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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v Case No: 15-3884-FC

ROBERTO MARCHELLO DUPREE

Defendant.

_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA

MT. CLEMENS, MICHIGAN - TUESDAY, MAY 15, 2018

APPEARANCES:

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WITNESSES:

None

EXHIBITS:

None

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Mt. Clemens, Michigan]

Tuesday, May 15, 2018

At 10:14 a.m.

* * *

THE COURT: Calling case number 15-3884 FC, People versus Dupree.

MR. LASZCZAK: Good morning, Your Honor. Ron Laszczak on behalf of the People.

MR. TOMKO: Ready, Judge. Good morning. Thomas Tomko appearing on behalf of Mr. Dupree.

THE COURT: Okay. Before we call the jury up, I see that there are a couple of motions in limine, which have been filed. Mr. Tomko, you want to bring those matters up right now?

MR. TOMKO: Yes, Judge. Judge, first there is a motion which Mr. Dupree assisted in drafting. It's before the Court. We have provided a copy and his copy, as well. I typed up this motion and also submitted a memo in support.

That motion is to exclude DNA evidence based on taint.

THE COURT: Okay. Make --- make your motion. Okay.

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MR. TOMKO: The motion and brief spell out what some of the problems are throughout the course of this DNA collection and testing. And each of these things it notes that there were defective procedures in identifying exactly where things were gathered; the defective procedures while these things were gathered and stored. And defective procedures once again when they were submitted to the --- the State Police Lab for testing.

Each time that these procedures have --- have been employed, it creates a possibility of tainting this --- this particular evidence. The evidence of DNA.

And so our motion, which we've spelled out and supported is something we are asking the Court to consider to strike this DNA evidence and not allow it in the case.

THE COURT: Okay. Mr. Laszczak.

MR. LASZCZAK: Judge, with all due respect to counsel, I believe the Court has addressed this previously with a motion. I know that maybe not this Court but when this --- this case is old so it's kind of been scuffled from a double of different courtrooms. And I believe in the early

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stages of litigation this issue was brought up defendant and his prior counsel. Motion was filed. People's response was filed. And, ultimately, defense's motion was denied.

Furthermore, Judge, I would indicate that the --- the remedy if the Court is to determine that there is some kind of tainting of the evidence, wouldn't be to exclude it, Judge, but rather it goes to the weight, not the admissibility of what is going to be presented during our case-in-chief.

THE COURT: Okay. Mr. Tomko, how do you deal with this? That --- that most of the case law says that this goes to weight not admissibility. I know that a judge has to make initial determinations under Rule 104 as to whether or not a proper foundation is laid. All of this seems to go to that very issue, as to whether or not there is a proper foundation; whether there's a chain of evidence; whether there's the possibility of taint.

Normally, a judge looks at that coterminous, that is exactly at the same time, that the lawyer is --- in this case, the prosecutor, is laying a foundation for each piece of evidence. If then further argument is necessary, we do it out of

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the presence of the jury. And I understand and appreciate that motions in limine are made for this purpose, to --- to --- to tackle these things that we know are coming, so that we don't have to interrupt the flow of the jury trial.

But, even knowing that, it seems that on the basis of just even what, Mr. Dupree and you, have stated, these are matters which would seem to go more heavily towards the weight that the jury can give these pieces of evidence, rather than the sheer question of admissibility. So your response?

MR. TOMKO: Judge, my first --- my response would be that, look, when it comes to foundation, the problem with me is that if the evidence was presented and the --- the foundation was being attempted, then to do it all in front of the jury then would prejudice the jury in the event that this excluded from evidence. So our position is that this is something that should be resolved prior to the jury being privy to the arguments back and forth.

THE COURT: Okay.

MR. TOMKO: I know Mr. Dupree wants to add ---

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MR. DUPREE: I'm --- the issue --- I --- I object to the --- to the --- to the --- that the decision should be made based on the weight of the evidence and not if the evidence is tainted. And, I believe that if the evidence is tainted, I don't understand how it can be used. How --- how is tainted evidence being used at trial, regardless of what the weight of evidence is or the admissibility? If it's --- if it's tainted, then it's inadmissible.

And --- and there's one more issue, Your Honor.

THE COURT: Yep.

MR. DUPREE: I would please like to address right fast last --- at my last court date, you --- you addressed me as the gatekeeper, and I would like to object to that. I'm not the gatekeeper and you made claim that you was going to more than compensate Mr. Tomko for his services for represent me. So he's my attorney.

And I just wanted to make it plain that I'm not taking responsibility over my proceedings. That's Mr. Tomko's responsibility, not mine.

THE COURT: Okay. There --- there is a recent Supreme Court decision out just yesterday,

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which indicates that a defendant is entitle to assistance of counsel, but the defendant still has the right ultimately to make his own decisions. And it was a 6-3 decision of the U. S. Supreme Court. My comments were just made to echo that and that is that Mr. Tomko is here to provide advice, to provide you legal services, but it is still your life. The case is still ultimately in your control, but wisdom and experience dictates that you listen to the sound advice of a qualified attorney, which Mr. Tomko is.

Most of the time that means yielding to his judgment on things. But I just want to emphasize for you that I will respect your right to assert your own point of view and Mr. Tomko know how to make this happen outside of the presence of the jury so that it never looks to the jury like there's a disagreement between you and your counsel.

Mr. Tomko knows how to take advantage of sidebars, knows what to do in recesses to make sure that your wishes are dominate. And that's all I'm -- all I meant to indicate is that yes, he is your lawyer. You put your trust in him. I will not allow this to be bifurcated, that it, a witness doesn't get cross-examined by both --- both Mr.

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Tomko and you. You have to play the part of the client. But in terms of major decisions as the case goes, if you need time to confer with your --- with your lawyer because there is a difference of opinion, I will respect that. That's it. Okay.

All right. On --- on this motion, my ruling is that the matter does sufficient issues on a motion in limine to make me believe that I can grant the motion now. I will take the arguments that have been made and keep that in mind as the foundation is being laid. But on the surface, these matters are admissible and the worst case analysis would be that if admitted it would go to the weight not the admissibility. But so the motion is denied without prejudice to have the matters raised and be considered at the appropriate times as the foundation is being laid for --- for these pieces of evidence. Okay. Next motion, Mr. Tomko.

MR. TOMKO: Judge, one perhaps we can all agree on is the motion to exclude any prior bad acts.

THE COURT: Yeah.

MR. TOMKO: We did file a motion and brief in support of that. The reason that that comes up

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is that --- is that I don't think that priors are going to be an issue, but it can come up in the context of if the DNA evidence comes in and there's an initial match of DNA evidence, that was done through CODIS. CODIS is a situation where a person with a prior conviction would have his DNA stored by the State Police. So the --- the reference to CODIS to the implication that there is some type of prior offense that Mr. Dupree has that should be excluded from evidence, as well as any mention of any mention of any priors or --- at all.

THE COURT: Let me hear from the prosecutor. I think we are on the same page. Sir.

MR. LASZCZAK: Judge, with regards to any prior bad acts or conviction, obviously, we did not properly file a 404B notice nor did we intend to. So I would concur with counsel's argument regarding that portion of the document.

With regarding the portion of the DNA test, Judge, I think counsel is --- is trying to insinuate that because CODIS means prior convictions, that's actually not accurate, Judge. And --- and the reason why I say that is because, for example, Judge, in this case well, the victim

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Mohamad Zamzami, DNA was also being extracted, tested analyzed, and that also goes into the State date base.

So CODIS, I would agree with counsel, because we had objections --- our office had objections to that term being used, but I don't think I should be precluded, Judge, to talk about a database in which crime-scene evidence is analyzed and then put into the database at a national --- state and national and local level, Judge. And what I anticipate happening is two major things. First, evidence is collected, it sent off to the Northville lab that does DNA biological analysis. They do a comparison to what was given to them based on other evidence collected at the scene and they are unable to determine the major donor, that DNA strand is then put into a database and that is compared on the local level, on the state level and a national level.

And it's compared to any DNA that is collected at any sort of crime scene. So, for example, Judge, Mohamad Zamzami, the victim in this case, the victim in this case DNA is in the database. That does mean that he has a prior

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conviction. That does mean he is a --- convicted of anything.

So my argument to that, Judge, is I have no problem refraining from any of my witnesses using the word CODIS. But I do anticipate using that. Our lab techs collected evidence. They analyzed it. They processed it. It was put into a database and based off that database we determined Detective Gilbert was able to determine a possible suspect. Search warrant was issued, a buckle swab of defendant was done, sent back to the lab for a comparison. So the fact that we can't use ---

THE COURT: Well, except --- except that the --- the DNA that was extracted, I take it, was by a blood draw of Mr. Dupree, correct?

MR. LASZCZAK: It was a buckle swab.

THE COURT: A buckle swab, okay. So that part would certainly be admissible. That a buckle swab of Mr. Dupree was taken and it came back positive. All of the previous procedures seem to me to be either irrelevant or prejudicial.

In other words, the jury will not necessarily know that CODIS or at database refers to a prior conviction. But it does seem to me that it

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does for some very perceptive jurors it could inform them that ah, Mr. Dupree's DNA was already in some central registry, how does that happen? Oh, well, he must have been involved in previous criminal activity.

And, although there's an alternate explanation that he could be a victim, that this not the most likely thing that is likely to pop to mind.

And rather than go through all of this unnecessary middle ground by talking about putting it into a database isn't the short, better and nonprejudicial way to say this is that DNA was --- was taken from --- from gloves found near the scene and it was compared to DNA that was taken from a buckle swab obtained from Mr. Dupree.

And then we don't even get into the database, with don't have to explain have to explain CODIS, we don't have to explain that well, sometimes victims' DNA is put in there. It just cuts out a whole irrelevant middle step that at best is irrelevant, at worst tips off the jury that Mr. Dupree's DNA is already is in a central registry. Don't --- and what is your position on that?

MR. LASZCZAK: I --- I would have --- I

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have no issues with limiting to what Your Honor just said with regard to DNA was collected, analyzed and then at one point we --- Detective Gilbert formed a lead, a buckle swab was done, and that DNA was completed.

THE COURT: That's --- that's the only part that I want brought in. Otherwise, I think we run the risk of revealing too much to the jury that could be more prejudicial than probative.

MR. LASZCZAK: And, Judge, I have no issue with that.

THE COURT: Okay. All right. That's the way we will do it then. Mr. Tomko, is that --- does that satisfy you?

MR. TOMKO: Yes, Judge. I think it satisfies the concern. That --- that direct it away from, you know, some data base and the reason why and the speculation as to how it got there.

THE COURT: Yeah, okay. All right. All right. So next motion then?

MR. TOMKO: Judge, I have a motion. You know, when we were here, it was two weeks ago on a Monday, there was a motion that concerns all tracking evidence. And so we filed that motion and

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we said we don't have any foundation for this. We cited the cases without foundation and the Court said well, prosecutor, produce these things within seven days. That was on April 30. And so by May 7 I was hoping to get the exact thing that the Court be ordered be done.

Nothing arrived on the 7th or the 8th or 9th --- well, actually the 9th or the 10th. And then I started getting information from the prosecutor. The information that I received I attached it to a copy of the motion. And my complaint is this. There are a series of certification about the dog that did the tracking. And there's also a report from December 15, 2012.

Now, this case --- Mr. Dupree, it's been pending for him since 2015. Through a series of attorneys, I wasn't involved in the case at the time, but there have been at least four or five prior attorneys, each of them asking for discovery. Myself filing a demand for discovery, asking for exactly these reports, any reports related to the case.

Now, of course, according to the court rule, within twenty-one days all these police

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reports should have been provided and they weren't. And then there was a court order on April 30 that said produce these within seven days. And they weren't. They were produced after that.

The question that we first need to resolve is what remedy, if anything, should arise from not following the court rule and not following court orders. Because, you know, as we prepare this case, and meeting with Mr. Dupree, talking what we are going to do with the case, and then, well, on Monday when we had nothing, we assumed there was nothing. That's good from our perspective.

Then later in the week we started to get documents. Now, this creates a difficulty. We are asking the Court for some type of remedy. The remedy we propose is to exclude this evidence because since 2012 they had a report. Since 2015 it was requested several times by attorneys, requested by myself. Never timely produced. Even if ordered by the Court, still not produced in compliance with the order.

THE COURT: Okay. Before we go much further, can somebody make sense for me about this date of 2012, I saw on this report? Mr. Laszczak,

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you can have the floor. Mr. Hall, either one of you, just tell me why does it have a date that predates the history of this case.

MR. LASZCZAK: I'm sorry? Which date?

THE COURT: 2012 --- this case --- the allegations here are that this alleged crime occurred in 2015, I believe.

MR. LASZCZAK: 2012, Judge.

THE COURT: Pardon.

MR. LASZCZAK: 2012.

THE COURT: Oh, it did, in 2012.

MR. LASZCZAK: December 15, 2012 is the alleged date of the occurrence.

THE COURT: Okay. I'm sorry. Okay. So I get that. So, on the --- and I'm looking for the report right now, which is what I was focusing on. There are some discovery materials that do date back to 2012, having to do with the tracking dog. And they were just produced in the last week, as I understand. What was the long delay in getting that over to the defendant?

MR. LASZCZAK: Are you referring to the certification documents or the dog track report?

THE COURT: No, the dog track report. In

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fact --- I --- what?

MR. LASZCZAK: It --- it wasn't a part of the initial discovery that came over to our office or any of the supplementals. I don't know the --- oh, well, actually I can tell you why. The dog track came through the Sheriff's Department. Our police department is the Clinton Township Police Department and their systems aren't --- they don't talk to each and it's no one ever asked for the Sheriff's Department to send it over. Probably just that most of our cases, it's one police department.

I think it was just an oversight that there was a separate agency involved with this case. So that's why the dog track report was not included in the discovery or we --- we didn't have it at the time either.

What I would say as --- as far as any prejudice to the defendant, what is in that report is also backed up other than the name of the dog, that information was available from the reports that we did have. There was a Clinton Township Police report that was written by one of the officers who observed and followed the dog track that gave deals of where the dog track went, where the evidence was

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found and collected. And the dog track --- the deputy who performed the dock track's name was in that report. There's nothing --- it --- it may be there's some small details more, but there's nothing substantial that came out of that report that wasn't already supplemented in the reports that were originally there.

So I understand we're missing a report and it is quite old because how old the case is, but there's no surprise, nothing new came out of this report. When we got it, we turned it over.

THE COURT: So, Mr. Tomko, I suppose the argument is that it's, as far as --- as the oldest report, the one that dates back to 2012, it's that it's cumulative. What's your response for that?

MR. TOMKO: Well, as we stated in our original motion, Judge, concerning this dog evidence, the foundation requirements are that the handier was qualified to use the dog. The dog was trained and accurate in tracking humans. The dog was on a trial where circumstances indicated the guilty party took. And the trial had not become so stale or contaminated as to be beyond the dog's competency.

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This report, and what this creates, is the possibility of even an expert to --- to find out whether or not things were done properly in this case. You see, when a dog picks up a trial, the question of tracking and trailing is two different things. And only for the first time are we understanding that, okay, this was a track. Tracking is different from trailing.

There also is this beginning part of where did the scent begin. Track is first referred to in this report. The question then becomes if an expert were to testify, they would say look, when you're tracking on a very hard surface, very difficult to get a scent in the first place.

In the reports there were people that were coming and going in the store, through the door where they said the track started. There were also several police officers that went in and out the door. And yet, the track is beginning at the door. So the questions becomes, foundationally, for the first time we understand it's a track and for the first time we understand what it is.

The second thing is when you talk about a dog and tracking, when --- when an alert is given,

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when the dog makes some type of indication, there are foundational requirements for that, as well.

The other problem is not so much the report, but now we have the certifications of the dog. This leads to a *Daubert* discussion. Because the dog being certified is one of the foundational requirements if we believe that the dog is trained and accurate in testing humans. Our case again is *People v Harper, 43 Mich App 500, 1972.* (phonetic).

Trained and accurate. When a dog is trained, they get a certification. In looking up the certifications, the ones that were provided, the first one that's provided is in 2010. That's a certification for narcotics and it's also for tracking. That certification is good for the balance 2010 and through the year 2011, December 31.

The next certification was in 2013. So the initial certification had expired in December, 2011. So on December 15, 2012, there is no certification at all for this dog. It has not been produced. I understood from the prosecutor there are no further documents that are going to be produced regarding certifications.

So now the question becomes well, was the

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dog ill, was the dog --- you know, seeing a vet at the time? I have no idea. Why wasn't this dog certified on the date that we're using it to provide a foundation for tracking evidence?

The other thing is we don't have any indication of the error rate for the dog. Now, it might seem --- seem silly because we talk about error rates and we talk about testing of different substance and things. But dogs, too, have an error rate. In fact, when the certification comes up, there's a series of judges and they have to score the dog as to whether they are accurate or not. They may or may not pass. If they don't pass, they don't get certified.

In this case we don't have a certification. We don't have any indication of what the scores were for the dog as to --- is the dog one hundred percent? People aren't one hundred percent, and nor are dogs.

So in this case the --- the foundation, to make sure that the dog is accurate in tracking humans, there's no certification for 2012. We have no indication of any error rate. And there's different forms that are used to grade these dogs.

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And perhaps it was that the doge never --- never passed. Or perhaps the dog was ill and never went for a certification. We have no idea.

So the foundational requirement of the dog being trained and accurate, that's a problem. That relates to getting the documents less than seven days before trial. Because there's not much more investigation that can be done. Now, to figure out what's the status, what's going on with this dog?

THE COURT: Okay. Well, look, we are talking about two different things. I want the prosecutor to respond to --- to both. First, of all ---

MR. HALL: I --- I can make a response to the second argument.

THE COURT: Okay.

MR. HALL: Briefly, Your Honor.

THE COURT: Go on.

MR. HALL: As long as the --- the dog tracking documents that were turned over, defense counsel is taking extreme liberties with what the case law says you have to have for a foundation. It says that you have to have --- show that the handler is qualified to handle a dog. That does not say the

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handler has to be certified, has to be certified on this date.

The same thing is said for the dog. It must be shown that the dog is trained and accurate in tracking humans. It doesn't say it has to be qualified, qualified by a certain body, qualified at a certain time. It just says it has to be trained and accurate.

Those are the things that the witness will testify to. Defense counsel had a chance to cross-examine that witness. These are all trial questions of weight that are innate to a jury. These are not admissibility issues to bring up before the trial.

Now, I understand that he just got these qualifications a week ago, but this --- this officer's name has been known the entire pendency of the case. He's been free to be talked to. He could have been called. Nothing that we gave to counsel on --- on last week or the week before, stopped him from ever getting his own dog-tracking expert to have as a defense witness.

And those are all things that have --- someone who has been qualified dog-tracking expert could have testified to at a trial, saying well,

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this is how --- in the industry, this is how we train and this how a dog would normally point or indicate that there's a piece of evidence or do this.

But none of that would keep our dog-tracking deputy from being able to get on the stand and give testimony as to what he's qualified to do for his training; what his dog's qualified to do through his training; and what actually happened on that day. The only way that he would be able to keep that officer from testifying as to dog tracking is if the officer --- deputy got on the stand and was not able to lay the foundational requirements through his testimony to allow that --- that deputy to testify.

So there --- there is no well, he's testified on this date because he didn't have a certification, that's not part of the case law. That's not a requirement.

MR. LASZCZAK: Judge, if I could just add to. I mean, one of the things that the jurors are going to get instructed are at the end --- through the jury instructions, is Michigan Criminal Hearing Instructions 4514, which basically tells the jurors,

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you've heard evidence about dog tracking and you need to give this --- you need to take this with great care. It is to provide little proof, and that you are not to convict just on dog-tracking evidence alone. So I think the jury instruction of itself cures any kind of hole that counsel is trying to pick and exclude the evidence in general.

THE COURT: So, basically, the prosecution's argument is that you don't have to show a continuous certification for the dog. That there can be breaks in the certification and it would still be admissible under Rule 104.

MR. TOMKO: Number one, the burden of evidence and the burden of going forward is on the prosecution.

THE COURT: Right.

MR. TOMKO: And so now how do we satisfy the dog was trained and accurate in tracking humans? Now, if they're saying ah the jury can just figure it out after cross-examination, good, give me the tools for cross-examination. Give me the tools. What's the accuracy rate of this dog? *Daubert v Dow Chemicals* and *Daubert v Dow Pharmaceuticals and* through Kumho Tire; those two

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things say look I should get --- I should get information that tells me how accurate this dog is.

I know one thing and one thing only, that the dog was certified a period before the tracking and sought to be introduced and after. I don't know anything about on that date. Nothing. I don't know what the dog's error rate is. I don't know if the dog didn't pass. I'm going to ask the --- the officer and --- and he might say oh, well, we just missed it, but he was accurate before. How on earth is the full information for a jury to decide whether or not they believe or don't his testimony.

You see, we need the information that lets us figure out whether this dog was or was not accurate. The one piece of information we know is that there was no valid certification and so what was the error rate when the dog was originally certified? What's the error rate when the dog was certified afterwards?

THE COURT: Well, let --- let me stop right there. There's --- there's seems to be nothing in terms in what was produced that would show the error rate. I don't even know if the police department or the prosecutor's office is prepared to

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answer that on cross-examination. Now ----

MR. TOMKO: I'm ---I'm sure they ---

THE COURT: I'm --- not --- not saying that that's a point against you. It's just that --- that the certifications says what --- say what they do. But I --- I don't recall reading any document that was produced that says that the dob ninety-three percent on this day, and ninety-two percent on this date, and fifty percent on this date. I didn't see anything like that.

MR. TOMKO: That's correct.

THE COURT: All right. And that would be needed for a foundation for expert testimony. The dog is acting as a ---

MR. TOMKO: So you're saying that in all cases in which a tracking dog is used, that it would be expected that there would be, basically, a report card on the accuracy of the dog and that we would not be relying upon human memory or antidotal testimony or vouching for the reliability for the dog. That there has to be something in the record to show what the actual accuracy rate of the dog is. And that would apply in every case.

MR. TOMKO: Yes. Even the handler, when

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he has this dog to --- to come up with some type of accuracy rate on this on this and this date, and all these different dates; there was a search for drugs; the dog was able to do this on this date; the dog was not able to find any --- on this date, there's a tracking and the dog was able to do --- and he was unable on different dates.

Those things should be kept track of and I submit they are things that a handler who keeps appropriate records, they would have that. And that's exactly what we need to show whether or not this is accurate at all. To say well, we'll just throw it out there and let the jury figure it out, that misses the whole background to give them the information to figure it out.

THE COURT: So you're saying if we went back into the transcripts of every case in which a dog handler testified and which dog tracking was used, that we would see report cards on the accuracy of the dog because if that wasn't, then it would not be admissible, that's what you're suggesting?

MR. TOMKO: No. It might go to --- it might go to the weight at that point. But at this point there's no other documents provided, it's now

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the eve of trial, we've asked for, by motion, copies of documents to show the foundational requirements for this dog evidence to come in. We didn't get it timely. We got, albeit, after the court order. And now we are here with partial information. We don't have all the information.

So now the problem becomes well, you know, wait a minute, now how do we fairly present this to a jury, presented aside whether this dog was accurate not?

THE COURT: Hold on. Look, I'll admit this. In forty years or so of practice, I don't think I ever handled a case, either on the prosecution or the defense side, in which a dog-tracking dog was --- was used. And so I've never seen the --- the type of report card that Mr. Tomko is talking about.

We're not going to do this on the basis of (inaudible - can't distinguish words) of either of the prosecutors here, but I'll tell you this, Mr. Tomko, it does strike me that what you are asking is a bridge too far, namely, a piece of documentary evidence that is probably not kept in the ordinary course of business; that is probably not offered as

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part of a foundation in other cases. And you're very skillful and diligent in suggesting that it has to be offered now.

But then, again, I'm talking in a vacuum and I don't have any case law to guide me over here. I've never seen or heard of the type of documentary evidence that you're talking about. All I know is that it doesn't appear to have been maintained in this case because it hasn't been produced.

But, Mr. Laszczak or Mr. Hall, any comments on what Mr. Tomko has said so far or what I have said?

MR. HALL: Just --- just that it's --- we've produced the case law for this that there four things that we have ---

THE COURT: Right.

JF: --- to meet. If what Mr. Tomko is saying is true, those would be in here. Those would be requirements as a foundation to put this in, but they're not. We --- we will meet our foundation at trial with testimony or we don't get to put that evidence in. That's how it works.

THE COURT: Yeah. Mr. Tomko, at this point I'm going to say this. I'm still open to

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considering this. I --- I understand that you are raising this as a motion in limine because you don't want to get to the point in trial where we have certain things in and then I tell the jury to forget about them, to put that out of their mind. Because that's a very difficult task for them to do. I understand that.

But right now it seems to me that you - you've made your point that there's no documentary evidence giving the report card on the accuracy of the dog. If --- if that would now come in, that would certainly be a surprise. It would be an unfair surprise. I don't think it's coming in because I don't think that the handler --- I don't know, but I do not expect that the handler is going to say yeah, we've --- we've --- we've got these report cards. If he does, and it wasn't produced, we are going to cross that bridge when we come to it. Until we get there, though, we will just see what the foundation is.

MR. TOMKO: Judge, in --- in fairness, there's one thing that I truly disagree with. When we say well, the prosecutor didn't produce it, so it doesn't exist ---

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THE COURT: No, no, no, no, I'm saying ---

MR. TOMKO: That's what I thought you ---

THE COURT: No, wait --- wait. I've got to correct. I don't mean to say that. I don't mean to make a conclusion that because it's not produced it doesn't exist. The --- the --- obviously, under *Brady* and other applicable cases, the prosecutor has the obligation to do a search. The police department has the obligation to cooperate with the prosecutor, but the prosecutor is the court officer in charge of making sure that everything that needs to be produced is produced.

If this is something that --- that is there and the handler says oh, yeah, I have these; I got --- you know, forty-seven pages of these things. At that time we will reconsider your motion to --- to do a lot of things, including striking that testimony. But right now, I'm saying that --- that going in, I don't think that there's anything more. I'm pretty sure that the prosecutor doesn't think that there's anything more because if so, they would have made the effort, I think.

But --- but right now I am not going to decide things in a vacuum. I'm going to listen to

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what the handler says he has or she has in terms of the records before we engage in this any further. That's all I'm saying,.

MR. TOMKO: I understand --- I understand true --- for the record, I don't want to beat it do death, but I see a handler that will get up there and he'll say maybe I don't keep records. Maybe the standard in the industry is to keep records. What if he says, well, my dog is always accurate? Okay. Now wait a minute, we know there3 are scores that judges given when they go for certification. Certainly, those would be available. And yet we wouldn't have those, you see. At its during a period of time when the dog is not certified. So there's two levels. There's a production level, we don't have documentation nor do we know the answers to some of these questions, we know what was produced. I asked for all the foundational requirements and nothing else has been produced. So assume there's not going to be new things.

The other thing is that when it comes to *Daubert* and *Kumho Tire* and a foundation for expert testimony, there has to be an error rate; there has to be a test that can be performed over and over

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with some scientific reliability, we have to know how reliable it is.

If we had a test for marijuana, or a test for alcohol or on blood or some on other substance, we would insist upon that it. We would say you can't foundationally get that in until you show me what your error rate is. This is no different. And so we are here. We are going to go to trial, and I understand if this gentleman testifies, we don't know what that error rate is. I'm suggesting now that we don't know what that error rate is, I'm suggesting now that the foundation is not satisfied, we don't know what the error rate. It shouldn't come in in the first place and if he's producing records on the stand, that --- 2012 today we waited until today to get a report that came within a week before trial.

Are there other documents out there? I sure don't know. I would hope that there weren't because, you know, the prosecutors, I trust them. They've given me the things they have in the file. Are there things not in their file? They are in the hands of the police; in the hands of, you know, the ---- the dog handler. We don't know. Was it asked?

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I don't know. The problem is to have it first come in on the stand, that is --- is completely contrary to considering evidentiary issues, foundational issues prior to starting trial.

And what we are doing, we're going to create a taint to the jury, perhaps if it doesn't come in. And we will still be without an error rate. Judge, I ---

THE COURT: Judge, I do want the prosecutor to respond to one thing. It hasn't been argued extensively, but it - it's bothersome. A request for discovery was made in early April, twenty-one days passed, nothing was produced. An order was entered on April 20 for things to be produced in seven days. Things weren't produced until - the first production was nine days.

Court orders must be obeyed. I'm trying -- and also the court rules must be obeyed on discovery. I'm asking the prosecutor for an explanation of why these things came in late.

MR. HALL: Your Honor, I was the prosecutor that was here when your --- the Court ordered seven days to produce the documents. I reached out that day to the Police Department to

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start the process of getting it. We didn't --- it was like I had it in my possession and I could just turn it over. I had to go through one police department, not realizing I had to go through, then, a second police department, the Sheriff's Department to get this.

We got it as fast as we could but continued to follow-up to get the documents processed. It --- yes, we were two days and three days late on the --- documents that were turned over, but it was --- it --- the court rules don't say that if a court order isn't followed, that it's automatically qualified as evidence to come in. The Court can take into account that yes, the order was essentially followed, it just took a couple of extra days.

It was literally just the logistics of getting the report from the officers and going through two different --- through two different departments. I think it's reasonable that it took nine or ten days instead of the seven. I don't think it's cause to bar that for that.

THE COURT: Okay.

MR. HALL: As far as coming into court.

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As far as the twenty-one days, for the discovery, the first time, I didn't know there was other stuff out there. I'd have to see the discovery order to be specific as to what it asked for. If --- if it specifically asked for the dog-training certificates, I'm --- I'm not sure I'll have it in front of me.

I --- I've never had to produce any of that or even know that it was out there. So --- but, I guess this is a learning curve for the prosecution, as well. But we did follow-up. We did eventually get it.

MR. LASZCZAK: Just, I would just add to that. I also was in constant contact with Detective Gilbert almost on a daily basis just trying to get a status and update, you know, where are these certifications. And, as Mr. Hall said, it was literally a logistics of just communicating with two different departments. And I --- I can show the Court that immediately when they were sent, I sent my --- our discovery unit while in the court asking please forward these documents through discovery to counsel on this case. And I was don't within, you know, minutes of me asking for that.

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So I would just back Mr. Hall's argument with it's --- it's not that we were sitting on these and were being disrespectful to Your Honor and Your Honor's order. It was literally just a "soon as we got them, we provided them."

THE COURT: Okay. Before Mr. Tomko responds, there's one other question then. I take it that --- well, I'll --- I'll just open end it. Is it the prosecution's position now that they have produced everything that was required by the discover demand of Mr. Tomko and by this Court's order?

In other words, is there any chance that we're going to be met with more documents or report cards on the dog or anything like that coming in?

MR. LASZCZAK: Our OIC has been texting with the deputy as we've been sitting here, to double-check and make sure he doesn't have anything else. The trophies he could bring in that he wants --- the Court want, but all the records , certifications, that's everything that he has, he forwarded it. It's --- in regards to the dog case.

THE COURT: Okay.

MR. HALL: And for the record, he is no

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longer with the dog-tracking unit, so part of the problem of getting the records unit so part of problems of getting the records was it was to an OIC, to another department deputy, then contacting the dog-tracking unit. He couldn't just get it straight from that deputy. So it was a number of different departments they had to go through to get this information, as part of the process.

THE COURT: Okay.

MR. LASZCZAK: Thank you.

THE COURT: Mr. Tomko, you have the floor.

MR. TOMKO: Thank you. I know Mr. Dupree wishes to speak, but let me finish my part with this. April 2, 2018, demand for discovery, paragraph 1A. Please produce all police reports and investigation reports, *People v Denning*, 140 Mich 331, *in re County Prosecutor, MCR 601(B)(2)*, including all notes from investigating officer, April 2,

April 30, order from the Court, produce within seven days. Neither of those things were followed, Judge. And I know Mr. Dupree wants to address the Court.

MR. DUPREE: My --- my --- my --- one of

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my main issues, Your Honor, is with this (inaudible, can't understand) Deputy Quartuccio. Six years later. This --- my --- my attorney Mr. Tomko stated on the record that I've had --- he is my fifth attorney and discovery has been put in five times. This --- this redacted version of a --- of a report that he filed not the original report. And this is nowhere near the original report. This is a report that he could have typed up ten minutes after he --- they emailed it to Mr. Tomko.

And in every police report coming from Detective Ryan Gilbert, an all the other officers that was involved that was at --- at that crime scene and their narratives, not one time did they make a reference to Deputy Quartuccio's report. Not one time did anybody say you can refer to Deputy Quartuccio's report. Quartuccio is claiming that he was the one that located the --- the last gloves at this crime scene.

And, if he was the one who located the last gloves at the crime scene, I want to know why protocol and procedure was not followed, was nothing labeled, was nothing secured, and all the other evidence that was --- that was out there on the

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grass, nothing else was touched.

In the police report they that it was allegedly three suspects involved in this. And the only thing that Detective Ryan Gilbert was focused on these alleged gloves that happened to --- that don't even match the photographs of the gloves that they tested, and the gloves that they found at the crime scene. There's three separate photos and three separate gloves. And that's why protocol and procedure wasn't followed and that's why this narrative is false. This is not the original narrative. And another officer can't testify as to what Deputy Quartuccio found at that crime scene through his alleged track.

There's no proof to prove that Deputy Quartuccio was even at that crime scene. There's no pictures of any dog. There's no pictures of him. This --- this --- this narrative of him surfaced six years later. It was just emailed May 9, 2018. And as far as I'm looking at it, the --- the --- the incident --- the case number incident ain't even the same that's on this report.

I have no clue4 where this came from, but this is not the original. This is a redacted

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version. From where he got it from, or if did it a couple of days ago. But I don't even see how this is --- how this is admissible anyway, period.

THE COURT: Okay. Well, look it, again, I will continue to extend this courtesy prior to getting the jury in, but once we start the trial, we are not going to have dual arguments by Mr. Tomko and Mr. Dupree.

The --- the point that Mr. Dupree, and I'll speak through --- to him through you, Mr. Tomko, is that we are not talking about a document that is admissible because it's a hearsay document, it would not be admissible, and so we aren't talking the question of admissibility. We are talking about timely discovery. And I am not going to make a ruling because it is just improper for me to even consider the whole question as to whether or not this report was dictated recently or a long time ago. It does say it was created on December 15, 2012 and last changed on December 15, 2012 about an event that happened in 20 --- I'm sorry, about events that happened in 2012.

I guess, at this time, so that we don't get into a whole bunch of academic exercises about

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the rules of discovery, I'm going to make this ruling that I think that the defense has not been significantly prejudiced by the late production of these documents. It provide information that could have been or should have been provided earlier, but even though we are now within minutes of starting trial, it doesn't appear to me that anything that has been recently revealed is at odds with what has been revealed earlier.

So in terms of being in able to prepare a defense, know how to cross-examine witnesses, know how to provide a defense, this is still basically the same case that has been here for several years now, which is that we have an alleged armed robbery; we have a glove found near the scene; we have a tracking dog that led it, and that all of these issues that are now being raised go to the weight of the evidence rather than admissibility,

And I am aware that under Rule 104 preliminary questions are for the judge to decide. Because I don't actually have a witness on the stand to listen to what that witness might say, some of -- - some of the answers that might fill in the gaps, aren't provided yet.

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I will still have to make rulings on admissibility, when we cross that bridge. But these things cannot be decided, in my opinion, in a motion in limine. Even though that's what motions in limine are for, sometimes all the pieces aren't the to make a preliminary finding, and so I'm going to decline any finding on --- on these issues relating to the admissible of the dog-tracking evidence until we actually hear the witness lay a foundation. Whatever that might be.

And, so the motions are denied without prejudice; denied as motions in limine; but the issues raised are still valid issues to be decided for admissibility under Rule 104 when we come to those witnesses. Okay.

MR. TOMKO: Verification as to the aspect of the argument with the error rate?

THE COURT: Oh, well, on the error rate, I guess I'm saying I don't know what the answer is. I don't know if the witness is going to say yeah, we test the dogs and we have these reports. Or if the witness is going to say we never test the --- the dogs.

Obviously, there's --- there's answers

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that would come out very favorable to --- for the defense if the witness says no, we never test the dogs, we just assume that they're --- they've got a good sense of smell. That's why we have these dogs. And we've never thought of it before.

If that were the answer, then it would seem, under *People v Harper, 43 Mich App 500, 1972* case that the second element that the dog was trained and accurate in tracking humans, will not have been able to have been met. So at that point we will excuse the jury, have further argument, and then, if I exclude the evidence, the jury will be told the evidence is --- is excluded.

MR. TOMKO: Will we do that foundational hearing outside the hearing of the jury, or with the jury listening to it?

MR. LASZCZAK: They have to listen to it. It's the foundation that shows the ---

THE COURT: Yeah, because --- I mean, there --- there are two things that are going on at the same time. First of all, Rule 104 requires the Court to make the preliminary finding on admissibility. But, secondly, for the sake of due process for the sake of the very type of issues that

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your client wants to have before the jury in this matter, you are arguing that the trial was stale; the procedures weren't followed; that there's an unreliability in the collection of evidence. There's even an expert you're going to call. I know you don't have to call an expert.

But your whole theory of the case --- the defense theory of the case, so far as it's been presented to me, is that there are these substantial defects in procedures that render this evidence unreliable. That is, first of all, a question for the judge as to whether or not it's admissible in the first place. But it is also necessary for the jury to hear that evidence if you are going to be arguing to --- to them that there's something unreliable about the police procedures.

You can't tell the jury go out of the room, argue everything about police procedures and then bring them back in the room and --- and then expect the trial to pick up with the jury knowing everything that was argued. It doesn't work that way. If part of this is the unreliability of the procedure, they are going to have to hear the foundational evidence, as well, I believe.

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But each --- each time this comes up, as it comes up, we'll --- will --- I will certainly allow you to suggest to me that we should have a side bar and at that time we could exclude the jury so that we could --- we could deal with it as it comes up.

Because, otherwise, I think what's happening here, and I think it's --- it's painfully obviously now on this record, is that there's probably three, four, five or six scenarios that this could go off into. And so the permutation (sic) of what the foundational evidence would be is probably already mathematically in the several hundred thousand because I don't know what the answer to each question is going to be and with that many x factors out there, we don't know what I'm finally going to be asked to rule on in terms of admissibility.

I'm just satisfied that enough discovery has gone forward to put the defense on notice of what they have to defend. You know it's a dog-tracking case. Your motions themselves indicate that you are prepared to deal with --- with this argument that you are making now as part of the argument that

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you are making to --- to the jury. So I do not believe that you have been substantially prejudiced, you and your client, as we go into this case.

As Justice Mary Coleman once said, and it's a favorite phrase of most trial judges, because unlike the Court of Appeals and the Supreme Court we deal with issues on the fly as they come up. A --- "a defendant is entitled to a fair trial, not a perfect trial."

Yes, it would have been perfect if two years ago all of these documents had been delivered. Yes, it would have been perfect if from the very first time that Mr. Dupree had counsel, that counsel was allowed to remain on the case long enough to argue all of these things.

But a part of the problem here is that we've had this --- this rolling replacement of counsel and so things that could have been decided years ago have4 not been decided. It may be part of it falls on counsel. Maybe part of it falls on the court. It maybe that part of it falls on the prosecution. Maybe that part of it falls on Mr. Dupree. I don't know. I'm not going to hear to speculate to try to figure out, you know, where

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every part of the puzzle fits.

I'm just saying that the way that this is done in all trials and will be done in this case, is that we will have a witness on the stand. The witness will be asked questions by the proponent of the witness' as far as the foundation. We will allow voir dire of that expert --- or that witness as far as the foundation.

If this can all be done in front of the jury, fine. If the defense things that some of the arguments that we'll be getting into are more prejudicial, then we will excuse the jury. But we are going to do this in --- according to the ground rules that we've been following now for at least, you know, about a thousand years in Angelo-American Juris Prudence. That's why we have a trial. You can't decide everything prior to trial. That's my point.

Now, at the end of that speech, I think we are ready to call the jury up. Although, I've seen an attorney pop in. Can we handle that matter now. Okay. We are going to take a short research --- recess in this matter to handle one other matter and we'll be able to get the jury up for the Dupree case

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before --- before the noon hour. Okay.

(11:09, off the record)

(11:53, on the record)

THE COURT: Okay. We are back on the recording the matter of *People of the State of Michigan v Roberto Dupree*. It is now about four minutes to twelve. It seems pointless to try to bring in the jury in now for just a short period of time. And, also, there is an issue that we have thirty-five in our jury panel, and we are going to need more. So we can get more if we wait until 2:00. So we are going to recess to 2 p.m. Okay.

MR. LASZCZAK: Thank you, Your Honor.

THE COURT: Thank you.

