMAN: Yes, it is.

9 THE COURT: Does defendant wish to have the jurors
10 polled as to their verdicts on punishment?

11 MR. ROGERS: No, Your Honor. Thank you.

12 THE COURT: Ladies and gentlemen, thank you is
13 inadequate to express our gratitude for your service here.

14 You are certainly welcome to spend the night here,
15 or we will arrange to take you back to your homes this
16 evening.

17 You are no longer under a prohibition about talking
18 about the case, but you're not required to, if you choose not
19 to talk about the case. That's your decision, personally.

20 I will ask that the jury be free to pass through the
21 courthouse now and go to wherever they choose to go, without
22 disturbance. But you may talk to whomever, family, friends,
23 or the media, if you choose to do that, once you leave this
24 courtroom.

25 The Court will order an investigation prior to

1 I would hope that we would have reports and any kind of
2 post-trial motions to be heard at that particular time.

3 Is that date agreeable with the state?

4 MR. CRANE: As far as I know.

5 THE COURT: I mean, you're planning to be here and
6 there's not a conflict on that Monday.

7 MR. CRANE: I'll be here.

8 THE COURT: Are you looking at your calendar?

9 MR. WEIS: Yeah.

10 MR. ROGERS: I've looked at mine, Your Honor, and I
11 am available on that date.

12 THE COURT: All right.

13 Final disposition then is set for the 5th of
14 December, 2005, 9:00 a.m., Division III.

15 If you wanted to set it a little bit later in the
16 morning, since you travel from Kansas City, I would be
17 agreeable to do that. If you anticipate that you want to
18 present evidence at final disposition, in addition to
19 whatever we've heard during this trial, if you'll let me
20 know. And perhaps we would need a different date, so that
21 I'd be sure and have enough time, because usually a law day
22 is a busy day and it's hard to have very lengthy hearings on
23 those days.

24 MR. ROGERS: Very well, Your Honor. We'll do that.

25 THE COURT: And I'm permitting counsel on both sides

1 to withdraw all the exhibits. And we will make sure that we
2 have the exhibits for you before you leave the courtroom.

3 Were you about to say something?

4 MR. ROGERS: Yes, Your Honor. We would request an
5 additional 10 days, for a total of 25 days in which to file
6 post-trial motions.

7 THE COURT: All right.

8 Defendant is given additional 10 days to file motion
9 for new trial.

10 And that still should be within that time frame,
11 since today --

12 MR. ROGERS: Yes.

13 THE COURT: -- is the 21st of October. And I'm sure
14 this probably will get out on Monday, I hope. Yes?

15 DEPUTY CLERK SMITH: Yes.

16 THE COURT: Okay. At least the order will get to
17 probation and parole to begin its investigation.

18 Anything further then for the state?

19 MR. CRANE: Nothing further, Judge.

20 THE COURT: For the defendant?

21 MR. ROGERS: No, Your Honor. Thank you.

22 THE COURT: Thank you.

23 What I'm going to do is leave it on the bench.

24 DEPUTY CLERK SMITH: That's fine.

25 THE COURT: And I thought I had an extra paper clip.

1 I'm going to put the docket sheets together.

2 Would you give this to Mr. Rogers.

3 This is part of the deposition of Erickson that you
4 had filed that I've allowed you to withdraw. And I believe
5 this goes with it, because this appears to be an exhibit to
6 that deposition.

7 MR. ROGERS: Thank you, Your Honor.

8 THE COURT: Uh-huh.

9 And are there any exhibits in the jury room?

10 DEPUTY COURT MARSHAL BAER: Yes, Judge.

11 THE COURT: If you would provide those exhibits to
12 counsel, please.

13 DEPUTY COURT MARSHAL BAER: Okay, Judge.

14 (Hearing adjourned.)

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P R O C E E D I N G S

December 5, 2005

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THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: What says the defendant?

MR. ROGERS: Your Honor, can we have about ten minutes to discuss some things?

