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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

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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 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 - - -

1 REDIRECT EXAMINATION

2 BY MS. BENSON:

3 Q. You remember that Mr. Crane asked you about the
4 newspaper and how you might have heard about the murder?

5 A. Yes.

6 Q. Okay. And in addition to the Tribune, we also have
7 a paper called the Missourian in Columbia?

8 A. Yes.

9 Q. Okay. And that's a free paper delivered
10 occasionally? Maybe twice a week or something?

11 A. I think the Tribune and the Missourian are both free
12 once or twice a week.

13 Q. Okay. Now, Mr. Crane also asked you about being
14 uncertain about phone calls or not telling the police that
15 you remembered making phone calls when you were interviewed
16 on March 10th. Do you remember that?

17 A. Yes.

18 Q. Okay. And you had just gotten arrested that very
19 day; is that correct?

20 A. Yes.

21 Q. Okay. And you had been interrogated immediately
22 upon your arrest?

23 MR. CRANE: Judge, I'm going to object to the
24 leading nature of these questions.

25 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 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 - - -

25