MR. TOMKO: Judge, ---

COURT OFFICER: Judge, do you want me to just announce 2:00 or should they go to the first floor.

COURT CLERK: They should all come back up to our lounge. All forty-five.

THE COURT: Okay. Okay. We are in recess.

(11:54, off the record)

(2:41, on the record)

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THE COURT: All right. We are back on the record now in the matter of *The People of the State of Michigan v Roberto Marcello Dupree*. Appearances from counsel, quickly.

MR. LASZCZAK: Good afternoon, Your Honor. Ron Laszczak on behalf of the People.

THE COURT: Yes.

MR. TOMKO: Thomas Tomko on behalf of Mr. Dupree.

THE COURT: Okay. And we are ready to bring in the jury?

MR. LASZCZAK: Judge, it's my understanding the jury room downstairs that we are only going to remain with thirty-five jurors for the remainder of this afternoon.

THE COURT: Okay. Well, we might finish picking this --- well, especially if we go through twenty-four peremptory challenges, we probably not going to finish picking the jury today anyway. All --- but we can get started with --- with getting more jurors, then, tomorrow morning. Ms. Hintz, is that possible? Do we ---

COURT CLERK: It is, Judge.

THE COURT: Okay. Okay. I don't want to

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put things off. Now, you know, it does mean that when we get the new jurors coming in tomorrow, we will have to be repeating a lot of the questions that we did before, but to just lose the next couple of hours by --- by saying we're going to wait until tomorrow, I think is the less advisable way to go. Mr. Tomko, do you have any objection to us starting the jury selection today?

MR. TOMKO: None, Judge.

THE COURT: Okay. Does the prosecutor have any ---

MR. LASZCZAK: I don't have any objection, Judge.

THE COURT: Just so we know that mathematically we might be running out of jurors, but there's --- it's the best way to handle it. Let's bring in the jury, then. Okay. Thank you.

MR. TOMKO: Judge, I just want to express, you know, my client, he would prefer to have all the jurors here at once, believing that it would be a fair to pick the juror to have them here all at once.

THE COURT: Okay. Well, it's --- it's still --- it's a matter of practicality more than it

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is a matter of law. And the only downside is that we'll just have to repeat ourselves a lot to --- to --- to the new members of the panel. And so that request is noted. The objection is preserved, but the request is respectfully denied. Let's get the jurors in. Okay.

MR. TOMKO: Thank you, Judge.

(2:45, jury in)

THE COURT: Okay. We can all be seated. Waiting for --- Greg, do we have everybody here then?

COURT OFFICER: Yes.

THE COURT: Okay. Hi, ladies and gentlemen. My names is Carl Marlinga. I'm a judge of the circuit court here. You've been called for jury duty here in this court. And we will begin our jury selection process today. We tried to get you here before the noon hour, but the rest of my docket was too crowded this morning. We finished it about four minutes to twelve, so then it didn't make sense to --- to call then. And then from noon until about 2:00, I have another docket that I had to take care of. And it went a little long.

So I'm sorry that this has been such a

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long day waiting. Once we get you picked and on the jury we expect to --- to pick up the pace a little news. But the bad news is that the rest of this week is a bit crowded and so our jury duty days are probably going to be in the afternoon rather in the morning, except on Friday, which I think we can go all day.

But rather than get into all of that detail, we will wait to see who are the fourteen that we seat and we will talk with you then more --- more specifically about the schedule once we know the fourteen of you are going to be the members of our jury.

Obviously, I say fourteen because twelve people sit on a jury in a criminal case, but in order to make sure that there's enough if the jury goes longer; if somebody gets ill or has an emergency, we typically seat two alternate jurors and then at the end of the trial, by lot, we just pick too names of people who are dismissed at that time.

It's always a disappointment because after sitting for three or four days, trying to decide a case, then you --- then you go home without ---

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without having to do anything. Except, you would still be subject to recall, meaning that if somebody would get sick and we needed a replacement, you could still be pulled up. But we will get it all into that detail at a later time.

So, ladies and gentlemen, I am Judge Carl Marlinga, and it is my pleasure and privilege to welcome you to the Sixteenth Circuit Court for the County of Macomb.

I know that jury duty may be a new experience for some of you. Jury duty is one of the most duties that members of a free society are asked to perform. Our system of self-government could not exist without it. The jury is an important part of this court. The right to a jury trial is an ancient tradition and part of our heritage.

The law says that both a person who is accused of a crime and the prosecutor have a right to a trial by jury, not by one person, but by a jury of persons. Jurors must be as free as humanly possible from bias, prejudice or sympathy for either side. Each side in a trial is entitled to jurors who keep open minds until the time comes to decide the case.

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I know that jury duty may be a new experience for some of you. Jury duty is one of the most serious duties that members of a free society are asked to perform. Our system of self-government could not exist without it. The jury is an important part of this court. The right to a jury trial is an ancient tradition and part of our heritage. The law says that both the person who is accused of a crime and the prosecution have the right to a trial, not by one person but by a jury of twelve impartial persons.

Jurors must be as free as humanly possible from bias, prejudice or sympathy for either side. Each side in a trial is entitled to jurors who keep open minds until the time comes to decide the case.

A trial begins with jury selection. The purpose of this process is to obtain information about you that will help us to choose a fair and impartial jury to hear this case. During jury selection the lawyers and I will ask you questions. This is called the voir dire. The questions are meant to find --- oh, by the way, the term voir dir --- we usually --- we use a lot of Latin. This is one time we use a little French. It means to see or

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to say. It means that we get to see what you say in answer to our questions.

So, in case you're wondering if we are throwing Latin around, it happens to be French. We shouldn't do it at all, but for some reasons we --- we continually get stuck with some old, ancient words in the way that we do things. English --- Modern English is always preferable, but every once in a while words like that sneak in. But these are basically questions to you.

The questions are meant to find out if you know anything about the case. Also, we need to find out if you have an opinions or personal experiences that might influence you for or against the prosecution, the defendant or any witnesses. One or more of these things could cause you to be excused in this particular case, even though you may otherwise be qualified to be a juror.

The questions may probe deeply into your attitudes, beliefs and experiences. They are not meant to be an unreasonable prying into your private life. The law requires that we get this information so that an impartial jury can be chosen.

If you do not hear or understand a

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question, you should say so. If you do understand it, you should answer it truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

During jury selection you may be excused from serving on the jury in one of two ways. First, I may excuse you for cause. That is I may decide there is a valid reason why you cannot or should not serve in this case, or a lawyer from one side or the other may excuse you without giving any reason for doing so. This is called the peremptory challenge. The law gives each side the right to excuse a certain number of jurors in this way. If you are excused, you should not feel bad or take it personally. As I explained before, there simply may be something that causes you to be excused from this particular case.

I will now ask you to stand and swear to answer truthfully, fully and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. If you have religious beliefs against taking an oath, you may simply substitute the word 'affirm' and in your mind, you may affirm that you that you will

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answer all of the questions truthfully, fully and honestly. Madam clerk. Lisa, do you have something?

COURT CLERK: The jury room says they may have about three more in about twenty minutes or so.

THE COURT: Oh. Okay. Is that --- is that a promise? I am told that there are thirty-five of you. Typically, we --- we go through about --- you know, we seat fourteen and it's --- thirty-five is pretty close to what we might use up. And so it would be far better if we had a --- a wider panel. So before I administer this oath, let's see ---

COURT CLERK: I don't want to leave it in the shadow. I am going to make a quick call.

THE COURT: Okay. I take it from the lawyers that --- I mean, I think it's the preferred way to go to wait the half-hour to get the full panel?

MR. LASZCZAK: If we can be guaranteed that, then I think that's preferable.

THE COURT: If we can guarantee it. Mr. Tomko, do you agree?

MR. TOMKO: I agree, Judge.

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THE COURT: Okay. All right. Everybody just stay seated for --- be seated for a second. My clerk is going to find out if we have more jurors coming. Because, otherwise, I --- I can explain it this way. What would happen if we --- if we used up all of the jurors through excuses for cause and peremptory challenges, then we would have to get a new group tomorrow. The ones that we would have already seated could stay, but we would have to go through all of these instructions again another time.

And so it's --- it's probably better if we just cool our heels, wait a little bit and --- and see if we can get some more people up here. So we're going to find that out shortly. Until then, I'm just going to stay here and wait until we get an answer.

So as to not make this completely dead time, I can just talk to you about some nuts and bolts. We will go until about quarter to five every day. If you are actually a member of the jury and --- and we can stay later and the lawyers want to stay later, I will give you your choice. We could stay until 5:30, 6:00 or 7:00.

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Sometimes jurors like to get as much done in a day as possible, but everybody has to agree. In order words, if there are fourteen people on the jury and you've got to be out of here by quarter to five, and thirteen people say they want to stay, one person has the veto power. Because I'm not going to keep anybody after 5:00 involuntarily. You all have to agree. But sometimes it happens that people say we all agree. But you can be guaranteed of knowing that you're going to be out by quarter to five.

The other thing is this docket --- this week, I'm just particularly crunched with a lot of stuff and so there's no point keeping you sitting around in the jury room waiting for things to start. So we will start everyday at 1:30 and go to 4:45. That will be on Wednesday and Thursday. And, Friday we might be able to go a whole day, meaning the morning included. Yes, Lisa?

COURT CLERK: We were able to get the remaining jurors. Greg will go down in about five minutes and he will get some more.

THE COURT: Okay. All right. So, then -- - I'm just trying to think if we should --- is everybody happy just sitting here? If not, I can

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release you back into the hall, if you wanted to go out, but it's only going to be about five minutes. Okay. So --- so I see from the shaking of the heads, everybody says we're tired of being shuffled back and forth, let's just sit for a second, and --- and wait for the additional people. Okay.

So anyway, again, the --- the general schedule is Wednesday and Thursday, 1:30 TO 4:45. Friday, probably 9:00 to 12:00 and maybe 1:00 to 5:00. And if we can't then, when we go into next week, we can't use Monday. Because Monday is reserved for --- it's called Motion Day. It's all of the miscellaneous matters that all of the judges have to take care. So we're not --- we --- we're not --- I --- I was about to say we're not allowed to have trials. I don't know if it's that strict. Nut we don't have trial on Monday because all of the other temporary, emergency cases that we have to handle come up. So we would then have the trial again on Tuesday and probably the longest that we would be here would be here until Wednesday of next week.

(2:57, proceedings paused)

(3:16, proceedings resumed)

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COURT OFFICER: All rise for the jury please.

THE COURT: Try to fill I where you can in terms of the seating, but some people will inevitably have to remain standing. We will soon call --- well, I'll wait until everybody is in. If anybody has a hard time standing, please --- please come forward. Let --- let the deputy know so we can get you a seat. Okay. Let's everybody be seated please and then we will see if there anymore chairs to fill in.

I have about five minutes of instructions to read to you before we can put fourteen of you in the jury box and that will relieve some of the congestion out there because people can fill in.

Obviously, I am mortified and I'm mortified and I apologize for the fact that you have to stand. I will try to get on with this and then have a more --- a longer apology later. By the way, this is going to be a probate courtroom, which is not set up for the amount of jurors that we need at felony trials, at least in terms of the benches.

When they are finished with construction, in about a month, we will go back to our now

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renovated courtroom on the fourth floor, where there are more benches. So that's the reason why we are trying to pack too many people into too tight of a space.

But, if there is somebody standing on the outside, if you are a member of the jury, you have to come in, you can't stand out --- okay. No, I'm sorry. Okay. Okay. Why don't you close the door so that we know either people are in our out?

Okay. I started reading these and we realized we had too few jurors. The clerk downstairs cured it by bringing us more. But I now have to just briefly and quickly read over what I did before to try to --- to try to speed things up.

Ladies and gentlemen. My name is Carl Marlinga. I'm a judge of the Macomb County Circuit Court. And it's my pleasure and privilege to welcome to the Sixteenth Circuit Court for the County of Macomb.

I know that jury duty may be a new experience for some of you. Jury duty is one of the most serious duties that members of a free society are asked to perform. Our system of self-government could not exist without it. The jury is an

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important part of this court. The right to a jury trial is an ancient tradition and part of our heritage.

The law says that both a person who is accused of a crime and the prosecution have a right to a trial by jury, not by one person, but by a jury of twelve impartial persons. Jurors must be as free as humanly possible from bias, prejudice or sympathy for either side. Each side in a trial is entitled to jurors who keep open minds until the time comes to decide the case.

A trial begins with jury selection. The purpose of this process is to obtain information about you that will help us to choose a fair and impartial jury to hear this case. During jury selection the lawyers and I will ask you questions. This is called the voir dire. The questions are meant to find out if you know anything about the case. Also, we need to find out if you have any opinions or personal experiences that might influence you for or against the prosecution, the defendant or any witnesses. One or more of these things could cause you to be excused in this particular case even though you may otherwise to be

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a juror.

The questions may probe deeply into your attitudes, beliefs and experiences. They are not meant to be an unreasonably prying into your private life. The law requires that we get this information so that an impartial jury can be chosen.

If you do not hear or understand a question, you should say so. If you do understand it, you should answer truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

Also, we need to find out if you have an opinions or personal experiences that might influence you for or against the prosecution, the defendant or any witnesses. One or more of these things could cause you to be excused in this particular case, even though you may otherwise be qualified to be a juror.

The questions may probe deeply into your attitudes, beliefs and experiences. They are not meant to be an unreasonable prying into your private life. The law requires that we get this information so that an impartial jury can be chosen.

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If you do not hear or understand a question, you should say so. If you do understand it, you should answer it truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

During jury selection you may be excused from serving on the jury in one of two ways. First, I may excuse you for cause. That is I may decide there is a valid reason why you cannot or should not serve in this case, or a lawyer from one side or the other may excuse you without giving any reason for doing so. This is called the peremptory challenge. The law gives each side the right to excuse a certain number of jurors in this way. If you are excused, you should not feel bad or take it personally. As I explained before, there simply may be something that causes you to be excused from this particular case.

I will now ask all of you to stand and swear to answer truthfully, fully and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer the questions

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truthfully, fully and honestly. So please all raise your right hand and here is your oath.

Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case? To take that oath or affirmation, please now say I do.

JURORS: I do.

THE COURT: Okay. The record will indicate --- you can all be seated. The record will indicate that upon my view, all the potential jurors have been sworn.

So, now, I would just like to introduce to you members of my staff. Lisa Hintz is the clerk in the well there. Greg Schumacher is the deputy. Sometimes we will refer to him as the deputy or the bailiff. He is the person that if you're serving on the jury that you will be in contact with the most. And my secretary, Kim Tatum, may come in from time-to-time.

This is a criminal case involving one charge of armed robbery --- which I will explain more fully later. These charges have been made against the defendant, who is Mr. Roberto M. Dupree.

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And the defendant's lawyer is Thomas Tomko. Mr. Tomko, would you please rise and introduced yourself and your client?

MR. TOMKO: Yes. Hello everyone. Welcome. I am Thomas Tomko. I am the defense attorney.

THE COURT: Okay. Thank you. You can have a seat.

MR. TOMKO: And this is Mr. Dupree.

THE COURT: Okay. Thank you. Okay.

MR. TOMKO: Repeat your name for the jury.

MR. DUPREE: Roberto Marcello Dupree.

THE COURT: Thank you. Now, the lawyer for the State of Michigan is assistant prosecuting attorney Ron Laszczak, and also Jeffrey Hall. I believe, Mr. Laszczak, would you rise and introduce the people seated with you?

MR. LASZCZAK: Yes, Judge. Thank you. Good afternoon everybody. My name is Ron Laszczak. I am the assistant prosecuting attorney from the Macomb County Prosecutor's Office. This is my colleague Jeff Hall. And to his right would be Detective Gilbert, with the Clinton Township Police Department. Thank you.

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THE COURT: Okay. And I have as a list of potential witnesses who maybe called in this case. They may not ne4cesdsarily all be called. But --- but these are some of the names --- these are the names that have been suggested, would be called as witnesses.

First of all, Detective Gilbert, who is already sitting at the counsel table. Why don't you rise, Detective. I don't know if you did that before. But just turn around. Okay.

Also, we have Detective Ramlo. Detective, you can have a seat. There is an Elizabeth Lyons. A person by the last name of Collins. Let me just ask the prosecution, FOC. Collins. I don't understand what FOC means.

MR. LASZCZAK: Judge, he is a police officer with Clinton Township.

THE COURT: Oh, I'm sorry. Okay. F-O-C, I wasn't familiar with the F. Anyway --- in any event, after that there is a Mohamad Zamzami, Z-a-m-z-a-m-i. And a Sergeant Turzo. And Sergeant Turzo is also with the Clinton Township Police Department; is that correct?

MR. LASZCZAK: Correct, Your Honor.

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THE COURT: The reason I go through these names is that it's important that we know if you know any of these potential witnesses. If you are actually called to the jury box, I will ask this question again. But just roll it over in your mind, if any of these names sound familiar. Again, you might know somebody casually; it might not disqualify you as a juror, but if you know them very well, or if they're a relative, or if you've had some dealing with them it could cause you to be excused.

So let me just ask right now, just be a show of hands, with the names I've read, does anybody waiting to be chosen know either the defendant, any of the lawyers, or any of the potential witnesses whose names have been read. If you think you do, raise your hand. Seeing no hands raised, we probably won't have --- oh, I'm sorry. I didn't look far enough. I will wait until --- just remind me if you get to the jury box, I'll try to remember and I'll ask you again. Okay.

Judge, pardon me for interrupting, but we filed an amended witness list on March 21, 2018, which included additional witnesses.

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THE COURT: Okay. Would you please read those off. I was going back to the original list.

MR. LASZCZAK: Absolutely, Judge. It would be Elizabeth Lyons. Jodie Corsi, C-o-r-s-i. Monica Barulski. Andrea Halvorson Young. Julie Howenstine. Detective Barbera. And Leslie Quartuccio of the Macomb County Sheriff's Department.

THE COURT: Okay. Now, did everybody hear the assistant prosecutor. If so, with the --- with the additional names, again, like we did the last time, by a show of hands, anybody recognize any of those names? Okay. So we just have the one from the previous list.

Now, we think that this trial will last approximately four days. Our trial day will be today until about 4:45. Tomorrow, because the --- the schedule is packed in the morning, there's no use bringing you in to wait around, we'll start at 1:30 and go to about 4:45.

Thursday, the same thing. Although, when you're actually seated in the jury, we will take a poll to see if we could come back in the morning, but --- but generally it would from 1:30 until 4:45.

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And then Friday we will open up all day from 9:00 in the morning until noon, and until about 1:15 until 4:45. And those can be adjusted slightly.

If we have to go into next week, Monday is a day that the courts reserve for Motion Day. Those are a series of --- of emergency matters to be brought before the court, all lawyers know they can bring them on Monday. So we don't bring them in on that day because we have about forty-five to fifty cases, all really short things, that we have to deal with.

That means that we would --- would be back on Tuesday. And, again, on Tuesday the schedule would likely be 1:30 to about 5:00 with the possibility of being in the morning. And then Wednesday, again, the same thing with the possibility of being in the morning.

So, although I say the trial --- trial last approximately four days because the schedule is so crammed this week, we can't get you in for a full day starting in the morning. It might bleed over until next week Tuesday or Wednesday.

So if you are called to the jury box, and the length of the trial is going to be a problem for

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you, and it has to be not just a problem, the law says it has to be a real hardship, we will find out from you at that time what the hardship is and then I will have to make a decision based on the law whether or not I can excuse you.

Also, some of you may have health problems that may prevent you from serving on a jury. For example, does anyone have a medical problem that makes it --- you unable to sit for two to three hours at a time? Or does anybody have a sight or hearing problem? Once again, rather than polling all of you now, we will wait until we have fourteen in the jury box and --- but because all of you will have to be paying attention to all of the questions, because some people will be excused, you will then be able to tell me that at that time if you have a health or sight or hearing problem.

Now, to better describe what is happening here so that the questions that are put to you about your qualifications to serve as jurors will be more meaningful, it is naturally reasonable to find out what the case is about. Now, I can't go into very much detail because I don't know anything about the case. I am just the judge. It is the witnesses

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that will be telling you about the case pursuant to the questions that are asked by the attorneys.

But, in general, this is what you should know. This is a criminal case. The paper, and I emphasize paper because it is only a piece of paper, it is not a piece of evidence, it's only a way of providing information as to what the charges are.

The paper used to charge the defendant with a crime is called an Information. The Information in this case alleges or charges that the defendant Roberto M. Dupree with the crime of armed robbery. And the Information reads as follows: Quote ---

"The prosecuting attorney for this county appears before this court and informs the court that on the date and time and at the location described above, the defendant did the following. And the date that is alleged is on or about December 15, 2012, in Clinton Township, in the county of Macomb, here in the state of Michigan.

It is alleged that defendant Roberto Marcello Dupree did, in the course of committing a larceny of money, assault or put in fear a person present, namely Mohamad Zamzami. And in the course

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of that conduct possessed a handgun, a dangerous weapon, contrary to law." And that is the charge of armed robbery.

The defendant has pled not guilty to this charge. You should all clearly understand that the Information that I have just read is not evidence. An Information is read in every criminal trial so that the defendant and the jury can hear the charges. And I would add that this --- a charge like this, an Information, is read in every case; that includes the cases in which the juries come back not guilty; in which the person is not guilty.

And so a person who is presumed to be innocent has to sit and listen to this --- this charge being read, but it --- it doesn't constitute evidence. It is only notification of what the charge is. You must not think that this is evidence of his guilt, or you must not think that he must be guilty because he has been charged. This is simply a way of starting the matter off or putting the Information before you as to what the charges are.

A person accused of a crime, is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent.

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This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty. A reasonable doubt is a fair, honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary or possible, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Now, at this point, we are going to call the numbers of the potential jurors and you will have a seat in the jury box. We're are going to go slow with the first ones so that everyone understands what the process is. And then we will speed it up as we go to the next and beyond that.

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This is a random draw generated by a computer. My clerk will now call of the number of the juror and that person who is called will sit in seat number 1, which is going to be defined by my court officer. He is going to stand by seat number 1 --- I guess we had some participants earlier. Anyway, I want you to point where seat number 1 is, Greg? The first one down there. So, okay. Call the first juror to be chosen.

COURT CLERK: Juror Number 305.

THE COURT: Okay. Come on up. We will wait for Number 305 to take her seat. And as soon as that happens, we will call the juror for seat number 2.

COURT CLERK: Seat number 2 is Juror Number 19.

THE COURT: All right. Now, after this we will wait until the juror has at least crossed the swinging door before we call the next one. Next.

COURT CLERK: Jury for seat number 3, is Juror Number 102. Juror 102.

THE COURT: Juror 102, gathering her stuff.

COURT CLERK: Seat number 4 is Juror

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Number 221. Seat 5 is Juror Number 40.

COURT OFFICER: You can come around either way. It doesn't matter. There's a door over there.

THE COURT: Okay.

COURT CLERK: Seat number 6 is Juror 54. Seat number 7 is Juror 118. Seat number 8 is Juror 382. Seat number 9 is Juror 24. Seat number 10 is Juror 232. Seat number 11 is Juror 89. Juror 197 for seat 12. Juror Number 337 for seat 13. And Juror Number 78 for seat 14.

COURT OFFICER: Everyone move to the center please. Just skooch to the center so everyone can have a seat.

THE COURT: Okay. Scrunge in a little bit knowing that it's hard to stand for a long period of time. So better to be a little --- little tight in the seats rather than have somebody have back problems. Again --- again, if there's an open seat, just seek it out. It would be far better for you to be seated rather than standing. There's still --- I think we are almost. Okay.

Okay. So then let me turn to our jurors. I have a series of questions to start us off and then the lawyers will be asking you questions on

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their own, as well. First of all, does anybody have any health concerns that would make it difficult to serve as a juror? If so, raise your hand. Wow. Okay. So we will start with --- go down the list. We'll start with juror in seat number 2.

And, now, these are health concerns that, you know, we don't want you to reveal a lot of medical history. The question is not is there some degree of discomfort, but is this really going to make it difficult for you to serve. So we will start with you first, in seat number 2. What's --- that's the concern?

JUROR NUMBER 19: (inaudible)

THE COURT: You what? Oh, that --- that's a further question. I take it that you are a U.S. citizen. Yes. But you --- do you speak English every day? You don't. All right. I'm going to turn to the attorneys and ask, would you like a sidebar on this or do you have any objection to my excusing this juror immediately?

MR. LASZCZAK: No objection from the prosecution.

THE COURT: Mr. Tomko.

MR. TOMKO: No objection, Judge.

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THE COURT: Okay. Thank you. Juror in seat number 2, you are excused. Okay. We thank you for your service. And, it's very important that you be honest with us. I know that this is always a little bit embarrassing. But it's far better to get it out now then --- okay. Thank you. Okay. Okay. You are excused and you go back to the juror room on the first floor. Okay. So let's refill that seat right away.

COURT CLERK: Juror Number 101.

THE COURT: Okay. The same question then again to everybody. This would include the Juror 101 in seat number 2. Are there any health concerns that would make it difficult to serve as a juror. Okay. So we have --- we --- we go down to seat number 4. What's your concern, sir?

JUROR NUMBER 101: (inaudible)

THE COURT: Okay. Would it help to know that during the trial you would be free at any time you felt the need to --- to kind of standup? In other words, you don't have to be perfectly still all the time. And I am letting everybody else know this, as well.

As a matter of fact, when I was kid lawyer

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in federal court, there was a federal judge who made a point that, you know, it's better to be alert and awake than have the proper décor in the courtroom. So if you want to stand and stretch you could, as long as your arms didn't flay a lot and sit somebody else.

Knowing that you'll be able to stand if need be, does that --- does that reveal the pain enough or not? Okay. Looking to --- to the lawyers, sidebar or I can just ask it straight out. Any objection to my excusing juror in seat number 4?

MR. HALL: No objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: No objection, Judge.

THE COURT: Okay. Thank you. Okay. Your are excused, go back to --- to the jury room. And instead of filling this immediately, why don't we do this alternate way of doing this. We'll --- we'll go down the list and then we'll pick out a number of jurors all at the same time if we have more excuses. So the next one down the line, who else had a --- had raised their hand? Anybody? So we go to juror in seat --- seat number 7. Okay. And what is your concern?

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JUROR NUMBER 118: It's a double whammy. I'm practically blind. (inaudible)

THE COURT: Okay. You have sight problems?

JUROR NUMBER 118: Yes.

THE COURT: I notice you don't wear glasses. You got contact lenses?

JUROR NUMBER 118: No. My glasses were actually lost about a week ago. They were smashed into my face. (inaudible)

THE COURT: All right. So that if you were --- what the double whammy? What's the other part?

JUROR NUMBER 118: (inaudible)

THE COURT: What?

JUROR NUMBER 118: (inaudible)

THE COURT: Let me --- let me ask the lawyers. Any problem with excusing juror in seat number 7?

MR. HALL: No, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: No objection.

THE COURT: Okay. You are excused. Thank you. You can go back to the first floor. Going to

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the next row, then. Juror in seat number 8, yes.

JUROR NUMBER 382: (inaudible)

THE COURT: Yes?

JUROR NUMBER 382: (inaudible)

THE COURT: What?

JUROR NUMBER 382: (inaudible)

THE COURT: Oh, yeah. Look to the lawyers. Any objection?

MR. HALL: No, objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: Okay. You're excused also. The juror in the next seat. Yes? Wait --- wait until --- no, you can go. Thank you for your service. Actually my speech about thanking you for your service would be a little bit longer and more flowery but we started late and I'm trying to move things along. So, okay. So juror in seat number 9. Yes.

JUROR NUMBER 24: (inaudible)

THE COURT: You know. Hold on. When --- your voices aren't amplified. So I --- I --- I leave my vanity behind and put on this hearing device so that I make sure that I can hear you

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clearly. Hold on one second. Okay. And your reason is what, please?

JUROR NUMBER 24: (inaudible).

THE COURT: Okay. You are a U. S. citizen?

JUROR NUMBER 24: Yes.

THE COURT: Do you speak English every day?

JUROR NUMBER 24: At work, but not (inaudible).

THE COURT: Okay. Okay. All right. Any objection?

MR. HALL: No objection.

THE COURT: Mr. Tomko.

MR. TOMKO: No objection, Judge.

THE COURT: Any by the way, for all of those who were here earlier who are wondering how come it's going to be hard to pick fourteen jurors out of so many of you, you can see what the problem is. That there are just these practicalities that we have to be concerned about. Okay. The next person who raised their hand. Yes, sir?

UNIDENTIFIED JUROR: Yeah. I just had recent hernia surgery. (inaudible) sitting for a

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period of time and standing once in awhile sure would help, but other than that ---

THE COURT: Okay. Any objection, prosecution?

MR. LASZCZAK: No objection.

MR. HALL: No objection.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: Okay. You are excused. Thank you. Go back to the jury room. Next. Anybody else raise their hand? Okay. Juror in seat number 12. Yes? What's the --- what's your situation?

JUROR NUMBER 89: (inaudible)

THE COURT: Okay. Now, --- well, I'll just ask the lawyers. Any objections?

MR. HALL: Judge, no objection.

THE COURT: Mr. Tomko.

MR. TOMKO: No objection, Judge.

THE COURT: You are excused. Thank you. Okay. Next. Seat number 13.

JUROR NUMBER 337: My wife is pregnant and it's a high-risk pregnancy so she is in bed most of the time.

THE COURT: Okay. Any objections?

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MR. HALL: No, Your Honor.

THE COURT: Mr. Tomko.

MR. TOMKO: No, Judge.

THE COURT: Okay. Good luck to you and your wife. I hope things work out well. Thanks. Okay. Seat number 14, you didn't have your hand raised

JUROR NUMBER 78: No.

THE COURT: Thank you. Okay. Okay. So let's --- let's call to fix the seats that we have vacant now.

COURT CLERK: Juror for seat number 4 is Juror Number 131. The juror for seat number 7 is Juror 62. Seat number 8 is going to be Juror 157. Seat number 9 is Juror 209. Seat number 10, Juror Number 49. Seat 12 is Juror 82. And seat 13, is Juror 395.

THE COURT: Okay. And while these jurors are being seated, again, everybody who is standing again, fill in the vacant spots. You don't have to but --- but certainly there's room now so --- so find a spot to --- to sit down. And, again, listen to all of the questions because you can see that it's mathematically, fairly much ha probability that

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you might be called up because we've --- we're going through jurors pretty quickly.

I'm going to read you all again a group of questions so that we don't have to do these one at a time, but then you can tell me which, if any, apply to you. And the questions are --- we already did the first ones. We are still working on that for the new ones. Does anybody have any health concerns that would make it difficult to serve as a juror? Or does anybody have any sight, hearing, or language problems that would make it difficult to serve as a juror?

The third is a little different. Does anybody have any prepaid vacations coming up between now and like next Wednesday? Fourth, is anybody currently distracted by awn pressing personal problems, economic problems for family emergencies that would make it difficult to serve as a juror? As we've noted, we had a husband with a wife with a high-risk pregnancy and in her eight month. That would --- that would qualify.

And is anybody a full-time student or is anybody a sole proprietor of a business or a key employee at work, so that if chosen as a juror, is

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would result in severe financial hardship? And the key word there is severe. We all know that serving on a jury is going to take you away from your job; might cause some financial hardship. But that's just part of the duties and the price to pay to be a citizen of the United States. So you've got to serve on jury duty from time-to-time. So the key words there are "severe financial hardship".

Now going over those categories, does anybody have anything to call to my attention with regard to any of those questions? And, if so, raise your hand. Okay. Okay. So juror in seat number 2, what's --- what's your situation?

JUROR NUMBER 101: I'm the sole proprietor at home. (inaudible).

THE COURT: Okay. Okay. Okay. But the word here meaning sole proprietor means that you are running a business out of your house?

JUROR NUMBER 101: No, no.

THE COURT: Okay. You are just by yourself, okay. Are --- are you retired?

JUROR NUMBER 101: No.

THE COURT: What --- what do you do?

JUROR NUMBER 101: Install garage doors.

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THE COURT: You what?

JUROR NUMBER 101: Install garage doors.

THE COURT: Okay. How many people do you have working for you?

JUROR NUMBER 101: I work for a company.

THE COURT: Okay. What company?

JUROR NUMBER 101: (inaudible)

THE COURT: Okay. And are you an independent contractor or do you get a paycheck?

JUROR NUMBER 101: (inaudible)

THE COURT: Okay. On the surface, that's probably not enough to be a severe financial hardship. I will certainly let the lawyers in their questions explore that with you more. But at the outsight, that --- the law would not permit me to excuse you just on that basis. So we will go to the next --- who else had their hand raised? I see juror in seat number 5. Yes.

JUROR NUMBER 40: (inaudible)

THE COURT: Do you have a court date scheduled in your divorce case?

JUROR NUMBER 40: (inaudible)

THE COURT: Do you have anything coming up this week or next week in your divorce case?

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JUROR NUMBER 40: No.

THE COURT: All right.

JUROR NUMBER 40: (inaudible)

THE COURT: All right. Now, you know that if you lost your job, or if they took any job action against you, that would be against the law. They would face criminal charges and also you could probably sue the heck out of them for whatever you lost. In order words, they --- they can't retaliate against you for serving on a jury. You know that?

JUROR NUMBER 40: (inaudible)

THE COURT: Yeah.

JUROR NUMBER 40: (inaudible)

THE COURT: I do know what you're saying, but for now I just have to pass your case. I'll talk about it with the lawyers. They will have a chance to ask you more questions. But that doesn't, at least so far, appear to be quite enough. Next, in terms of --- juror in seat number 7.

JUROR NUMBER 62: (inaudible)

THE COURT: Okay. So Saturday and Sunday you would be out of town, and you'd be coming back Sunday night?

JUROR NUMBER 62: Correct.

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THE COURT: You'd be leaving Saturday morning?

JUROR NUMBER 62: Yes.

THE COURT: Okay. Thanks for letting me know that but that --- that will not be a problem, especially knowing that you're going to have Monday anyway so that even if you got back a little late. But that's exactly what we're looking for is to tell us anything that might be relevant. Okay. Next, go to the back row. Juror in seat 8.

JUROR NUMBER 62: I just have a question.

THE COURT: Yeah.

JUROR NUMBER 62: I do have blood clots in my legs and I can't sit for long period of time. But how long --- you said like a couple of hours it would be, or ---

THE COURT: Well, first of all, it's almost inevitable, because there will be other cases that I will have to handle where you'll be excused and I --- I can't almost guarantee a break about every hour.

JUROR NUMBER 62: Okay.

THE COURT: And in between that remember what I said about getting up and stretching if you

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want to, okay? But we --- we hardly ever go more than an hour. And the other thing is if we're going and --- even if it's forty-five minutes, and you feel the need to --- to take a break just raise your hand.

JUROR NUMBER 62: It can't be like three, four hours ---

THE COURT: Got it. Okay. All right. Okay. Next in line. Yes, sir.

JUROR NUMBER 243: (inaudible).

THE COURT: Oh. Okay. Did you put that in your jury questionnaire?

JUROR NUMBER 243: I --- (inaudible)

THE COURT: All right. Let's see. Are you I finals right?

JUROR NUMBER 243: I go to ICT Tech, so --- I'll --- yes and no. (inaudible)

THE COURT: Okay. So when is the quarter up?

JUROR NUMBER 243: In June.

THE COURT: Right. And --- and how any credit hours are you carrying?

JUROR NUMBER 243: (inaudible)

THE COURT: Okay. Full-time student. Any

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objection?

MR. HALL: No.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: Okay. Next in line? Anybody else have their hand up? We go to juror in seat number 13, yes.

JUROR NUMBER 395: I took (inaudible) and have a flight booked for Saturday to move out there. And I am also (inaudible)

THE COURT: Okay. So run that by me again. You're leaving, what, Saturday?

JUROR NUMBER 395: Saturday, uh-uh.

THE COURT: For how long?

JUROR NUMBER 395: Permanently. I took a position as (inaudible) out there.

THE COURT: Oh, any objection.

MR. HALL: No objection.

THE COURT: Mr. Tomko?

MR. TOMKO: No objection.

THE COURT: Okay.

JUROR NUMBER 395: Thank you.

THE COURT: Okay. So let's fill those two seats then.

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COURT CLERK: Replacing the juror in seat number 10 is Juror Number 243. And replacing the juror in seat number 13 is Juror Number 127.

THE COURT: All right. For our two newly seated jurors then, you know the questions that have been asked before. You know what we are looking for. So how would you respond to any of those? Any problems? If so, raise your hand.

JUROR NUMBER 243: None.

THE COURT: None. Okay. So now juror in seat number 13, any problems?

JUROR NUMBER 127: Yeah. I am a Type 1 diabetic. So I do go to the bathroom a lot, as well as bladder issues. And then I get paid by commission so if I don't show up for work I'm don't make any money.

THE COURT: Well. Look it, I --- I obviously have, you know, a great, great deal of empathy for the Type 1 diabetes. I have a son and also a --- a granddaughter. So I know the disease well. Hate it dearly. But we --- we live with it. I can't excuse you for that --- that reason. If you need --- do need a bathroom break, we --- obviously, you can just raise your hand if you have to take a

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bathroom break. But what --- what was the other thing? You also what?

JUROR NUMBER 127: Yeah. I also get paid on commission. So if I don't show up to work, I don't --- I mean, $45.00 compared to what I would make at work is just --- you know ---

THE COURT: Yeah. Well, some people get drafted. Some people join the Army. Some people, you know, serve the country in other ways. This is your turn in the barrel. And it has to be a severe economic hardship and the fact that you will be called to jury duty for awhile the law does not permit to me just excuse you on that grounds.

The lawyers can ask more questions, but I --- at least preliminarily, as I've done with other jurors, I can't --- I can't grant you an excuse for that. Okay. All right. So let me go --- again, fill in the empty spots. Now, let me ask --- I think we've already covered this, but I need to cover it again. Does anybody know, or is anybody related so any of the attorneys, parties or witnesses whose names you've heard read? Didn't see any hands before, so that should be no.

Is there anybody who has been a victim of

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a crime or is closely associated with a person who has been the victim of a crime? If so, raise your hand in the jury box. Okay. We have two. Juror in seat number 5, what's --- what's the relationship?

JUROR NUMBER 40: (inaudible).

THE COURT: Pardon?

JUROR NUMBER 40: (inaudible)

THE COURT: And was --- did that case result in a criminal case that went to trial?

JUROR NUMBER 40: Yes.

THE COURT: And how long ago was it?

JUROR NUMBER 40: (inaudible)

THE COURT: Were --- were you there present in the courtroom when the case was being heard?

JUROR NUMBER 40: (inaudible)

THE COURT: Okay. Well, let me just reserve comment on that for a second. There was another hand up. Juror in seat number 8. Yes, you. What --- what is the re --- what is the crime and what is the relationship?

JUROR NUMBER 157: (inaudible)]

THE COURT: What?

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JUROR NUMBER 157: It was myself.

THE COURT: Okay.

JUROR NUMBER 157: (inaudible) like thirty years ago.

THE COURT: Okay. Would that experience cause you, in your mind, to always find yourself always being sympathetic to one side or the other? No, okay. So you can still be a fair juror?

JUROR NUMBER 157: Yes.

THE COURT: Okay. Okay. Let me go on with the questions. Has anybody ever been charged with a crime? You know, there --- there are cases everyday in which people are totally innocent and mistakenly picked up and charged. So it doesn't mean, you know, that you should be embarrassed by it. If you were charged with a crime, let me know. Raise your hand. Okay. Juror in seat number 5.

JUROR NUMBER 40: Drunk driving.

THE COURT: Okay. How long ago?

JUROR NUMBER 40: Probably ten years.

THE COURT: All right. Now, is there anything about that experience that would cause you to be not a good juror in this case? Meaning that you would be biased for or against the prosecution

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or biased for or against the defendant?

JUROR NUMBER 40: No.

THE COURT: Okay. Has anybody ever testified on the witness stand as a witness in a case? All right. We've got three. Juror in seat number 5, again. When --- when did you testify?

JUROR NUMBER 40: (inaudible)

THE COURT: Here in this courtroom?

JUROR NUMBER 40: Well, not this specific ---]

THE COURT: No, no, but in this building?

JUROR NUMBER 40: Yes.

THE COURT: And what kind of case was that?

JUROR NUMBER 40: (inaudible)

THE COURT: And when you --- were you called as a witness by the prosecution or the defense?

JUROR NUMBER 40: Prosecution.

THE COURT: Okay. And --- and again, about how long ago was it?

JUROR NUMBER 40: (inaudible)

THE COURT: Okay. The next person to have raised their hand? Number --- in seat number 7,

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yes.

JUROR NUMBER 62: 2006, I believe it was, or maybe 2007. It was a work-related case for two different employers, where the employer wanted to (inaudible).