THE COURT: You need ten minutes? Okay. I will take up the civil docket then.

(Other cases heard.)

THE COURT: Mr. Rogers.

MR. ROGERS: Yes.

THE COURT: Are you ready to proceed in State versus Ferguson at this time? Have you had sufficient time to consult?

MR. ROGERS: Yes, Your Honor.

THE COURT: We will then take up Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: And what says the defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: Mr. Rogers, you may be heard on your

1 motion for judgment of acquittal, or, in the alternative, for
2 new trial.

3 MR. ROGERS: Thank you, Your Honor.

4 I have been practicing criminal defense for going on
5 30 years. And I have conducted many hearings such as this.
6 And what usually happens is: I usually stand up and say,
7 "Your Honor, we rest on the motion for new trial as filed and
8 have no additional argument," and the motion is usually
9 overruled, and then we proceed to sentencing, because in the
10 usual case the function of a motion like this is to preserve
11 issues for appeal. This, as the Court is well aware, is not
12 a usual case. And therefore, we are asking for extraordinary
13 consideration of parts of this motion.

14 With regard to the first 14 points raised, those are
15 points which were raised at trial, and those are points which
16 I do not intend to argue this morning, although I -- I do not
17 want to waive any of them, obviously. But with regard to the
18 15th and 16th points, I think it deserves consideration.

19 The reason this is not a usual case is because our
20 system usually works. Usually when you have a jury trial,
21 the jury reaches the right conclusion. They didn't this
22 time. We have here a young man who has been found guilty, by
23 a jury, after a week-long trial, of a crime that he had no
24 involvement in. And so that's why we need to take a long
25 hard look and see how that happened.

1 And paragraph 15 in the motion for new trial is a
2 claim of newly discovered evidence. You'll recall, Your
3 Honor, that during the trial we located some witnesses, two
4 witnesses, Miss Griggs and Mr. Canada, who had not been
5 disclosed to the state. And the reason we didn't disclose
6 them is because we didn't know about them. And we were able
7 to demonstrate at a hearing outside of the presence of the
8 jury that the state had, in fact, known about these
9 witnesses; that they had interviewed these witnesses; that
10 they had not prepared any reports of the interviews; and that
11 the exculpatory information these witnesses gave had not been
12 disclosed to the defense.

13 That is the same with the evidence referred to in
14 paragraph 15, Your Honor. And that's evidence which has been
15 filed as part of the motion supported by the affidavit of the
16 records custodian. Evidence of the -- I call it liquor
17 control, but I guess the official name is the Missouri
18 Division of Alcohol and Tobacco Control-Licensing.

19 And the Court will recall that one of the major
20 issues in this case was Charles Erickson's claim that this
21 robbery was committed for the purpose of gaining money to go
22 back to By George's nightclub and spend on alcohol. And yet
23 the robbery occurred after 2:00 in the morning. And the
24 testimony of Miss Canada -- or excuse me, Mr. Canada and
25 Miss Griggs was that By George's closed before 1:30, and at

1 1:30 everybody was supposed to be out and they locked the
2 door.

3 The state, during its argument, and during its
4 cross-examination of Griggs and Canada, made much of the fact
5 that By George's routinely violated the liquor law which
6 prohibits the sale of alcohol to minors. Or the possession
7 of alcohol by minors on the premises. And questioned them
8 about numerous citations that By George's had received from
9 liquor control.

10 After the trial, we were able to acquire those
11 citations, which have been filed with the Court. Those were
12 in the possession of the State of Missouri throughout.
13 Therefore, they're clearly within the possession -- the
14 constructive possession of the prosecutor's office. They
15 were not disclosed to us beforehand.

16 Yet they showed numerous citations, as the state
17 pointed out, for serving alcohol to minors or for minor in
18 possession on the premises. Not one single citation over the
19 years for being open after hours, for ever being open after
20 hours, which is the point that the state tried to argue.

21 So, here we have evidence which is material, within
22 the meaning of Brady and Kyles versus Whitley, which is in
23 the possession of the state, State of Missouri, which is not
24 disclosed to the defense. And therefore, I think the Court
25 is well aware of the precedence which require such

1 disclosure.

2 And I think that that is a very powerful claim. And
3 it goes, at least to some extent, to answering the question
4 of how this kid got convicted of a crime he didn't commit.
5 Because the state had evidence that showed that their theory,
6 that they went back and drank afterwards, evidence
7 inconsistent with that, evidence which impeaches the
8 testimony of Charles Erickson, and they didn't disclose it.
9 Just like they didn't disclose the evidence from Miss Griggs
10 or Mr. Canada, even though they knew about that.

11 So that's our claim with regard to Brady versus
12 Maryland and Giglio versus United States.

13 Your Honor, let me now move to paragraph 16, which
14 is the claim that the verdict -- the verdicts in this case
15 are against the weight of the credible evidence.

16 Although in the usual case motions for new trial
17 are -- they're always necessary and they're usually
18 sufficient to preserve a claim for appeal, this is a claim
19 which the appellate courts of Missouri have frequently said
20 they cannot entertain. It is, however, a claim which this
21 Court has the right, the authority, and the obligation to
22 entertain. And it is sometimes said that the trial court in
23 a situation like this sits as a 13th juror, which cannot
24 enter a judgment of acquittal, but can say, "Hey, I don't
25 care whether the other 12 believed it or not, I'm going to

1 make this as if there were a hung jury." And that's what
2 we're asking you to do on the case of the -- in this case,
3 based upon the weight of the credible evidence.

4 The only evidence that in any way involves Ryan
5 Ferguson in the death of Kent Heitholt is the testimony of
6 Charles Erickson. That testimony, taken as a whole, is
7 unworthy of belief. Even though the jury obviously believed
8 it.

9 And the reason -- there are several reasons it's
10 unworthy of belief. One of the reasons is: It has changed,
11 over time, to fit the convenience of the prosecution. The
12 route that he originally told the police they took is
13 different than the route that he testified in court they
14 took. The route they testified in court is more consistent,
15 although not totally consistent, with the route followed by
16 the police dog in the early morning of November 1st.

17 The whole point of this robbery, according to
18 Erickson, was to get money to go back to By George's and
19 spend it drinking. But I don't think it can be seriously
20 contested that By George's was closed at the time. There's
21 no way they could have gone back and continued drinking.
22 It's just not worthy of belief. Every possible check on
23 Erickson's veracity comes out negative.

24 Physical evidence at the scene. There's a hair
25 found in the bag removed from the hand of the decedent, which

1 is not the decedent's, which is not Erickson's, which is not
2 Ferguson's. There are fingerprints in the car which are not
3 the decedent's, not his daughter's, not Erickson's, not
4 Ferguson's. There are bloody footprints at the scene, left
5 by Sketchers shoes. Erickson says he wasn't wearing
6 Sketchers shoes. Although the footprints are in the area
7 where he said he was. There is no evidence whatsoever from
8 anybody, including Erickson, that Mr. Ferguson has ever owned
9 or worn Sketchers shoes.

10 You saw the photographs of the crime scene. Blood
11 spatter up on the fender of the car. A pool of blood all
12 over the parking lot. Blood spatter many feet away from
13 where the body was found. Yet nobody claims there's any
14 blood on the clothing of Ryan Ferguson. Charles Erickson
15 doesn't say, "I woke up the next morning and found blood on
16 my clothing." No bloody clothing anywhere.

17 No blood on the interior of the car when it's tested
18 for luminol. Admittedly that's a while later, but blood
19 stains last, unless something's done to somehow chemically
20 alter them. They would still luminesce. And there's no
21 blood found.

22 Those are just a few of the items, Your Honor.

23 You sat through the trial and paid close attention.
24 What we're asking you to do now is weigh the evidence and
25 correct the mistake the jury has made and give us a new trial

1 based upon the weight of the evidence.