THE COURT: Okay.

JUROR NUMBER 62: (inaudible) and I was called by the previous employer.

THE COURT: Okay. Now, is there anything about experience that would make you think that you would not be a good, fair and unbiased juror in this case?

JUROR NUMBER 62: No.

THE COURT: Okay. Next row. Juror in seat number eight, nine, ten, eleven, yes.

JUROR NUMBER: 89: (inaudible)

THE COURT: Okay. And so a civil case again. Anything about that experience that would cause you to think that you could not be fair and impartial? Okay. Beyond that, anybody else raise their hand? No. Okay.

Right now, as you sit here, does anybody believe that you would be biased for or against a party or any attorney? No hands raised. Has

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anybody served as a juror before? If so, raise your hand. Jurors in seat numbers 6 and 7. We'll go with 6 first. When did you serve as a juror and what kind of case?

JUROR NUMBER 54: Me?

THE COURT: Yes.

JUROR NUMBER 54: I --- I --- I didn't --- I got picked but they --- they --- you know, like that ---

THE COURT: Okay. So you got seated, but then ---

JUROR NUMBER 54: In Oakland County.

THE COURT: Okay. So you didn't actually hear the case?

JUROR NUMBER 54: No.

THE COURT: Okay. So you were in the jury box, but got excused either for cause or peremptories. Okay. Juror in seat number 7, so what --- what's your situation?

JUROR NUMBER 62: (inaudible). I was seated and stayed on the jury through (inaudible).

THE COURT: Okay. What kind of case was that?

JUROR NUMBER 62: It was civil, I think.

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Brothers and brothers?

THE COURT: Okay. All right. Again, I'm just asking these preliminary questions. The lawyers will follow-up with some of their own --- with a lot of their own, maybe. Okay. Now, this is unlikely, but let me ask. Has anybody read anything or listened to any news reports about this case? I don't recall there being any but anybody remember this case from the newspapers or news reports? Okay. Again, I --- I don't think there was very much, if at all.

Now, is there anybody who, sitting there right now, has formed an opinion about the facts of the case or what the outcome should be, knowing that you've heard absolutely nothing? But this --- this goes back to any kind of internal bias that you have. Does anybody think that they, already, are forming opinions about what's happened here? If so, raise your hand. No hands raised.

Does anybody have a philosophical or a personal belief or a religious belief that you should not sit in judgment of another person? No hands raised.

Now, I have read you the instructions on

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the 'presumption of innocence' and the meaning of 'proof beyond a reasonable doubt.' It was read just a short time ago. But --- but let me --- let me just read that again.

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything.

If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty. A reasonable doubt it a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after

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a careful and considered examination of the facts and circumstances of this case.

Now, again, I have read that to you again. So based on those instructions if you had to bring in a verdict right now, what would your verdict me? And we will go to juror in seat number 4. One, two, three, four. That's you. What would your verdict be right now?

JUROR NUMBER 133: Not guilty.

THE COURT: Okay. And why is that?

JUROR NUMBER 133: Because he is innocent until proven guilty.

THE COURT: Okay. And right now you've heard nothing, okay. All right. Does everybody understand and agree with that answer? Okay. All right. I'm going to turn this over to the attorneys to let them begin their questions. And, again, they may go over some of the stuff I already did because they might want to inquire further on some of the issues that you've raised. Mr. Laszczak, you can begin.

MR. LASZCZAK: Thank you, Judge. Good afternoon, right. As you've kind of seen this is a unique time in a criminal jury trial. And it's

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unique kind of for one reason. It's because it's the only time myself and counsel are going to be able to actually interact with you through answers and --- or questions and answers.

Once we determine the fourteen of you who are going to sit and hear the trial, we no longer get to engage in conversation with you until after a verdict is returned. So I preface that with --- the questions I ask are not meant to be intrusive; they are not meant to be --- they may be intrusive, but it's not meant to be insulting or to take offense to. It's truly just to determine who you are as an individual and --- and make sure that we have the most fair and impartial jury for this case.

So I'm going to jump right to jury in seat number 5. I know you brought to the judge's attention that this could possibly be a financial hardship for you, correct?

JUROR NUMBER 40: (yes)

MR. LASZCZAK: And you said you are in the process of getting a divorce?

JUROR NUMBER 40: Yes.

MR. LASZCZAK: Okay. Where are you employed again?

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JUROR NUMBER 40: I work at Cosmo House.

MR. LASZCZAK: What --- what is Cosmo House?

JUROR NUMBER 40: (inaudible)

MR. LASZCZAK: And is that open like traditional business hours, nine to five?

JUROR NUMBER 40: We are only open until (inaudible).

MR. LASZCZAK: Oh, okay. So you indicated that you are part-time, right?

JUROR NUMBER 40: Right.

MR. LASZCZAK: Do you get paid any kind of benefits or paid time off if you're not there?

JUROR NUMBER 40: (inaudible) not part-time.

MR. LASZCZAK: And are you currently living with your husband or are you guys separated?

JUROR NUMBER 40: We are separated?

MR. LASZCZAK: How --- how are you splitting up bills? Are you responsible for all of your bills?

JUROR NUMBER 40: Yes. Yes.

MR. LASZCZAK: Okay.

JUROR NUMBER 40: (inaudible)

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MR. LASZCZAK: And, obviously, by not showing up --- or not being able to show up at work, you don't get paid, right?

JUROR NUMBER 40: Correct.

MR. LASZCZAK: Is that going to financially affect you to be able to maintain lights, food, housing?

JUROR NUMBER 40: (inaudible)

MR. LASZCZAK: And would daycare be an additional expense?

JUROR NUMBER 40: Yes.

MR. LASZCZAK: Do you think that that's -- - worrying about all the financials and the daycare is going to maybe distract you from listening to the witnesses who are going to take the stand and provide testimony, and, as well, as any exhibits that might be presented?

JUROR NUMBER 40: I can listen to it, but (inaudible) --- (inaudible - coughing).

MR. LASZCZAK: Thank you. I --- I --- I -- you said that you had to testify in a criminal trial; correct?

JUROR NUMBER 40: Yes.

MR. LASZCZAK: And that was about eight

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years ago?

JUROR NUMBER 40: (inaudible)

MR. LASZCZAK: And just so everybody knows too, we need verbal answers, okay? I understand --- I know what you are doing. But just so we have a clear record, okay? Who was the individual you were testifying for?

JUROR NUMBER 40: (inaudible)

MR. LASZCZAK: Okay. Was he --- was he the defendant in the case?

JUROR NUMBER 40: Yes.

MR. LASZCZAK: Okay. Who was the victim?

JUROR NUMBER 40: (inaudible)

MR. LASZCZAK: What police department was this out of? Do you recall?

JUROR NUMBER 40: I think it was Shelby.

MR. LASZCZAK: Shelby Township Police Department?

JUROR NUMBER 40: Oh, Washington Township, so I believe it was the sheriff.

MR. LASZCZAK: Okay. Did it occur in Washington Township? So that would be with the Sheriff's Department. Is there anything about that experience that you think, you know what, the police

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just --- they didn't do a really good job?

JUROR NUMBER 40: No.

MR. LASZCZAK: You hesitated for a second. Is there --- I mean, this is a clearly emotional event to have to relive, but is there --- is there a purpose for hesitating?

JUROR NUMBER 40: No.

MR. LASZCZAK: No. Okay. So you're okay with police officers and law enforcement agencies?

JR 40: Yes.

MR. LASZCZAK: All right. Juror seated in seat number 8, and you brought up to the Court's attention that you were a victim in a case?

JUROR NUMBER 157: Yes,

MR. LASZCZAK: About thirty years ago, right?

JUROR NUMBER 157: It was probably like twenty-five.

MR. LASZCZAK: And I'm going to be --- I'm going to try and say this as politely as possible, but ---

JUROR NUMBER 157: That's all right.

MR. LASZCZAK: --- I don't think it gets any closer to home than other than being the victim

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yourself. Would you agree with me on that?

JUROR NUMBER 157: Obviously.

MR. LASZCZAK: And it was obviously something very serious?

JUROR NUMBER 157: Yes.

MR. LASZCZAK: And --- and judge asked you if that was going to somehow change your view from either the prosecution side or the defense side, and you indicated that it wouldn't, right?

JUROR NUMBER 157: No.

MR. LASZCZAK: All right. How old were you when this took place?

JUROR NUMBER 157: Thirteen.

MR. LASZCZAK: Okay. And do you recall -- - where did this take place? In the state of Michigan or someplace else?

JUROR NUMBER 157: No, Michigan.

MR. LASZCZAK: Do you recall having to speak with the police and whatnot?

JUROR NUMBER 157: Uh-huh.

MR. LASZCZAK: And do you feel that you were treated fairly during that process?

JUROR NUMBER 157: Yes.

MR. LASZCZAK: Okay. And there's nothing

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about that process that is going to bring up --- nothing about this process that's going to bring up bad memories or ---

JUROR NUMBER 157: No. I put that behind me.

MR. LASZCZAK: Okay. And --- and --- and like I said, I appreciate you being honest. And I truly am trying to be as cautious as possible with asking questions, but I just need to make sure that that prior experience isn't going to interfere with what you are here to do today.

JUROR NUMBER 157: No, I understand.

MR. LASZCZAK: Okay. Thank you. Let's see, somebody who has been quiet. I don't think we've heard from juror seated in seat 12. What do you think of --- a juror's purpose is?

JUROR NUMBER 82: Well, to (inaudible) choice for them as to what they've seen and hear.

MR. LASZCZAK: Anyone else kind of want to expand on that? What a juror's purpose is? Yes, juror seated in seat number 11.

JUROR NUMBER 89: To hear all of the facts and then to weigh what's been said and make a decision.

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MR. LASZCZAK: Perfect. Can people --- as jurors can you agree that you're not here to determine whether Mr. Dupree is a good person or a bad person? Okay. As juror in seat 11 said, you're here --- your purpose is to listen to what the facts are, observe the evidence that's admitted as part of the case, and then take the law as the judge give it to you and apply. Can everybody do that with a fair and open mind? Yes?

JURORS: Yes.

MR. LASZCZAK: Who here watches a --- you know, some kind of law enforcement, CSI program? Yes, there are a lot of hands. All right. I always like --- I say this with all seriousness because a colleague actually had a juror one time bring this up. So can everybody --- does everybody understand that that is for entertainment purposes?

JURORS: Yes.

MR. LASZCZAK: Okay. All right. And a lot of times it's --- you know, it's got you on the edge of your seat, you --- that commercial comes and wham, why do they have to put a commercial right here, right? Everything is getting hot and heavy. But that is not reality. Can --- can you agree with

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that?

JURORS: Yes.

MR. LASZCZAK: And I say that because one of my colleagues had a juror one time, she was doing voir dire and she indicated it was a homicide case and she literally figured there was someone sitting in there, and there was no danger, and said well, I don't understand why can't we just examine the retina of the dead guy to see who the last person he saw was. That technology doesn't exist. We're not going to have the CSI effect. We're not going to have big machines come in and --- and extrapolate time. I'm sorry, if I'm the letdown, but it's just not going to happen. Okay. So can we all just put the CSI effect aside and --- and judge based on reality? Can we do that?

JURORS: Yes.

MR. LASZCZAK: Thank you. Who can --- does anybody --- let's see, juror in seat number --- I don't think I've heard from you. That would be 8 --- 10. What do you think evidence is?

JUROR NUMBER 243: The --- evidence is what's provided by witnesses and prosecution and defendants that was taken place; that you can use

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to judge your --- or make a judgment or make a clearer judgment on what had taken place and use that evidence to make a clear decision.

MR. LASZCZAK: All right. Good. And you --- the judge asked you all a question, a very important question during this process. If you were to go --- if the judge was to send you out through that door into the jury room, and he asked you to render a verdict, what would your verdict be? And I think juror seated in seat number 4, what was your -- what did you indicate?

JUROR NUMBER 133: It's not guilty.

MR. LASZCZAK: Not guilty. And that was because of what?

JUROR NUMBER 133: He's innocent until proven guilty. We know nothing about this case. Nothing about this person.

MR. LASZCZAK: Correct. So part of my burden and my job as a prosecutor is obviously to introduce evidence. And as you stated, juror in seat 10, that evidence is obviously testimony you are going to hear from witnesses; would you agree?

UNIDENTIFIED JUROR: Yes.

MR. LASZCZAK: Okay. Testimony ---

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evidence as in documents you might see, that are admitted; can we agree that that's evidence? Pictures, evidence? Okay. There might be physical evidence. Can we agree that that's evidence?

JURORS: Yes.

MR. LASZCZAK: Okay. So it's more than just what you hear. It could be what you hear, what you see, correct?

JURORS: Yes.

MR. LASZCZAK: All right. And after that the judge is going to read you elements that I have to prove beyond a reasonable doubt. And I'm going to ask you this question now, because I think this is also an important question. As the defendant sits here today, he is innocent until proven guilty.

At the close of this trial you are going to be given evidence to use to apply to the law and render a verdict. And what I'm going to ask everyone of you to commit to is if the evidence that you hear or see in this courtroom fits the elements in which I am required to prove beyond a reasonable doubt, does anybody have a problem, whether it be religious or ideological problem about rendering a verdict of guilty? No. Everybody can agree then.

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Based on what is presented, the law, that you would have no issues with rendering a guilty verdict. Yes.

JUROR NUMBER 78: I have an issue with that.

MR. LASZCZAK: Okay. You have an issue with that. Okay. Juror in seat number 14, what is your issue with that?

JUROR NUMBER 78: I have a hard time (inaudible).

MR. LASZCZAK: And what is it? Is that an ideological thing, or is that a religious thing? What --- what is your reasoning for ---

JUROR NUMBER 78: It would be ideological. It would just be hard for me to (inaudible)

MR. LASZCZAK: Okay.

JUROR NUMBER 78: (inaudible)

MR. LASZCZAK: Do you have children?

JUROR NUMBER 78: I have two.

MR. LASZCZAK: You have two, okay. Obviously, as a parent you have to parent these children, right? Okay. And when one of your child --- or one of your children makes a mistake, are you able to administer some form of punishment?

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JUROR NUMBER 78: Not that well. They are grown up now.

MR. LASZCZAK: Okay. How old are your children?

JUROR NUMBER 78: Twenty and eighteen.

MR. LASZCZAK: Okay.

JUROR NUMBER 78: I wasn't that good at administering punishment, no.

MR. LASZCZAK: So let me ask you very simply. You are indicating to this court that if the law as given to you, and the facts and evidence support those elements, regardless of how much there is, there is no way you can --- you can convict this person; is that what you're saying?

JUROR NUMBER 78: Not in a way. I'm just saying it's much too difficult. That was your question.

MR. LASZCZAK: Okay.

JUROR NUMBER 78: And that's my answer.

MR. LASZCZAK: Okay. Anybody else have an issue with that? I thought I saw your hand, as well.

JUROR NUMBER 127: I mean, I don't --- I don't think I'll have an issue coming to a decision,

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but in my mind, I wouldn't --- you know, because I wasn't there obviously --- I know that may sound stupid, but even if you did prove it, you know, beyond a reasonable doubt, but I wasn't there so I wouldn't one hundred percent believe it I my mind that he did or did not do it.

MR. LASZCZAK: Okay. So you would be accurate in saying that, obviously, you weren't there, because if you were there, you wouldn't be sitting in there. You'd probably be sitting in the back as one of our witnesses, right? Right. Okay. So let's --- let's get to the next point because this might help.

You've already determined reasonable doubt, right? Judge just read it for us, correct? How about beyond all doubt? We've heard that before? Beyond all doubt. How about --- juror in seat number 13, do you hear a difference between reasonable doubt and beyond all doubt?

JUROR NUMBER 127: Yeah.

MR. LASZCZAK: What would you say that difference is?

JUROR NUMBER 127: I wouldn't say reasonable. I mean, it could be one hundred

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percent, but beyond all doubt, that's definite.

MR. LASZCZAK: It's definite, right?

JUROR NUMBER 127: Correct.

MR. LASZCZAK: Do you --- do you agree that beyond on all doubt is not what my burden is?

JUROR NUMBER 127: No. I get what you're saying, and it could still be --- I'm just saying in my mind, either way, there wouldn't be a hundred percent.

MR. LASZCZAK: Okay. Reasonable doubt is --- who's here --- who's here to be laughed at? Leave it up to a lawyer to define something, right. I mean, none of us --- we are supposed to be good writers and good readers, yet sometimes we write the most convoluted pieces of legislation or law that exists or contracts that are out there. Would anybody agree or disagree with that statement? You've all heard that, right?

And I always chuckle when we talk about reasonable doubt, because I remember being in grade school and --- and my English teacher telling me that when you are using --- when you are trying to define a word, you should never use the word itself within the definition. Anybody heard that phrase

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before? Yes. Okay.

So here we are, as attorneys, we tell you what reasonable doubt is and the first word, I think, the first or second word is a doubt is based on reason. Right? So we are using that --- that word to define the definition. So here's --- here's my hypothetical of reasonable doubt. Who --- who is here that's built a puzzle before, or at least seen a puzzle, right? We've all seen them at a store, Target, Meijers, or whatever. And would everybody agree that on the front of that puzzle there is usually a picture, right? All right.

And that picture is supposedly what the puzzle pieces, when all put together, is to look like. Would you agree?

JUROR NUMBER 127: Right.

MR. LASZCZAK: So you start building this puzzle and you get down to the end and lo and behold the puzzle is supposed to be the picture of a red barn, with a big oak tree and a cow in front of it. You get all the pieces that are given to you in the box. You put it together. And you've got a couple of twigs missing out of the oak tree. You've got a couple pieces of the red barn missing, and maybe the

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back half of the cow is not there. Are you at that point questioning whether that puzzle is supposed to be a picture of a red barn, an oak tree and a cow?

UNIDENTIFIED JUROR: No.

MR. LASZCZAK: No. Because that wouldn't be reasonable, right? That wouldn't be common sense. Would you agree?

UNIDENTIFIED JUROR: Yes.

MR. LASZCZAK: All right. So apply it to the law. There are going to be things and I'm --- I mean, I'm not going to guarantee it, but I --- I'm going to speculate greatly that there are going to be things at the end of the trial that you're going to question. You're going to wonder well, why isn't this here. Or why don't we have this or that to look at? And my response to you is that some of it just doesn't exist, like pieces in the puzzle. They just weren't given to you when you bought it from the store.

Some of them won't be allowed because of the Rules of Evidence within the state of Michigan don't allow that type of evidence to be admitted. But the purpose is that the big picture wouldn't create somebody to have doubt that there's supposed

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to be a red barn, an oak tree and a cow in front of it. Can we agree with that? Does that help clarify what a reasonable doubt is? Okay.

This is a little bit more about evidence. Who here has heard of direct evidence? By a show of hands, has anybody heard the term 'direct evidence'? Yes. Juror in seat five, what do you think direct evidence is?

JUROR NUMBER 40: Like --- (inaudible)

MR. LASZCZAK: How about like somebody's testimony about they saw? Direct evidence, would you agree?

JUROR NUMBER 40: I'm not sure. (inaudible)

MR. LASZCZAK: But if you --- say, for example, you were to see a car accident ---

JUROR NUMBER 40: Right.

MR. LASZCZAK: --- and you had to be --- you were summoned into court and you had to testify as to what you saw. That would be direct evidence, right?

JUROR NUMBER 40: Yes.

MR. LASZCZAK: Okay. Would anybody here disagree with that? All right. Who here has heard

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the term 'circumstantial evidence'?

MR. LASZCZAK: All right. Who here has heard the term, you know, this is a real circumstantial case? Yes. Do we have a show of hands? All right. How about --- let's see. Juror seated in seat number 7, have you heard that term before?

JUROR NUMBER 62: Uh-huh.

MR. LASZCZAK: And you said you were on a previous civil jury trial, correct? Did that term ever come up at all, 'circumstantial evidence'?

JUROR NUMBER 62: I don't think so. Does anybody want to raise their hand and maybe what you think is better, physical or direct evidence versus circumstantial evidence? How about juror in seat number 1?

JUROR NUMBER 305: I would think direct evidence is more important because you can visualize what's there, you know. Like you said with a car accident, you can see pieces of the accident or if someone is injured or bleeding and it's all related.

MR. LASZCZAK: Does anybody --- anybody agree with juror in seat number 1? Juror in seat number --- seat number 9, you say no. What you

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think is better, circumstantial ---

JUROR NUMBER 209: I think all evidence -- - evidence is equally (inaudible). I think all ---

MR. LASZCZAK: Okay. Let me --- let me pose a hypothetical to you and ask you some questions about it. So say, for example, you are in your home and it's about 6:00-7:00 at night. You are sitting in your living room and you hear a noise coming from the front door. You know that nobody is supposed to be coming home at that time. So you decide to walk over to the front door. You see that somebody or something is trying to move the handle. You ask who's there. And the movement of the handle stops.

So then you decide to open the door --- unlock it, open it up, and you see a person --- let's say a six foot, white, two hundred ten pound, male with a baseball --- a red baseball cap, a blue jacket and blue jeans, running from your front porch. That's the description you have. So you call the police and you say hey, I just saw this individual, it appears they were trying to get into my home; I need you guys to come out and so some investigation.

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So the police come out. They give you a piece of paper. You write down the witness statement; you put the description of the person that you saw; what you believe they were doing; or what they were doing. The evidence tech comes out. They dust the handle for some fingerprints. They do some swabs on some things and they send it out to the lab.

You get a call back saying that they have some DNA that was collected; they have a possible suspect. What do you think is better, the direct evidence that you saw the description of the person or the DNA that was collected and submitted to the lab?

JUROR NUMBER 305: DNA.

MR. LASZCZAK: Now, how about this. What do you think DNA is? Do you think DNA is direct evidence of circumstantial evidence.

JUROR NUMBER 305: Direct.

MR. LASZCZAK: Most of you are going to be surprised that DNA is circumstantial evidence. Okay. So does anybody's opinion change about whether or not circumstantial evidence is as good as direct evidence?

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One of the things we don't ask you to do as jurors when you come through that door, we do ask you to do a lot. We ask you to set aside a lot of things, a lot of personal feelings. But we don't ask is that you leave your common sense, okay? As humans we are able to analyze and able to have a thought process and we usually use common sense on a day-to-day basis. Would everybody agree with that?

We are not asking you to leave that aside. Can we do that? Can we make sure we are using our common sense when we are listening to the testimony; when we are listening to or looking at any of the exhibits?

Who here watches sports, or at least knows of sports, right? Okay. I'm going to pick an easy one because I think it's a big one. Football. Everybody has watched football or seen it on TV, right?

Let's see. Juror in seat number 1, do you know how many players are on the field for a team at one time?

JUROR NUMBER 305: I don't think I know that one.

MR. LASZCZAK: It's eleven. Eleven

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players on the field. And offense you usually have --- we've all heard of a quarterback, right? And we've all heard of the running back, right? We've all heard of the wide receivers, right? All right. So you've got your favorite team. Let's see. Juror in seat 14, do you have a favorite football team?

JUROR NUMBER 78: No.

MR. LASZCZAK: You don't watch football?

JUROR NUMBER 78: No.

MR. LASZCZAK: Who here is a big football lover?

UNIDENTIFIED JUROR: Probably the Lions.

MR. LASZCZAK: Okay. The Lions. You must be one of this diehards, right? Statistics show that they are due for a win, right? So at some point the quarterback gives the play, they run the play and they score a touchdown, right? Who usually gets all the fame and the glory and the --- you know, and whatnot? Who made the touchdown, right? Okay.

Does anybody see a problem with that? What --- what problem do you see with that?

UNIDENTIFIED JUROR: Well, it's because the other players who did the blocking, the other

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player that through the ball, (inaudible, coughing) that led to that touchdown.

MR. LASZCZAK: Exactly. So it took all eleven of those to make sure that that play was executed perfectly so that that touchdown could happen, right? Has anybody heard the term "aiding and abetting."

UNIDENTIFIED JUROR: Yes.

MR. LASZCZAK: That's the football scenario. So just because the lineman doesn't actually catch the ball in the end zone, doesn't mean that he doesn't get credit for part of that touchdown. Would you agree? Okay.

I want you to use that and think about that example when you're listening to the evidence and looking at the evidence, and listening to the testimony. It's going to be helpful when you have to determine and decide the verdict on this case. Can we all keep that in the back of our minds?

Who has heard 'intent'? We've all heard that term before? No. Yes. I think juror in seat number 3. I know we haven't heard from you or picked on you, yet.

JUROR NUMBER 102: Not heard from me.

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MR. LASZCZAK: Okay. Intent. What do you think intent is?

JUROR NUMBER 102: I don't know that complete words but something that's intentionally done.

MR. LASZCZAK: Okay. How do you think you determine a person's intent? Does anyone want to help her out? Juror in seat number 9.

JUROR NUMBER 209: Go there with a purpose. You are planning on doing something.

MR. LASZCZAK: Okay. And so --- let me give you an example. Oops. What was my intent? After I said oops? My intent was to knock the pen down, right? How did you determine that?

JUROR NUMBER 209: Because you deliberately hit that (inaudible, coughing) ---

MR. LASZCZAK: So you tool into account my demeanor?

JUROR NUMBER 209: Yes.

MR. LASZCZAK: Would you agree?

JUROR NUMBER 209: Yes.

MR. LASZCZAK: You looked at my facial expressions.

JUROR NUMBER 209: Uh-huh.

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MR. LASZCZAK: You looked at what I actually did with my hands, right. It wasn't like I --- I slipped it off by accident, right? So the fact that I said oops really doesn't disprove what my true intent was, would you agree? All right. So the point is that when you're looking at the evidence, listening to the testimony, one of the things you're going to have to determine is intent. And I'm going to ask you to observe and look at everything, regardless of what you may see or what you may hear, not to focus on just one thing. Can we all do that?

JURORS: Yes.

MR. LASZCZAK: You heard the judge that this is a case about armed robbery. Other than the juror in seat 14 --- seated in 14 and 13, is there anything about that term that strikes somebody --- somebody's chord that you just got to say something? You don't know if you can be fair and impartial? You don't know anything? Jury in seat ---

UNIDENTIFIED JUROR: I'll say it anyway. My brother was robber.

MR. LASZCZAK: Okay.

UNIDENTIFIED JUROR: His home was robbed.

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So when the judge first asked that question, it came to my (inaudible, coughing) was I apart of that no, but it was on my mind, yes.

MR. LASZCZAK: Okay. Was he home when that took place?

UNIDENTIFIED JUROR: No, he was not.

MR. LASZCZAK: Did you talk to him about that incident?

UNIDENTIFIED JUROR: Yes.

MR. LASZCZAK: All right.

UNIDENTIFIED JUROR: And my nieces and nephews were pretty scared. They stayed at our house for a few days. So, you know, life came back to normal and their belongings --- some of their belongings were replaced. So it kind of came back to the way they left it when they went to school that day.

MR. LASZCZAK: Do you know if there was a --- a suspect that was apprehended at some point?

UNIDENTIFIED JUROR: There was a suspect apprehended and some of their belongings were found, yes. The items were found at --- you know --- not the resale ---

MR. LASZCZAK: The pawn shop?

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UNIDENTIFIED JUROR: The pawn shop, yes.

MR. LASZCZAK: And is there anything about that, you know, that you've kind of gone with --- with your family going to influence you one way or the other in this case?

UNIDENTIFIED JUROR: Would it influence me in this case? I don't believe, but I've made changes in my life because of it.

MR. LASZCZAK: Okay.

UNIDENTIFIED JUROR: Home security and that kind of stuff in my own home.

MR. LASZCZAK: One of the other things that you are going to hear is that this robbery took place in 2012. Clearly, we're in 2018, right. Is anybody --- that timespan, that six-year depth, does anybody have an issue with six years regardless of what the evidence shows? Anybody think that they're not going to be able to render a verdict because, you know what, it's just been too long. That's way too long. No? We are all going to commit to that, right? Thank you.

MR. LASZCZAK: The judge didn't cover this and I just want to get it --- quick --- anybody related to a police officer? I'll just --- we'll

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just kind of go systematically. Juror in seat number 1, who - who are you related to? Or not who, but how are you related to that individual?

JUROR NUMBER 305: The individual is my first cousin.

MR. LASZCZAK: Okay.

JUROR NUMBER 305: He was killed by a drunk driver. He was a cop in (inaudible).

MR. LASZCZAK: Okay. Was that recently?

JUROR NUMBER 305: No, in '71.

MR. LASZCZAK: Okay. Anybody else? Any of his children or anything or ---

JUROR NUMBER 305: He wasn't married at the time.

MR. LASZCZAK: Okay. Anything about that pointing to your relationship --- okay. And you're not going to give an officer more weight or credibility when he's testifying ---

JUROR NUMBER 305: No, no.

MR. LASZCZAK: --- or she's testifying?

JUROR NUMBER 305: No.

MR. LASZCZAK: All right.

JUROR NUMBER 305: It's quite awhile ago.

MR. LASZCZAK: Who else indicated that

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they were --- juror in seat number 7.

JUROR NUMBER 62: I have a cousin who is a sheriff. He currently works at school right now. I then I also have ---

MR. LASZCZAK: You don't have to give names. Just the relationship.

JUROR NUMBER 62: Oh, okay. I have a neighbor who is an FBI agent. I don't know if that qualifies. And I have a brother-in-law that is a secret service in Washington, DC.

MR. LASZCZAK: Okay. Do you talk to these three individuals on a regular basis?

JUROR NUMBER 62: I do speak to --- I watch is children.

MR. LASZCZAK: All right. Do you --- do you feel that --- are you able to give an officer's testimony the same weight as any other testimony, judge their credibility the same?

JUROR NUMBER 62: I believe I could.

MR. LASZCZAK: Okay. Thank you. Who else indicated that they were related. Juror in seat number 8, 9, 11. Who --- what relationship?

JUROR NUMBER 89: My husband, who is now deceased.

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MR. LASZCZAK: And the --- and where was he employed at?

JUROR NUMBER 89: Pardon?

MR. LASZCZAK: Where --- what ---

JUROR NUMBER 89: Oh, Massachusetts. I just relocated from there.

MR. LASZCZAK: Did he die in the line of duty or was it natural causes?

JUROR NUMBER 89: (inaudible)

MR. LASZCZAK: Anything about that relationship --- obviously, being married to a police officer, anything about that that's not going to allow you to be fair and impartial in this case?

JUROR NUMBER 89: Nol.

MR. LASZCZAK: Okay. So you are going to hold every witness to the same standard of credibility?

JUROR NUMBER 89: Absolutely.

MR. LASZCZAK: Regardless of their employment?

JUROR NUMBER 89: Yes.

MR. LASZCZAK: Thank you. Juror in seat number 12.

JUROR NUMBER 82: Yes. My brother is a

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police officer in Boston. And my brother-in-law is a cop in Grand Rapids.

MR. LASZCZAK: All right. And same question I posed to the rest. Anything about those relationships that are going to make you unable to be fair and impartial in this case?

JUROR NUMBER 82: I don't believe so.

MR. LASZCZAK: You're going to be able to hold the officer to the same level of credibility as any other witness?

JUROR NUMBER 82: I would think so.

MR. LASZCZAK: Anybody else raise their hands that I missed? Okay. Fine. I thank you for your time and patience. Thank you. Thank you, Judge.

THE COURT: Okay. Mr. Tomko, I know that we're --- well, you have a couple of minutes. Do you want to --- do you want to start today or tomorrow morning --- or tomorrow afternoon?

MR. TOMKO: Judge, if you don't mind, I'd like to start --- we could just go through it by starting tomorrow afternoon, if that's okay.

THE COURT: Okay. Well, we're losing two minutes and ten seconds as a result of that

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decision, but I think we can live with that.

MR. TOMKO: I hope it's not too big a burden.

THE COURT: No. Okay. All right. Okay. We said we were going to break at 4:45. We are almost there anyway. But now this is very important. I'm going to just give you some instructions. There will be more detailed instructions on this point later.

But --- well, first of all, just the mechanics. Be here tomorrow at about what 1:30? We want to start at 1:30, so about 1:15. Okay. Be here. The door will be locked at 1:15, but be here so that my deputy can let you in here so that we can start promptly at 1:30.

Remember what seat you are in because you will return to that. As far as the people seated out in the benches, you don't have to sit in exactly the same place. But --- but make sure that you are here.

This is an absolute obligation. Just because you were here today doesn't mean that you are excused tomorrow. Each and every one of you must be here tomorrow. Obviously, if there are

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family emergencies or sickness there would be a hearing to determine what the reason was that you were not here. But it would have to be a very, very good reason.

Now, because somebody might be leaving on vacation or something of that nature, I will, by a show of hands, ask is anybody leaving town tomorrow? All right. Stand up and let me know what your situation is.

JUROR NUMBER 238: (inaudible)

THE COURT: For where?

JUROR NUMBER 238: A business trip.

THE COURT: Okay. And you're Juror Number what, please?

JUROR NUMBER 238: Number 48.

THE COURT: Knowing that, any objection from the attorneys if we could excuse this person?

MR. LASZCZAK: No objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: Okay. Thank you.

COURT CLERK: I didn't get the juror number.

THE COURT: Juror Number 38 ---

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JUROR NUMBER 238: Two-thirty-eight.

THE COURT: Oh, 238. Okay. All right. So today --- is there anybody down in the jury room? Does she have to report back?

COURT CLERK: She can just go, Judge.

THE COURT: Okay. You can just go. You don't have to be back tomorrow. Okay. Somebody else had their hand raised, as well. Yes. Where -- - what --- what's your situation.

JUROR NUMBER 270: (inaudible)

THE COURT: I'm sorry, what?

JUROR NUMBER 270: (inaudible)

THE COURT: Okay. Now, how can you be living in Ypsilanti --- are you still a resident of Macomb? You must be a resident of Macomb County.

JUROR NUMBER 270: (inaudible)

THE COURT: When did you move out?

JUROR NUMBER 270: August.

THE COURT: And you are at Eastern Michigan?

JUROR NUMBER 270: Yes.

THE COURT: So you are a full-time student?

JUROR NUMBER 270: Yes. (inaudible)

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THE COURT: I'm going to ask the attorneys, any objection?

MR. LASZCZAK: No. No objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: Very normal. No objection.

THE COURT: Okay. So you're excused also.

COURT CLERK: What's your juror number?

JUROR NUMBER 270: Two-seventy.

THE COURT: All right. Nobody else, I believe, raised their hands. So that means that everybody else has to be back here tomorrow. Now --- now, this is an important instruction. I'm not going to read the entire pages because you need to be out. But I'll --- I'll just summarize it.

It's important, even though you are not sworn as jurors and even though some of you don't even know if you're going to make it into the jury box, to not talk about this case with anyone. If you --- if you are asked today if you're going to be picked, what --- even if they say what kind of case, just say the judge has told me I can't talk to you about it at all because here is what would happen.

If you said that I'm --- I'm a juror, it's going to be on a criminal case, and they are going

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to say oh, what kind of case is it. You might say well, I think --- I think the allegation is that it's an armed robbery. Almost inevitably the person that you're talking to is going to start giving you his or her opinion about the status of law in the United States, or about some that he or she had seen on television. And, in that way you're mind is going to be already moved to start thinking about the case with information that you don't get from the courtroom, from the witnesses or from the exhibits.

Or in trying to explain what happens, even though you don't know much about what this case is about, if somebody asks you questions about what kind of case are you on, in answering them, your mind is already going to be pulling bits and pieces of what you've heard today. And inevitably, subtly, but it will happen, you will --- you will find yourself forming an opinion because in trying to explain what you are about to somebody else, you're going to be categorizing things in a way that the lawyers will not know about, I will not know about. And you will be subtly, but realistically starting to form a judgment about the case even at this early

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stage.

So it's absolutely mandatory that you not talk about the case. And it's absolutely mandatory that you not research anything that you've heard about the charge, about any of the people involved. Because information that you gain from the Internet could be --- could be false; could be misleading; most likely, it could be incomplete, and so if there's some technical word that you've heard or some terminology with regard to law, don't be doing any research because it could be misleading.

And, again, the lawyers would have no way of knowing what you have already started to try to pick up. And so you can be deciding the case as something totally different than what is presented in terms of the evidence.

It's not --- it's not overwhelmingly a likely list, but it is a risk. So to be safe, do not do any research whatsoever, either in books, on the Internet, or anything. Leave your mind totally blank. Think about the Tigers. Think about the Lions. Think about anything else, the weather, but don't think about the case except for your obligation to be here tomorrow at 1:15 so we can

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pick up this process as soon as possible. Okay. And with that, you are all excused for the evening. Thank you.

Yes. Another question. Hold on. Yes.

JUROR NUMBER 132: I've heard less than twenty percent of everything that's been said today. I'm --- I'm one hundred percent deaf. I've got medal wires in here in this ear and I'm really deaf in this ear. My hearing aid right here because Costco just gave it back to me and said it's five years old, they won't even look at it. And I don't have $1600 to buy one right now.

THE COURT: Don't anybody leave. Again, could you get Lisa or Greg or --- I need a clerk back. Can we agree that this juror can be excused?

MR. LASZCZAK: No objection, Judge.

MR. TOMKO: No objection.

THE COURT: What is your juror number?

JUROR NUMBER 132: One-thirty-two.

THE COURT: One-thirty-two, okay. So Juror Number 132 is excused. There was one other hand that was raised. Yes, sir. You. You, seated, yes. What's --- what's your situation?

UNIDENTIFIED JUROR: (inaudible)

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THE COURT: We're going to have to ask you more questions about that. That's --- please forgive me. But you are going to have to come back tomorrow. This is not something I can do on the fly. The lawyers are entitled to ask your questions to find out what the real situation is. I --- I sympathize, but I can't help. I'm sorry. You've got to come back tomorrow. There was another juror who was excused.

COURT CLERK: What was that juror number?

COURT OFFICER: One-thirty-two, Lisa.

COURT CLERK: Thank you.

THE COURT: Yeah. All right. Everybody be back tomorrow. Thank you. Okay.

(4:51, proceedings concluded)

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STATE OF MICHIGAN)
)ss.
COUNTY OF MACOMB)

CERTIFICATE

I, Rebecca A. Russell, Certified Court Reporter in the State of Michigan, do hereby certify that the foregoing pages, 1 through 146, inclusive, comprise a full, true, and correct transcript of the proceedings taken by means of video recordation without the benefit of a court reporter present in the matter of People of the State of Michigan v Roberto Dupree, case number 15-3884 FC on Tuesday, May 15, 2018.

Further certify that I, Rebecca A. Russell, will assume no responsibility for any events that occurred during the above proceedings for any inaudible responses by any party that are not discernible on the video of the proceedings.

/s/Rebecca A. Russell

REBECCA A. RUSSELL, 4105
Macomb County, MI

Mount Clemens, MI

DATED: August 23, 2018

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v Case No: 15-3884-FC

ROBERTO MARCHELLO DUPREE

Defendant.

_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA

MT. CLEMENS, MICHIGAN - WEDNESDAY, MAY 16, 2018

APPEARANCES:

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WITNESSES:

None

EXHIBITS:

None

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Mt. Clemens, Michigan

Wednesday, May 16, 2018

At 1:30 p.m.

* * *

THE COURT: Okay. Recalling the case of the People versus Roberto Marchello Dupree. Appearances, counsel.

MR. LASZCZAK: Ron Laszczak on behalf of the People.

MR. HALL: Jeffrey Hall on behalf of the People.

MR. TOMKO: Ready, Judge. Thomas Tomko on behalf of Mr. Dupree.

THE COURT: Okay. Where we left off yesterday, we were just about to turn the matter over to you for voir dire. Anything between this --- now and then to raise to my attention?

MR. LASZCZAK: Nothing from the People, Judge.

THE COURT: Thank you.

MR. TOMKO: Nothing, Judge.

THE COURT: Okay. Let's bring the jurors in.

COURT OFFICER: All rise for the jury please.

THE COURT: Okay. We can all be seated. The

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record will reflect that the fourteen previously seated in the jury box are now back in the jury box in their places, and the rest of the panel has been brought in. Deputy Schumacher, is everybody present and accounted for?

COURT OFFICER: We didn't do a full roll call, Judge, so I can't tell you that.

THE COURT: Okay. It's 1:36. If somebody is not here I wouldn't --- I wouldn't be holding things up anyway. So --- well, I'll ask. Mr. Prosecutor, do you want us to do a roll call to make sure we have every member of the panel here? Same with you, Mr. Tomko, do you want to take time to do that?

MR. LASZCZAK: Judge, I mean, with appeal issues ---

THE COURT: Pardon?

MR. LASZCZAK: For appellate issues, it might be a good idea that we make sure that the jury pool is here.

THE COURT: That's what I'm thinking. Mr. Tomko, what do you think?

MR. TOMKO: I'm in agreement, Judge. I think it's a good idea to make sure we've got everybody here.