2 That's all I have to say about the motion for new
3 trial, Your Honor.

4 THE COURT: Mr. Crane, you may be heard.

5 MR. CRANE: Just a couple quick responses, Judge.

6 On that number 15, that's the one about the liquor
7 control records, I'd just bring the Court's attention to a
8 portion of the transcript, which I know isn't totally
9 completed, but there was a section I wanted to highlight in
10 the testimony of Mr. Canada, Kristopher Canada, a defense
11 witness who was asked on redirect by defense counsel,
12 Mr. Rogers, about liquor law violations.

13 And Mr. Canada indicated that he recalled that the
14 business, By George's, was closed by liquor control four or
15 five times. And was asked if it was ever closed for staying
16 open after hours. Mr. Canada responded, "No, sir." And he
17 was asked, "Did at any time when you were working there, did
18 the police come in after hours and say, 'Wait a minute. You
19 guys are supposed to be closed.'" Answer: "No, sir."

20 Those were questions asked by defense counsel of
21 their witness. I can't imagine that Mr. Rogers would ask
22 such questions if he didn't know the answer.

23 There was testimony, evidence in this case, that the
24 bar was closed for having people under age. In their motion
25 for new trial, they say that I mentioned that during the

1 course of it, either via the witnesses' testimony, Melissa
2 Griggs, Mr. Canada, et cetera. I did. That is not
3 exculpatory for the defense.

4 If this argument -- quite frankly, I don't
5 understand the argument. But I believe that it's basically
6 that if liquor control had shut down By George's at some
7 point, then that would somehow indicate whether or not they
8 were open late on the night in question. It's like: If you
9 get caught speeding, you sped. But if you don't get caught
10 speeding, it never happened.

11 You'll remember, Judge, that on the night in
12 question, there were underage drinkers. Ms. Griggs, a
13 defense witness, was 16 years old. The defendant and Chuck
14 Erickson were 17 years old. There's evidence that there were
15 numerous other people in there on the night in question. I
16 don't think liquor control busted them for underage drinking
17 that night. But that obviously doesn't mean there weren't
18 underage drinkers in the bar. So the argument doesn't
19 follow.

20 To suggest that the jury's decision would have been
21 different, even though this evidence did actually come in, if
22 they had liquor control records, in other words, if they were
23 proving a negative, is -- is beyond the pale. I mean,
24 there's no possibility that that would have occurred.

25 So, it's not exculpatory. And the second major

1 thing is: It did not result in any prejudice to the
2 defendant.

3 Insofar as -- insofar as the 16th point is
4 concerned, Judge, I mean, there was ample evidence -- I'm not
5 going to go into what I disagree with on the comments of
6 Mr. Rogers, but there was ample evidence to convict. I mean,
7 this was a situation where the jury listened to this case and
8 heard the evidence and made a decision. The defense did a
9 good job of bringing forth points that arguably contradicted
10 the state's evidence.

11 The jury made the decision in this case, after
12 careful and impartial consideration of the evidence, and
13 their verdict should stand.

14 THE COURT: Do you care to briefly reply,
15 Mr. Rogers?

16 MR. ROGERS: Yes. And I heard the word "briefly,"
17 Your Honor.

18 THE COURT: Well, I'm trying to be -- I mean, I'm
19 not giving you a time -- I'm not having an alarm go off. But
20 Mr. Crane's remarks were rather brief in response to your
21 motion --

22 MR. ROGERS: Right.

23 THE COURT: -- and so your response should likewise
24 be brief.

25 MR. ROGERS: And it will.

1 I want to make sure -- I think Mr. Crane does, in
2 fact, understand the argument, but I want to make sure that
3 not only he does, but everybody else does too.

4 The argument is that the evidence which was not
5 disclosed is evidence not only showing that there was never a
6 citation, let alone a closing of By George's for being open
7 after hours, but also evidence that there were numerous
8 citations of By George's over the period of time when it was
9 in business, showing not only that they were not closed for
10 being open after hours, but also showing that they were in
11 the attention of the liquor control people. That liquor
12 control showed up there fairly frequently and cited them for
13 the violations that they found.