THE COURT: Okay. All right. We're going to -

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-- we have the fourteen in the box --- well, I --- I don't know if we have it differentiated.

COURT CLERK: I can do a roll call.

THE COURT: Okay. We will do the roll call. So when the clerk calls your number, raise your hand or -- or say it out loud here so we know we didn't miss you.

COURT CLERK: Juror 292.

JUROR NUMBER 292: Here.

COURT CLERK: Juror 160.

JUROR NUMBER 160: Here.

COURT CLERK: Okay. Thank you. Five.

JUROR NUMBER 5: Here.

COURT CLERK: Eighty-three.

JUROR NUMBER 83: Here.

COURT CLERK: Three-forty.

JUROR NUMBER 340: Here.

COURT CLERK: Two hundred.

JUROR NUMBER 200: Here.

COURT CLERK: Two-ninety-four.

JUROR NUMBER 294: Here.

COURT CLERK: Three-ninety-six.

JUROR NUMBER 396: Here.

COURT CLERK: Fifty-eight.

JUROR NUMBER 58: Here.

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COURT CLERK: Two-fifty.

JUROR NUMBER 250: Here.

COURT CLERK: One-ninety-two.

JUROR NUMBER 192: Here.

COURT CLERK: Two-ten. Juror 210

JUROR NUMBER 210: I'm here.

COURT CLERK: Thank you. Two-twenty-eight.

JUROR NUMBER 228: Here.

COURT CLERK: Two-0-eight.

JUROR NUMBER 208: Here.

COURT CLERK: Three-sixty.

JUROR NUMBER 360: Here.

COURT CLERK: Three-eighty.

JUROR NUMBER 380: Here.

COURT CLERK: Three-thirty-three.

JUROR NUMBER 333: Here.

COURT CLERK: Ninety-two.

JUROR NUMBER 92: Here.

COURT CLERK: Four hundred.

JUROR NUMBER 400: Here.

COURT CLERK: Three-thirty-nine.

JUROR NUMBER 339: Here.

COURT CLERK: Three-ninety-two.

JUROR NUMBER 392: Here.

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COURT CLERK: Two-twelve.

JUROR NUMBER 212: Here.

COURT CLERK: Three-sixty-two.

JUROR NUMBER 362: Here.

COURT CLERK: One-ninety-three.

JUROR NUMBER 193: Here.

COURT CLERK: Three-seventy-seven.

JUROR NUMBER 377: Here.

COURT CLERK: Three-fifty-one. I'm sorry? Three-fifty-one? Juror 351.

THE COURT: Once again, look at your name tag. Is there a Juror 351 in the house?

COURT CLERK: All right. I'll make a note of that, Judge.

THE COURT: Okay.

COURT CLERK: Three-sixteen.

JUROR NUMBER 316: Here.

COURT CLERK: One-twenty-three.

JUROR NUMBER 123: Here.

COURT CLERK: One-forty-six.

JUROR NUMBER 146: Here.

COURT CLERK: Forty-two.

JUROR NUMBER 42: Here.

COURT CLERK: Three-seventy-four.

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JUROR NUMBER 374: Here.

COURT CLERK: Three-sixty-six.

JUROR NUMBER 366: Here.

COURT CLERK: Three-ninety-one.

JUROR NUMBER 391: Here.

COURT CLERK: Two-forty-four.

JUROR NUMBER 244: Here.

COURT CLERK: Twenty-two.

JUROR NUMBER 22: Here.

COURT CLERK: Thirty-seven.

JUROR NUMBER 37: Here.

COURT CLERK: One-o-eight.

JUROR NUMBER 108: Here.

COURT CLERK: Two-forty-eight.

JUROR NUMBER 248: Here.

COURT CLERK: Anybody whose number I did not call?

UNIDENTIFIED JUROR: Mine.

COURT CLERK: Oh, you guys are in the box. You guys are all counted. Okay. Everybody except for that one juror, and I'll find out what's going on with that.

THE COURT: Okay. So in the absence of Juror Number 351, let's --- let's at least call down to the jury clerk's office and we'll wait a minute or two until

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we get a response. Lisa, are you doing that?

COURT CLERK: Yes. I just was checking to make sure they weren't dismiss for cause by the Court and I forget to release them. Okay. I sent a chat to the jury clerk, Judge. It will be just a moment.

(1:37, proceedings paused)

COURT CLERK: Again, no Juror Number 351?

THE COURT: Do we have a name associated with that?

COURT CLERK: We do.

THE COURT: Call out the name, just in case.

COURT CLERK: Essa Qaquish, Q-a-q-u-i-s-h.

MR. LASZCZAK: Mind if we approach.

THE COURT: So nobody is answering to the number. Nobody is answering to the name. My suggestion --- well, let --- let me ---

COURT CLERK: Sir, what's your name? Are you Juror 351?

JUROR NUMBER 351: Yes.

COURT CLERK: Welcome.

THE COURT: Come on in.

COURT CLERK: We have them all.

THE COURT: You were late. If you are serving on the jury, please don't be late again. Have a --- have

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a seat somewhere, if you can. All right. Mr. Tomko, you can begin your portion of the voir dire.

MR. TOMKO: Thank you, Judge. Good afternoon, everyone.

THE COURT: Good afternoon.

JURORS: Good afternoon.

MR. TOMKO: My name is Thomas Tomko, and I'm the defense attorney in this case. And --- let me --- me follow-up because it's important why we are doing this. A jury free from bias, prejudice and sympathy. That's what we are looking for from everyone. So when we ask questions, that's what we really are looking for. And ultimately, as you listen to all of the evidence and things, you are going to have to determine well what are the facts in the case.

A witness is going to testify, let me ask juror in seat number 1, what would you use to think about whether than juror was telling the truth or not?

JUROR NUMBER 305: The --- the testimony of the people called into the courtroom and the --- I don't know if he's going to testify or not, but the --- the witnesses that are called (inaudible) ---

MR. TOMKO: Well, and that's true. If a --- if a witness said I have a yellow copy, is it going to be

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based just on that or is it going to be based on some other things?

JUROR NUMBER 305: Well --- (inaudible) ---

MR. TOMKO: Sure. But what if the person appeared to be nervous? Would that make you wonder whether or not they are telling the truth or not?

JUROR NUMBER 305: Probably not so much because people are nervous. I'm nervous right now. So ---

MR. TOMKO: So a reasonable about of nervous -- - what if they were unreasonably nervous?

JUROR NUMBER 305: I don't know if I could judge that person by that.

MR. TOMKO: Okay. How about --- can you think of any other things beyond that?

JUROR NUMBER 305: In terms of what happened?

MR. TOMKO: To whether or not your believe what they are saying?

JUROR NUMBER 305: I probably would look at body language somewhat. But I would probably listen to what their testimony was.

MR. TOMKO: So how they appear. That may have something to do with it. How about juror in seat 10, you nodded your head. You must have an answer for me.

JUROR NUMBER 243: They are under oath.

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MR. TOMKO: What do you think you ---

JUROR NUMBER 243: They are under oath. They're under oath.

MR. TOMKO: Okay. So there's a promise?

JUROR NUMBER 243: Yes.

MR. TOMKO: Okay. And that's the promise to tell the truth, so that's important. What else can you think of beyond that that might be something you would judge somebody's honestly at all?

JUROR NUMBER 243: Hesitations. Listening to if there are recalling or changing their mind. Or, oh, wait a minute about this. Or I'll say again, it's --- it's reading what their language through television and to feel that they are under oath.

MR. TOMKO: Okay. Those are good observations. How about things like what if they struggle or maybe they fought the question? You know, would that give you some pause as to what they were being honest?

JUROR NUMBER 243: That --- that or the --- the question just doesn't pertain to what they feel they have as a witness.

MR. TOMKO: All right. That's fair. How about --- how about their accuracy? Maybe not just true, but being accurate? Is there anything you can think about as

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to whether or not a person is being accurate?

JUROR NUMBER 243: Yes, accuracy is important because if it's part of the testimony against the defendant himself. In that situation, yes.

MR. TOMKO: Well, just as --- just as a matter of example, I suppose. What if I ask you what color tie I had on yesterday, do you know?

JUROR NUMBER 243: I couldn't tell you. Again, it would be the same as what happened in that situation that happened in 2012.

MR. TOMKO: Sure. And if I asked you, you know, two months from now what color tie I had on today --

JUROR NUMBER 243: Chances of me remembering are slim.

MR. TOMKO: But the period of time between when something happens and when the person is talking about, that may have something to do with, you know, whether or not you accept their testimony?

JUROR NUMBER 243: To the best of my ability, yes.

MR. TOMKO: Sure. And --- and you'd agree --- well, let's --- let's ask someone else. Juror in seat 14, do you believe that someone could try as hard as they

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can to remember something but maybe it just --- it's too long ago?

JUROR NUMBER 78: Yes. (inaudible)

MR. TOMKO: Speak way up because I ---

JUROR NUMBER 78: Yes. Because remembering gets ---

MR. TOMKO: Sure, sure. And so these are the things that --- that we look at when someone testifies. How many people --- they --- they said, once again, they had something to do in their family or they're related to or knew somebody close to them who is a police officer? Where are those hands again? Okay. So, juror in seat number 7, does being a police officer affect whether or not you believe the witness?

JUROR NUMBER 62: No. Being a police officer shouldn't affect whether or not we believe the witness, no. But I do hold them at a higher standard of trust and confidence and courage. Yeah, I --- I don't know that I would believe them, but I hold them at a higher level in --- in my own personal life, yeah.

MR. TOMKO: Well, what do you mean --- if they testified and they were going to tell us what the weather was last Friday, and the fact that they're a police officer, does that make them anymore or less believable

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about that issue?

JUROR NUMBER 62: No.

MR. TOMKO: And when you said a level of trust, what do you mean? A trust in --- in trusting what they say or something else?

JUROR NUMBER 62: I view them as huge members of our community. And raising children, that's what I teach my children, that if you need help, if you are anybody where you need to trust someone, those are who you can go to. That's what I mean by that.

MR. TOMKO: Well, we all watch the news and we know that there's good police officers, bad police officers, right?

JUROR NUMBER 62: Right.

MR. TOMKO: So they are still human.

JUROR NUMBER 62: There's good neighbors and there's bad neighbors in life. And you hold people accountable for what they do to you, right?

MR. TOMKO: Correct. And don't misunderstand. I'm not saying anybody on this case is a bad person.

JUROR NUMBER 62: Right.

MR. TOMKO: What I am saying is that police officers can make the same mistakes that you and I could make.

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JUROR NUMBER 62: Correct.

MR. TOMKO: And so when they testify, they might be trying their best to be accurate, but they may or may not be. Yes?

JUROR NUMBER 62: (inaudible)

MR. TOMKO: You have to say yes or not.

JUROR NUMBER 62: Right. And, again, they are testifying so based on their belief, what they are saying should be accurate to the best of their ability.

MR. TOMKO: Okay. And so if the judge were to explain to you the rule that says hey, look, when a police officer testifies, don't give him extra credibility, don't --- don't trust what they are saying more than anybody else. Just treat them just like any old witness that testified. The question is can you do that?

JUROR NUMBER 62: Yes, I can.

MR. TOMKO: Juror in seat 6, what do you think about those thoughts?

JUROR NUMBER 54: We actually have to treat that testimony the same as the next person.

MR. TOMKO: Right. Right. And are you working now?

JUROR NUMBER 54: Yeah, yeah, I'm working. I'm

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employed.

MR. TOMKO: Okay. Where --- and what type of work do you do?

JUROR NUMBER 54: I'm an electrician.

MR. TOMKO: An electrician. Okay. And as an electrician are you new home construction, or what type of ---

JUROR NUMBER 54: Commercial. Industrial. Free model. Residential.

MR. TOMKO: All right. All right. And so you have a supervisor, correct?

JUROR NUMBER 54: Yes.

MR. TOMKO: And if your supervisor said okay, here's the rules on how we do a particular job. As an employee you'll follow those rules, right?

JUROR NUMBER 54: Yes.

MR. TOMKO: What would happen if you didn't follow the rules?

JUROR NUMBER 54: I'd probably get counseling or something or talked to. We have code books, so we follow those codes, otherwise our job doesn't pass inspection.

MR. TOMKO: And what if you said I know the code but I'm going to do it this way, I think it's

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better? What would happen?

JUROR NUMBER 54: I could pose a danger to someone.

MR. TOMKO: Could. Or the job wouldn't get done the way it's supposed to?

JUROR NUMBER 54: Correct.

MR. TOMKO: Would there be a consequence to you?

JUROR NUMBER 54: I'm sure.

MR. TOMKO: Okay. All right. So the point is is that there's rules and we need to follow them. If the judge gives you a set of rules as to what you're going to use to try to determine whether you believe somebody, would you be able to follow them?

JUROR NUMBER 54: Yes.

MR. TOMKO: Juror in seat number 5, how are you?

JUROR NUMBER 40: Okay. How are you?

MR. TOMKO: Good. We talked about rules and following rules, do you believe that --- or do you feel that in all jobs there's certain rules you have to follow?

JUROR NUMBER 40: Absolutely.

MR. TOMKO: Okay. And if you don't follow the

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rules, what can happen?

JUROR NUMBER 40: There are consequences for your actions.

MR. TOMKO: I'm sorry?

JUROR NUMBER 40: There are consequences for your actions.

MR. TOMKO: What do you think some of the consequences could be?

JUROR NUMBER 40: Depending on what you did or did not do. Are we talking about work or ---

MR. TOMKO: Work.

JUROR NUMBER 40: Work, you could be terminated.

MR. TOMKO: Sure. If it was bad enough, you could be terminated. And, let's say, someone asks you if you followed the rules, but you really didn't. Would there be some incentive to just say you followed the rules?

JUROR NUMBER 40: (inaudible) I'd have a guilty conscience, so no.

MR. TOMKO: So not for you?

JUROR NUMBER 40: No.

MR. TOMKO: But if could be for somebody else?

JUROR NUMBER 40: Potentially, yes.

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MR. TOMKO: Okay. All right. And so one of the things that we would use to look at somebody's credibility is whether or not there might be a consequence to them, right?

JUROR NUMBER 40: Yes.

MR. TOMKO: So if you're the boss and somebody told you it happened this way, but you say no, it happened another way, you might want to reprimand that person even though they said it the right way?

JUROR NUMBER 40: Yes.

MR. TOMKO: Right. How about juror in seat 8, how are you?

JUROR NUMBER 157: Well.

MR. TOMKO: What do you think about this reasonable doubt thing? What's your definition? Let's just ask that.

JUROR NUMBER 157: Beyond a reasonable doubt means to me --- it would mean that in my mind, you know, beyond normal things that you might question are normal, any normal doubt you might have about information or pertaining to pieces of information that what you're being told what you are looking at makes sense or would -- that you could come to the conclusion and --- it would be reasonable to come to a conclusion aside from it being

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like normal doubts or I use my common sense.

That's kind of rambling, but I --- I'm not sure that's the best definition. I don't know what you're looking for.

MR. TOMKO: Almost as hard as the definition you're going to get for reasonable doubt.

JUROR NUMBER 157: Yes.

MR. TOMKO: But it's honest and that's okay. I'm not --- I'm not saying it to make fun. I'm just saying --- the concept of reasonable doubt is kind of trick --- tricky or ---

JUROR NUMBER 157: It's a hard way to define it. It's more of a concept, you know, of how you define doubt or how you define ---

MR. TOMKO: Do you think that how you define something beyond a reasonable doubt that you'd have to guess about something?

JUROR NUMBER 157: No.

MR. TOMKO: Why is that?

JUROR NUMBER 157: I would say just --- if it's guessing, you know, even just fifty-fifty --- I would say that's not reasonable.

MR. TOMKO: Okay.

JUROR NUMBER 157: It's too much of a guess.

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MR. TOMKO: So if it's fifty-fifty, that's not beyond a reasonable doubt, is it?

JUROR NUMBER 157: I wouldn't say so.

MR. TOMKO: Juror in seat number 3, what do you think about this reasonable doubt thing? What's your definition?

JUROR NUMBER 102: That you one hundred percent believe that it was it is. There is no question in your mind like maybe this or maybe that, there's absolutely no --- no question in your mind.

MR. TOMKO: Okay. So that's fair. So for you it's got to be an absolute certainty?

JUROR NUMBER 102: Yes.

MR. TOMKO: Would you trust in the concept that --- that it could be almost absolute certainty, but not quite and still be beyond a reasonable doubt?

JUROR NUMBER 102: No.

MR. TOMKO: All right.

JUROR NUMBER 102: I have to be absolutely certain.

MR. TOMKO: All right, all right. So you're saying if you --- for you to have some doubt, you would said it's reasonable, it could have happened a different way?

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JUROR NUMBER 102: Yes. Even when I'm making details sometimes, you forget people (inaudible) and say oh, even that minor detail changes the whole picture.

MR. TOMKO: All right. All right. All right. How about juror in seat number 2? How are you today?

JUROR NUMBER 101: Okay.

MR. TOMKO: Okay. You mentioned earlier that there's some difficulties with your job, with being here today?

JUROR NUMBER 101: Yes.

MR. TOMKO: I don't know, maybe it's too personal. But on your job, do you get paid by the job?

JUROR NUMBER 101: Yes, by the job, right.

MR. TOMKO: And by being here are you missing jobs?

JUROR NUMBER 101: Yes, I am.

MR. TOMKO: In your household, who --- who are the income earners?

JUROR NUMBER 101: Just myself.

MR. TOMKO: Just --- you live by yourself, right?

JUROR NUMBER 101: Yes.

MR. TOMKO: And --- and missing --- and missing work for a few days for court, we talked about this

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afternoon, tomorrow, Friday, maybe a day next week. Will that have a significant impact on your income?

JUROR NUMBER 101: Absolutely.

MR. TOMKO: Explain what that is.

JUROR NUMBER 101: I won't have enough money to pay my bills.

MR. TOMKO: Okay. Okay. And that's a hardship on you?

JUROR NUMBER 101: Yes, it is.

MR. TOMKO: Let me ask you this. What's the -- - what's your idea of what beyond a reasonable doubt means?

JUROR NUMBER 101: I'd say about seventy percent ---

MR. TOMKO: Pardon?

JUROR NUMBER 101: I'd say seventy/third.

MR. TOMKO: So yours is a seventy/thirty?

JUROR NUMBER 101: Yes.

MR. TOMKO: So we've got a hundred percent. We've got seventy/thirty, we've got more than fifty/fifty. So we've got a lot of definitions going on. But for you, that's --- that's where you're looking at. All right. So the reason I'll ask, you know, some things we have to be more certain about than others.

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Let's say you were going to go to the store and you were going to buy yourself a candy bar. You see a brand new one you never saw before. You say ah, that might be pretty good and it cost you $1.39. You might buy it, right?

JUROR NUMBER 101: Yeah, possibly.

MR. TOMKO: If you went to the auto showroom, and you were looking at a new car, you saw a new car you never knew before and didn't know anything about, and it's $139,000. Would you just say I'll try it?

JUROR NUMBER 101: I'd try it.

MR. TOMKO: Would you just try it with $139,000, or would you check into it more?

JUROR NUMBER 101: I'll try it.

MR. TOMKO: Well, I wish I had $139,000. But I think for most people, the purpose of the example is to -- -- is to say hey, some things not as significant, you're not going to think about it so much. Other things, we're talking beyond a reasonable doubt, I want --- I don't have any doubts in buying this car, I might check the mileage, okay?

JUROR NUMBER 101: Right.

MR. TOMKO: And I might check, well, the rating in the --- in the --- you know, in the auto magazine,

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right?

JUROR NUMBER 101: Right.

MR. TOMKO: And I might check, well, you know, how many other people bought that car and liked it, and how many said they had a lot of problems with it? And would you do that for a car light that?

JUROR NUMBER 101: I would think so.

MR. TOMKO: Okay. How about juror number 1, what are your thoughts about some of those things? What is beyond a reasonable doubt to you?

JUROR NUMBER 305: I feel like it's almost a hundred percent. You've got the facts. You've look at it completely. And you decide whether or not (inaudible) ---

MR. TOMKO: Okay.

JUROR NUMBER 305: --- (inaudible).

MR. TOMKO: Fair enough. Because what --- what I'll submit is there's --- there's probably not a particular number with a hundred percent ---

JUROR NUMBER 305: No.

MR. TOMKO: I would say --- I would say it's probably more than fifty/fifty. You know, we have a thing called the preponderance of the evidence that attorneys talk about. That's more reasonable than not or

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something like --- that's more than fifty/fifty. So it is something that approaches certain amount. Maybe not exactly one hundred percent certainty. But pretty darn close. Is that --- that fair? Can you accept that?

JUROR NUMBER 305: (inaudible) closer to a hundred than fifty/fifty.

MR. TOMKO: All right. Fair enough. Juror in seat number 8, what do you think about this beyond a reasonable doubt thing? There is no wrong answer, by the way, okay.

JUROR NUMBER 157: I --- I think --- I think it's beyond reason. (inaudible)

MR. TOMKO: Okay. Explain that a little bit more. Can you give me a --- can you give me an example.

JUROR NUMBER 157: Well, you have to have the facts to decide, you know, like evidence and (inaudible). Like you make your list and you --- you know, you want to make sure you have all the facts and (inaudible) ---

MR. TOMKO: All right. Well, let's --- let's build this a little differently. Let's say there are five things that had to be shown by the prosecution, elements.

JUROR NUMBER 157: Right.

MR. TOMKO: And let's say you have to find each

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of them beyond a reasonable doubt. And let's say, you define four but not the fifth one. And if the judge gave you a rule that said you've got to find all five beyond a reasonable doubt, what would your conclusion as to whether or not there's beyond a reasonable doubt on all five.

JUROR NUMBER 157: You have to have all five?

MR. TOMKO: Yes.

JUROR NUMBER 157: Than I --- I wouldn't be able to do it.

MR. TOMKO: Right. So it's not just beyond a reasonable doubt, you know. The big picture is beyond a reasonable doubt; beyond a reasonable doubt; beyond a reasonable doubt for all five.

JUROR NUMBER 157: Right. Yes. You'd have to have all --- all of the facts and all --- you'd have to have all your pieces. You know, you'll have to have your reasons, you know. For all the --- you know, for all the stuff and good reason (inaudible) ---

MR. TOMKO: Well, what if --- what if these were where you might say ah, it might be fifty/fifty? Is that beyond a reasonable doubt?

MR. LASZCZAK: Judge, I'm going to object to that statement. The case law indicates that reasonable

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doubt really can't be quantified to a percentage or to a number. And I understand counsel's questions to the jurors, potential jurors. The jurors were answering to that form. But counsel is indicating a definition of a numerical number and I just don't think it's proper based on case law.

THE COURT: Yes. The --- I'll handle it this way. I'm going to allow Mr. Tomko to --- to continue to explore this except you always have to bear in mind that I alone --- not because I think I'm so good --- but this is the job --- this is the job that the law had --- has given to the judge. Only my instructions on what reasonable doubt means are things that you are to accept and apply.

The lawyers are permitted to ask questions, as long as it's understood that --- that they are probing into what your --- your --- your thoughts may be coming into this as to what the term may mean, to see if there's something that you --- you have in mind about the term that --- that needs to be explored. But they are not the source of information.

The source of information as to what is reasonable doubt, is what I will read to you. And I'll tell you, I'll just read it again because it --- it is

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one of those definitions that circles back on itself. It seemly says this:

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, or a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Now, I will add one more clarifying point. And, again, I'm not going to stop the lawyers from asking these questions. But, again, when I give an example or when I give a statement of what the law is, you are bound to take it. We --- well, let me just put it this way.

We know some things that --- that we can exclude. First of all, proof by a preponderance of the evidence would mean just a featherweight more than fifty percent. Just tipping the scales ever so slightly. That's the standard we use in civil cases. That is not applicable here.

There's another standard that we sometimes use in other cases, which are not criminal cases. Certain types of --- of civil cases require proof by clear and convincing evidence. That's the next highest standard.

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The standard after that is proof beyond a reasonable doubt. That's the highest standard that we have in proof in the judicial system that applies to criminal cases. But there is no expectation that anybody could --- could find anything to a hundred percent certainty. That in human affairs is impossible, unless you experienced it yourself and if you've experienced it yourself, then you would be a part of the case. You would be a witness. You would not in --- on --- on the jury. So we know that reasonable doubt is not one hundred percent certainty.

Now, with those broad mathematical type of descriptions, again, even I have to return to the definition. And if you ask me for further clarification, again, all I could do is repeat the definition that I've read now, several times. A reasonable doubt is a fair, honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and the circumstances of this case.

But, again, I will let the attorneys continue to ask questions as long as you understand they are not

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trying to plant into your mind a definition. They are really trying to draw out from you any predilections, preconceptions, that you might have about the term. Mr. Tomko, you may continue.

MR. TOMKO: Thank you, Judge. So the real question is the judge is going to give us instructions and tell us what things are. Juror in seat number 8, the question is can we follow those instructions?

JUROR NUMBER 157: Yes.

MR. TOMKO: And you've heard the differences, or different burdens of proof beyond a reasonable doubt. Can you follow this the instruction about beyond a reasonable doubt?

JUROR NUMBER 157: I will try.

MR. TOMKO: And that's fair. Thank you. Juror in seat nine, how are you?

JUROR NUMBER 209: Fine. Thank you.

MR. TOMKO: Good. Yesterday I heard --- I heard an example about a --- a puzzle. Do you remember that example?

JUROR NUMBER 209: Yes, I do.

MR. TOMKO: If I told you that this is case is nothing like building a puzzle, what would you think?

JUROR NUMBER 209: It not simplistic.

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MR. TOMKO: Perhaps. But, also a puzzle has just one solution, correct?

JUROR NUMBER 209: I would agree ---

MR. TOMKO: Because a puzzle has a picture right here and --- and you put the pieces together. An you know what you are already getting.

JUROR NUMBER 209: Right.

MR. TOMKO: Right. So you understand that this isn't like building a puzzle. It's more like you have to listen to the evidence and you get to decide what the picture is.

JUROR NUMBER 209: Exactly.

MR. TOMKO: Do you see the difference?

JUROR NUMBER 209: Yes.

MR. TOMKO: All right. Because --- and that's the reason that we have all these jurors. Everyone has to agree of what --- what --- what this picture is.

JUROR NUMBER 209: Right.

MR. TOMKO: When it comes to reasonable doubt, are you able to follow the instructions about that?

JUROR NUMBER 209: Yes.

MR. TOMKO: How about a police officer? What do you think about a police officer's testimony versus somebody else's testimony? What are your thoughts?

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JUROR NUMBER 209: I believe they hold the same amount of weight. It's just that as a police officer --- I have to put honest, just because they are a police officer, I was brought up to believe that --- and I know you said there are good police and bad police just like everything. But I guess I would believe that the facts that they have, if they are telling me, and they are under oath, that they are telling me the truth. They are reading me the facts of the case and they have the Information down in front of me, I would believe it as the truth.

MR. TOMKO: Did you ever see a situation where the police officer might not tell the truth?

JUROR NUMBER 209: Not in my personal life, I haven't had that.

MR. TOMKO: Okay. All right. Might a police have an incentive to shade something one way or the other?

JUROR NUMBER 209: I guess like you said, there's good people and there's bad people. So I know that there's police aren't truthfully --- you know, all the time truthful, but I --- I guess like the situation you hear on the news, there's a kickback for something, dealing drugs or whatever it is, something like that.

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MR. TOMKO: Do you think that if somebody didn't do their job, where the supervisor said it needed to be done. Anyway, maybe the way the rules. Maybe they just didn't do it in a way that wasn't maybe the best practice. Do you think they might have incentive to cover it up.

JUROR NUMBER 209: Possibly.

MR. TOMKO: And to shade things one way that maybe they would had if they had done things correctly?

JUROR NUMBER 209: Yes.

MR. TOMKO: You know, when you listen --- listen to all this and --- and I think you're one that said you watch CSI ---

JUROR NUMBER 209: Yes.

MR. TOMKO: I like those shows, too. You know, when you watch a show like that, in the very beginning when you look at it, you think oh, boy, you watch the first ten minutes, you say I --- I know who the person is. Do you ever do that?

JUROR NUMBER 209: Yeah. Lots of times you can figure it out, you know.

MR. TOMKO: But isn't it true that sometimes you get to the end and all of a sudden oh, oh, something's different ---

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JUROR NUMBER 209: Right.

MR. TOMKO: --- and it's something different. I try to pick someone like that and --- and you'll be instructed to hold you decision until the very end. And so part of being a jury is to follow instructions. And so are you the type of person who can hold your decision until the very end?

JUROR NUMBER 209: Yes, I think I could.

MR. TOMKO: Because if there were seven, eight, nine, ten witnesses, if you decide in the beginning, you might not pay much attention to the last ones; is that fair?

JUROR NUMBER 209: No. (inaudible) --- and I follow ---

MR. TOMKO: So you would listen ---

JUROR NUMBER 209: I follow ---

MR. TOMKO: --- you wait until the very end?

JUROR NUMBER 209: I would, yes.

MR. TOMKO: All right. All right. So, juror in seat 10, how about you? Do you watch those shows, the CSI and ---

JUROR NUMBER 243: No, I don't

MR. TOMKO: Your life is easier. But are you a moviegoer, do you ---

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JUROR NUMBER 243: I watch movies mostly.

MR. TOMKO: --- watch mysteries or things --- or something ---

JUROR NUMBER 243: Not to a sickness.

MR. TOMKO: Did you see the new Avengers movie?

JUROR NUMBER 243: No, I have not.

MR. TOMKO: It's pretty good. Anyway --- but even in those types of --- of movies where --- where there's a plot that unfolds; is that fair to say?

JUROR NUMBER 243: Yes.

MR. TOMKO: And --- and really if you keep an open mind about, as we enjoy it, and remember we all said CSI, we all said that's entertainment, right?

JUROR NUMBER 243: Yes.

MR. TOMKO: And, really, if you keep an open mind about as we enjoy it and remember CSI, we all said that's entertainment, right? Any movie we watch is some form of entertainment. And so we naturally think about things about it. We will look at it and we will make decisions. And go along with this character later they really are the hero, or something along those lines; is that fair?

JUROR NUMBER 243: Yeah, absolutely.

MR. TOMKO: Now, can you accept that a trial is

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similar only we have to wait to the very end to get to that point where we say uh, I have to listen to all the evidence. Can you follow that instruction?

JUROR NUMBER 243: Absolutely.

MR. TOMKO: What is your idea of what is beyond a reasonable doubt is?

JUROR NUMBER 243: It has to be something that I wouldn't question. This makes sense to me so (inaudible) --- I understand what they're saying and it's something that's either yea or nay, with regards to that (inaudible).

MR. TOMKO: What about witnesses, what do you use to judge a witness to see whether or not they are being accurate or telling the truth?

JUROR NUMBER 243: A combination. First and foremost, was that they are under oath. And they take that oath o tell the truth, the whole truth. Their body language. Their voice and whether they hesitate and not being sure of themselves. Are they confident in what they're saying? And then how confident can you possibly be?

MR. TOMKO: What about if you thought they may be hiding something?

JUROR NUMBER 243: Absolutely. But, there

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again, I think that's where the attorneys come into play by asking the questions that will lead to the answer.

MR. TOMKO: Can you accept, too, that questions by the jury are --- well, not by the jury, but by the attorneys, that those are not evidence.

JUROR NUMBER 243: No.

MR. TOMKO: So if I ask the world's best questions --- I hope I do --- that question itself isn't the evidence, it's the answer.

JUROR NUMBER 243: It's the answer to that question.

MR. TOMKO: And, juror in seat 11, how are you?

JUROR NUMBER 89: Just fine.

MR. TOMKO: You're taking notes already? I see that you have a notebook.

JUROR NUMBER 89: I'm a note-taker. I hope that's okay.

MR. TOMKO: Well, that could be good. Well, the notes are interesting because notes are the way we memorialize things, correct?

JUROR NUMBER 89: Well, I guess.

MR. TOMKO: Well, and it helps you to remember later.

JUROR NUMBER 89: Yes.

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MR. TOMKO: So, say, for example, a witness is called to the stand and they are going to testify to the color of tie that I wore yesterday.

JUROR NUMBER 89: Okay.

MR. TOMKO: And they --- they picked a color. They said yellow. If they had notes and they say yeah, I took notes and I --- I wrote down that he had a yellow tie yesterday. That would be helpful. They didn't take notes, but they took a --- a photograph and they showed you the photograph. That would be helpful, wouldn't it?

JUROR NUMBER 89: Yes.

MR. TOMKO: What if they testified and they said I had a photograph but I threw it away? Does that help you to believe their testimony or question their testimony?

JUROR NUMBER 89: I would make me question it. If they say they threw it away and (inaudible).

MR. TOMKO: Because I didn't have a yellow tie on yesterday. I had a blue tie on.

JUROR NUMBER 89: I didn't remember, but I knew it wasn't yellow.

MR. TOMKO: Trust me, if I was being a witness. But, no, I didn't have --- and if that witness said no, it was yellow; so, sir, did you have a picture of it?

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Yes, I did, but I didn't bring it truly. That would give you pause as to wonder well, huh, I didn't know it was going to be important to find out what color tie the person was wearing, why didn't you keep the picture? Would that be something you would consider? You need to think about it whether --- whether or not you believe that person.

JUROR NUMBER 89: (inaudible)

MR. TOMKO: Right. And I think everybody would. Does everybody agree? Anyone not agree with that? And it wouldn't matter if it was a police officer or an individual, would it?

JUROR NUMBER 89: Absolutely not.

MR. TOMKO: And what about this whole I idea of oh, man, I've got to wait until the end before I decide what's going on? Are you that type of person or do you sometimes look at the beginning and say Oh, boy, I know what's going on?

JUROR NUMBER 89: No. I want to hear all the facts.

MR. TOMKO: And if you're instructed to do so, you will?

JUROR NUMBER 89: Absolutely.

MR. TOMKO: You know who's next. Juror in seat

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number 12, how are you?

JUROR NUMBER 82: Good. How are you?

MR. TOMKO: I'm great. What about --- what about this idea of the policemen? Do you think they're more honest than other people?

JUROR NUMBER 82: No. I think there are bad cops and good cops just like any other people.

MR. TOMKO: And --- and remember, this isn't a question of good or bad. This is a question of accuracy, believability ---

JUROR NUMBER 82: Right.

MR. TOMKO: --- and do they remember correctly? And the fact that they're a police officer or not, that really --- that's not part of it; is that fair?

JUROR NUMBER 82: Yes.

MR. TOMKO: And can you follow that instruction and treat a police officer like any other witness?

JUROR NUMBER 82: Yes.

MR. TOMKO: Let's say --- let's say we had a trial, and let's say we had seven witnesses. Everyone one of them was called by the prosecution. Would the fact that they called seven witnesses and the defense calls zero, would that lead to any conclusions?

JUROR NUMBER 82: No.

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MR. TOMKO: And why is that?

JUROR NUMBER 82: (inaudible) from both sides, the prosecution and the defense.

MR. TOMKO: Say the defense did nothing, nothing?

JUROR NUMBER 82: You still have to look at all the evidence and wait to the very end.

MR. TOMKO: And you can follow the rules that the judge gives you, correct?

JUROR NUMBER 82: Correct.

MR. TOMKO: And as the judge told you, he said, look, there's one side of this case that has the burden of showing everything. It's on the prosecution side. You can accept that?

JUROR NUMBER 82: Yes.

MR. TOMKO: And instruct you that the defense doesn't have to do anything and you can't hold it against him.

JUROR NUMBER 82: Right.

MR. TOMKO: Can you accept that?

JUROR NUMBER 82: I can accept it.

MR. TOMKO: What if the defendant doesn't testify? How do you feel?

JUROR NUMBER 82: It would be fine. I'd look

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at all the evidence, listen to the prosecution and --- (inaudible).

MR. TOMKO: Right. And --- and what if beyond that the judge says hey, if the defendant choose to not testify, because he's got a Constitutional right not to, you can't use it against him. Can you accept that?

JUROR NUMBER 82: Yes.

MR. TOMKO: Juror in seat 13, how are you?

JUROR NUMBER 127: I'm fine. How are you?

MR. TOMKO: Good. What do you think about all of this? Interesting, isn't it?

JUROR NUMBER 127: Yes.

MR. TOMKO: What did you think when you first heard the case was armed robbery?

JUROR NUMBER 127: Well, if you don't me asking you a question.

MR. TOMKO: Well, I'm not here to answer questions, but I don't know --- go ahead.

JUROR NUMBER 127: Well, when I first --- I mean, it didn't really matter that it was armed robbery. My question is if this was in 2012, what happened, you know, in the previous six years until today?

MR. TOMKO: Well --- and perhaps the witnesses will explain that.

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JUROR NUMBER 127: Right.

MR. TOMKO: And --- so --- and the fact that somebody is charged with something, armed robber, shoplifting, whatever it might be, doesn't prove if anything happened or didn't happen, does it?

JUROR NUMBER 127: No.

MR. TOMKO: And it's a --- it's also something that's important, and I guess it's important to Mr. Dupree. And so we want to take everything seriously. Are you a person who can take it seriously?

JUROR NUMBER 127: Yes.

MR. TOMKO: So it's not like building a jigsaw puzzle.

JUROR NUMBER 127: Correct.

MR. TOMKO: It's important and we have to see what the rules are. And the question is, again, if the judge says that there are five things that have to be proven and the burden is on the prosecutor; will you hold the prosecutor to that burden?

JUROR NUMBER 127: Yes, absolutely.

MR. TOMKO: And if you have reasonable doubt on three of those five things, what would your verdict be?

JUROR NUMBER 127: If it's not a hundred percent, I'll (inaudible)

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MR. TOMKO: So it doesn't matter if you doubt three of them, two of them or one of them, if you have a reasonable doubt about any one, your verdict would be?

JUROR NUMBER 127: Right. Just like I said yesterday. I wasn't there, so I wouldn't --- either way, I wouldn't know a hundred percent. So four out of five, three out of five, I mean, it's not a hundred percent.

MR. TOMKO: And then the verdict is?

JUROR NUMBER 127: Not guilty.

MR. TOMKO: Not guilty. As we stand here today, when we know what evidence is and the judge will explain what evidence, have we heard the evidence yet?

JUROR NUMBER 127: No.

MR. TOMKO: So if we start with the presume of not guilty and I ask you for a verdict right not, what would have to say?

JUROR NUMBER 127: Not guilty.

MR. TOMKO: Does everyone agree? Juror in seat 14, hello again.

JUROR NUMBER 78: Hello.

MR. TOMKO: What are your thoughts about this beyond a reasonable doubt? What do you think beyond a reasonable doubt it?

JUROR NUMBER 78: I have to be one hundred

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percent sure. (inaudible).

MR. TOMKO: All right. But remember the judge says it's not a number. It's not like one hundred. It's not ninety-nine. It's not ninety-five. But it's something that's pretty darn sure; is that fair?

JUROR NUMBER 78: Yes. I have to accept that.

MR. TOMKO: And you can accept the definition the judge gives you for that?

JUROR NUMBER 78: Yes.

MR. TOMKO: All right. And --- I forgot. Did you raise your hand? (inaudible, door slamming). You had a relative who is a police officer?

JUROR NUMBER 78: No.

MR. TOMKO: Is not, okay. And what about --- you're working now?

JUROR NUMBER 78: Yes. I need to go to work right after this.

MR. TOMKO: Oh, okay.

JUROR NUMBER 78: I'm in my work uniform.

MR. TOMKO: And, of course, at work if you don't follow the rules, there's a consequence, right?

JUROR NUMBER 78: Right.

MR. TOMKO: What if one of the rules had to do with gathering evidence for a case that may go to trial,

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and you didn't do it the right way? What would you think?

JUROR NUMBER 78: Well, if I didn't do it the right way, (inaudible) ---

MR. TOMKO: Well, what if it came in anyway and they present it as evidence, even though it wasn't so proper, what would you think about that? The --- the mere fact that it wasn't gathered the correct way?

JUROR NUMBER 78: That would just make it difficult for me to reach a decision if it wasn't done properly.

MR. TOMKO: Juror in seat 7, what do you think about it?

JUROR NUMBER 62: I think that you have to understand the circumstances regarding gathering the evidence. So if it was --- if the evidence was presented, and the circumstances regarding how that evidence was presented was delivered as well, then that would determine whether I would agree with the evidence or not agree with the evidence.

MR. TOMKO: Okay.

JUROR NUMBER 62: The circumstances would determine the evidence.

MR. TOMKO: Juror in seat 6, what do you think?

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JUROR NUMBER 54: Well, for me it --- let's say it was video evidence, I don't care how the evidence --- they got the evidence, they've got the evidence. I can see the evidence and that weighs in on my conclusion. Then, so long as it was allowed to be in evidence, I mean ---

MR. TOMKO: Okay. Well, you mentioned a video. What if there's a video of the entire episode that happened? That would be pretty helpful, wouldn't it?

JUROR NUMBER 54: Sure.

MR. TOMKO: What if there's a video of a little bit of what happened, but another portion of it was thrown out, or lost.

JUROR NUMBER 54: You take that into account and why is that lost.

MR. TOMKO: Well, the reason why it was lost, would that enter your mind?

JUROR NUMBER 54: Sure. Absolutely.

MR. TOMKO: And if something important was in the lost part, would that enter your mind?

JUROR NUMBER 54: Oh, yeah.

MR. TOMKO: Juror in seat 1, if someone is qualified as an expert, what's your idea of what an expert is?

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JUROR NUMBER 305: Some people have training to become an expert. Some people have had additional classes, maybe a degree in something, you know, toxicology or so, it would be an expert in that.

MR. TOMKO: And what is your profession?

JUROR NUMBER 305: I am retired.

MR. TOMKO: Sorry?

JUROR NUMBER 305: I am retired.

MR. TOMKO: From?

JUROR NUMBER 305: From Oakland County. I was a nurse.

MR. TOMKO: So a nurse, that's a great example. So I am not a nurse. I don't know anything. I would look to you as an expert in nursing; is that fair?

JUROR NUMBER 305: Pretty much, yes.

MR. TOMKO: Okay. Because --- but as a witness, if you were to testify as a nurse, I would still have a choice of believing you or not believing you even though you were the expert.

JUROR NUMBER 305: Yes.

MR. TOMKO: And so if the judge instructs us all that way, you could accept that instruction?

JUROR NUMBER 305: Yes.

MR. TOMKO: Okay. How about juror in seat

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number 2, what --- what's your idea --- who's --- what --- what do you think an expert is?

JUROR NUMBER 101: A guy who would give you a hundred percent of ---

MR. TOMKO: A hundred percent?

JUROR NUMBER 101: --- of specialists.

MR. TOMKO: Specialists. And if a person is a specialist, and they --- they give us knowledge that we --- we don't have that makes them an expert in their field; is that fair?

JUROR NUMBER 101: Yes.

MR. TOMKO: And so you if someone testifies as an expert, you can still believe them or not believe them, right?

JUROR NUMBER 101: Yeah.

MR. TOMKO: Because just because they are an expert doesn't mean they're --- oh, I've got to believe everything they say, right?

JUROR NUMBER 101: I can use my own mind.

MR. TOMKO: And if the --- juror in seat 3, if the --- if the judge instructs us along those lines that a person can be an expert to help us understand things, but you can still choose to believe or not believe what they say. You can do that, correct?

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JUROR NUMBER 102: Yes.

MR. TOMKO: Okay. Who is an expert to you? What do you think?

JUROR NUMBER 102: I work in the Troy School System, so we have healthcare professionals that come.

MR. TOMKO: Because they had training that we didn't have.

JUROR NUMBER 102: Absolutely.

MR. TOMKO: Or --- or you didn't --- I don't either, but I'm sure you didn't have it either.

JUROR NUMBER 102: I have quite an extensive --

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MR. TOMKO: Okay. All right. After listening6to everything that we've heard, is there anybody here who doesn't think they can be fair in this case? That's what we are looking for, is a fair jury. That's all I have.

THE COURT: Okay. At this time we are going to ask the attorneys if there are any challenges that you have for cause. And we will start with the prosecution. Any challenges for cause?

MR. LASZCZAK: Judge, there are multiples do you want to go right through them, or do you want to do one at a time?

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THE COURT: Let's do it one at a time.

MR. LASZCZAK: And --- and --- we are going to do juror seated in seat number 3, Judge. I'm going to challenge for cause and --- and the reason, Judge, is because through questioning by Mr. Tomko, he gave an example regarding the reasonable doubt, what it meant to her. She indicated that it was one hundred percent certainty; that there was no questions, if ands or buts about this. He indicated to her, second, well, what if I was to tell you that that's not the standard and the standard is actually a little bit something less than then, would you be able to follow that standard, and she said no, it's one hundred percent.

At that time, Judge, we did have --- I did have an objection, which you did read some --- the reasonable doubt definition and there was no further questioning from that juror. But I believe based on her prior answers it seems that she would be unable to render a decision based on the law in which Your Honor gives based on what she believes reasonable doubt to mean. And for that, Judge, I ask that she be excused for cause.

THE COURT: Okay. Mr. Tomko, do you agree?

MR. TOMKO: Judge, I would just invite the Court to inquire ---

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THE COURT: Okay. I will. I will. Okay.

MR. TOMKO: --- I would --- before I followed up I just wanted to know if you agreed on --- on the face of it. Okay. Juror in seat number 3, again, understand that I will be giving you instructions and you are to follow those instructions. I realize that when you're a juror you're dealing with legal terms that you've never had to think about before. And so you've heard some of the discussion, so let me --- let me just go at this one more time.

Remember when I was giving the explanation of the various standards of proof, and I said there's proof by a preponderance of the evidence, that's the lowest standard because it's only if you imagine the scales of justice, it tips just a little bit, a featherweight will --- will make one side predominate. That's the standard of proof that we are always using in civil cases where there's less significant issues involved in civil cases. And so it's --- it's a lower standard. Just is it more likely than not tipping the scales ever so much.

The next is proof by clear and convincing evidence. Which I won't get into a complete definition of that, but it's higher standard. It has to be clear. It has to be convincing. So it's not just a little more

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likely than not. It has to be clear and convincing.

The standard above that is proof beyond a reasonable doubt, which is the highest standard and I've read the definition a couple --- a couple of times.

The point here is that you used the word one hundred percent. Are you --- are you fixed with that in your mind that you would accept proof --- that proof beyond a reasonable doubt to you would mean one hundred percent certainty? Or are you --- are you willing to listen and understand that the definition of reasonable doubt does not mean one hundred percent certainty. Because --- and I'll repeat this again --- one hundred percent certainty would that you, yourself, witnessed something. That you know it because you experienced it.

If you have to listen to other people tell you what happened, I think you can understand, and I hope you can, the statement that none of us can be certain with one hundred percent certainty unless we experience it ourselves. First of all, do you agree with that statement?

JUROR NUMBER 102: Yes.

THE COURT: All right. Now, after giving you that statement, when I say would you demand --- in order for the prosecutor to prove something beyond a reasonable

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doubt, would you demand in your own mind, one hundred percent certainty in order to come back with a guilty verdict?

JUROR NUMBER 102: Well, after hearing it and the way you've explained things, nothing is really one hundred percent and if there were other details that, you know, that we can hear everything that was brought up, yeah, I could, you know, yes, that's a possibility, that could happen.

THE COURT: Okay. So the question then is if you had some doubt, but you looked at in and you said, you know, that doubt isn't really based on reason or common sense. It's just speculation. It's just a what-if. Could you put that doubt aside and vote for a guilty verdict even with that doubt, if you determine that the doubt you were entertaining was not reasonable?

JUROR NUMBER 102: Yes.

THE COURT: So after all of this discussion, and I know that these are terms that we just don't deal with everyday, but you understand that it would be unfair and not right for you to demand one hundred percent certainty because that's an impossibility? Can we agree on that?

JUROR NUMBER 102: Yes.

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THE COURT: All right. So with think that with that explanation do you think that you can accept the definition of beyond a reasonable doubt that the Court gives?

JUROR NUMBER 102: Yes.

THE COURT: Okay. Yeah, for cause I'm going to respectful deny their --- their request to excuse the juror for cause. So we will go --- we will do this in turn for cause. Mr. Tomko, do you have any excuses for cause?

MR. TOMKO: For --- for cause I think juror 2 would be a --- a good juror otherwise, but the hardships that I'm hearing for his, you know, financial and --- and being the only one --- he's the only breadwinner, and being off work for a time, you know, in his business, he said it was a financial strain. I would ask the Court to reconsider for cause after the questions asked.

THE COURT: Mr. Prosecutor, do you agree?

MR. LASZCZAK: Judge, I don't have any objection.

THE COURT: Okay. The juror in seat number 2, the lawyers have listened to you. I couldn't do it outright because I needed to have them to have the chance to ask you more questions. But they are in agreement,

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and I agree too, you can be excused for cause. We just think that the hardship that you would face would be too distracting and so we are going to permit you to be excused. So thank you. Okay. You go back down to --- to the first floor. And, again, I'm sure the lawyers join with me sympathies for your loss that you're --- you're alone now. I thank you for your service. Thank you. Let's fill the seat.

COURT CLERK: Juror Number 292.

THE COURT: All right. Juror in seat number 2, you were here yesterday. You were listening today. Without going through all of the questions, I think that you've been attentive and have listened long enough to know what we are looking for. Is there something that you would like to call to our attention that would be a hardship or a difficulty in you serving as a juror. Or is there something that would make you think that you would not be able to be a fair and impartial juror? So we open the question to you. You tell us.

JUROR NUMBER 292: For me, I'm a homecare assistant and I work in Macomb here. So I if I get chosen to be a juror, I won't be able to visit my patients and my patients are homebound. So it will be hard for them for me not doing my job. (inaudible)

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THE COURT: I --- I understand and I'm not trying to be a hard guy, but the law requires that we trial judges look at hardships as being something more severe than that. Because a party to a lawsuit is entitled to a cross-section of the community to serve on the jury. That means people from all different walks of life, different types of jobs, different types of experiences.

When a person is an independent contractor or a person that you provide. You might have an unique contribution to make in terms of the thinking on the jury. And if we just went with people who are employed by big corporations, hold certain types of jobs that permit them to easily be compensated when they are on the jury. We would be narrowing down the cross-section of the community. We would not be truly representative. So although I have sympathy for you and your patients, I am going to have to decline that as reason for cause.

So the next question then is, is there anything about this case that would cause you to think that you could not be fair and impartial?

JUROR NUMBER 292: No.

THE COURT: All right. If you had to bring back a verdict right now, what would that verdict be?

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JUROR NUMBER 292: Not guilty.

THE COURT: Okay. All right. Let's go to the lawyers for more questions than. We will start --- we'll still go with the prosecution and then we will flip it after this. Mr. Laszczak, you can begin.

MR. LASZCZAK: Thank you, Judge.

THE COURT: And, by the way, I still know that the attorneys still might have other challenges for cause. You haven't waived those. I just decided to fill the seat first. So you can begin your questions.

MR. LASZCZAK: Thank you, Judge. Juror in seat 2, how are you doing this afternoon?

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: Pretty good. You were here yesterday, correct? And you heard a lot of the questioning that I did and then you got to hear counsel's questioning to the jurors, as well, right?

JUROR NUMBER 292: Right.

MR. LASZCZAK: One of the big things that he focused on was --- and we've had --- we've had discussion about reasonable doubt. What is --- can you give maybe what your definition of what reasonable doubt it?

JUROR NUMBER 292: After hearing the judge ---

MR. LASZCZAK: Does it make sense to you?

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JUROR NUMBER 292: It makes sense.

MR. LASZCZAK: Okay. So let me give an example for you because do you hear the difference between a possible doubt and a reasonable doubt?

JUROR NUMBER 292: Not really.

MR. LASZCZAK: You don't hear a difference between those two terms? Okay. Let me give you an example. So I live in a house with my wife and I have two kids, okay. And I have a favorite brand of cookies that I like and it just so happens that my oldest daughter likes the same brand.

So I decide that I'm going to take all the cookies, put them in a jar, lock them up and put them on top of the refrigerator, and hide the key. I do that. I wake up the morning. I go up on top. I open up the jar. And, lo and behold, the cookies are gone. Nobody has access to my home besides my wife and my oldest daughter. Who took the cookies?

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: What about --- what if my neighbor came in while we were sleeping, found my key, went into the kitchen, climbed on the stepstool, went on top of the fridge and opened it up and ate them all? Is that possible?

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JUROR NUMBER 292: It's a possible answer.

MR. LASZCZAK: That's a possibility, right? Does it make sense?

JUROR NUMBER 292: I think ---

MR. LASZCZAK: Does the --- does the neighbor -- does my neighbor coming into my home while we are sleeping, finding the key, knowing the cookies are locked in the jar on top of the fridge ---

JUROR NUMBER 292: She broke into your house.

MR. LASZCZAK: My question to you is does that make sense? Is that a sensible answer to why the cookies are going.

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: How about evidence? What is evidence to you?

JUROR NUMBER 292: Evidence comes from the facts.

MR. LASZCZAK: What about other individuals? Maybe just a regular citizen who may be --- could that be put into evidence if they gave testimony?

JUROR NUMBER 292: Yes.

MR. LASZCZAK: What about the documents? Would you consider those as evidence?

JUROR NUMBER 292: (inaudible)

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MR. LASZCZAK: What happens if there is no date on it? Would you not consider it then?

JUROR NUMBER 292: Yeah.

MR. LASZCZAK: All right. So you said you are a physical therapist?

JUROR NUMBER 292: Assistant.

MR. LASZCZAK: Assistant, all right. What kind of certification did you have to obtain to get that?

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: Okay. Do you main --- do you have to maintain like continuing education or attend other classes?

JUROR NUMBER 292: In the state of Michigan, they just started that. It used to be that you could just renew your license.

MR. LASZCZAK: Okay. And how would you renew it? Just go on line and pay a fee?

JUROR NUMBER 292: You --- you go like to a seminar for a few days. You go through meetings, or you can just go on line as well.

MR. LASZCZAK: Okay. And what happens if --- what happens if you don't attend --- do you have to do this every year or every couple of years?

JUROR NUMBER 292: Every two years.

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MR. LASZCZAK: Every two years. What happens if you don't attend one of those seminars within those two years?

JUROR NUMBER 292: Well, you --- you can ask for an extension. You can renew and you don't have a --- you'd have to take another test.

MR. LASZCZAK: And that's because of state law, correct?

JUROR NUMBER 292: Correct.

MR. LASZCZAK: All right. So let's --- let's do another hypothetical. So you are trained to help people who get out of the hospital, who may be suffered a stroke or a severe fall and need rehabilitation, right?

JUROR NUMBER 292: Right.

MR. LASZCZAK: All right. So you know how to perform different exercises to help an individual regain, whether it be lower extremity strength, upper extremity strength; would you agree with that?

JUROR NUMBER 292: Yes.

MR. LASZCZAK: All right. So say it's 2018. You don't do any continuing education or seminar this year. You don't do any continuing education or seminar in 2019 because you just go so busy and you forget. 2020 comes along and you administer services to a patient,

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right? Technically, by law, your --- your license would be cancelled, right?

JUROR NUMBER 292: Correct.

MR. LASZCZAK: But does the license have anything to do with the rehabilitation that you serviced that client in 2020? Would the rehabilitation you gave no longer be existed?

JUROR NUMBER 292: They won't pay me.

MR. LASZCZAK: Okay. But would that person not benefit from it, then?

JUROR NUMBER 292: Oh, I could still give treatment.

MR. LASZCZAK: So really all it is is just a piece of paper in your hand that says so and so completed the two hour --- or the two-day seminar; his license is still active? What it doesn't say is that you no longer know --- don't know how to provide rehabilitation services. Accurate statement?

JUROR NUMBER 292: Yeah, that's. I just came back from serving as a soldier. So during this time I was --- I written in 2009, what happened is I only read for a year and then went into the Army. So that's why I came back to Michigan to renew my license here. Then I'm just starting to renew --- how --- how I treat the PT.

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MR. LASZCZAK: Okay. Do you --- does --- how long have you --- you're a U. S. citizen, obviously, right?

JUROR NUMBER 292: Yes.

MR. LASZCZAK: How long have you been --- were you born in the United States?

JUROR NUMBER 292: No.

MR. LASZCZAK: So things --- how long have you been in the country?

JUROR NUMBER 292: Came in 2006, so ---

MR. LASZCZAK: And prior to 2006, did you speak English?

JUROR NUMBER 292: Yes.

MR. LASZCZAK: Yeah, okay. Do you --- and I'm not trying to be offensive or anything, but is English your first language or your second?

JUROR NUMBER 292: Second.

MR. LASZCZAK: Second language, okay. Is there --- is there a difficulty in understanding certain concepts because of the language barrier or no? Would you say ---

JUROR NUMBER 292: Personally, for example, it's all about (inaudible) --- how --- how I speak is that I'm (inaudible) ---

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MR. LASZCZAK: So you're taking my English and converting it into your language and then translating it? Okay.

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: Okay. And would you agree that sometimes the English language not necessarily doesn't translate verbatim to your language?

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: Okay. Do you feel that you're going to have a problem may be sitting here as a juror listening to testimony? Because you're going to hear technical terms. You're going to hear technical terms from a police officer. You're going to hear technical terms from a forensic scientist. Do you think you're going to have difficulty being able to understand what they are explaining to you because of the language barrier?

JUROR NUMBER 292: Maybe. I don't know.

MR. LASZCZAK: And --- and --- and I'm not trying to be rude. We just need to know that because if you sit throughout this trial and then at the end tell us I don't --- I don't understand a word that lab tech said because that doesn't translate into my language. We need to know that now.

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JUROR NUMBER 292: Yeah, I know. Maybe the --- for example, the witness here ---

MR. LASZCZAK: But remember what the judge said is that when you leave this courtroom you are instructed to not do your own research because we've all seen the Google commercial, right? Where this lady walks down the street and she sees this guy and she's like I've got a boyfriend, he's French. And the other person says oh, yeah, and he shows up and he says Bon Jour and she says I found him on Google. Not everything is accurate on Google, right?

JUROR NUMBER 292: Right.

MR. LASZCZAK: So, again, do you feel that you're going to have a difficulty understanding the --- the testimony and technical terms and being able to translate them into that --- that into your language?

JUROR NUMBER 292: (inaudible)

MR. LASZCZAK: I don't have anything further, Judge.

THE COURT: Okay. If I may, just to follow-up on that. When I was in college, I worked for a summer in Germany as a waiter. And so if --- if you're limiting me to food, to recommendations for places to see, and money in German, I can sound like I'm a native speaker because

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I did it for a summer and I had a lot of schooling in German.

But if I were in a German court, and was asked could I serve as a juror, my --- my language would sound perfect. They would think that I was almost a native-born, German speaker, but as soon as --- as it was removed from the immediate day-to-day things like money and food and places, if I had to listen to something technical in German or a legal definition in German, I would have to admit that that's just too far for me.

And --- and I do that as kind of an example to you that --- that a person can be fluent in a language, as you clearly are, but only you know because in terms of --- of how you speak, how you present yourself, you are sounding great.

But I just know that if I were in your shoes in a German court, people would think that I was sounding great also, but I would have this nagging knowledge in the back of my head that boy, as soon as they get into something that's going to require some real careful attention, I'm going to be lost.

Now, I only was in Germany for a summer. I only studied the language for four years. So I --- I'm --- I'm nowhere near your level of expertise in English.

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But I just throw that out as an example to kind of like make it easy for you. And only you can answer this question.

Knowing that people can be fluent as you are, there still is a possibility that --- that for something technical like this, this might be too much to ask of you, especially if you have to be translating from English to Filipino or Spanish or --- or whatever. So I'm trying to make it just as easy for you as I can to --- to ask the punch line to --- to this question. Knowing that you are the only one who can answer this question, do you feel that you can keep up with everything that is being said in the courtroom and are you very confident of that?

JUROR NUMBER 292: I don't think so.

THE COURT: You don't think so?

JUROR NUMBER 292: Like I said, this --- the story about the cookies, I had to ---

THE COURT: Okay. Yeah. Yeah.

JUROR NUMBER 292: --- I didn't have time ---

THE COURT: Yeah.

JUROR NUMBER 292: And then thank you for telling me ---

THE COURT: Yeah. Well, I mean I --- I can

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almost put myself in your shoes. Because --- okay. Enough said on that. Mr. Tomko, I believe that we should probably excuse the juror for cause; do you agree?

MR. TOMKO: I'm satisfied, Judge.

THE COURT: Okay. Mr. Prosecutor.

MR. LASZCZAK: More than satisfied, Judge.

THE COURT: Okay. Thank you very much. We really appreciate your service and thank you being such a straight and honest guy. I appreciate it, sir. Thank you. Okay. You have to go down to one. Okay. All right. Let's refill that seat.

COURT CLERK: Juror Number 160.

THE COURT: Okay. Juror in seat number 2 now, you've heard the questions that were asked before. So let's take --- there will be two questions. First, any particular hardship or difficulty you want to call to our attention? And, secondly, the questions on do you think you can be a fair and an unbiased juror? Let's take the hardship problem first. Any hardship for you sitting here as a juror in the next four or five days?

JUROR NUMBER 160: My father went to emergency room yesterday. He's in ICU right now.

THE COURT: That's enough for me.

MR. LASZCZAK: No objection, Judge.

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THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: Okay. With our thoughts and prayers you may --- you are excused. Thank you.

JUROR NUMBER 160: Thank you.

COURT CLERK: Juror Number 5.

THE COURT: Juror Number 5 for seat number 2.

COURT CLERK: That's correct.

THE COURT: Okay. Juror in seat number 2, the first question is there any particular hardship or difficulty that you are facing if you serve as a juror over the next four or five days?

JUROR NUMBER 5: No, Judge.

THE COURT: Okay. Secondly, you've heard all of the questions and so I'll ask it broadly first. Do you think you can be a fair and impartial juror in this case?

JUROR NUMBER 5: Yes, sir.

THE COURT: Okay. All right. Let's go to questions. Go to Mr. Tomko first this time.

MR. TOMKO: Thank you. Welcome.

JUROR NUMBER 5: First time.

MR. TOMKO: First time. Tell us a little bit about yourself. What do you do?

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JUROR NUMBER 5: I'm retired from the grocery industry (phonetic). I'm a grandmother of thirteen. A great- grandmother of about six, and a great-great-grandmother of four.

MR. TOMKO: You have some great life experience.

JUROR NUMBER 5: Everybody says I don't look like it.

MR. TOMKO: And back when you were working you said you were working in the grocery industry?

JUROR NUMBER 5: Yes.

MR. TOMKO: What did you do?

JUROR NUMBER 5: I was assistant head cashier.

MR. TOMKO: And --- let's see --- well, you've heard a lot of our questions. Some of them have to do with --- first, we want to get this jury that's free from any bias or prejudice or sympathy. And to get that we have --- we have to get there by following rules. We've talked about rules.

We've talked about what reasonable doubt is. How do you feel about this instruction about reasonable doubt is. How do you feel about this instruction about reasonable doubt? Can you follow that?

JUROR NUMBER 5: Yes.

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MR. TOMKO: okay. What --- in your words, what's your thoughts behind what reasonable doubt it? Beyond a reasonable doubt.

JUROR NUMBER 5: Well, we have to go through all the evidence to make sure, you know. And if I --- if there was something I didn't understand, I would ask to see the evidence again.

MR. TOMKO: And that's fair. That's a good point. Because you'd be --- you'd be instructed that if there was some evidence that you wanted to see, there was physical evidence, you could ask for it. That would be one of the rules. That might be something that you would do.

JUROR NUMBER 5: Right.

MR. TOMKO: Okay. What about the --- are you related to any police officers in the family? All those grandkids, none of them are police officers?

JUROR NUMBER 5: No. You don't want to know about my kids.

MR. TOMKO: The --- so when it comes to a police officer, do you think they are entitled to any added belief just because they're a police officer?

JUROR NUMBER 5: No. Because they are human, just like us.

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MR. TOMKO: Yeah, because they can make a mistake.

JUROR NUMBER 5: Yeah.

MR. TOMKO: Or they might be inaccurate about something; is that fair? Yes?

JUROR NUMBER 5: Yes.

MR. TOMKO: I'm sorry. I keep reminding because we don't want to say the uh-uhs and uh-huhs. They are hard to write down. What about this idea --- remember we talked about holding your --- holding your opinion until the end. Are you --- do you watch some of these shows, the CSI and ---

JUROR NUMBER 5: I'm DI --- I'm DIY,

MR. TOMKO: You're what?

JUROR NUMBER 5: All the home improvement, cooking.

MR. TOMKO: Gotcha. Gotcha.

THE COURT: A lot better than CSI.

MR. TOMKO: Well, this concept about waiting until the very end, see, because it's --- it's choppy. See how we take terms, you know, and that's --- that may --- it might not be how we would speak. If we all sat in a circle and talked about things, we might do it a lot differently.

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JUROR NUMBER 5: Yeah.

MR. TOMKO: And it might be that exchange back and forth we might get to things in a different way. So here, you know, we --- we need to wait until the end because sometimes things are presented one way and they might look a different way when someone examines or cross-examines a witness. Okay. So can you appreciate that concept and wait until the end to formulate an opinion?

JUROR NUMBER 5: Yes.

MR. TOMKO: So if there was a half-dozen witnesses, or so, you wouldn't after listening to two or three, say ah geez, I'm not going to listen anymore? You wouldn't do that, would you?

JUROR NUMBER 5: No. No I wouldn't do that.

MR. TOMKO: All right. What did you think when you heard --- did you hear when they said it was about an armed robbery? What was your reaction.

JUROR NUMBER 5: I didn't hear nothing about no armed robbery.

MR. TOMKO: Oh, well, that was one of the instructions. You know, the judge will read you instructions, because you heard the instructions the judge read before, right?

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JUROR NUMBER 5: Yes.

MR. TOMKO: And you will be given a copy of those instructions if you are a juror in our case. Can you follow those instructions?

JUROR NUMBER 5: Yes, sir.

MR. TOMKO: So is the fact that someone is charged with something, how does that make you feel?

JUROR NUMBER 5: I won't know until the evidence is shown.

MR. TOMKO: Okay. Because being charged with something, that's --- that's not evidence.

JUROR NUMBER 5: No, it's not.

MR. TOMKO: What's evidence to you?

JUROR NUMBER 5: I would like to see the camera from the --- wherever it happened. Witnesses.

MR. TOMKO: In some cases there might be a camera, and in other cases there might not be, right?

JUROR NUMBER 5: Right.

MR. TOMKO: But in almost all cases, I suppose there's witnesses of some sort.

JUROR NUMBER 5: In fact, my neighbor had his truck stolen the other day. So now everybody is putting cameras on the houses.

MR. TOMKO: Yeah, and so some people do that.

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But, you know, evidence will be the things that are presented to you.

JUROR NUMBER 5: Right.

MR. TOMKO: And those things will be witnesses, it might be papers, it might be all sorts of things. But you'll listen to that evidence?

JUROR NUMBER 5: Right.

MR. TOMKO: You know, we talked about --- the last juror was asked a little bit about getting a license. Remember those questions that he was asked?

JUROR NUMBER 5: I --- I really couldn't hear from way over there.

MR. TOMKO: Oh. Do you have any problems with hearing?

JUROR NUMBER 5: I have fifty percent on this side.

MR. TOMKO: Okay. So when we were in the room and we were talking earlier when the judge was giving instructions, way back in the beginning, were you able to hear all those things?

JUROR NUMBER 5: Not all of them.

MR. TOMKO: Okay. How about the questions when we were talking with people, were you able to hear those?

JUROR NUMBER 5: Yeah. You were talking about

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MR. TOMKO: So is it fair to say maybe not everything?

JUROR NUMBER 5: Not everything.

MR. TOMKO: Okay. All right. Do you have a hearing aid or a device or anything that helps?

JUROR NUMBER 5: No.

MR. TOMKO: Do you think --- do you think it would be important for a juror to hear everything in the case?

JUROR NUMBER 5: Yes, sir.

MR. TOMKO: And you think it's possible as the case goes on, there might be things you won't hear?

JUROR NUMBER 5: Yes. But maybe I can --- again, a juror can't ask questions?

MR. TOMKO: That's something that the judge may or may not allow. That's up to the judge. That's a different issue. Because you can understand that this is an important case.

JUROR NUMBER 5: Yes, sir.

MR. TOMKO: It's important certainly for Mr. Dupree.

JUROR NUMBER 5: Right.

MR. TOMKO: Boy, he would sure want somebody to

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hear everything because there may be something that's important that's missed. Can you appreciate that?

JUROR NUMBER 5: Yes.

MR. TOMKO: And even though you try your hardest, is it --- is it possible you might miss something?

JUROR NUMBER 5: Yes.

MR. TOMKO: But other than that, you think you can be a fair juror?

JUROR NUMBER 5: Yes, sir.

MR. TOMKO: When it comes to this idea of --- of a person having a license, you can understand a person needing to do certain things to get a license?

JUROR NUMBER 5: Yes.

MR. TOMKO: Like to be a surgeon, for example, you have to go to law school and pass a test --- not law school. You have to go to medical school ---

JUROR NUMBER 5: I heard that.

MR. TOMKO: I hope you'd go to medical school. And then you'd have to pass a test of some kind before he gets his --- his certificate to get a doctor, right?

JUROR NUMBER 5: Yes.

MR. TOMKO: And if it has to be renewed from time-to-time, you can appreciate that the doctor might

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have to be retested, right?

JUROR NUMBER 5: Right.

MR. TOMKO: To make sure that he's being accurate and be up-to-date on the procedures.

JUROR NUMBER 5: Yes.

MR. TOMKO: And to make sure they didn't forget something?

JUROR NUMBER 5: Right.

MR. TOMKO: Okay. Hopefully, certainly so that they don't mistakes, right?

JUROR NUMBER 5: Yes, sir.

MR. TOMKO: Do you think you can be a fair juror in this case?

JUROR NUMBER 5: Yes.

MR. TOMKO: All right. Thank you.

THE COURT: Mr. Laszczak.

MR. LASZCZAK: Thank you, Judge. Since you've been in this seat and counsel was asking you questions, were you able to hear correctly?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Okay. And, if at some point, you were selected as a juror and --- and you couldn't hear something, would you be able to raise your hand and notify us so that ---

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JUROR NUMBER 5: Yes.

MR. LASZCZAK: --- we can ask people to speak up. We could maybe ask --- provide some kind of accommodation, would that be beneficial to you?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Did you hear my example regarding the cookie jar scenario?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: All right. Do you hear a difference between possible doubt and reasonable doubt?

JUROR NUMBER 5: Yes. I was --- I was going to say I seen the cookies on your pajamas.

MR. LASZCZAK: So you would agree that the neighbor coming in while we're sleeping, finding the key, opening up the jar and eating all the cookies; that's a possibility, right?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: But is it reasonable?

JUROR NUMBER 5: No.

MR. LASZCZAK: Okay. Right. Because it just -- it doesn't make sense that they found a way into my home, found where I hid the key, knew that the cookies were in the jar, knew where the jar was stored and were able to eat all the cookies, right?

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JUROR NUMBER 5: Right.

MR. LASZCZAK: All right. So not only --- you said you had thir --- how many grandchildren?

JUROR NUMBER 5: Thirteen. Okay. I've got a lot.

MR. LASZCZAK: You've got a lot. And counsel said that, you know, you come with a lot of life experiences then, right?

JUROR NUMBER 5: Right.

MR. LASZCZAK: As well as probably a big Christmas bill?

JUROR NUMBER 5: Oh, yeah.

MR. LASZCZAK: Yes. Have you ever --- you said that this was your first time, too, sitting as a juror?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Is this the first time you've been called to this courthouse to be a potential juror?

JUROR NUMBER 5: No, no.

MR. LASZCZAK: All right.

JUROR NUMBER 5: One other time.

MR. LASZCZAK: Ever involved in any kind of litigation before?

JUROR NUMBER 5: No.

MR. LASZCZAK: Never had to come and testify

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and sit in the witness stand?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Okay. When --- where was that at?

JUROR NUMBER 5: That was in your court --- not this courtroom. I think it was on three. My two granddaughters were molested and beaten.

MR. LASZCZAK: How long ago was that?

JUROR NUMBER 5: Fifteen years.

MR. LASZCZAK: And it doesn't get much closer than that. How --- that experience, did --- did you feel that your granddaughters were treated fairly by the police?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Okay. You feel that the judicial system did what they --- did what it was supposed to do to the person?

JUROR NUMBER 5: Yes.

MR. LASZCZAK: Okay. Are you going to hold any of that experience against either myself or the --- the defenses in this trial?

JUROR NUMBER 5: No.

MR. LASZCZAK: All right. I don't have anything further. Thank you, Judge.

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THE COURT: Okay. Thank you. By the way, on the hearing I think you notice that every once in awhile I reach for this because you don't have microphones and when I'm trying to get every word, this is a listening device that Macomb County provides. It's amazing because it's one of the things provided by Macomb County that really works.

But if you are chosen as a juror, we'll let you try this out because we have lots of them in the building. So if you wanted to --- to use one, you could. Have you tried a hearing aid and it just doesn't work for you? Or ---

JUROR NUMBER 5: The doctor hasn't said anything about a hearing aid.

THE COURT: I have.

JUROR NUMBER 5: I have (inaudible).

THE COURT: Okay. Anyway, if you --- at the end of the jury selection process, if you remain on the jury, we'll get you one to try out.

JUROR NUMBER 5: Thank you.

THE COURT: As a matter of fact, a couple of months ago I had a --- a great trial in which there was a juror who was deaf and we had sign language interpreters. And it worked fine. So the point is we can make

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accommodations for that. And right now, since you are sitting where you are, I know that it's a lot easier to hear when you are up in the benches --- in the jury box there than back in the benches there because people are turned away from you. So I --- I don't see it being a big problem. But we're doing to give that to you if you want to try it out.

JUROR NUMBER 5: Okay.

THE COURT: Okay. All right. So now let's go to challenges for cause again and we will go to the prosecution.

MR. LASZCZAK: Judge, I'm going to --- for cause, juror seated in seat number 5. There's been no questioning of that juror today, but yesterday, Judge, during my initial questioning, as well as during your initial voir dire of that juror, she indicated that she is a --- going through a divorce. She has a young child. This is a huge financial difficulty for her. She's a part-time employee at a place which does not offer benefits when she is not at work. I don't think ---

And, secondly, Judge, she indicated that that could become a distraction during the pendency of this case and I don't want somebody to be worried about financials when we need them to be focusing on what is

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being presented as --- through evidence as well as witnesses. So that --- that is the reason I ask she be excused for cause.

THE COURT: Okay. Mr. Tomko, do you agree or disagree on juror in seat number 5?

MR. TOMKO: Judge, I think the juror in seat 5, I think she's honest and I think would make a great juror. When I --- I listened to the financial hardship, it's always a financial hardship on everyone. Of course, I leave it to the Court's discretion. The Court already visited that --- that part of the issue. And if the Court wishes to revisit that with her, you're welcome to. But I haven't heard anything new that the Court decided.

THE COURT: Well, --- but --- but I didn't make a decision that she was definitely going to stay. I --- I basically said let's have more questions from the attorney because I didn't want to slow down the process. And also I wanted to happen what has happened. You've been here now yesterday --- this is juror in seat number 5 --- you've been here yesterday and today. I know that sometime when people first get in the jury box, they have this tendency to say I want to be out of here.

And then after you hear a little bit, you get a little bit more comfortable, and you just basically say

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okay, I've got these other problems on my mind, but this is important, I am a citizen, I want to do this. And it kind of like --- you settle in and then you say I can put these things aside.

So the question to you, just like the gentleman I was talking with --- to about the language difficulty. You are certainly qualified to be a juror. We would welcome you to be a juror, but only you know how badly you're going to be distracted from these other problems in your life. And I'm going to turn to you and --- again, you are under oath, we expect you to be honest. You are going to be honest.

Do you think that these distractions will be too much, and if so, I will excuse you. If you think that you can put them aside and concentrate and give your full attention to us, we are going to keep you as a juror. So what do you think?

JUROR NUMBER 40: I'll be honest --- naturally, of course, I should be (inaudible) --- not exactly where I want to be today or yesterday. However, with that said I am a mom (inaudible) --- I cannot be concerned with (inaudible) --- I need to provide childcare for after school (inaudible).

THE COURT: Okay. Basically, I'm telling you

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that you are excused if you want to be excused. I think that there's enough. But if you now say, I'm going to change my mind, I can put that aside, I'm going to let you stay. So big decision, but you've got to make it now. Do you want to stay or you want to go? I think there's a song to that affect.

JUROR NUMBER 40: I would like to be excused.

THE COURT: Pardon?

JUROR NUMBER 40: I would like to be excused.

THE COURT: Okay. All right. Then you are excused. It was close the other day when it was raised, but, again I --- I wanted to give you the chance to settle in. But --- but obviously the lawyers understand, I understand. You are excused. Thank you.

Okay. Before we fill that seat let's --- because for cause we can go in any order. And so let's --- let's continue to have a discussion of challenges for cause. And, by the way, thank you very much for your service. We appreciate it. Thank you. And, so we've heard from the prosecutor. Let's go to the defense. Any other challenges for cause?

MR. TOMKO: The only question I have --- and I liked juror 2. I think she's a great person. She could be a great juror. I still have a question about the

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hearing part. What the Court proposed is that if she is seated as a juror, then we try out the jury device. That's a little reverse. I --- I would really be more comfortable if we knew that she could hear everything ---

THE COURT: Greg, why don't you get the hearing device right now? Do you want to use mine?

MR. TOMKO: --- the hearing device is great, otherwise, I would be afraid ---

THE COURT: Do you want to use mine.

MR. TOMKO: --- I would be afraid. I don't want her to miss anything.

THE COURT: Oh, he's got that one. We got some from the other courtroom?

COURT OFFICER: That where I'll --- I'll get one.

THE COURT: Yeah, we'll get another hearing device. I would give you --- now, it doesn't actually stick in your ear, it's just on the outside. But still I just don't feel that you'd be comfortable just using the thing that I had plastered against my ear. So we are going to get you one that's been freshly swabbed with alcohol, okay?

JUROR NUMBER 101: I don't want to get out of court because I can't hear.

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THE COURT: No, no, no. And, again, I've had such confidence in these devices because it's just one of those things, you get older, you don't --- I mean, you don't --- you know when you can't jump over the boards playing hockey, you know when that day has come, right?

And you know when you can't --- I'm --- I'm talking about me. I mean, I know I had to give up a lot of things, but I never thought that I would lose my --- my hearing, but when I'm doing this, I have to say, look it, I don't care about vanity; I don't care if I'm embarrassed; I've got to catch every single word.

And some voices, I don't need this at all, other voices I do. And so it's obviously --- the law is more important than my own personal feelings. So I got to do what I got to do. But we'll see when you get it, how it works out.

(3:08, proceedings paused)

THE COURT: Greg should be back in just a second. But if --- after he is back we're going to take a very short break at 3:30 simply because should be allowed to get up and stretch a little bit. I'd like to keep on going, but this is not an endurance feat. We --- we need to be able to stretch and relax a little bit.

Oh, by the way, the law also requires that we

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provide reasonable accommodations for anybody with sight problems or hearing problems. So this is not just a --- a courtesy. This is something that is mandated by the laws of the United States, so we've got to do it.

Part of the problem of --- of being shuffled around from new courtroom to new courtroom is that as they are building up the courtrooms, is that everything that you know where it is in your home courtroom, you got to go looking for on these floors. So Greg is obviously taking a little longer. I thought this would be done in a half minute.

MR. LASZCZAK: Judge, if I could suggest that we take our break now?

THE COURT: No? None?

COURT OFFICER: I went to each court individually ---

THE COURT: Okay. Then I'll --- I'll get some --- I'll swab this down and give it to --- to --- to the juror because I'll be fine without it.

COURT OFFICER: I'll take care of it. I'll go ---

THE COURT: Go. Well, this might be a good time for the break anyway. Okay. We are going to take a ten-minute break. We're going to be back in ten minutes,

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twenty-five after. Everybody remember your seating in the jury box. Everybody else, don't take any longer than ten minutes. Thank you. We are in recess.

(3:12, off the record)

(3:25, on the record)

COURT OFFICER: All rise for the jury please.

THE COURT: Okay. The record indicates that -- - I guess we've still got one more seat. Oh, that's --- that's vacant. Okay. We can all be seated. Before we start again, Juror Number 392, raise your hand. You are excused. My apologies to you. I don't know why the juror clerk told you that you had to be a part of this panel. That was heartless. I --- I will take this up at a meeting with the judges.

The jury clerk should know that with a family emergency such as that, that you should be excused immediately. Or they should let me know so it can happen as soon as possible. Good luck, our prayers are with you. Hope everything comes out okay. Okay. You are immediately excused.

JUROR NUMBER 392: Don't even go to 1?

THE COURT: Don't even go to 1, just go. Okay. Is there anybody else --- and I normally would not have to ask this question because they are normally weeded out

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beforehand --- but is there anybody else who has family emergency where some family member is having surgery today? Okay. Anything else that comes close to that? Okay. Let's --- let's continue you, then, with our jury selection.

Okay. First of all, Deputy Schumacher is going to present the juror in seat number 2 with a brand new listening device. You might have to change the channel to get it to this court. Kim says she knows how to do that. Okay. Can you hear it?