14 And putting those two together, I think there is
15 certainly a -- an exculpatory and material aspect to that
16 evidence, because Mr. Crane made to the jury the same
17 argument he's making today, which is: Just the fact that
18 they're serving underage people means they don't care about
19 the law, so therefore you can assume they might have been
20 open late.

21 I also do recall asking Mr. Canada about the
22 closings. That was after the cross-examination by Mr. Crane,
23 which indicated several occasions where By George's had been
24 closed by liquor control, as it turned out, for having
25 underage drinkers.

1 I did ask a question to which I did not know the
2 answer. And I got the answer that I hoped to get. But that
3 answer is totally -- it is not on the par with having
4 evidence from an official agency showing what the closings
5 were for, when the closings occurred, and showing the utter
6 lack of any hint or intimation that they were ever open after
7 hours.

8 So, even though I -- and, in fact, the second
9 question that Mr. Crane read was: Any time while he was
10 working there. So that obviously further limits the
11 questioning, and it's not nearly -- his answers were neither
12 as persuasive nor as inclusive as the records would have
13 been, had they been disclosed to us.

14 Point 16, we're not talking about the sufficiency of
15 the evidence. We do talk about that on one technical point
16 earlier, but we're talking about the weight of the evidence.
17 And we're not asking you to hold that there was not
18 sufficient evidence to send this case to the jury under point
19 16. What we're asking you to do is to weigh that evidence
20 and say: It's not enough to send this kid to prison.

21 THE COURT: Is this the only other motion that you
22 have filed with respect to post conviction?

23 MR. ROGERS: Yes, Your Honor.

24 THE COURT: Okay. I want to make sure I didn't
25 overlook something in the file.

1 Defendant's motion for judgment of acquittal, or, in
2 the alternative, for a new trial is argued and is overruled.

3 I received only recently a pre-sentence
4 investigation.

5 Let me ask whether or not, first, did the state
6 receive a pre-sentence?

7 MR. CRANE: We did, Judge.

8 THE COURT: And did defense counsel receive a
9 pre-sentence?

10 MR. ROGERS: Yes, we did, Your Honor.

11 THE COURT: And have you had an opportunity to look
12 at that and talk about it with your client?

13 MR. ROGERS: Yes, we have. That's what we did in
14 our ten minutes.

15 THE COURT: All right. Are there additions or
16 corrections that the defendant wishes to make to the
17 pre-sentence that I -- I just received on the 30th of
18 November?

19 MR. ROGERS: Yes, Your Honor. On I believe it's
20 page 7 of 8.

21 THE COURT: All right. Let me find that page.

22 Well, I only have five pages. Let me see if I --

23 MR. ROGERS: Okay. Maybe that's the fax number.

24 THE COURT: Maybe. If you --

25 MR. ROGERS: Next to the last page.

1 THE COURT: There is a little page number up in the
2 right-hand corner. And I see a page 4, which would be the
3 next-to-the-last page that I have.

4 MR. ROGERS: I don't see --

5 THE COURT: Why don't you --

6 MR. ROGERS: Let me read the first part of the
7 paragraph.

8 THE COURT: All right.

9 MR. ROGERS: It says, "Ferguson stated that he
10 attended one trimester."

11 THE COURT: Okay. And is that at the very top?

12 MR. ROGERS: No. It's the sixth paragraph. The
13 fifth complete paragraph.

14 THE COURT: Okay. I have that. That is the
15 next-to-the-last page.

16 MR. ROGERS: All right.

17 THE COURT: My page 4. Yes.

18 MR. ROGERS: There's just a couple of minor errors,
19 which are probably clerical more than anything else.

20 It says, "Ferguson stated he was to begin taking
21 classes. However, was arrested for the present offense in
22 March of 2004, prior to the start of the term." That's
23 inaccurate. I believe the Court will recall his trial
24 testimony. In fact, to the effect that he was enrolled and
25 taking classes during the -- at the time of his arrest, which

1 makes sense, because it's in March, and the term starts in
2 January.

3 And, in fact, I believe the testimony was: He was
4 concerned about, at the time of his arrest, concerned about
5 exams scheduled for the next day or later that week.

6 And then the other inaccuracy is that "Ferguson
7 stated he wanted to obtain an associate's degree in art."
8 Actually what he wanted to obtain was an associate of arts
9 degree.

10 So those are the only actual corrections we have to
11 the pre-sentence investigation report, Your Honor.

12 THE COURT: All right. Does the state have any
13 evidence on dis -- on disposition?

14 MR. CRANE: No evidence. Brief comments.

15 THE COURT: All right. Does the defendant have any
16 evidence on disposition?

17 MR. ROGERS: No evidence, Your Honor.

18 THE COURT: All right.

19 I'll hear the state's comments.

20 MR. CRANE: Your Honor, you heard the trial
21 evidence, obviously. And you've -- you heard at the
22 conclusion of the case the victim impact testimony from the
23 victim's wife and daughter. Miss Kali Heitholt is here with
24 us this morning. Second row back there.

25 The -- you've, again, reviewed the pre-sentence

1 investigation. The victim impact comments in that.

2 Considering all that, Judge, on behalf of the State
3 of Missouri, on behalf of the Heitholt family, I ask that you
4 follow the jury's recommendation: 30 years as to Count I and
5 10 years as to Count II. And further, the state would
6 respectfully request that you order those sentences to run
7 consecutively and not concurrently.

8 THE COURT: Mr. Rogers.

9 MR. ROGERS: Your Honor, first of all, there's no
10 question that this is a serious case. However, the
11 pre-sentence investigation is very favorable. It reflects
12 almost exclusively positive ideas.

13 I do not anticipate that the Court is going to
14 seriously consider probation in this case. And so I would
15 just state for the record that Mr. Ferguson has indicated
16 that, if he is placed on probation, he certainly would abide
17 by all of the special conditions recommended in the
18 pre-sentence report.

19 I think the state's position about the seriousness
20 of the case is somewhat inconsistent with its plea agreement
21 with Mr. Erickson. Mr. Erickson testified that he
22 anticipates receiving a 15-year sentence and a 10-year
23 sentence, consecutive. I think that -- I'm not
24 Mr. Erickson's lawyer, so I don't really need to comment on
25 whether I think that's appropriate for him. Certainly it is

1 I think inappropriate to sentence Mr. Ferguson more harshly
2 than Mr. Erickson, when, according to Erickson's own
3 testimony, he's the one who initiated the attack. He's the
4 one who decided the time had come to physically assault
5 somebody. There's no indication that there was any plan to
6 do that beforehand.

7 Having said that, Your Honor, I would ask the Court
8 to look at Mr. Ferguson, consider the positive things he has
9 going for him, and to show mercy.

10 THE COURT: Do you care to respond, Mr. Crane?

11 MR. CRANE: (Shaking head from side to side.)

12 THE COURT: State appears by prosecuting attorney
13 and assistant prosecuting attorney. Defendant appears in
14 person and by counsel. Defendant's motion for judgment of
15 acquittal, or, in the alternative, for new trial is argued
16 and is overruled. Pre-sentence investigation is considered,
17 corrections noted, and is ordered sealed. In accordance with
18 this jury's verdict, Court will fix punishment --

19 MR. ROGERS: Your Honor, before you pronounce
20 sentence, Mr. Ferguson would like to address the Court.

21 THE COURT: All right.

22 THE DEFENDANT: May I stand?

23 THE COURT: You may.

24 THE DEFENDANT: Thank you. Appreciate the time to
25 speak.

1 I really just wanted to say that today is a sad day,
2 because the justice system has failed not only my family and
3 I, but the Heitholts and the community. It has failed
4 because they're sending an innocent man to jail. Because
5 they're letting a horrible person run free, without a care.
6 They don't have to worry about the police looking for them.
7 I can't understand that. I don't see how Crane can live with
8 himself with that.