COURT OFFICER: Yep.

THE COURT: Okay. Try it out. Obviously it can work in either ear. Sometimes you can just put it in your good ear and it will amplify --- how does that sound?

JUROR NUMBER 101: Staticiey.

THE COURT: Staticiey? You could put it on the lower volume with the other ear as an additional assist. Greg, testing one, two, three. Why don't you try that? Okay. I'm going to talk in this voice. Can you hear me now.

JUROR NUMBER 101: Yes, sir.

THE COURT: Isn't it amazing? Okay. All right. So let's now continue with the jury --- and by

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the way you loop it on your ear, it's --- it's kind of counterintuitive. The part that you thing should go the other way, you take this part and you loop around the back of your --- of your ear to get it on. A little trial and error, it becomes kind of easy.

JUROR NUMBER 101: It won't fit.

THE COURT: Well, just --- just continue to work with it because when I first saw this thing, I didn't know how to use it, but eventually you get it.

All right. While juror in seat 2 is still trying that out, we --- we can do some matters that don't directly affect her. And so let's ask, challenges for cause, move back to the prosecution.

MR. LASZCZAK: Judge, I do have one last at this point. Juror seated in seat 14. I'm going to ask for cause again, Judge. This was questioning based on yesterday specifically relating to the affect, Judge, when we talked about if she was to render a verdict right now what her verdict would be, obviously, she answered that question correctly.

However, then I asked her if during the pendency of the trial, at the conclusion of the trial, you hear all the evidence, you take into consideration the elements and the burden that I must prove to you

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beyond a reasonable doubt. And if you believe that to be true, what would your verdict be now. And she indicated to me that she would have a hard time condemning somebody and still wouldn't be able to possibly find the defendant guilty.

Obviously that is an issue, Judge, and for that reason I'm asking that she be excused for cause for un -- - for unwilling or unable for either ideological issues or religious issues, to be able to follow the Court's orders and the law that is --- pertains to this case and render a verdict.

THE COURT: Okay. Let me ask juror in seat number 14. Yesterday you did --- you did give some answers which were a bit troubling, but then, again, I have to allow for the fact that this is the first time you're probably sitting in a jury box being asked these questions. But I want you to know there is no wrong answer. All we need is --- is your honest belief, your honest opinion, your honest heartfelt thinking about this matter.

It's obviously of great importance that we have a fair trial. And that means fair for the defendant, but fair for the prosecution, as well. If we have somebody who just doesn't think that they ever could

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convict another fellow human being, because they --- they just don't think that they have the right to sit in judgment like that, well, that person could not sit as a juror.

Now, you did not say that exactly. You did not say it was religious or philosophical, but as a practical matter, it did sound to me like you were saying that it would almost be impossible for you to find a person guilty. Am I --- am I right? Is that basically what you were saying?

JUROR NUMBER 78: Pretty much. If I'm not one hundred percent certain, I'm not going to be able to say guilty.

THE COURT: Okay. And now you heard my explanation that beyond a reasonable doubt does not mean one hundred percent certainty. Because unless you've experienced yourself, nobody can be one hundred percent certain. If you are listening to other people say what happened, you can --- you can believe them. You can believe them beyond a reasonable doubt. But a one hundred percent certainty is --- is a practical impossibility. Do you understand that.

JUROR NUMBER 78: I understand what you are saying.

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THE COURT: Okay.

JUROR NUMBER 78: I'm still going to have a hard time convicting a fellow citizen of a crime.

THE COURT: I understand. Okay. Let me ask Mr. Tomko. Do you have argument on --- that you would like to offer, or any comments at all? Or --- or further questions

MR. TOMKO: Well, do you think you can be fair to both sides being a juror?

JUROR NUMBER 78: I can be fair to both sides, yes.

MR. TOMKO: Okay. But fair would mean that you could come back --- if you listen to the rules, you could come back and you could say not guilty or you could listen to all the facts and you could say guilty? Do you think that you could do that?

JUROR NUMBER 78: I'll try.

MR. TOMKO: That's all I have, Judge.

THE COURT: Further argument from the prosecution?

MR. LASZCZAK: Judge, I think that this ---

THE COURT: Or further questions, if you want.

MR. LASZCZAK: Do you remember --- may I ask a question?

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THE COURT: Sure.

MR. LASZCZAK: Do you remember yesterday when we talked about --- I asked you that question, if you were to render a verdict now, and you said --- what was your verdict?

JUROR NUMBER 78: Right now?

MR. LASZCZAK: Right now.

JUROR NUMBER 78: Right now, not guilty. And the reason for that is because you've heard no evidence regarding this case, correct?

JUROR NUMBER 78: Correct.

MR. LASZCZAK: All right. So then I asked you a series of questions and then okay, well, what if after you hear the evidence, you see the exhibits, you'll look at the documents, and you believe beyond a reasonable doubt that I've met all of the elements that the judge instructs you that I must prove?

JUROR NUMBER 78: (inaudible)

MR. LASZCZAK: Do you recall indicating that yesterday you stated even if that was the case, you don't feel that you could condemn somebody. Do you remember saying that?

JUROR NUMBER 78: Yeah.

MR. LASZCZAK: Okay. And then so I kind of

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asked you well, do you have children. And you said yes. And I said well, did you ever kind of have to render any kind of punishment to them. And you said well, not really. I wasn't really good at it; do you remember that?

JUROR NUMBER 78: Yeah.

MR. LASZCZAK: Okay. So my question to you is are you going to hold me to what the judge tells me --- tells you what my standard is, or are you going to make me prove something beyond what I have to prove?

JUROR NUMBER 78: I going to follow the judge's rulings.

MR. LASZCZAK: Okay. And --- and the judges rules, based on reasonable doubt, you --- you understand what that means?

JUROR NUMBER 78: Yes. Do you see a difference between possible and reasonable?

JUROR NUMBER 78: Yes.

MR. LASZCZAK: Okay. And would you agree that a possible doubt, based on the definition that the judge gives you is not enough to say that that's not beyond reasonable doubt?

JUROR NUMBER 78: Yes.

MR. LASZCZAK: Okay. I don't have any

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questions, Judge.

THE COURT: Okay. Well, the standards for excusing a juror for cause are pretty high. It --- it's not what a person comes in thinking or their off-the-cuff opinion,, it's how they respond to the questions that were put to --- to the jury. It appears to me that she has said that although she would find it difficult, she would follow the law, and that she is not expecting one hundred percent certainty.

I just want to assure myself of that again. You are not expecting one hundred percent certainty of the prosecutor before you --- you could vote guilty. Is that --- is that you're telling us now?

JUROR NUMBER 78: That is correct.

THE COURT: Okay. That really, I think, takes care of the problem. Again, people come to the courtroom with their own --- their own thoughts about what the system is and it takes a little bit of --- of explaining as to what the rules are. I am satisfied that juror in seat number 14 can follow the rules. So the request is denied. For cause, let's turn to you, Mr. Tomko. Anything further for cause?

MR. TOMKO: Nothing further, Judge.

THE COURT: Okay. Then let's fill the seat for

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juror in seat number 5.

COURT CLERK: The juror for seat number 5 is Juror Number 83.

THE COURT: Okay. The new occupant of seat number 5, you know the basic two questions to start off with. But first of all, any --- any hardship or great difficulty in serving as a juror over the next four or five days?

JUROR NUMBER 83: No.

COURT CLERK: Next question. Do you think that you can be a fair and impartial juror?

JUROR NUMBER 83: Yes.

THE COURT: All right. I'll leave the other questions to the lawyers. We will go back to the prosecution. Mr. Laszczak, any questions for this juror?

MR. LASZCZAK: Just briefly, Judge. Any --- are you related to any law enforcement officers?

JUROR NUMBER 83: My son is a officer.

MR. LASZCZAK: Where is --- in the state of Michigan?

JUROR NUMBER 83: In Detroit.

MR. LASZCZAK: Anything about that relationship that's going to affect your ability to judge?

JUROR NUMBER 83: No.

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MR. LASZCZAK: And you understand that when an officer takes a stand you are to judge that person the same way as you would judge any other individual?

JUROR NUMBER 83: Right.

MR. LASZCZAK: And just like --- are you employed? Retired?

JUROR NUMBER 83: I'm retired.

MR. LASZCZAK: I'm sorry. Congratulations. What did you did when you were working?

JUROR NUMBER 83: I was a hairdresser for twenty-three years.

MR. LASZCZAK: Okay. And in life there are good hairdressers and there are bad hairdressers, right?

JUROR NUMBER 83: Right.

MR. LASZCZAK: And --- and not just on how they do hair, but maybe just as a person, correct?

JUROR NUMBER 83: Correct.

MR. LASZCZAK: What are some of the things that you would --- you use to judge somebody's credibility?

JUROR NUMBER 83: It's how they carry themselves. (inaudible). It's how they live their life and use it for good.

MR. LASZCZAK: All right. You heard the case -- or you heard the term "armed robbery", right.

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JUROR NUMBER 83: Yes.

MR. LASZCZAK: Anything about that that strikes a chord with you?

JUROR NUMBER 83: No.

MR. LASZCZAK: No. Ever had any experiences as a witness or testify in a case before?

JUROR NUMBER 83: No.

MR. LASZCZAK: Never been a victim of a crime?

JUROR NUMBER 83: No.

MR. LASZCZAK: Have you had any family members who were victims --- victims of crimes?

JUROR NUMBER 83: (inaudible)

MR. LASZCZAK: I'd like to use --- we --- I think basically you guys are going to dream about reasonable doubt. You heard --- you've heard the term numerous times now, okay. Any kind of confusion there?

JUROR NUMBER 83: No.

MR. LASZCZAK: All right. You heard the term -- you heard me use possible doubt, right?

JUROR NUMBER 83: Right.

MR. LASZCZAK: Okay. You've heard the example, understand it, and it makes sense, right?

JUROR NUMBER 83: Yes.

MR. LASZCZAK: Thank you. I have nothing

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further.

THE COURT: Okay. Mr. Tomko.

MR. TOMKO: Welcome. And I heard correctly, you were a hairdresser?

JUROR NUMBER 83: Yes.

MR. TOMKO: Okay. The --- did you work for someone or ---

JUROR NUMBER 83: I did for awhile and then I worked out of my home.

MR. TOMKO: Oh, out of your home. Let's see here. Are you married or not married?

JUROR NUMBER 83: I am married.

MR. TOMKO: And your spouse, what did you do?

JUROR NUMBER 83: He's an electrician.

MR. TOMKO: An electrician?

JUROR NUMBER 83: Yes.

MR. TOMKO: Okay. And so does your spouse ever talk to you about --- about the things about work and being an electrician.

JUROR NUMBER 83: Uh-huh.

MR. TOMKO: Talk to you about codes and having to follow codes?

JUROR NUMBER 83: Yes.

MR. TOMKO: Okay. Ever talk to you about what

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happens if you don't follow the code?

JUROR NUMBER 83: Yes.

MR. TOMKO: What's he say?

JUROR NUMBER 83: You could die.

MR. TOMKO: You what?

JUROR NUMBER 83: You could die. If you don't do the job right.

MR. TOMKO: Right. There could be serious consequences.

JUROR NUMBER 83: Exactly.

MR. TOMKO: Not just the outcome, but even from your boss.

JUROR NUMBER 83: He is the boss.

MR. TOMKO: Oh, he's the boss. It's good to be the boss?

JUROR NUMBER 83: Yeah.

MR. TOMKO: But, in the end, though if someone has hired him to do something ---

JUROR NUMBER 83: Exactly.

MR. TOMKO: --- so you might be your own boss, but you still have to answer to somebody.

JUROR NUMBER 83: You always do.

MR. TOMKO: And you have to answer to someone if you didn't do something right, you have to answer?

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JUROR NUMBER 83: Correct.

MR. TOMKO: The idea of someone being a police officer, if they testified, would you believe whatever they say?

JUROR NUMBER 83: No. They're human just like everybody else.

MR. TOMKO: And what --- what would you use to figure out if you believe them or not?

JUROR NUMBER 83: I would listen to them like I would everybody else. What I am hearing. What they had to offer.

MR. TOMKO: And so how they appeared?

JUROR NUMBER 83: Yes, sir.

MR. TOMKO: Whether they have some motivation to be truthful or --- or not truthful.

JUROR NUMBER 83: Yes.

MR. TOMKO: Or motivation just to stretch the truth?

JUROR NUMBER 83: Yes. Anybody can do that.

MR. TOMKO: Or motivation to cover something up?

JUROR NUMBER 83: Yes.

MR. TOMKO: Like not following the rules?

JUROR NUMBER 83: Yes.

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MR. TOMKO: So just because they might come in a --- in a uniform or have a badge or be a police officer, regardless of how they're dressed, that's not reason to just to believe them?

JUROR NUMBER 83: No.

MR. TOMKO: The --- talk about the --- remember that --- remember that example with the cookies on the refrigerator?

JUROR NUMBER 83: Yes.

MR. TOMKO: Let's change it a little bit. Let's say that the cookies were on the --- on the shelf -- up on the shelf. And all of a sudden they're missing. Some people are in the house. The daughter who loves cookies. And there's another one that --- with mom and dad, you know, but dad is convinced, who ate my cookies. How does he immediately guess as ate the cookies?

JUROR NUMBER 83: The daughter who likes cookies.

MR. TOMKO: But --- but you'd have to investigate, wouldn't you?

JUROR NUMBER 83: Ask her.

MR. TOMKO: And if you investigate it and you found that the other child, they --- they got into the cookies and you'd say oh, oh, because they've got crumbs

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on them. That would tell you something, wouldn't it?

JUROR NUMBER 83: Yes.

MR. TOMKO: Or what if neither of them had crumbs on them but you saw the bag on the floor, and you saw the dog next to the --- next to the cookie crumbs. You may have a different conclusion?

JUROR NUMBER 83: Yes.

MR. TOMKO: So really what it boils down to is that you have to wait and get all the facts before you make a decision.

JUROR NUMBER 83: Correct.

MR. TOMKO: And when you are instructed to do that, I know you've asked a million times, if you have a doubt. But --- but the point is that can you wait until the end and make a conclusion?

JUROR NUMBER 83: Yes.

MR. TOMKO: When --- do you watch some TV shows? What do you watch?

JUROR NUMBER 83: I'm not a fan of TV, you know?

MR. TOMKO: Read books?

JUROR NUMBER 83: Yes.

MR. TOMKO: All right. All kinds of books, a novel, start out and it has a plot and everything. You

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get to the end and all of a sudden something you didn't think of ---

JUROR NUMBER 83: Right.

MR. TOMKO: --- and a trial might be similar to that. And in that way can you wait until the end to make a decision?

JUROR NUMBER 83: Yes.

MR. TOMKO: In this case, then, could you be fair?

JUROR NUMBER 83: Yes.

MR. TOMKO: If you were on trial, someone said you did something, would you want a juror like yourself to be on the jury?

JUROR NUMBER 83: Yes.

MR. TOMKO: And that's because you would listen to both sides?

JUROR NUMBER 83: Yes.

MR. TOMKO: If you were asked what the verdict is at this very moment, what would it be?

JUROR NUMBER 83: Not guilty.

MR. TOMKO: And why is that?

JUROR NUMBER 83: I don't have anything to go on.

MR. TOMKO: Nothing to go on and we also have

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an instruction, right?

JUROR NUMBER 83: Absolutely.

MR. TOMKO: Because the --- the judge instructed us and said hey, your defendant is presumed -- -

JUROR NUMBER 83: Not guilty.

MR. TOMKO: --- to be innocent.

JUROR NUMBER 83: Right.

MR. TOMKO: And then you can follow instructions, right?

JUROR NUMBER 83: Yes.

MR. TOMKO: And one of the instructions is that the prosecutor bears the burden to show all the different things. Can you hold them to that?

JUROR NUMBER 83: Yes.

MR. TOMKO: Would you want the defendant to do anything?

JUROR NUMBER 83: (inaudible)

MR. TOMKO: And if he didn't, would you hold that against him?

JUROR NUMBER 83: No.

MR. TOMKO: Do you think you can be fair in this case?

JUROR NUMBER 83: Yes.

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THE COURT: Okay. Thank you. Let's go then to challenges set for cause, move to the prosecution first. Challenges for cause?

MR. LASZCZAK: People are going to pass for cause, Judge.

THE COURT: And defense.

MR. TOMKO: Judge, I just consulted with my client a moment and we have no further for cause.

THE COURT: Okay. Let's go through peremptories. Mr. Prosecutor, peremptories.

MR. LASZCZAK: Judge, People are going to thank and excuse juror in seat number 14.

THE COURT: Okay. So, juror in seat number 14, this --- this is called a peremptory challenge. It can be for a good reason, a bad reason or no reason at all. It's just whatever gut feeling or choices of the lawyers. They have a certain number of peremptories where they don't have to give reason. So you are excused, and I guess you report back to the jury room. Okay. Okay. So let's fill that seat. And thank you for your service. Appreciate it.

COURT CLERK: Juror Number 340.

THE COURT: Okay. Any --- anything in terms of an emergency or difficulties that would make it difficult

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for you to serve as a juror>

JUROR NUMBER 340: I'm the only income at home. And my brother had a stroke last March. And I'm just trying to make things roll. And I'm having a hard time doing that right --- right now.

THE COURT: Okay. Only income at home. Who lives at home with you?

JUROR NUMBER 340: My brother who had a stroke.

THE COURT: Oh, okay. So he's dependent upon you for daily care?

JUROR NUMBER 340: Yes. And I'm working on some disability for him, but right now he has no income.

THE COURT: While you're gone right now who is watching over him?

JUROR NUMBER 340: Oh, he's able to watch over himself during the day while I work. It's he has a harder time getting dressed; hard time washing; a hard time eating. So I have to make him like a sandwich while I'm gone at work or ---

THE COURT: What kind of work do you do?

JUROR NUMBER 340: I do construction. I install sprinklers.

THE COURT: Is it your own business or are --- are you an employee?

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JUROR NUMBER 340: I am an employee, yes, sir.

THE COURT: What company?

JUROR NUMBER 340: Metro Lawn Sprinklers our of Utica. They are in Shelby Township now.

THE COURT: All right. And --- and they give you break time to serve on a jury, don't they?

JUROR NUMBER 340: Yes, they would, but I have very little income and I'm struggling right now to make it. And I know --- I did spend four years in the military. So I know how that goes. But I just want to try to make his life --- and right now I am having a rough time.

THE COURT: Let me ask the lawyers. Well, I've got to do a sidebar on this. Hold on.

(3:48, off the record)

(3:50, on the record)

THE COURT: This is one of those situations where I'm not sure that you've presented enough reason not to serve as a juror, but the lawyers have no objection to excusing you, so I will excuse you. Thank you very much for your service. Appreciate it, thank you. Okay. Next.

COURT CLERK: Juror Number 200.

THE COURT: Okay. New juror in seat number 14,

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is there any problem that would make it difficult for you to serve as a juror?

JUROR NUMBER 200: Nothing.

THE COURT: Do you think you can be a fair and impartial juror in this case?

JUROR NUMBER 200: I do.

THE COURT: If you had to bring in a verdict right now, what would that verdict be?

JUROR NUMBER 200: Nor guilty.

THE COURT: Okay. Let's go to questions. Mr. Tomko, you can begin.

MR. TOMKO: Thank you. Welcome and good afternoon. Related to anyone who is a police officer?

JUROR NUMBER 200: No, I don't.

MR. TOMKO: Do you have any close friends who are police officers?

JUROR NUMBER 200: No.

MR. TOMKO: What do you think of police officers.

JUROR NUMBER 200: They are meant to uphold the law, but like any other persons there are good and bad. But they (inaudible)

MR. TOMKO: Okay. And you understand this case isn't about good or bad. It's more a case of accurate,

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inaccurate, did something, didn't do something. Those -- - those are going to be the types of questions. Can you accept that?

JUROR NUMBER 200: Yes.

MR. TOMKO: And when a police officer testifies, what you are really saying, correct me if I'm wrong, is that you're not going to give them favorable treatment?

JUROR NUMBER 200: Right. Correct.

MR. TOMKO: What are some of the things that you would use to determine the accuracy of what someone is telling you?

JUROR NUMBER 200: The way that they recall events the same way every time. (inaudible) Just their overall accuracy each time.

MR. TOMKO: Have you ever been involved in any type of court proceeding before?

JUROR NUMBER 200: No, never, ever.

MR. TOMKO: Never. Never been a witness.

JUROR NUMBER 200: No.

MR. TOMKO: Ever had a traffic ticket?

JUROR NUMBER 200: No, not even.

MR. TOMKO: Good for you. What --- this idea of beyond a reasonable doubt, you've heard that. Can you

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follow the instructions the judge will give you?

JUROR NUMBER 200: I can.

MR. TOMKO: One of the most important ones, from a certain perspective, is being able to wait until the end to make a decision. Sometimes it's hard to do, wouldn't you agree?

JUROR NUMBER 200: I do.

MR. TOMKO: Are you able to do such a thing?

JUROR NUMBER 200: I believe so.

MR. TOMKO: The way we ask questions and went back and forth between the prosecutor and I, do you find distracting or troubling?

JUROR NUMBER 200: Sometimes (inaudible) but I --- I know that I can --- if I concentrated I would be able to do it.

MR. TOMKO: Because, really --- really that's --- that's what you are asked to do at trial, as well. Do you think that's something you can do?

JUROR NUMBER 200: I think so.

MR. TOMKO: Good. Let's see. Do you have any pets?

JUROR NUMBER 200: I do, yes.

MR. TOMKO: What do you have?

JUROR NUMBER 200: Two dogs.

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MR. TOMKO: Pardon?

JUROR NUMBER 200: Two dogs.

MR. TOMKO: Are they potty trained?

JUROR NUMBER 200: They are.

MR. TOMKO: Okay. Do they have accidents and things?

JUROR NUMBER 200: They do, un-uh.

MR. TOMKO: Because they are dogs, right?

JUROR NUMBER 200: Yes.

MR. TOMKO: Now, when we talked about these things called elements, did you hear some of the questions about elements?

JUROR NUMBER 200: I might have, but (inaudible, coughing) I could use a refresher.

MR. TOMKO: All right. When the --- you will be instructed that any crime --- the crime in this case is armed robbery is what we are talking about --- is going to have certain elements. Elements are the things that must be shown to --- to get us there. And so those are five things. The instruction would be that the prosecutor needs to show each of those things beyond a reasonable doubt. Do you understand?

JUROR NUMBER 200: Yes.

MR. TOMKO: And if you found that only three

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were beyond a reasonable doubt, what would your verdict be?

JUROR NUMBER 200: Not guilty.

MR. TOMKO: What if there were four?

JUROR NUMBER 200: Still not guilty.

MR. TOMKO: What if they really, really showed four of them.

JUROR NUMBER 200: Not guilty.

MR. TOMKO: Okay. Because the rule was --- actually my question is can you follow the rule? The rule is okay, you have to have all five.

JUROR NUMBER 200: Uh-huh.

MR. TOMKO: Okay. And you can accept that?

JUROR NUMBER 200: I can.

MR. TOMKO: And how far did you go in school?

JUROR NUMBER 200: I have an associate's degree (inaudible).

MR. TOMKO: Okay. Wonderful. Wonderful. And are you single or married?

JUROR NUMBER 200: Single.

MR. TOMKO: Any children?

JUROR NUMBER 200: No.

MR. TOMKO: That's all I have. Thank you.

THE COURT: Mr. Prosecutor.

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MR. LASZCZAK: Where are you employed or are you employed?

JUROR NUMBER 200: I am. I work for Kohl's. I work in the online department.

MR. LASZCZAK: Okay. So do you have to deal with people or not necessarily?

JUROR NUMBER 200: A little bit.

MR. LASZCZAK: Face-to-face interaction or more through telephone and -

JUROR NUMBER 200: Face-to-face interaction.

MR. LASZCZAK: Do --- you obviously can judge a person's credibility?

JUROR NUMBER 200: Yes.

MR. LASZCZAK: Through facial expressions?

JUROR NUMBER 200: Correct.

MR. LASZCZAK: Okay. How they appeared?

JUROR NUMBER 200: Yes.

MR. LASZCZAK: And no confusion with the reasonable doubt?

JUROR NUMBER 200: No.

MR. LASZCZAK: You indicated you have two dogs?

JUROR NUMBER 200: I do.

MR. LASZCZAK: What kind of dogs?

JUROR NUMBER 200: Toy poodles

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MR. LASZCZAK: Do teach them any tricks?

JUROR NUMBER 200: A few, yes.

MR. LASZCZAK: What tricks do you teach them?

JUROR NUMBER 200: They can play hide-and-seek. Or they'll run and hide and it's come find me.

MR. LASZCZAK: And that is through you teaching them, right?

JUROR NUMBER 200: Yes.

MR. LASZCZAK: And then rewarding them?

JUROR NUMBER 200: Yes.

MR. LASZCZAK: And then when they --- when --- so how do you get --- what do you do say let's play --- what's your dogs' names?

JUROR NUMBER 200: Gatsby and Daisy.

MR. LASZCZAK: So you go up to your dog and you say hey, Daisy, let's play hide-and-seek, and then you go hide?

JUROR NUMBER 200: Yeah, I count and then they know when you reach ten that they have to go find the person that's it.

MR. LASZCZAK: And do they usually find you?

JUROR NUMBER 200: Yes, always. Yes.

MR. LASZCZAK: Gatsby, you said?

JUROR NUMBER 200: Yes.

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MR. LASZCZAK: He's trained to play hide-and-seek, as well.

JUROR NUMBER 200: Yes.

MR. LASZCZAK: All right. And do you guys play this often?

JUROR NUMBER 200: Yes.

MR. LASZCZAK: Can they play hide-and-seek with other individuals or just you?

JUROR NUMBER 200: They can. They can play with anybody.

MR. LASZCZAK: Okay. And do they --- are they successful with whoever is hiding?

JUROR NUMBER 200: Uh-huh.

MR. LASZCZAK: Okay. I don't have anything further. Thanks, Judge.

THE COURT: Okay. Thanks. Thank you for that. Okay. We'll go to challenges for cause, Prosecution.

MR. LASZCZAK: Pass for cause, Judge.

THE COURT: Defense.

MR. TOMKO: None, Judge.

THE COURT: Okay. Peremptories go to the defense. You're next. Any peremptories?

MR. TOMKO: Judge, we do have a peremptory. We'd like to thank juror in seat number 7.

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THE COURT: Three, four, five --- okay. Thank you. Juror in seat number 7, you are excused. Again, don't feel bad, don't take it personally. This is just the right a party to a lawsuit has. Go back to the first floor, correct, Greg? Yes. Okay. Thanks. Okay. Let's fill --- refill the seat number 7.

COURT CLERK: Juror 294.

THE COURT: First, any problems that would make it difficult for you to serve as a juror?

JUROR NUMBER 294: No, nothing.

THE COURT: Would you have called our attention to any one of the questions that you know are important here, that your answer, you know, would --- would strike a chord or be --- be different or troubling in some way?

JUROR NUMBER 294: No.

THE COURT: And you can be fair and impartial?

JUROR NUMBER 294: Yes.

THE COURT: Okay. Let's go to questions. Turn to --- lost track. I think --- let's start with the prosecutor. Okay.

MR. LASZCZAK: Any relationship to law enforcement?

JUROR NUMBER 294: NO.

MR. LASZCZAK: Ever served as a juror before?

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JUROR NUMBER 294: No.

MR. LASZCZAK: Ever have to come into and give some testimony?

JUROR NUMBER 294: No.

MR. LASZCZAK: And are you employed?

JUROR NUMBER 294: Yes.

MR. LASZCZAK: What do you do for a living?

JUROR NUMBER 294: I am a maintenance manager for a property management company. I oversee about four hundred houses.

MR. LASZCZAK: All right. Are you married?

JUROR NUMBER 294: No.

MR. LASZCZAK: Okay. Do you have children?

JUROR NUMBER 294: No.

MR. LASZCZAK: All right. Any questions or confusions about reasonable doubt?

JUROR NUMBER 294: No.

MR. LASZCZAK: If you were to render a verdict today, what would your verdict be?

JUROR NUMBER 294: Not guilty.

MR. LASZCZAK: All right. If after the conclusion of the case, you hear the testimony, you look at the evidence, you listen to the long instruction that the judge gives, do you have any issues with the verdict

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of guilty if you believe I have met beyond a reasonable doubt?

JUROR NUMBER 294: No.

MR. LASZCZAK: I don't have anything further. Thank you.

THE COURT: Okay. Defense.

MR. TOMKO: Welcome. When they called your number, I didn't know if that was a groan or a cheer. But we are glad to have you. You know, as a maintenance manager, what --- what type of place is this?

JUROR NUMBER 294: These are residential homes.

MR. TOMKO: Residential homes.

JUROR NUMBER 294: And there's unoccupied ones.

MR. TOMKO: I'm sorry?

JUROR NUMBER 294: Tenant occupied homes. We have units for multiple owners.

MR. TOMKO: Individual homes?

JUROR NUMBER 294: Yes.

MR. TOMKO: Okay. But the --- when you first talked, I thought you said it was a group home.

JUROR NUMBER 294: No, no. They are all individual homes.

MR. TOMKO: All individual homes.

JUROR NUMBER 294: Yep.

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MR. TOMKO: I see. All right. And so are --- are you the supervisor?

JUROR NUMBER 294: Technically, I'm the maintenance manager, so I subcontract a lot of work, pay the contractors.

MR. TOMKO: All right. And so when you --- when you subcontract something out, there's things that need to be done, whatever it is, when you subcontract, you expect them to do that task.

JUROR NUMBER 294: Correct.

MR. TOMKO: Do you expect them to do it in a certain fashion?

JUROR NUMBER 294: In a timely manner, yes.

MR. TOMKO: And if --- not so much timely, but if they don't do it in the manner that you're expecting it can cause a problem?

JUROR NUMBER 294: Yes.

MR. TOMKO: And what consequence?

JUROR NUMBER 294: They don't get paid.

MR. TOMKO: Big consequence.

JUROR NUMBER 294: Yes.

MR. TOMKO: Beyond a reasonable doubt, what's that to you?

JUROR NUMBER 294: You need to show me the

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evidence and --- and --- and make me believe that something is beyond --- obviously the cause of the issue here. It needs to be presented to me and have me see all the facts and bring me to my conclusion.

MR. TOMKO: So you --- you've heard a lot of talk about beyond a reasonable doubt. And the judge is going to instruct us and you can follow that instruction. Do you think as you listen to something and if it technically happened one way and it could have happened another way, it could be one or the other. Does that give you pause when it comes to thinking about reasonable doubt?

JUROR NUMBER 294: No.

MR. TOMKO: Well, what I'm saying is it could be one way or the other, you don't know which.

JUROR NUMBER 294: Yeah, yes.

MR. TOMKO: Does that mean you have reasonable doubt?

JUROR NUMBER 294: No.

MR. TOMKO: Well, explain that.

JUROR NUMBER 294: Can you state the question again?

MR. TOMKO: Well, your job is to --- is to decide if something happened this way or happened a

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different way. You don't know which. One could happen and the other one could happen. So now you've got to choose, but you may have to guess.

So, if someone is asking you to believe one beyond a reasonable doubt, can you do that when the other one is over here and it could have happened that way. So when you're in a position of guessing about something that would not be beyond a reasonable doubt.

And, when it comes to that guess, you know, it has to be something reasonable. If this one over here was crazy, preposterous well, that may not be a guess anymore, right?

JUROR NUMBER 294: Right.

MR. TOMKO: You know, the prosecutor is the one who has to prove the case. What do you think of the possibility --- what --- what if --- the defense has no witnesses and the defendant didn't testify. Would --- would you hold that against him?

JUROR NUMBER 294: Not really.

MR. TOMKO: Because, after all, the defendant's in an awkward position. The awkward position if he testifies, of course, the person denies it. If he doesn't testify everybody says why didn't he? Either way, they're going to question that testimony, right?

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And so you understand that there's a constitutional right to not testify. And that you can't use it against him.

JUROR NUMBER 294: Yes.

MR. TOMKO: Would you use it against if he chose not to testify?

JUROR NUMBER 294: No, I would not.

MR. TOMKO: Because there's no choice you may have; do you understand that? Because we haven't gotten to trial yet. And a police officer, did we ask questions about that?

JUROR NUMBER 294: You didn't.

MR. TOMKO: Related --- you're not related to a police officer?

JUROR NUMBER 294: No.

MR. TOMKO: What do you think about a police officer's testimony?

JUROR NUMBER 294: I believe that they are as equal as the defendant or anybody speaking under oath, and that's the way I'm going to interpret it.

MR. TOMKO: Uh-huh. You heard lots of reasons that --- that people gave, the different reasons why they --- they would look at somebody; what they'd use to decide if they are being accurate or telling the truth. What would you use?

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JUROR NUMBER 294: Say that one more time.

MR. TOMKO: To decide if someone has been accurate or telling the truth or shading something one way or the other.

JUROR NUMBER 294: All you can judge a person -- I wouldn't say judge, but you can use their tone of voice, their --- their body language. And, obviously, they are under oath, so I would take that under consideration, as well.

MR. TOMKO: How about motivation? Someone is motivated to testify, would that be considered?

JUROR NUMBER 294: I don't ---

MR. TOMKO: Say if I were testifying; if I --- if I said one thing, I'd lose my job. I'm saying something else, the fact that I could get in trouble or lose my job just like the subcontractor, do you think that might shade someone's testimony?

JUROR NUMBER 294: I think that could shade somebody's testimony, but the fact that they would be under oath, I would take that into consideration.

MR. TOMKO: Well, you would consider their prom8ise to tell the truth.

JUROR NUMBER 294: I would not be able to judge, unless I hear it from (inaudible).

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MR. TOMKO: You'd consider their demeanor?

JUROR NUMBER 294: Certainly. Their voice, body language.

MR. TOMKO: Body language. Whether they argue with the attorneys or try to avoid the questions?

JUROR NUMBER 294: Sure.

MR. TOMKO: And whether or not that motivation existed; is that fair?

JUROR NUMBER 294: Sure.

MR. TOMKO: Would you be a fair juror in this case?

JUROR NUMBER 294: Yes, I would.

MR. TOMKO: Anything --- anything that we talked about, and as you listened, you thought, oh, I had a different answer, anything like that?

JUROR NUMBER 294: No.

MR. TOMKO: Thank you. That's all I have.

THE COURT: Okay. Mr. Laszczak.

MR. LASZCZAK: For questions, Judge?

THE COURT: Yes.

MR. LASZCZAK: No further questions.

THE COURT: No further --- okay. All right. Let's go to challenges for cause. Mr. Tomko, challenges for cause.

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MR. TOMKO: None for cause, Judge.

THE COURT: Prosecution.

MR. LASZCZAK: Pass for cause.

THE COURT: Okay. Let's go to peremptories. Prosecution.

MR. LASZCZAK: Judge, People are going to thank and excuse juror seated in seat number 13.

THE COURT: Juror in seat number 13, okay. That person is excused. Let's pick a new juror for that seat. Thank you very much your services, sir.

COURT CLERK: Juror 396.

THE COURT: Okay. Before I --- I ask my two questions, we just remind the lawyers that the jurors have heard these questions now a great deal, so I think that some --- some shorthanding can be employed to make the questions be a little tighter, a little shorter. You certainly --- I'm going to allow you to police yourself, but we've --- we've heard these questions time and time again. And so I think a little bit of abbreviation would be helpful. But let me ask juror in seat number 13. Any --- any hardship or difficulty in serving as a juror?

JUROR NUMBER 396: No hardship. I do have a preplanned, prepaid vacations beginning Friday morning. I am supposed to leave ---

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THE COURT: This --- this Friday morning?

JUROR NUMBER 396: At 7 a.m., yes.

THE COURT: And where are you going?

JUROR NUMBER 396: Traverse City.

THE COURT: Okay. Prepaid?

JUROR NUMBER 396: Partly yes. Not for working. For my best friend. They are getting married in June.

THE COURT: So we (inaudible).

JUROR NUMBER 396: Okay.

THE COURT: That's enough. Any objection to my excusing this juror?

MR. LASZCZAK: No objection.

MR. TOMKO: None, Judge.

THE COURT: Thank you. You are excused. Thank you very much.

JUROR NUMBER 396: Oh, thank you.

THE COURT: Yeah. You're sitting there worried and don't know what to tell your friend.

JUROR NUMBER 396: Exactly. Have a good day.

THE COURT: Let's refill seat number 13.

COURT CLERK: Fifty-eight.

THE COURT: The new juror seated now in seat number 13 --- I guess I should wait for you to sit down.

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Okay. All right. Any --- any hardship or difficulties in serving as a juror?

JUROR NUMBER 58: Preplanned, prepaid starting Monday and we will be gone (inaudible).

THE COURT: And where are you going?

JUROR NUMBER 58: Just to Ann Arbor. I am instructor for the University (inaudible) fifty-five people on (inaudible).

THE COURT: Okay. Any objection to my excusing the juror?

MR. LASZCZAK: No objection.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: You are excused. Thank you. Okay.

COURT CLERK: Juror 250.

THE COURT: And the same question to you. Any hardship or difficulty in serving as a juror?

JUROR NUMBER 250: Yes, I do.

THE COURT: What's that.

JUROR NUMBER 250: I was laid off --- laid off work during the wintertime. I work construction and I just got back to work. And I got a wife at home and this would be very difficult for me. So I'm just getting --- trying to get back on my feet when I got called up for

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here. This is my catch-up time. This is my season.

THE COURT: All right. Any objection if I excuse the juror?

MR. LASZCZAK: No objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: None, Judge.

THE COURT: You're excused. Thank you. New juror in seat number 13.

COURT CLERK: One-ninety-two.

MR. TOMKO: I'm sorry. What number?

COURT CLERK: One-ninety-two.

MR. TOMKO: Thank you.

COURT CLERK: You're welcome.

THE COURT: The new juror in seat 13, any difficulty in serving as a juror for the next four or five days?

JUROR NUMBER 192: Financially, yes. I have a lot, a lot, a lot of medical bills since 2017. I had three major surgeries for a detached retina. I'm trying to pay those bills off. I didn't sleep last night wondering how I am going to make my rent on the first of June.

THE COURT: Because you are --- you are employed, I take it, but ---

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JUROR NUMBER 192: Two part-time jobs. I'm sixty-one and it's difficult to find ---

THE COURT: So you don't get any pay while you're serving as a juror?

JUROR NUMBER 192: None.

THE COURT: I'd like to excuse the juror. Any objection?

MR. LASZCZAK: No objection, Judge.

THE COURT: Mr. Tomko.

MR. TOMKO: None.

THE COURT: You are excused. Okay.

JUROR NUMBER 192: Thank you.

COURT CLERK: Juror Number 210.

THE COURT: Thank you very much.

JUROR NUMBER 192: Thank you.

THE COURT: Any hardship that you would face or any great difficulty in serving as a juror?

JUROR NUMBER 210: No, sir.

THE COURT: Can you be fair and impartial?

JUROR NUMBER 210: Yes.

THE COURT: If yu had to bring a verdict right now, what would it be?

JUROR NUMBER 210: Not guilty.

THE COURT: Okay. Questions from the

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prosecution.

MR. LASZCZAK: Judge, I'm going to be very brief ---

THE COURT: Sure.

MR. LASZCZAK: --- I promise. Sir, what do you do for a living?

JUROR NUMBER 210: High school teacher.

MR. LASZCZAK: And I see you have a military emblem on your shirt.

JUROR NUMBER 210: Yes, sir.

MR. LASZCZAK: Previous Military?

JUROR NUMBER 210: Yes.

MR. LASZCZAK: Okay. Obviously, you would agree that you didn't --- you weren't present for World War I, would you agree with the statement?

JUROR NUMBER 210: I agree.

MR. LASZCZAK: Okay. You weren't there. You didn't serve in the military at that time.

JUROR NUMBER 210: No.

MR. LASZCZAK: Do you believe that World War I took place?

JUROR NUMBER 210: Yes.

MR. LASZCZAK: And how --- why would you say that?

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JUROR NUMBER 210: Evidence.

MR. LASZCZAK: Okay. So through what you've read in books?

JUROR NUMBER 210: What you've read. What you've heard.

MR. LASZCZAK: What you've heard?

JUROR NUMBER 210: (inaudible)

MR. LASZCZAK: And --- and obviously you weren't at the place where this alleged robbery took place, right?

JUROR NUMBER 210: Correct.

MR. LASZCZAK: Because otherwise you wouldn't be here as a juror, you'd be part of our team?

JUROR NUMBER 210: Yes.

MR. LASZCZAK: All right. So when determining whether or not the armed robbery took place by defendant, obviously, you're going to look at the evidence, correct?

JUROR NUMBER 210: Yes, sir.