9 But some day the truth will come out and everyone
10 will see that I am innocent, and I will be free. And that
11 will be a great day, because on that day the justice system
12 will finally have done justice. That's it.

13 Thank you, Your Honor.

14 THE COURT: You may be seated.

15 And I would have given him an opportunity to be
16 heard, because I do allow allocution.

17 In accordance with the jury's verdict, the Court
18 would fix punishment at 30 years on Count I and 10 years on
19 Count II.

20 Mr. Ferguson, although I have heard your statement,
21 I need to ask you if you have any legal reason why the
22 judgment and sentence of this Court should not be pronounced
23 upon you at this time.

24 THE DEFENDANT: No.

25 THE COURT: Allocution is granted. Defendant is

1 sentenced to 30 years on Count I and 10 years on Count II,
2 the sentence on Count II to run consecutively to the sentence
3 on Count I.

4 Mr. Ferguson, you do have a right to appeal the
5 jury's verdict and this Court's judgment. If you are unable,
6 by reason of indigency, to pay for an attorney, the Court
7 will appoint an attorney for you, for the purpose of appeal.
8 You do have private counsel now, I note, but that is not
9 always the case on appeal. So I'm required to inform you of
10 this right. And need to know whether or not, first of all,
11 you wish the Court to consider appointing appellate counsel
12 for you, due to indigency.

13 THE DEFENDANT: I haven't discussed these matters
14 yet. Is it all right if I --

15 THE COURT: Well, I would assume then that a notice
16 of appeal would be filed by present private counsel, so that
17 the opportunity either to request appointment of counsel or
18 to continue with private counsel would be available.

19 Mr. Rogers, I assume that you would do that on
20 behalf of this defendant?

21 MR. ROGERS: Yes, we will, Your Honor.

22 THE COURT: All right.

23 The record will reflect, though, that defendant has
24 been so informed.

25 Mr. Ferguson, one of your basic rights under our

1 constitution is to have an effective -- or effective
2 attorneys represent you in connection with your case. It is
3 somewhat difficult to ask you the question with your attorney
4 sitting there by you at counsel table, but I'm required by
5 law to do so. And need to know if you have any complaint
6 about their services to you. And I'm talking about those
7 attorneys who represented you previous to trial, as well as
8 during the trial of this case, as well as after the trial of
9 the case. Do you have complaints about their services?

10 THE DEFENDANT: Over the whole period there were
11 concerns, but we're still discussing those, and we're in the
12 process of --

13 THE COURT: Do you have any specific complaints
14 about Mr. Rogers' services to you?

15 THE DEFENDANT: Still we're discussing those as
16 well. Not at this time.

17 THE COURT: Do you have any specific complaints
18 about Miss Benson's services to you at this time?

19 THE DEFENDANT: Not at this time.

20 THE COURT: All right.

21 Record will reflect that there is no probable cause
22 at least at this time to believe counsel has been
23 ineffective, and therefore trial counsel may continue to
24 represent the defendant in any post-sentencing matters.

25 Mr. Ferguson, in addition to your right to appeal

1 this case, you have other rights as well. In the
2 unlikelihood that you do not appeal the case, you may bring
3 to this Court a motion asking that the Court consider your
4 sentence if you believe the sentence is larger on either or
5 both of those counts than permitted by law or if you believe
6 any of your constitutional rights, either guaranteed by the
7 U.S. or by the state constitution, have been violated.