MR. LASZCZAK: You're going to listen to the testimony?

JUROR NUMBER 210: Yes, sir.

MR. LASZCZAK: And that --- from that point you'll be able to make your conclusion? All right. I don't hjave4 anything further.

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THE COURT: Mr. Tomko.

MR. TOMKO: What branch did you serve in?

JUROR NUMBER 210: Twenty-one years, twenty days a Marine.

MR. TOMKO: I'm sorry?

JUROR NUMBER 210: Twenty-one years, twenty days as a Marine.

MR. TOMKO: Marine Corps?

JUROR NUMBER 210: Yes.

MR. TOMKO: Retired as of when?

JUROR NUMBER 210: (inaudible) 2015.

MR. TOMKO: What did you do in the Marine Corps?

JUROR NUMBER 210: Air field services officer.

MR. TOMKO: I'm sorry?

JUROR NUMBER 210: Air field services officer.

MR. TOMKO: Okay. Ever testify in a proceeding with a military court or any court?

JUROR NUMBER 210: No.

MR. TOMKO: Ever been charged with anything?

JUROR NUMBER 210: No.

MR. TOMKO: Anyone related to you who is in a police department?

JUROR NUMBER 210: My uncle.

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MR. TOMKO: I'm sorry?

JUROR NUMBER 210: Uncle.

MR. TOMKO: Which police department?

JUROR NUMBER 210: In Oregon.

MR. TOMKO: Any contact with him?

JUROR NUMBER 210: Family reunion every two years.

MR. TOMKO: Any reason to believe or disbelieve a police officer when they testify

JUROR NUMBER 210: You want to know if they uphold the law. So you want to believe in them. They are people (inaudible, coughing) time-and-time again today. I understand that hey, sometimes people speak differently just because of this or that. You've got to look at the person by defense.

MR. TOMKO: If a police officer testified one way, and there was some evidence to show that there was something that contradicted it, that give you a reason for not believe a police officer?

JUROR NUMBER 210: If there's evidence, yes.

MR. TOMKO: In the military you follow a lot of rule, correct?

JUROR NUMBER 210: Correct.

MR. TOMKO: When someone doesn't follow tee

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rule, there's a consequence?

JUROR NUMBER 210: Correct.

MR. TOMKO: Even if the consequence is maybe something that doesn't make sense, there's still a consequence, correct?

JUROR NUMBER 210: Yes.

MR. TOMKO: You heard all the talk about evidence, about witnesses, and beyond a reasonable doubt, and waiting to the end to make a decision. Each of those are going to be instructions that the judge gives. Do you understand that?

JUROR NUMBER 210: Yes.

MR. TOMKO: And when the judge gives those instructions, will you be able to follow those instructions?

JUROR NUMBER 210: Yes

MR. TOMKO: And one of those instructions also will be that the prosecutor has the burden of proof.

JUROR NUMBER 210: Correct.

MR. TOMKO: And will you be able to follow that instruction?

JUROR NUMBER 210: Yes.

MR. TOMKO: So if the prosecutor fails to show each of the five elements of the offense, you'd come back

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with a verdict of not guilty?

JUROR NUMBER 210: Yes, as long as that's the rules.

MR. TOMKO: All right. And if the defendant does not testify, you will not hold that against him?

JUROR NUMBER 210: According to the law, I can't.

MR. TOMKO: Because that's one of the rules?

JUROR NUMBER 210: Yes.

MR. TOMKO: And if the defense has not put on any witnesses, you will not hold that against them?

JUROR NUMBER 10: That the rules, yes.

MR. TOMKO: And if the rule is explained to you, and the defendant need not testify, need not produce any evidence whatsoever, you won't hold that against him?

JUROR NUMBER 210: According to the rule, yes.

MR. TOMKO: Very good. Do you think you can be a fair juror in this case?

JUROR NUMBER 210: I hope so.

MR. TOMKO: That's a fair statement. You've never done this before, correct?

JUROR NUMBER 210: Never done it.

MR. TOMKO: All right. If you were charged with a crime --- hopefully it will never happen, would

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you want a juror like yourself to be on that jury?

JUROR NUMBER 20: I hope so.

MR. TOMKO: Can you be fair and impartial in this case?

JUROR NUMBER 210:

MR. TOMKO: The fact that someone is charged with a crime, does that mean anything to you?

JUROR NUMBERB 210: Just means he was charged with a crime.

MR. TOMKO: Right. So that's not evidence.

JUROR NUMBER 210: No.

MR. TOMKO: Okay. Very good. Can you be fair in this case?

JUROR NUMBER 210: I said yes.

MR. TOMKO: Thank you.

THE COURT: I just want to catch up with my bookkeeping here. I have the prosecution as two peremptories used so far?

MR. LASZCZAK: Right.

THE COURT: And the defense, did you use the second one already?

MR. TOMKO: We've used one, Judge.

THE COURT: Just used one, okay. So we go to the defense. Challenges for cause.

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MR. TOMKO: None for cause, Judge.

THE COURT: Prosecution.

MR. LASZCZAK: Pass for cause, Judge.

THE COURT: Peremptories, defense.

MR. TOMKO: One moment, Judge. We would like to thank and excuse the juror in seat number 6.

THE COURT: Okay. Juror in seat number 6 is excused. Let's fill that seat.

COURT CLERK: Juror 351.

THE COURT: Juror 351, in seat number 6, would you face any particular difficulty or hardship in serving as a juror in this case over the next four or five days?

JUROR NUMBER 351. I don't understand.

THE COURT: Well, the first --- first is is there --- can you hear me okay? Can --- can you hear me okay? Yes.

JUROR NUMBER 351: Yes.

THE COURT: It --- Is there some problem that you might have with the language? Is English a second language to you? Or is it your first language?

JUROR NUMBER 351: It's the second.

THE COURT: Okay. How long have3 you been speaking English?

JUROR NUMBER 351: Twenty years.

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THE COURT: And you are a naturalized citizen?

JUROR NUMBER 351: Yes.

THE COURT: What kind of work do you do?

JUROR NUMBER 351: I work with my (inaudible) We are located ---

THE COURT: Okay. One second. Can I have a sidebar?

(4:20. Off the record)

THE COURT: Juror Humber 351, in seat number 6, we've agreed. You can be excused. Okay. Okay. Thank you for your service.

COURT CLERK: Juror 374.

THE COURT: Sir, is there any hardship or difficulty that you have in serving as a juror?

JUROR NUMBER 374: Financially, no.

THE COURT: Okay. Medical? Something --- something on your mind? Any problems at home? Or anything that would distract you?

JUROR NUMBER 374: I volunteer a lot and I won't be able to get none of that in this week. But no big deal.

THE COURT: Small price to pay to be a citizen of the United States though, so okay. All right. How about your ability to serve as a juror in this case? Do

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you --- do you think you can be fair and impartial?

JUROR NUMBER 374: Yes,

THE COURT: All right. Let's go to Mr. Prosecutor.

MR. LASZCZAK: You are retired, sir?

JUROR NUMBER 374: Yes.

MR. LASZCZAK: Okay. What was your previous employment?

JUROR NUMBER 374: My last one was with the Census Bureau, the Department of Commerce for the last ten years?

JUROR NUMBER 374: Yes.

MR. LASZCZAK: All right. And have you ever served as a juror before?

JUROR NUMBER 374: I was on the prosecutor's side once.

MR. LASZCZAK: Okay. What do you mean by that?

JUROR NUMBER 374: I was a witness in a murder.

MR. LASZCZAK: Okay. How long ago was that?

JUROR NUMBER 374: About twenty years.

MR. LASZCZAK: And was that in Macomb County?

JUROR NUMBER 374: No. In Redford. That would be --- Wayne County.

MR. LASZCZAK: Wayne County. Okay. Anything

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about that experience that's going to prevent you from being fair and impartial to the defense?

JUROR NUMBER 374: No, I don't think so.

MR. LASZCZAK: Okay. Were you --- you said you were a witness. Were you a key witness? What was your part in that trial?

JUROR NUMBER 374: Well, I was out in front of the place when the robber left. And they was exchange of gunfire, and the store owner hit an innocent bystander and killed him.

MR. LASZCZAK: Okay. You've heard that term "reasonable doubt" before?

JUROR NUMBER 374: Yeah.

MR. LASZCZAK: All right. And any confusion with that?

JUROR NUMBER 374: No.

MR. LASZCZAK: You understand the burden that I have as a prosecutor?

JUROR NUMBER 374: Yes. You have to prove all counts.

MR. LASZCZAK: I have to prove beyond a reasonable doubt, right?

JUROR NUMBER 374: Right.

MR. LASZCZAK: And if you believe I've met that

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burden and met the elements, what would your verdict be at that point?

JUROR NUMBER 374: At that point if you prove all of them he would be guilty.

MR. LASZCZAK: All right. Thank you. Nothing further.

THE COURT: Defense.

MR. TOMKO: Sir, welcome. Your prior experience with the trial, it had something to do with a robbery, right?

JUROR NUMBER 374: Yes.

MR. TOMKO: Okay. This case is about a robbery.

JUROR NUMBER 374: Correct.

MR. TOMKO: This kind of gives me pause. I want to make sure that geez, that that prior thing would have nothing to do with this case.

JUROR NUMBER 374: Got to be impartial.

MR. TOMKO: So the fact that you had this prior experience, would that influence you in any way?.

JUROR NUMBER 374: I don't think so, no.

MR. TOMKO: Because --- because, I want --- you know, I want --- you know, we want you to be fair. I want you to use your best judgment in this case.

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JUROR NUMBER 374: Right, right.

MR. TOMKO: Well, in that other case you --- you were called --- you sat in the seat and you had to give testimony, right?

JUROR NUMBER 374: Right.

MR. TOMKO: So was there an outcome in that case that case that you are aware of?

JUROR NUMBER 374: Yes.

MR. TOMKO: What --- what happened? Guilty or not guilty?

JUROR NUMBER 374: They --- I think they --- they couldn't really prove who shot first, you know. And they kind of --- they --- I don't know you called it. They just didn't --- I don't --- I think he did go to jail for that.

MR. TOMKO: Okay. But you weren't involved in making the decision?

JUROR NUMBER 374: No.

MR. TOMKO: Okay. So anything you learned was just something you learned after the fact.

JUROR NUMBER 374: Right, right.

MR. TOMKO: All right. And you just testified as honestly as you could as to what you saw?

JUROR NUMBER 374: Right.

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MR. TOMKO: Now, as you testified, did you --- you know, there were things you saw and things you didn't see, right?

JUROR NUMBER 374: Correct.

MR. TOMKO: All right. So when they asked you questions, you testified the best you could?

JUROR NUMBER 374: Right.

MR. TOMKO: And when you --- nah, I'll take that back. You --- now, you heard all of our questions, all about what's beyond ---

JUROR NUMBER 374L: Uh-huh.

MR. TOMKO: -- reasonable doubt, witnesses and things. And, of course, being a witness yourself, people had to size you up.

JUROR NUMBER 374: Yeah. Yes.

MR. TOMKO: So this is kind of different. You're going to have to size someone else up.

JUROR NUMBER 374: Right.

MR. TOMKO: What do you think about that?

JUROR NUMBER 374: Well, I think I can use my best judgment.

MR. TOMKO: Okay. Can you keep an open mind?

JUROR NUMBER 374: Yes.

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MR. TOMKO: Can you wait to the very end to make a decision?

JUROR NUMBER 374: After all the facts are in, yeah.

MR. TOMKO: What do you think about a --- a police officer? More or less believable just because they're a police officer?

JUROR NUMBER 374: No, but they are people. I mean I've got a lot of friends who are police officers, you know.

MR. TOMKO: Okay. Are you related to anybody who is a police officer?

JUROR NUMBER 374: No.

MR. TOMKO: You said friends. Are these folks that you swap stories with?

JUROR NUMBER 374: No. This is four years ago. Back --- back when I lived in Indiana.

MR. TOMKO: Okay.

JUROR NUMBER 374: Small town.

MR. TOMKO: Okay. All right. Fair enough. But the fact that you had friends that were police officers you can set that aside and decide this case separate from any of that?

JUROR NUMBER 374: Right.

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MR. TOMKO: It was so long ago, it probably doesn't have much influence anymore I imagine.

JUROR NUMBER 374: No, just memories.

MR. TOMKO: Okay. Are you married or single?

JUROR NUMBER 374: I'm married.

MR. TOMKO: What does your spouse do?

JUROR NUMBER 374: She's --- she's a gate agent at the airport for American Airlines.

MR. TOMKO: Oh. All right. That --- anything in your past that you think that would --- would you'd be biased one way or the other in this case?

JUROR NUMBER 374: No. Not that I can remember.

MR. TOMKO: Okay.

JUROR NUMBER 374: That's why I take notes. I don't remember a lot.

MR. TOMKO: Okay. Well, that --- that's what we do when --- when we want to remember something. We write it down, right? It would be important to --- to --- you know, better you take the notes, the more accurate you can be.

JUROR NUMBER 374: That's right.

MR. TOMKO: All right. You know, if --- if you were going to have a trial and you, and you were being

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accused of something, would you want a person like yourself to be on the jury?

JUROR NUMBER 374: Yeah.

MR. TOMKO: And why would that be?

JUROR NUMBER 374: Nobody would be as honest as I am.

MR. TOMKO: Okay. You think you could be fair?

JUROR NUMBER 374: Yes.

MR. TOMKO: Thank you.

THE COURT: All right. Challenges for cause, Mr. Prosecutor.

MR. LASZCZAK: Pass for cause, Judge.

THE COURT: For cause, defense.

MR. TOMKO: Not for cause, Judge.

THE COURT: Back to the prosecution for peremptories.

MR. LASZCZAK: Pass peremptories, Judge3.

THE COURT: Okay. Back to defense for peremptories.

MR. TOMKO: Judge, we would like to thank and excuse juror in seat number 9.

THE COURT: Okay. So let's --- thank you very much for your service; appreciate you being here. Go back to the first floor.

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COURT CLERK: Juror Number 22.

JUROR NUMBER 207: Judge, I go downstairs?

THE COURT: Go down to one, yes. Thank you.

COURT OFFICER: Ma'am, I'll take your badge. Jury room is closed.

JUROR NUMBER 207: Okay. And I absolutely done, correct?

COURT OFFICER: Yes.

THE COURT: The new juror in seat number 9, do --- do you face any particular difficulties or hardships in serving as a juror over the next four or five days.

JUROR NUMBER 22: Say that again, sir.

THE COURT: Okay. The --- first of all, I notice that you're hesitating. Can you hear me okay?

JUROR NUMBER 22: Yes.

THE COURT: Are3 you having problems understanding my --- my speech?

JUROR NUMBER 22: No.

THE COURT: Can --- can you understand my English well?

JUROR NUMBER 22: (inaudible)

THE COURT: Are --- are you a citizen?

JUROR NUMBER 22: Yes.

THE COURT: How long have you been a citizen?

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JUROR NUMBER 22: (inaudible)

THE COURT: Do you speak English everyday?

JUROR NUMBER 22: No.

THE COURT: No? What --- what's the language that you predominately speak?

JUROR NUMBER 22: Filipino.

THE COURT: Are you employed?

JUROR NUMBER 22: (inaudible)

THE COURT: Where do you work?

JUROR NUMBER 22: (inaudible) company.

THE COURT: Do the attorneys wish to ask some questions? I'll --- I'll put it simply. Would --- would it be okay if I excused this juror?

MR. LASZCZAK: No objection, Judge.

MR. TOMKO: No objection, Judge.

THE COURT: Okay. You are excused. Thank you.

COURT CLERK: Juror 316.

THE COURT: Okay. New juror in seat number 9, any difficulties or hardships that you will face if you are a juror in this case?

JUROR NUMBER 316: No, Judge.

THE COURT: Can you be a fair and impartial juror?

JUROR NUMBER 316: Yes.

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THE COURT: All right. Let's go to the lawyers for questions. This time we will go to the --- to the prosecution.

MR. LASZCZAK: Sir, are you currently employed? I'm sorry. It's getting close to the end of the day.

JUROR NUMBER 316: I'm retired.

MR. LASZCZAK: You're retired. What did you do before you retired?

JUROR NUMBER 316: I worked for General Motors.

MR. LASZCZAK: All right. And what did you do at General Motors?

JUROR NUMBER 316: Made trucks and buses.

MR. LASZCZAK: Okay. On the --- so worked on the assembly line?

JUROR NUMBER 316: That and I worked at the proving grounds for awhile.

MR. LASZCZAK: All right.

JUROR NUMBER 316: And then to (inaudible)

MR. LASZCZAK: Awesome. Are you married?

JUROR NUMBER 316: Divorced.

MR. LASZCZAK: Divorced. Recently?

JUROR NUMBER 316: Twenty-five years ago.

MR. LASZCZAK: Any relationship with law enforcement?

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JUROR NUMBER 316: None.

MR. LASZCZAK: Ever sat as a juror before?

JUROR NUMBER 316: No.

MR. LASZCZAK: Ever had to testify in a case before?

JUROR NUMBER 316: No.

MR. LASZCZAK: Anything about this case that you've heard so far, regarding what counsel has said, what I've said, whatever the jurors have said, that you think, man, I --- I think I would have said something different or I wish I would have been able to say something if I were sitting in one of these seats?

JUROR NUMBER 316: No, not really.

MR. LASZCZAK: You believe you could be a fair and impartial juror?

JUROR NUMBER 316: I --- I believe so.

MR. LASZCZAK: Okay. And why do you thing that?

JUROR NUMBER 316: Because I'm a pretty fair (inaudible).

MR. LASZCZAK: Were you ever a supervisor.

JUROR NUMBER 316: No.

MR. LASZCZAK: Did you ever ---

JUROR NUMBER 316: Never wanted to be.

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MR. LASZCZAK: Never wanted to be. That's an interesting thought. Because of the corporate overhead or just didn't want to deal with people, or ---

JUROR NUMBER 316: That's kind of what I liked about General Motors. We didn't have to deal with (inaudible).

MR. LASZCZAK: All right. Any issue about listening with the facts and the testimony and looking at the evidence and making a --- making determination on guilt or innocence.

JUROR NUMBER 316: No.

MR. LASZCZAK: Thank you, Judge. Nothing further.

MR. TOMKO: Well welcome. Ever have a good or bad experience with a police officer?

JUROR NUMBER 316: Not really.

MR. TOMKO: Ever have any experiences with the court system at all?

JUROR NUMBER 316: No.

MR. TOMKO: Traffic tickets? Never arrested for anything?

JUROR NUMBER 316: I've been arrested.

MR. TOMKO: What --- what happened, if I can ask?

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JUROR NUMBER 315: DUI and recreational pot.

MR. TOMKO: Okay. With those --- with those circumstances, any problems you had with the way the cases were done?

JUROR NUMBER 316: No.

MR. TOMKO: Did it result in conviction of some kind?

JUROR NUMBER 316: I pled.

MR. TOMKO: You did a plea?

JUROR NUMBER 316: I did it so I pled.

MR. TOMKO: What ---

JUROR NUMBER 316: I did my penance, yeah.

MR. TOMKO: What if you wouldn't have done it?

JUROR NUMBER 316: Learned my lesson.

MR. TOMKO: What if you wouldn't have done it?

JUROR NUMBER 316: Exactly.

MR. TOMKO: I mean, would you have still pled if you didn't do it?

JUROR NUMBER 316: No.

MR. TOMKO: Any bad experience at all with the police or with the officers were involved?

JUROR NUMBER 316: No. They were fair.

MR. TOMKO: Heard the questions about reasonable doubt, witnesses, all those different

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questions? The judge will give you a set of rules to follow, instructions. Will you be able to follow those?

JUROR NUMBER 316: I believe so, yeah.

MR. TOMKO: Is everything that you heard when we were talking, asking questions that you thought boy, I just can't --- I couldn't do that?

JUROR NUMBER 316: No.

MR. TOMKO: All right. So you will follow those rules?

JUROR NUMBER 316: Yes.

MR. TOMKO: Not going to --- you --- you heard the case and this is about an armed robbery? Anything about that that you say oh, I couldn't sit as a juror in a case like that?

JUROR NUMBER 316: No. Just makes me wonder why people don't go get a job. Robbery to me is the end, you know.

MR. TOMKO: I'm sorry? Say that again.

JUROR NUMBER 316: I said most people that --- when I hear robbery, they should go work for a living instead of steal. But, you know ---

MR. TOMKO: All right. Well --- well that might be true in a general sense, but in this case we don't know if anybody stole anything.

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JUROR NUMBER 316: Well, exactly. But you asked me if I did anything about an armed robbery, and that's my thought.

MR. TOMKO: We can --- I suppose that we could agree that --- that all these crimes, whatever they might be, well, people shouldn't do them.

JUROR NUMBER 316: Well, exactly. A robbery --- armed robbery or anything against kids, or --- you know, everybody should have a live-and-let-live thing, you know.

MR. TOMKO: People shouldn't commit crimes?

JUROR NUMBER 316: Right.

MR. TOMKO: Okay.

JUROR NUMBER 316: Especially against other people.

MR. TOMKO: But you'd agree people shouldn't be convicted of crimes they didn't do?

JUROR NUMBER 316: Oh, exactly. Yeah.

MR. TOMKO: And that's really what a trial is all about, to figure out one way or the other.

JUROR NUMBER 316: Right.

MR. TOMKO: Now, all that is done by listening to all the evidence in the case, right? And you're going to be able to listen to all the evidence?

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JUROR NUMBER 316: I believe so, yes.

MR. TOMKO: Okay. Are you bias one way or the other in favor or against either the prosecution or the defense?

JUROR NUMBER 316: Not at all.

MR. TOMKO: All right. If --- if in one of your cases suppose you had a trial because you said you didn't do something and you had to pick a bunch of jurors, would you want a juror like yourself on that jury?

JUROR NUMBER 316: Yes, I would.

MR. TOMKO: Why is that?

JUROR NUMBER 316: Well, I'm fair and honest.

MR. TOMKO: Well, we know that. All right. All right. Thank you.

THE COURT: Okay. Let's go to challenges for cause. Prosecution first.

MR. LASZCZAK: Pass for cause, Judge.

THE COURT: Defense.

MR. TOMKO: None for cause, Judge.

THE COURT: Let's go to peremptories. Prosecution.

MR. LASZCZAK: Pass on peremptories.

THE COURT: Defense.

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MR. TOMKO: Judge, we would thank and excuse juror in seat 4.

THE COURT: Okay. Let's refill seat number 4.

COURT CLERK: Juror Number 37.

THE COURT: Thank you very much. New juror in seat number 4, would you face any particular difficulties or hardships serving as a juror over the next four or five days?

JUROR NUMBER 37: Just --- I am an elementary school teacher. I teach first grade. I have a huge (inaudible, speaking to fast and too low). (inaudible) Detroit Science Center and don't have enough teachers.

THE COURT: You are a teacher for what school district?

JUROR NUMBER 37: South Lyon Public School.

THE COURT: Isn't there somebody who could take your place on the field trip?

JUROR NUMBER 37: (inaudible, talks too fast)

THE COURT: Pardon?

JUROR NUMBER 37: (inaudible)

THE COURT: Yeah. I know that this is a personal disappointment and the children might be disappointed also if you're not there. But that's not going to be good enough to have an excuse, I'm sorry to

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say. Thank you. That's tough. I know. I'm sorry. Let's go to challenges --- well, to --- to questions. Pick up with the prosecution again.

MR. LASZCZAK: Juror in seat 4, obviously you are very emotional about that and we can all respect that. Do you feel that Friday, if we're hearing testimony that you'll be able to concentrate and comprehend and listen to what is happening in this court?

JUROR NUMBER 37: Yes.

THE COURT: Can I see the attorneys for a sidebar?

(4:38, off the record)

THE COURT: There are rules but then there's reason. We are letting you go. Okay. Thank you very much for your service. Okay.

COURT CLERK: Juror Number 108. One-o-eight.

THE COURT: Juror Number one-zero-eight. Okay. Okay. The new juror in seat number 4, sir, I see that your --- you've been using the hearing-assist device. Has it been working okay?

JUROR NUMBER 108: Yes. I love it. I wish I could take it home.

THE COURT: I know. It's --- although it really only works in the courtroom. I mean, it doesn't

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pick up sound. The courtroom is wired so that it picks up sound from the various microphones and sends it to our recording machines, but also to --- to these devices.

So am I correct in assume that there's no particular difficulty or hardship that you will have to serve as a juror?

JUROR NUMBER 108: Not with this.

THE COURT: Not with that, okay. Do you think you can be a fair and impartial juror?

JUROR NUMBER 108: Yes, I do.

THE COURT: You've heard a number of questions. You know what we are looking for so far. Is there any question that you think that, in fairness, the lawyers should hear you talk about because your answer would be remarkable or different in some way?

JUROR NUMBER 108: Not that I can think of.

THE COURT: Okay. Thank you. Let's go to questions. Mr. Tomko:

MR. TOMKO: And welcome.

JUROR NUMBER 108: Thank you.

MR. TOMKO: You've heard all the questions and all the different answers of the different people. Any questions that you would answer differently?

JUROR NUMBER 108: No.

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MR. TOMKO: What would you use to judge the believability of the testimony of a witness?

JUROR NUMBER 108: Yes.

MR. TOMKO: What would you use?

JUROR NUMBER 108: Well, I would use the --- the general --- their --- their demeanor in the courtroom. Their willingness to answer the questions directly.

MR. TOMKO: And if they testified about something and they said it was this way or that, but there was a possibility of it being tampered with and altered or contaminated, would you consider that when you listen to their testimony?

JUROR NUMBER 108: Yes.

MR. TOMKO: What about the whole idea of a police officer testifying, what are your thoughts?

JUROR NUMBER 108: They are the same as everybody else.

MR. TOMKO: Which side of this case bears the burden of proof?

JUROR NUMBER 108: I think it's a balance.

MR. TOMKO: Okay. If it was explained to you that it wasn't a balance and it was on the side of the prosecution, would you be able to follow that rule?

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JUROR NUMBER 108: Yes.

MR. TOMKO: All right. Because who has to prove all of the things beyond a reasonable doubt?

JUROR NUMBER 108: The prosecution.

MR. TOMKO: Yeah. And that will be one of the instruction and the statute because I know it was said before and I'm making sure that the hearing aids are working. In any event, the --- we want a fair and impartial jury. Is there anything about your background that might make it, ah, maybe not so fair?

JUROR NUMBER 108: I don't think so?

MR. TOMKO: Have you ever had contact with police before in the past?

JUROR NUMBER 108: I'm sorry. Aside from traffic, no.

MR. TOMKO: Okay. Ever been the witness in a case?

JUROR NUMBER 108: No.

MR. TOMKO: Ever been the victim of a crime?

JUROR NUMBER 108: No.

MR. TOMKO: Married?

JUROR NUMBER 108: Single.

MR. TOMKO: Single. Do you have any --- anybody close to you, police officers, friends,

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neighbors?

JUROR NUMBER 108: No.

MR. TOMKO: No relatives?

JUROR NUMBER 108: No.

MR. TOMKO: All right. And you said that you're retired?

JUROR NUMBER 108: No. I'm retired from the military after twenty years of service. And for the past nineteen years, I have been quality coordinator for Belle Tires.

MR. TOMKO: Okay. What branch of the military?

JUROR NUMBER 108: I was in the Air Force.

MR. TOMKO: Okay. Belle Tire, are you a worker, supervisor, management? What ---

JUROR NUMBER 108: I work out of the headquarters. I am in the 1D position. What I do is process products and develop our locations.

MR. TOMKO: Okay. And when you do an audit, you're just making sure that things are done correctly?

JUROR NUMBER 108: Yes.

MR. TOMKO: Okay. A financial audit or procedure?

JUROR NUMBER 108: No. It's a process audit for what our people do in the stores. How they greet our

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customers, how they treat our customers.

MR. TOMKO: And there are certain procedures that are expected in each of the stores?

JUROR NUMBER 108: Correct.

MR. TOMKO: And you're quality check is to make sure that they are doing those things?

JUROR NUMBER 108: Yes. It also involves safety in the service area and inventory control.

MR. TOMKO: Okay. And if those things aren't being done, then there is some change or consequence?

JUROR NUMBER 108: Yes. There is a write-up. It's sent to headquarters, to their regional boss and then they deal with it and then they have to send me the results.

MR. TOMKO: Okay. All right. All right. As far as a --- can you --- as a juror goes, can you wait and hold your opinion to the very end?

JUROR NUMBER 108: Yes.

MR. TOMKO: Do you think you can be fair in this case?

JUROR NUMBER 108: Yes, sir.

MR. TOMKO: Thank you.

THE COURT: Mr. Laszczak.

MR. LASZCZAK: Judge, I don't have any

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questions for this juror.

THE COURT: Okay. Let's go to challenges for cause. Mr. Tomko, for cause?

MR. TOMKO: None for cause, Judge.

THE COURT: Prosecution.

MR. LASZCZAK: Pass for cause.

THE COURT: Let's go to peremptories. Prosecution, any peremptories?

MR. LASZCZAK: Judge, People are going to pass on peremptories.

THE COURT: Okay. Defense.

MR. TOMKO: Judge, we would like and excuse the juror in seat number 9.

THE COURT: Okay. Before we fill that, I'm just looking at the time. Let me talk to the lawyers for a second please at a sidebar. Thank you, sir, for your service?

(4:45, sidebar conference)

COURT OFFICER: This is a good time to stand and stretch.

THE COURT: All right. The news is we are already past 4:45. It does not --- everybody can be seated for a second --- we're not going to be here very much longer today. We are going to have to finish this

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tomorrow. You're going to have to come back at 1:30. Again, be here by about quarter after 1:00.

And --- and I know that we are close, but this --- this often happens. And I use the phrase, which I'll --- I'll repeat here. It's more important that we do this right then that we do this quick. Which means that, although we're are close, I think that if we tried to finish this up, we'd be here to 5:15 to 5:30. And there would be pressure to hurry up and make snap decisions. That's not the way that we can do things in a court of law.

So everybody who is seated in the jury box, of course, come back tomorrow. But everybody out in the panel, there is still some choosing to do. There may be some additions --- additional changes. So you will have to be back tomorrow at 1:15, and we will pick up then. Thank you. At 1:15. Thank you. At --- at 1:30, of course, we will pick up. Okay. Thanks. You have to leave the listening devices here.

(4:48, jurors dismissed)

THE COURT: Okay. The --- the outer doors are closed. Again, I sent the jurors home because --- I mean, I --- I know that we're anxious to get the jury picked and sworn, but at this time of day, it just seems

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to be --- especially on the defense side, there's a lot of pressure to --- to wrap it up. And I didn't want to put the defense under that kind of pressure to --- to move too quickly --- too quickly.

So, we'll pick it up tomorrow at 1:30. There's obviously plenty of peremptory challenges left. And we will just have to pick it up again. It's more important that we do this right than we do it quick. Anything for the record before we leave today?

MR. LASZCZAK: Nothing from the People, Judge.

THE COURT: Okay.

MR. TOMKO: Just that I need to --- on plan on my witnesses will be here. I'm trying to get a guide as to approximately when I should have them ready. Originally it was Friday, but we've gone slower than I thought. So I'll plan on having them here on Tuesday?

THE COURT: I don't know. How long did --- once we get the jury picked how long does the ---- the prosecution case take on direct on direct examination?

MR. LASZCZAK: Judge, I --- I think my --- my first witness is going to be relatively quick. Second witness, I don't anticipate being up there for very long. I anticipate the third witness, which would be the K-9 officer, being a lengthy witness from possibly both the

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prosecution side as well as cross-examination. And then from there, Judge, there is a detective, which will be relatively quick on my side. There might be some cross-examination questions from counsel. And then there are three more witnesses after that. So knocking them all out by the end of Friday, I --- I am hopeful, but at the same time very doubtful.

THE COURT: Yeah. It does sound like you can reserve your witnesses for Tuesday and beyond.

MR. TOMKO: Because they're expert witnesses and they have to be paid, and obviously they'll be sitting around if they not testifying. So Tuesday is fine. That's fine. If you want to say Wednesday, I'll do what the Court tells me to do. Because I want to make sure that we're not paying someone just to sit, versus making sure we've got them here when we need them.

THE COURT: We'll look it. Tomorrow --- once --- once we get the jury picked, if we get opening statements in, we'll --- we'll plan for - for Friday, Tuesday and Wednesday. We will know a little bit better. And, by the way, not now, we don't want to crowd up this record, but obviously every time I'm in trial, I've got the same problem.

The way that the docket is set up here, I don't

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know if it's the county, or if it's the way that I'm doing it, or the other judges do --- do it, I just don't ever have enough trial time when I --- when I start a trial. There's too much stuff on the docket, and I wish that we had some spin-off judges, or some --- some way that we could clear our dockets and --- and have full trial days.

So if any of you have any suggestions about how we could do this better in the future, I would welcome it. Because I just really dislike this thought of --- of 1:30 to 4:45. It's just too short. I'll --- I'll just leave it at that and we'll see everybody tomorrow at 1:30. Thank you. Okay.

MR. TOMKO: Thank you, Judge.

MR. LASZCZAK: Thank you, Judge.

(4:51, proceedings concluded)

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STATE OF MICHIGAN)
)ss.
COUNTY OF MACOMB)

CERTIFICATE

I, Rebecca A. Russell, Certified Court Reporter in the State of Michigan, do hereby certify that the foregoing pages, 1 through 175, inclusive, comprise a full, true, and correct transcript of the proceedings taken by means of video recordation without the benefit of a court reporter present in the matter of People of the State of Michigan v Roberto Dupree, case number 15-3884 FC on Wednesday, May 16, 2018.

Further certify that I, Rebecca A. Russell, will assume no responsibility for any events that occurred during the above proceedings for any inaudible responses by any party that are not discernible on the video of the proceedings.

/s/Rebecca A. Russell

REBECCA A. RUSSELL, 4105
Macomb County, MI

Mount Clemens, MI

DATED: September 3, 2018

STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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tomorrow promptly at about ten minutes nine. Now, remember the big long instruction about no research, no talking, don't share your thoughts about the case with anybody. If anybody says so, you're on a case; you can yes. If they say what kind; just say the judge told me I can't tell you any information, at all. That will be the safe what to go. Okay. Thank you.

COURT OFFICER: Bring your pads into the jury room. All rise for the jury please.

THE COURT: Okay. The record will reflect that door to the jury room is closing and is closed. Okay. Sir, you can step down. Anything for the record before we break for the day?

MR. LASZCZAK: I don't think so.

MR. TOMKO: Nothing from the defense, Judge.

THE COURT: Okay. Thank you. The record is closed. We will see you tomorrow. Thank you.

MR. TOMKO: Thank you, Judge.

(5:01, proceedings adjourned)

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Q One black and white ---

A --- this one is not even working. That --- the one you was talking about was not working.

Q Oh. Because I thought when we looked at the picture, it appeared that there were images in the four squares.

A Yeah, but is not recording.

Q Not recording.

A Yeah.

Q So you could watch things happen, but not record those things?

A Yeah, if you back door --- if I'm in the back, I see some people over there, you know, if --- if there is something.

Q You could tell if there's a customer, you could go up front?

A Yes.

Q Oh, all right. But separate from that system, was a system that did record?

A Yep.

Q And that's what we saw of those images that were recording?

A Yes.

MR. TOMKO: Judge, if I may break at this point just for ---

being asked because there's a tracking dog that is possibly at issue in this matter. But I would ask --- or just strongly suggest that we stay away from detail questions about a dog, or say anything about a tracking dog being part of what's going to happen in this case.

I also want to address this prior to opening statement because I --- I've look at the --- the legal issue again, brought up in Mr. Tomko's motion in limine about the use of tracking dog evidence. And there is this in addition to *Harper* which he --- which he argued, just looking at *People v Norwood, 70 Mich App 53, 1976* case.

There, the Court of Appeals reversed a conviction holding that the trial court committed reversible error in admitting tracking-dog-evidence in absence of evidence of accuracy or dog's ability in non-training situations. The court said there has to be four elements consistent with what we said in *People v Harper*. One of the elements is that it is necessary. Second, it must be shown that the dog was trained and accurate in tracking humans. Quoting some out-of-state citations, but adopting in this Michigan appellate caser.

And then the court said that "the handler testified extensively to the dog's training. He also

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A Yes.
Q In fact, they are in business today, still, too?
A Yes.
Q Now, I notice that today --- you speak English. I understand you. There's no problem. I think everyone understands you well. Do you have any problem with writing things out in English?
A Not very well.
Q Not so well? Because you --- you were asked to write down everything that happened, weren't you?
A No.
Q The police never asked you to write down what happened?
A I don't think --- I --- I don't remember that, you know.
Q Okay. So you wouldn't remember telling them I don't write English so good, so I'm not going to do that?
A I don't remember exactly something like that happening.
Q Okay. All right. And what time in the morning did this happen on December 15?
A What do you mean?
Q Well, what time --- we talked about ---
A Oh, what time that happen?
Q --- you were in the store and things, what time is it?
A I think it's between 10 to 11. I'm not exactly time.
Q But it was in the morning?

voir dire with the jury. We will pick the jury and then before we start the trial, before we have the opening statement, we can raise this again. And, again, if a prosecutor is absolutely convinced that the dog handle is going to put in all four elements, then this is a moot point. We won't have to spend much time on it.

But, if there is some --- some problem with all four elements, we should probably talk about it again before opening statement. All right. Let's bring the jury in.

MR. TOMKO: Judge, there's a person in the courtroom?

THE COURT: Oh, this person from the Mental Health Board. He is here as an observer. He is behind the bar today because this is a sanction that he was required because of some missed testing that he had to observe some days in court as a court-watcher.

MR. TOMKO: The question was whether or not he was a juror, and we ---

THE COURT: No. No. That's right. Thank you. Okay. Bring in the jury.

COURT OFFICER: All stand for the jurors please.

THE COURT: All right. The record can indicate

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Q That's fair. Now, so in this L-shape building, all across this Family Dollar, this is pretty long. This is a hundred, two hundred feet, something like that?
A I don't know how many feet.
Q Well, it's not real short. Much longer than this courtroom, right?
A What, the L-shape?
Q Oh, the Family Dollar is much longer than this room?
A Yep.
Q And, of course, with this L-shape, then, in this area here, this is where all the parking is?
A Yep.
Q Now, if you go back behind the store, behind your store --
A Uh-huh.
Q --- did you ever go out the back door?
A Yeah ---
Q Okay.
A --- throw the garbage.
Q So you know what's back there, right?
A Uh-huh.
Q Yes?
A Yes.
Q Okay. Sometimes we say uh-huh or uh-uh ---

overall question, do you believe that you can be a fair and impartial juror?

JUROR NUMBER 123: Yes.

THE COURT: And I guess the last follow-up, knowing that we've --- but we've gone through a whole bunch of questions yesterday, is there any one of those questions that stands out in your mind where you think that you have information to give, that the lawyers or I might --- might need to know?.

JUROR NUMBER 123: No.

THE COURT: Okay. Let's pick up with additional quest8ions for this juror, Mr. Prosecutor.

MR. LASZCZAK: Juror in seat number 9, are you currently employed?

JUROR NUMBER 123: Yes.

MR. LASZCZAK: What do you do for a living?

JUROR NUMBER 123: (inaudible)

MR. LASZCZAK: Okay. When Judge asked you if there was any kind of hardship, your response was a little suspect for lack of a better terms. Can you elaborate a little more on that? Because I feel like there's something --- I can see something on your mind. You're --- you're giving it away, but you almost --- is there something bothering you about being here? Is it a

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A It's still open.
Q That's still there, okay. There was a nails store ---
A Uh-huh.
Q --- that was open?
A Yep.
Q There was a tan --- called Super Tan, they were there?
A Uh-huh. But it's not open no more.
Q Not now.
A Yeah.
Q But back in 2012, they were open?
A Yep.
Q Okay. On the corner was there a --- a restaurant or something to --- to the left?
A Yes.
Q What was the name of that restaurant?
A Rivercrest.
Q I'm sorry?
A Rivercrest.
Q Rivercrest, okay. And then between your --- your building --- your business, going in the other direction, what was --- what was to the right?
A Right next to it?
Q Yeah.
A There's an empty space.