8 In the event that you take an appeal -- and if you
9 do not appeal, you must bring this motion within 180 days.
10 In the event that you do appeal, and I have every reason,
11 from what you've said and counsel has said, that you do
12 intend to appeal, and the appellate court affirms the
13 convictions, you have 90 days after the mandate of that court
14 affirming the convictions. And it is not just an opinion.
15 After the opinion is written, there is a particular mandate
16 sent to counsel, to you, and to the Court, with respect to
17 this. If the convictions are affirmed, then you have 90
18 days. You still have the right to bring a motion, but
19 instead of having 180 days, as you would if there were no
20 appeal, you only have 90 days to bring the motion if your
21 convictions have been affirmed by the appellate court.

22 Do you understand those rights?

23 THE DEFENDANT: Yes.

24 THE COURT: Record will reflect that defendant is
25 informed of his rights under Supreme Court Rule 29.15 and the

1 time limitations therefore. Judgment is entered in favor of
2 the Crime Victims Compensation Fund and against the defendant
3 in the sum of \$45. Costs to be taxed to the defendant.
4 Sheriff is authorized one deputy in transporting defendant to
5 the department of corrections.

6 Does the state have any other matters to bring
7 before this Court?

8 MR. CRANE: No, Your Honor.

9 THE COURT: Does the defendant?

10 MR. ROGERS: No, Your Honor.

11 THE COURT: Although you haven't mentioned it,
12 certainly the defendant is entitled to an appeal bond. And I
13 had originally set the bond as I would in a case where a
14 first degree murder is charged. This defendant has not been
15 convicted of first degree murder. And the Court would invite
16 both counsel for the state as well as defense counsel, if you
17 wish, to suggest an appeal bond in this case.

18 Mr. Crane? Do you --

19 MR. CRANE: I'm not going to suggest.

20 THE COURT: All right.

21 MR. ROGERS: I would suggest, Your Honor, that, in
22 terms of the sentence which has been imposed, which is a
23 40-year sentence, all told, that perhaps an appeal bond in
24 the amount of \$200,000 would be sufficient. It's \$5,000 per
25 year of sentence.

1 THE COURT: Mr. Crane?

2 MR. CRANE: We're opposed to that, Judge.

3 MR. ROGERS: Your Honor, I'm sorry. It's my
4 understanding that by statute there is no appeal bond on
5 second degree murder.

6 THE COURT: On second -- you are probably -- that
7 is -- you are correct.

8 MR. ROGERS: I knew that I hadn't deliberately left
9 that out.

10 THE COURT: Right. I knew you hadn't either. And I
11 know on first degree there definitely is not.

12 We would then ask that the defendant be taken from
13 this courtroom. That the courtroom be closed until he has
14 been transported out of the courthouse. And the Court would
15 take a recess at this time.

16 Would ask that the doors be closed until the
17 defendant is secure or outside this courtroom.

18 We'll be in recess.

19 (Recess taken.)

20 (The defendant was not present for the following
21 proceedings.)

22 THE COURT: Yes.

23 MR. ROGERS: Your Honor, you should have before you
24 a motion to permit Mr. Ferguson to appeal as a poor person.

25 THE COURT: Well, let me just call the case --

1 MR. ROGERS: Okay.

2 THE COURT: -- since you filed something.

3 Case Number 165368-01, State of Missouri versus Ryan
4 William Ferguson. Mr. Crane is not here. Miss Gorovsky,
5 state -- this is a motion for an order allowing an appeal as
6 a poor person on that case. Does -- is the state ready to
7 take up the motion?

8 MS. GOROVSKY: I don't believe the state has any
9 position on the motion, Your Honor.

10 THE COURT: And Mr. Ferguson is not here. I could
11 have done it in chambers, but certainly would allow him to
12 perfect his appeal --

13 MR. ROGERS: I have a proposed order, Your Honor.

14 THE COURT: -- as a poor person.

15 All right. I will show defendant files motion to
16 appeal as a poor person. Motion is granted.

17 The clerk will note I'm giving Mr. Rogers his copy.
18 And then the other party's copy, including one directly to
19 Mr. Ferguson, ought to be mailed to him as well.

20 MR. ROGERS: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 (Hearing adjourned.)

23 - - -

24

25