JUROR NUMBER 123: Oh, yes.
MR. LASZCZAK: Were you supposed to be working at that time?
JUROR NUMBER 123: Yes,
MR. LASZCZAK: And, obviously, you haven't been able to go into work, correct?
JUROR NUMBER 123: No.
MR. LASZCZAK: So you haven't gotten paid for the last two days?
JUROR NUMBER 123: Yes.
MR. LASZCZAK: Is that --- financially, is that going to put a deficit on your household?
JUROR NUMBER 123: Yes. I was off all last week because my fiancé had surgery.
MR. LASZCZAK: All right. So let me ask you this question now, because we haven't even begun trial. You've only been seating in that seat for approximately a minute. And emotionally your are distraught. Are you going to be able to focus for the next four days on trial?
JUROR NUMBER 123: Yes. It's about my personal (inaudible).
MR. LASZCZAK: Okay. And that's not going to affect your ability to concentrate and listen to the

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minutes to five. We are going to be breaking at the very latest at five anyway. We have this closing time as between 4:45 and --- and 5:00. I'll leave it up to you. If you want to begin with a few questions, fine, but then we have to break. Or you can do your --- start of your cross-examination tomorrow.

MR. TOMKO: I'd be happy to start a little bit, Judge.

THE COURT: Sure. Go ahead.

MR. TOMKO: I'm sure we will continue.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. TOMKO:

Q Hello, Mr. Zamzami.

A Hi, how are you?

Q I'm fine. My name is Thomas Tomko and I'm an attorney. And I just want to clarify things so that we can get a good understanding of --- of what was going on.

A Okay.

Q Okay. So to begin with, this --- this starts out --- this is December 15, 2012.

A Yes.

Q Okay. Now, just to understand the --- the scene a little bit. This is a --- a --- strip mall where there are many

JUROR NUMBER 123: Van Buren Township.

MR. LASZCZAK: Do --- did you talk to the police in Van Buren Township?

JUROR NUMBER 123: Yes.

MR. LASZCZAK: Do you feel that you were treated fairly by the police department?

JUROR NUMBER 123: Yes.

MR. LASZCZAK: And did you end up speaking with the prosecutor in the case?

JUROR NUMBER 123: Yes.

MR. LASZCZAK: And do you feel that the prosecutor treated you like you should have been treated?

JUROR NUMBER 123: Yes.

MR. LASZCZAK: All right. Do you feel that the judicial system did what it was supposed to do with regards to your case?

JUROR NUMBER 123: Absolutely.

MR. LASZCZAK: All right. And you're not going to hold any of that experience against any one of the parties today?

JUROR NUMBER 123: No.

MR. LASZCZAK: You heard --- there's been a lot of questions asked to multiple different jurors and --- and nothing that has come across in the last two days has

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A No. They --- they come a few of them, then somebody --- one --- one person stay with me in the end.
Q Okay.
A They come a lot of them.
Q So you indicated that this --- this security footage was --- or the system was older, right?
A Is --- is old, but it's not, you know, you see the --- how is it, you know. It was not upgraded, you know.
Q Okay. Did you have any trouble giving the police the video footage?
A Yeah. I didn't know exactly how to do it, you know. And plus it was hard for me to give it to them. They ask me and then I tell them if you --- if you know how to do it, just bring somebody in to try and take it.
Q So you --- you didn't know how to ---]
A I don't know.
Q --- personally download, or ---
A No.
Q --- put it on some kind of thumb drive or anything like that?
A No.
Q Okay. Do you recall that --- meeting Detective Barbera?
A I think so, yeah.
Q Is that a yes?

JUROR NUMBER 123: --- however many ---
MR. LASZCZAK: Whatever the number is?
JUROR NUMBER 123: Yes.
MR. LASZCZAK: Okay.
JUROR NUMBER 123: But if those aren't all met, then he's not guilty because those all have to be met. So the rule is ---
MR. LASZCZAK: Thank you. I don't have anything further.
THE COURT: Okay. Mr. Tomko.
MR. TOMKO: Thank you. Welcome. We had a minute there. Are you okay now? You know, the concern I guess that I have of this case, for every juror, is that there's not a rush to a judgment or some feeling of pressure, hurry up and get things done, you know?
JUROR NUMBER 123: Right.
MR. TOMKO: When I heard about your work and your employment, that concerned me. What if the jury was deliberating and, gosh it might take one day, two days, three days to deliberate? I mean, is this going to --- in your mind is this going to push you to say let's hurry up and get this done?
JUROR NUMBER 123: No. I feel --- just got a little bit one time out of the courtroom and tried to

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A Yeah. That's the first person I seen.
Q And, again, that's the front door?
A Yep. That's --- now they get out.
Q And is this the camera that shows the outside?
A It's showing to the outside, yeah.
Q When these three --- were there any other customers in the store during this?
A No, they locked the door. Plus, there is no customer ---
Q Did you see them lock the door? How do you know they locked the door?
A They locked the door. I see them when --- because the first time --- first time they come in, now, that guy, he was, you know, the first time they come in, they --- he was holding me, you know, like don't move. And then they come in and then they put me down on the ground.
Q Okay.
A Plus, after that, I watched the videos, you know. Watched the --- watched the videos so many times, I see what they did.
Q Did you ever see a vehicle come and go from that location?
A No.
Q After they left, did you take an inventory of your store?
A No.

that, as well?
JUROR NUMBER 123: Of course.
MR. TOMKO: Thank you.
THE COURT: Okay. Challenges for cause, Prosecution.
MR. LASZCZAK: Pass for cause, Judge.
THE COURT: Defense.
MR. TOMKO: None for cause, Judge.
THE COURT: Peremptories, we go back to the prosecution.
MR. LASZCZAK: Judge, People are going to thank and excuse juror seated in seat number 9.
THE COURT: Okay. Thank you. Thank you for your service. I'm glad that it turned out that --- that your anxiety got alleviated. Thank you.
COURT CLERK: Juror Number 377.
THE COURT: Can you --- I think you're supposed to report to the jury room, ma'am. Okay. Thank you. New juror in seat number 9, any difficulties or hardships that would prevent you from being a juror?
JUROR NUMBER 377: Yes, Your Honor.
THE COURT: What's that?
JUROR NUMBER 377: I know the detective.
THE COURT: The detective sitting at the

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A Uh-huh.
Q Is that yes?
A Yes. I was watching it, not only one time, too many times.
Q Okay. And if you were to see that video again, would you be able --- or if you saw that video, does that video actually depict what occurred on that day?
A Yes.

MR. LASZCZAK: Judge, at this time I'm going to ask that People's Exhibit Number 7 be admitted.

THE COURT: Hold it. Before we play it. Hold it. Are we admitting this? Any objection?

MR. TOMKO: It's --- well, Mr. Zamzami had watched the videos. I'm assuming that these are the videos that he watched, of course, by the prosecutor's representation. And so if they are the videos, then they are what they are. And we have no objection to them.

THE COURT: Okay.

MR. LASZCZAK: And for evidence purposes for admission, Judge, this is what's on there. And then, obviously, for the jurors.

THE COURT: That's right. And --- and --- and you --- you're saying that this is the video that he was referring to when he said he watched it many times?

THE COURT: All right. Explain what's --- what's the hesitation when you say think so. I mean, it's --- the --- the bottom line might still be that you can be and you --- you will be, but the question obviously now is why the little bit of a hesitation?

JUROR NUMBER 244: Just the amount of years that passed, you know, that maybe there's a reason for them.

THE COURT: Okay. All right. You understand that it may be --- it may not be; I don't know. But maybe it's a part of the proofs that would be some explanation of that. And that we are just asking you to make a decision based upon the facts. And --- and the rules say that a reasonable doubt can be because of something in the evidence or from the lack of evidence, and just because you think that could be a problem doesn't necessarily mean that --- that that would be an unfair thing for you to think about. And so, with that explanation, does that ease your mind that --- that that's not an improper thought for you to have? That that's maybe one of the things that the prosecution does have to establish anyway.

JUROR NUMBERN 244: Sure.

THE COURT: Okay. Beyond that, any particular

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Q This picture, where is this picture depicted?
A This is in the back. This is in the back area. That's where the storage go.
Q And this is just a bigger angle?
A Almost the same place but this was bigger screen. That's the door. That's the back door right there? That is what I was telling you they tried to open it. Without this bar on it, it's easy to open the lock and get out. But when you have this --- this one here, they have another lock in here. They can't --- they have to open to get out.
Q All right. And there's --- there's one of the boxes in there and a bunch of stuff scattered all over the floor. Was it like that ---
A No.
Q --- before December 15?
A No, no.
Q Did you mess it up like that?
A No, they did.
Q All right. And what --- when you were brought into the back, can --- can you show the jurors where it is --- where you were laying while they were out front?
A Was not --- there is a --- there is another --- another area from --- right that way, you know. There is another

MR. TOMKO: Well, which side are you favoring?
JUROR NUMBER 244: Ah, you know, it's hard to say, but I kind of lean towards the --- the prosecution.
MR. TOMKO: Okay. When you think of a jury, we want people to come in with open minds. And if it was your case and you were being charged, would you want a juror --- with that feeling that you have right now, would you want that person to be on your jury?
JUROR NUMBER 244: No.
MR. TOMKO: And even after you're instructed to erase that from your mind, are you going to be able to do that?
JUROR NUMBER 244: Sure.
MR. TOMKO: So as we're talking here, you're saying you've already erased it from your mind?
JUROR NUMBER 244: Not necessarily. I can't say that. But I've listened to --- you know, I've been listening for about two and a half days, and I've done another --- this is my second courtroom. And, you know, I've been involved with theft at work and that kind of thing. So --- it's kind of hard for me to let it go.
MR. TOMKO: Okay. And where do you work?
JUROR NUMBER 244: I work at a tire store, similar to another juror. He works at Chrysler.

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Q Never saw them today --- or never saw them before that day?
A Before that day, never.
Q Did any of these individuals, other than the guy that you indicated had sunglasses on, did they have anything covering their face or anything?
A The other black guy, he has --- he has something to his mouth, like that, but he was ---
Q You could see his eyes, his nose?
A Seen his eyes, yeah.
Q How about the bald, white person --- white male, as you described him. Did that individual have anything covering his face?
A No. No.
Q Did you see anything on their hands?
A I --- I was not paying attention to him.
Q Fair enough. This is Exhibit 4. That picture of the box, what --- what's inside that? That's the duct tape?
A Yeah. That's the duct tape. They wrap my wrists --- I fold my hands like that (inaudible, voice drops)
Q All right. And you --- you --- you indicated you were able to free yourself, right?
A Yeah.
Q And then did you just throw it in that box or how did the

case?

JUROR NUMBER 244: Yes.

MR. TOMKO: And that's something that's going to stick with you regardless of what we're saying?

JUROR NUMBER 244: I think so, honestly. I really do.

MR. TOMKO: Okay. You know, that's an honest answer. There's no wrong answer. We're just kind of trying to get --- maybe a different type of case that didn't have anything to do with theft, and maybe that wouldn't matter at all, but in this case it's pretty important. You can see how that would be important in this case?

JUROR NUMBER 244: Absolutely. I'd rather him get a fair trial.

MR. TOMKO: You don't think you'd be able to be fair?

JUROR NUMBER 244: Correct.

MR. TOMKO: Thank you.

THE COURT: Mr. Laszczak, any questions.

MR. LASZCZAK: No questions for this juror, Judge.

THE COURT: Okay. Challenges for cause go to the defense.

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register, who --- who has access to that?
A To the cash, you mean?
Q Yes.
A Me.
Q Just you, okay. Is there a key? How do you open it?
A There's a key to open it, or something, you know, it --- it --- you pull it from the bottom.
Q Okay. Okay. So you can use either a key to open it?
A All there is a pop (inaudible) --- you know, if you want to open it with a --- you know, just --- you've got to know --- you've got to know what's ---
Q To touch?
A To touch to open it.
Q All right. So --- and this --- and this picture right door would be closest to us, right?
A Yeah, not --- right by the cash register. Right there. There's --- this is the cash register right here.
Q Where is the back room? Can you point that out on this photo?
A All the way down.
Q And this is People's Exhibit 2. And behind the cash register, that's where all of the cigarettes are located?
A This is cigarettes, and that's the cigars. You know, he brought me down to there, then he point the gun on me.

come back at 1:15 and go from 1:15 until 5:00. That probably will --- and that's in addition to the trial time today, which will go to about quarter to five or 5:00.

On next Tuesday we will start at 10:00 and go until about noon, and then again --- well, Tuesday I have this other docket that --- that interferes. We'll go from 10 until about 12:30 and then from 2:00 until 5. And then on Wednesday 10 to noon and 1:15 to 5:00. So there's going to be a short morning session and a longer afternoon session.

Then once the jury has been given the case for deliberation, you come in at 9:00 and work uninterrupted, break for lunch, come back. Basically, the members of the jury in consultation with the person whom you elect as your foreperson, decide to schedule for breaks and lunch. But basically it's 9 to 5, with breaks for lunch and other things until you reach a conclusion. Most juries come back within one or two days. Some take three days. Some take four or five. There's --- there's really no time limit on it.

And so if you decide in --- in fifteen minutes, fine. If you decide in fifteen days, fine. But the average is less than two days. But --- but that's only

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A This is the back door. That's the camera system.
Q Okay. And that's the camera system that you were able to watch the footage of from that ---
A No, not this one.
Q Not that one?
A No. The one I recall is showing the officers right by the cash register.
Q Okay.
A This is old system.
Q And People's proposed Exhibit 6. Is that --- what is that a picture of?
A This is right by the door, the back door. You know, the trash all over because the trash was by the door and they tried to open the door, and they messed it up, everything.
Q Okay. And you indicated that there's a --- a lock on the door?
A That's to bar the door, yeah. They cannot get into ---
Q Okay. And that bar prevented them from being able to opening the door into the back?
A Yeah.
Q All right. And do those six pictures all fairly and accurately depict the condition of the store on December 5, 2012?

THE COURT: All right. Let's go with questions from the lawyers. Mr. Laszczak.
MR. LASZCZAK: Juror in seat number 9, what do you do for a living?
JUROR NUMBER 391: I work in IT.
MR. LASZCZAK: And you said you are the sole provider for your family?
JUROR NUMBER 391: That's correct.
MR. LASZCZAK: You have children then?
JUROR NUMBER 391: Yes. (inaudible, other talking in s microphone)
MR. LASZCZAK: The old issue about possibly not being paid or not being compensated fully for the next five days is going to distract your ability or attention from being able to be a fair and impartial juror in this case?
JUROR NUMBER 391: No, I'll be fair.
MR. LASZCZAK: Okay. So the financial thing is not going to interfere at all?
JUROR NUMBER 391: I mean, it's definitely going to be a factor, you know, (inaudible, door closing) depending on the length and everything. But for the most part, yes, I'll be fair.
MR. LASZCZAK: And you've heard all the

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THE COURT: Yes.

MR. LASZCZAK: Thank you.

MR. LASZCZAK: (continuing)

Q This is People's proposed Exhibit 1. Do you recognize that photo?

A Yeah. That's the store.

Q That's a photo of your store located at where, 357 ---?

A 37557 Harper.

Q All right. And that picture fair --- fairly and accurately depict the --- what your store looked like on 2012, in December?

A Yes.

MR. LASZCZAK: All right. I'm just going to do these all at once and ask for admission at the end, Judge.

THE COURT: Okay.

BY MR. LASZCZAK: (continuing)

Q And People's proposed Exhibit 2. Do you recognize that photo?

A Yes.

Q And is --- what is that a photo of?

A This is a photo of --- I was showing the officers, you know, videos.

Q Okay. And is that a photo of the --- what portion of the

JUROR NUMBER 391: No. No.

MR. TOMKO: How about the (inaudible, door closing) police officers? Are any police officers related to you or someone you know real well?

JUROR NUMBER 391: There is a police officer being my wife's uncle in Indiana but I don't talk to him.

MR. TOMKO: Indiana a little distance so you don't see him all the time?

JUROR NUMBER 391: Right.

MR. TOMKO: Do you have any negative feelings for police officers or --- or prosecutors?

JUROR NUMBER 391: No.

MR. TOMKO: We talk about treating them as an ordinary witness because that's what they are. Can you do that?

JUROR NUMBER 391: Uh-huh.

MR. TOMKO: Okay. Any experience with thieves, robbers of any kind?

JUROR NUMBER 391: No.

MR. TOMKO: And you heard questions about following instructions? I mean, the judge is going to give us instructions. Are you a rule-follower, as a general rule?

JUROR NUMBER 391: Yes, I try.

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A Then they come back. Somebody hit --- the --- the guy --- before --- before --- before that, they --- they --- somebody hit me with the gun. The --- the guy who had the gun, he hit me by --- right here.

Q And where did he hit you? In the head?

A In the head, yeah.

Q Do --- you what particular side?

A Right here.

Q Okay. All right. Do you know what portion of the gun did he use to hit you with? Do you remember?

A No. I was laying down like this, you know.

Q Was he saying anything to you when he hit you in the head with the gun?

A Not really. They --- yes --- don't move, and things like that, you know.

Q All right. Eventually do these three individuals leave?

A Yeah, they --- after --- after I watch the things --- yeah after that they --- they --- they move --- they go through the front door, you know, because there isn't they can get out from the inside.

Q And what do you do?

A I --- I stay a little bit and then I try to take the tape out and I got the tape out. And I got the tape out from me because it was not too tight, you know. And then I

important case, important to you, would you want someone like you to be a juror?

JUROR NUMBER 391: Yes. I --- I believe I can be fair.

MR. TOMKO: Thank you.

THE COURT: Let's go to challenges for cause, Mr. Prosecutor.

MR. LASZCZAK: Pass for cause, Judge.

THE COURT: Defense.

MR. TOMKO: None for cause, Judge.

THE COURT: Peremptory challenges to the prosecution.

MR. LASZCZAK: Pass on peremptories, Judge.

THE COURT: Okay. Mr. Tomko.

MR. TOMKO: Judge, peremptorily we would like to thank and excuse the juror in seat number 6.

THE COURT: Two, three, four, five, six. Okay. N Thank you very much, sir, for your service. Appreciate it.

JUROR NUMBER 374: Thank you.

THE COURT: Okay. New juror for seat number 6 please.

COURT CLERK: Juror Number 366.

JUROR NUMBER 374: Do I go downstairs?

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Q Okay. So these two individuals take you to that area and they tape you up, hands behind your back?
A They tape me inside almost before the back door. And then they pull me out to the --- to that back, you know, and ---
Q Do you know what they taped you with?
A They taped me with that duct tape, you know.
Q All right. All right. Do have duct tape at your store?
A No, they --- they have it with them.
Q You don't sell duct tape at your store?
A No. I have one but --- but I use it. They don't use mine. I find out they didn't use mine. They have one before --- with them.
Q Okay. So they tie --- they tape your hands up behind your back ---
A Uh-huh.
Q --- and they pull you into the storage room, right?
A Uh-huh.
Q Did they say anything to you at this point?
A One person stay with me. The one he had the gun.
Q So the guy with the gun stayed with you?
A Yeah. He stay with me and --- and to --- take --- tried to take the money even from my pocket. And plus they asked me for the keys for the back door. They trying to

JUROR NUMBER 366: --- a lot of ---
THE COURT: So, the --- the question is always --- I mean, all of us come with experiences in the past that --- that can make it difficult to --- to --- to say that I'm the perfect blank-slate juror. I've never experienced anything negative; had no --- no experiences with the criminal justice system one way or the other, either as a victim or as a witness.
It's rare that --- that somebody goes through life without having some experience. The question is can you put that experience aside, keep an open mind and just make the firm decision that you're going to decide this case on the evidence, on the facts, on the testimony, on the exhibits in this case, apply the law as I give it to you, and not let that emotional experience, because of your mother's situation and your situation enter your mind; can you do that?
JUROR NUMBER 366: I don't know for sure.
THE COURT: You don't know for sure, okay. Defense, you can begin the questions.
MR. TOMKO: Thank you, Judge. And welcome. Start everyone out with welcome, because you are welcome. And thank you for coming, and thank you for being honest. You know, that was a pretty traumatic thing for your

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questions. You said that two more people entered the store?

A Yep.

Q Were these two people customers or were these two people that were part of this person who just pointed the gun at you?

A They part of these people.

Q Okay. Do you --- do you remember seeing any of those individuals?

A Yeah. By --- after that, I seen them by the cameras, too, you know. I was watching cameras and everything and I see them.

Q So far you've described one black male, right?

A Uh-huh.

Q Do you --- can you give a description of what the other two individuals looked like?

A One black and one white. Is, bald, you know, like ---

Q No hair?

A No hair.

Q Okay. Any kind of facial recognition? Did --- did --- did they have a mustache? Did they have ---

A Nothing.

Q --- anything that you can --- do you remember?

A Nothing.

whether you can be fair in this case?

JUROR NUMBER 366: Well, it's always in the back of my mind.

MR. TOMKO: Well, we can never erase a lot of questions. But the question becomes whether or not those thoughts really would influence you, whereas, if you didn't have those, you wouldn't be influenced. So the question becomes will it influence you in a direct or indirect way when you're thinking about this case?

JUROR NUMBER 366: (inaudible)

MR. TOMKO: And there's no wrong answer. I mean, I understand. Because we want people that are free from an bias or --- or something that may make you prejudice one way or the other. And the concern is whether or not that would influence you. I --- I think you're being honest by saying you don't know, which leads to the question if --- if there was an important trial of maybe yourself, and --- and you were charged with something like this, and one of the jurors said hey they don't know, would you want them to be on your jury?

JUROR NUMBER 366: No.

MR. TOMKO: And --- and that's honest. So, in all you can't, as you sit here right now, and in all honesty you can't say that it wouldn't influence you,

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A He come into the cash register and asked me for cigars. And he show me --- you know, tried to ask me for --- from --- from --- you know, cigars is a little bit farther from the cash register. So that way I go there and tried to show him. Then he was talking on the phone with somebody else, to talk to them about he's in a smoke shop. And he --- he asking about the cigars, you know, what kind of cigars that he want.

Q Okay.

A And ---

Q Let me ask you this. Are the --- what's behind you? What's --- what's behind the cash register? What kind of product?

A Cigar --- cigarettes and cigars.

Q Okay. So he is standing there talking on the phone with somebody, asking you questions about your cigars?

A Yep.

Q What happens after that?

A Then, as soon as I move to the --- try to show him the cigars, he pulled out the gun and tell me don't move.

Q So he pulls out the gun. Did you see where he pulled the gun out from?

A No. I was --- I was --- my face was like that to pull out the cigars and as soon --- as soon as I turn, and he

isn't there some reason to say, you know, the trial is important, let's make sure that we get the right person; let's make sure beyond a reasonable doubt that we get the right person. Wouldn't that come into play? Couldn't you put that in your mind, as well?

JUROR NUMBER 191: Not totally.

THE COURT: Okay. Well, thank you for your service. You're excused. Okay. Thank you. Okay. All right. Next juror.

COURT CLERK: Juror Number 42.

THE COURT: Sir, any hardships or difficulties that would prevent you from being a juror?

JUROR NUMBER 42: No.

THE COURT: Good.

JUROR NUMBER 42: Can you be fair and impartial in this case?

THE COURT: Yes.

JUROR NUMBER 42: Is there any question that had been asked previously that you believe that you have information which be somewhat different or important to --- to let us know now?

JUROR NUMBER 42: No.

THE COURT: If you had to bring in a verdict right now, what would that verdict be?

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how to do it and I could not to it. So --- plus they upgrade, you know, the --- the systems, you know, because they got better pictures, better photos.

Q Okay. So you updated the system so you had better cameras in your store?

A Yes.

Q And because it was just more user friendly?

A Yeah. Is --- is --- better system, you know.

Q Were your cameras working on December 15, 2012?

A Yes.

Q Who has the --- who has the ability to access the system? Just you or anybody else --- the security footage?

A Just me.

Q At some point --- what time did you open on the 15th, December 15?

A Nine o'clock.

Q Nine o'clock. And you indicated that you typically work alone, right?

A Yes.

Q All right. At some point did customer enter the store on that date, that you recall, in the early-morning hours?

A You mean before what's happening?

Q Yeah. Let me ask you this question.

A Okay.

JUROR NUMBER 42: No.

MR. LASZCZAK: Anything about armed robbery that strikes a chord with you?

JUROR NUMBER 42: No.

MR. LASZCZAK: And you indicated that you believe you can be fair and impartial in this case, correct?

JUROR NUMBER 42: Yes.

MR. LASZCZAK: All right. Thank you. Nothing further, Judge.

THE COURT: Thank you. Mr. Tomko:

MR. TOMKO: Thank you. Tell me a little bit about your job. What do you do in your job?

MR. LASZCZAK: I'm a store manager and so we -- - I supervise different departments so there's a few of us to hold it --- you know, there's parts and service; there's (inaudible) aspect; we have an online call center, and we also have a shop with mechanics.

MR. TOMKO: Good. Do you supervise people?

JUROR NUMBER 42: Yes.

MR. TOMKO: Ever run into any difficulties with any of the people you supervise?

JUROR NUMBER 42: Yes, three, four times.

MR. TOMKO: What happens when you have a

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A Most of the time. Not --- you known, sometimes somebody else, you know, to cover me if I have something to do.
Q And were you the person working on December 12, 2012?
A Yes.
Q You were working alone that day?
A Yes.
Q Did you --- at that point was your store --- did it have cameras in it?
A Yes.
Q Where were those located?
A It's --- it's all over, you know. There's about four or five of them, you know. So --- there's --- one of them is located to outside, too.
Q So you had cameras on the exterior portions of your building?
A From inside to outside.
Q Okay. And you had --- and then you had cameras on the inside, correct?
A Inside, yeah.
Q Let me ask you about your building. Is this a free-standing building? Or is free-standing building or is this a building that is connected in, like a strip mall?
A Strip mall.
Q All right. And are you in the middle of things or are

what we're talking about ---

JUROR NUMBER 42: Yeah.

MR. TOMKO: --- beyond a reasonable down. And we talked about the --- the verdict. Right now there's a presumption of innocence, can you accept that?

JUROR NUMBER 42: Yes.

MR. TOMKO: Is there anything about the armed robbery that strikes you in a funny way?

JUROR NUMBER 42: No.

MR. TOMKO: How about waiting until the end? Are you person --- you watch those shows CSI, things like that?

JUROR NUMBER 42: No. I --- (inaudible)

MR. TOMKO: Because you're going to be asked to weigh --- so how it's choppy when I go back and forth. It's difficult sometimes, especially for jurors, and you wait until the end to form a judgment?

JUROR NUMBER 42: Yes.

MR. TOMKO: Is there anything about you that you think is important for us to know about you as far as how you decide things?

JUROR NUMBER 42: Nothing I can think of.

MR. TOMKO: Do you think you're pretty fair?

JUROR NUMBER 42: Yes.

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THE COURT: Okay. Thank you. Pull yourself a little closer to the microphone. Bring the microphone down and speak loudly and clearly so that you are projecting to the very back of the courtroom. Okay. Your witness.

MR. LASZCZAK: Thank you, Judge.

M O H A M E D Z A M Z A M I

Witness having been duly sworn, states as follows:

DIRECT EXAMINATION

BY MR. LASZCZAK:

Q Good afternoon.

A Good afternoon.

Q Can you state your name for the record please?

A Mohamed Zamzami.

Q And can you spell the last name?

A Z-a-m-z-a-m-i.

Q And, Mr. Zamzami, I want to take you to 2012. What did you do for work?

A I work in a smoke shop.

Q Okay. Where was that --- where was that smoke shop located?

A 37557 Harper.

Q And do you know what township that's in?

JUROR NUMBER 146: No, Your Honor.

THE COURT: Can you be a fair juror?

JUROR NUMBER 146: I believe I can.

THE COURT: Any question that you want to bring to our attention that you think we should know?

JUROR NUMBER 146: No, Your Honor.

THE COURT: Okay. Let's go with questions. Mr. Laszczak.

MR. LASZCZAK: Do you feel like the luckiest person in the room right now? Sir, are you employed?

JUROR NUMBER 146: I am.

MR. LASZCZAK: And where do you work?

JUROR NUMBER 146: I am the Director of Information Technology (inaudible)

MR. LASZCZAK: Okay. Have you been doing that your whole life?

JUROR NUMBER 146: Seems like it, I'll tell you. Since about eighteen.

MR. LASZCZAK: That's a long time. Always been a director or have you moved on up?

JUROR NUMBER 146: I've worked my way up.

MR. LASZCZAK: All right. Kind of like the juror seated next to you, correct, IT?

JUROR NUMBER 146: IT.

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this evidence, where is it that you're being asked to guess, to try and fill in the blank? That's just not there. The most important of which is Mr. Dupree there at all? Because as we talked, the way evidence is gathered, and what's gathered, can we just decide whether or not something is believable or not. There's a consequence for not following the rules and a consequence fir bit gathering evidence in the right way, and not having evidence at all.

So as we get to this it's summertime, it's baseball season --- and I mean, this is what's going on now. We have to, just like a baseball player, the important thing is to keep our eye on the ball. The thing that we're looking to keep our eye on in this case is evidence. What's here and what's not here. Why is it not here? Is there a reason why it's not here?

Someone is asking you to believe something that's --- boy, if they would have only . . . then okay, maybe we'd know. But you didn't. Now I am asked to guess. It would have been good if it done the right way. It wasn't done the right way. Is it now tainted? What -- what's the integrity of what it is that's being shown?

And you'll see --- I mean, the prosecutor bears the burden of the answer in all those questions, to make

JUROR NUMBER 146: About fifteen years ago.

MR. LASZCZAK: In this building?

JUROR NUMBER 146: No. I was an alternate in a civil case in Cook County, Illinois.

MR. LASZCZAK: Cook County, Illinois. Okay. So that's Chicago, right?

JUROR NUMBER 146: Yes.

MR. LASZCZAK: Alternate. So you got to have the pleasure of sitting through the trial and then at the end you were one of the lots that were called in, right?

JUROR NUMBER 146: There were several different ---

MR. LASZCZAK: Oh, okay. All right. Civil is --- you heard the judge, civil is different than criminal, right?

JUROR NUMBER 146: Yes.

MR. LASZCZAK: Anything about that experience that you had to do that is going affect your ability to be a juror in this case?

JUROR NUMBER 146: I am.

MR. LASZCZAK: Are you married?

JUROR NUMBER 146: I am.

MR. LASZCZAK: Is your wife employed?

JUROR NUMBER 146: She is not.

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untruthful; it doesn't mean that it's not going to be accurate; all it means is that it took six years.

During voir dire we talked a lot about what is evidence. And we all agreed that testimony is evidence. Videos that are shown to you are evidence. Pictures that you will be able to see is evidence. And, ultimately, you get to determine what you --- what you use to determine your conclusion and your analysis.

And I submit to you to make sure that when you're going through this process and you're listening to the testimony and you're reviewing the evidence and you're looking at the documents that you use your common sense. Because common sense is going to be able to tell you that after the conclusion of this trial, you will be able to check all those boxes that the judge gives you beyond a reasonable doubt that Mr. Dupree committed an armed robbery in Clinton Township, Macomb County on December 15, 2012. And I ask that at the end of the trial you come back with a guilty verdict. Thank you.

THE COURT: All right. Mr. Tomko, you have the option of presenting a statement at this time or reserving until later. What do you wish to do?

MR. TOMKO: I prefer to make one now, Judge. Thank you.

that means you have some experience with firearms, of course. What was that experience?

JUROR NUMBER 146: I'm a (inaudible) for a lot of (inaudible).

MR. TOMKO: I see. So you currently do trainings?

JUROR NUMBER 146: Yes.

MR. TOMKO: And so some of the trainings are for police officers?

JUROR NUMBER 146: No, we just train them alone.

MR. TOMKO: So just individuals?

JUROR NUMBER 146: Yes.

MR. TOMKO: All right. So do you --- so does that mean that you align yourself, then, with like a police function as a firearms instructor?

JUROR NUMBER 146: No.

MR. TOMKO: Because that's for --- maybe one of the things is for defense or there could be other reasons why people have a firearm.

JUROR NUMBER 146: Sport.

MR. TOMKO: Oh, sport, absolutely. But the firearms instructions for pistols, rifles or both?

JUROR NUMBER 146: Pistols, rifles, shotguns.

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weapon. You're going to hear him say that what he believes to be a gun pointed at him. I think we all know that gun can be dangerous when used in a dangerous way.

After looking at everything, and keeping in mind that concept of the common goal, the common purpose, the aiding and abetting theory, that it's not just the quarterback and the receiver, or the quarterback and the running back who get credit for the six points after a touchdown because it's all eleven players on the field.

Mr. Dupree knew exactly what was happening on that day, partaking in the robbery to one common goal, to be able to walk out with something that wasn't his, product that wasn't his, cigarettes that weren't his, cash that wasn't his, all while putting Mr. Zamzami in fear. All while having one of his copartners point a gun at his head. All while being tied up and dragged to the back of the room.

At the conclusion of this trial you are going to hear and see a lot of things, specifically, evidence. And we ask that you judge that evidence and the testimony using your common sense. What makes sense to you? Now, part of the video which you are going to watch, you're going to hear testimony that Detective Barbera recorded that testimony on his cell phone. And the reason why he

JUROR NUMBER 146: Yeah.

MR. TOMKO: Okay. All right. And I didn't recall the question being asked. Married?

JUROR NUMBER 146: I am.

MR. TOMKO: And your wife is not working right now?

JUROR NUMBER 146: No, she is not.

MR. TOMKO: Okay. You're full-time employment, then, is with IT?

JUROR NUMBER 146: Yes.

MR. TOMKO: All right. And then the instruction and such, that's on the side, weekends or something along those lines?

JUROR NUMBER 146: Right.

MR. TOMKO: All right. Do you think that there's anything about that experience with being involved with firearms or anything that may influence you in this case? After all, it's an armed robbery.

JUROR NUMBER 146: No.

MR. TOMKO: Okay. All right. What else? I mean, you know it's an armed robbery. Do you think of anything else that might influence you in this case, one way or the other?

JUROR NUMBER 146: Actions speaks for

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Department continued their investigation. During the course of their investigation, you are going to hear the Detective Gilbert develops a possible suspect. One of the suspects being Mr. Dupree.

There is an investigation. He gets a search warrant to get a Buccal Swabs of Mr. Dupree. It is obtained, collected, sent to the Michigan State Police Crime Lab for analysis. An analysis to compare the DNA that was found in the glove and Mr. Dupree's DNA.

And what you are going to hear from another forensic scientist from the Michigan State Police Crime Lab, named Andrea Young, is that you're going to hear that the DNA found inside that glove matches the DNA from Mr. Dupree, the defendant in this case. You are never going to hear that Mr. Dupree worked at the smoke shop. You are never going to hear that he was a contractor doing work on the smoke shop. You're never going to hear Mr. Zamzami indicate that he's ever seen this man before.

All of these things, again, are those pieces of that puzzle that you are building when you look at it, the front of the box, the armed that you're going to see that took place on that date in Clinton Township to add, to you to be able to come to that conclusion that Mr. Dupree partook in that armed robbery.

prosecution. Peremptories.

MR. LASZCZAK: Pass on peremptories, Judge.

THE COURT: For the defense.

MR. TOMKO: One moment, Judge. We would like to thank and excuse juror in seat number 13.

THE COURT: Okay. Thank you very much, sir, for your service. You can return to the jury room. New --- new selection for 13.

COURT CLERK: Juror Number 362.

MR. TOMKO: Judge, can we approach for a quick moment?

THE COURT: Sure.

(2:25, sidebar conference)

THE COURT: All right. The new juror in seat number 13, any --- any hardships or difficulties that you'd like to call to our attention?

JUROR NUMBER 362: I realize, Your Honor, a lot of people have mentioned work. I am a customer service trainer at my job. We recently had a job fair. I had five new hires oriented yesterday. I worked with them this morning before coming here. They are waiting on me right now. They have a shift today and tomorrow. They can't move forward without working with me first. And they are all women. Three of them had to arrange child

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Quartuccio, who has Baxter. Baxter is a trained canine dog in narcotic detention and tracking. Deputy brings his dog out. He does what it standard procedures. Takes his dog to what is described as the last place that the possible suspect was, and he begins to scratch.

The dog, at that point, based on his training, does what it is supposed to do. Ultimately, getting on a rubber glove. Approximately, two, three hundred yards from the entrance --- an entrance of the smoke shop. That glove is photographed. It is processed, taken into evidence. And eventually sent out to the Michigan State Police Crime Lab for testing.

You're going to be able to look at pictures of the condition of the store after the three robbers left. You're going to see the backroom. You're going to see the door they couldn't get out of. You're going to see the area of the cigarettes. You are going to see the tobacco area. You're going to see that there's things that they didn't take. There is a computer on the steps. There were car keys. The three individuals were there for one thing, goods and money.

His glove is sent out to the Michigan State Police Crime Lab for analysis. One of the other things that the --- that you'll hear that the officers do during

THE COURT: So --- so he was formerly a police officer?

JUROR NUMBER 212: My brothers are retired. (inaudible)

THE COURT: Oh, I see, okay.

JUROR NUMBER 212: And my husband was a defense lawyer. He is deceased now.

THE COURT: All right. And do you talk about the cases with him?

JUROR NUMBER 212: When he was living. This is in California.

THE COURT: Oh, some time ago?

JUROR NUMBER 212: Oh, yeah. I used to --- I couldn't understand how he could do the job that he did. Even though I know there's, like with doctors and patients that need confidentiality, just as much as it with the attorney. And, you know ---

THE COURT: All right.

JUROR NUMBER 212: That sounds so --- I mean --

THE COURT: Well --- well, without saying more about that --- that relationship, how long has he been gone now?

JUROR NUMBER 212: Twelve years.

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just because the quarterback and the receiver, or the quarterback and the running back are the ones who actually compete to get the seven points on the board, or the six points on the board, doesn't mean that the rest of the ten players don't get credit.

The same thing in this case. Mr. Dupree might not have been one of the ones who came in, pointed the gun and tied up the victim, when he is definitely with the robbery. He definitely partakes with the successful completion by making sure that he achieves the goal. That the three of them achieves the goal. And the way they had to achieve that goal is to make sure that Mr. Zamzami was unable to call for help, couldn't get to the phone and couldn't escape. So they tied him up.

He also achieved the goal because he got them cash. All part of the robbery. All part of that big picture. And when you're going through and you're listening to the testimony, and you're looking at the evidence, you're going to start putting those pieces together. You're going to use the video, and you're going to put it into the puzzle. You are going to use the testimony from Mr. Zamzami, and you're going to fill in the holes.

You are going to see the still pictures and

that people fight and die for in a war; you --- you understand that?

JUROR NUMBER 212: That was his job.

THE COURT: All right. Let me --- let me talk to the lawyers.

(2:31, sidebar conference)

THE COURT: On balance, we're going to decide to let you go. You are excused. Thank you very much for your service. Appreciate it.

JUROR NUMBER 212: I wanted ---

THE COURT: No. That's all we needed. We --- We need from everybody the honest answer, the candid answer. There are no wrong answers, only your candid opinions and experience. Thank you. Next seat --- I mean, next juror.

COURT CLERK: Juror Number 248.

THE COURT: Sir, is there anything about you that would --- that you know would cause a difficulty or hardship in serving as a juror?

JUROR NUMBER 248: Yes. Missing work is a problem. I work on commission.

THE COURT: Okay. Hold on. I didn't hear that clearly so I'm going to ask you to repeat that.

JUROR NUMBER 248: I said missing work is

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You are going to see that this customer --- you're going to hear testimony from Mr. Zamzami that the customer was on the phone. He is talking to somebody, asking about different things that are in the store, specifically cigars and cigarettes.

And, then at some point, two more individuals walk into the store, and a gun is pointed at his head. That's the video that you're going to see. You are going to see that these three individuals rummaged through the store. You're going to see a video of individuals, and he defendant going up to the cash register, hitting the bottom button of the drawers and stuffing money in his --- in his pants.

So are going to see two other individuals go through cigarettes, grab a bunch of products, tried to hide it, conceal it. And that's the big picture of --- of ---

You are going to be able to watch the video and there are going to be at times when you --- you are going to get a look at what these things did look like. One from Mr. Dupree. Mr. Dupree is one of the two individuals that comes into the store. He is the one closest to the register. Pops it open, grabs the money and takes off.

JUROR NUMBER 360: I am being checked for ovarian cancer. I do not want to miss this appointment.

THE COURT: No, no, no. We --- we wouldn't have you miss it, but --- I mean even --- even assuming that the trial and deliberations would be done --- I mean, the worst case analysis is that if the trial were still going forward, we would just simply take Friday off. But --- so that's why I wanted to know is there any likelihood that following that appointment that you could immediately be checked in and be unavailable as a juror. You don't know?

JUROR NUMBER 360: I --- I don't know.

THE COURT: Okay.

JUROR NUMBER 360: (inaudible)

THE COURT: Other than that --- I mean, other than the time problem, is this something that's going to weigh so heavily on your mind that it's going to be distracting, that you're going to have a hard time listening to this case, no matter how important this is?

JUROR NUMBER 360: Yes.

THE COURT: I think so, too. I'm going to excuse this juror. Any objection?

MR. LASZCZAK: No objection, Judge.

MR. TOMKO: No objection, Judge.

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trial, and at the end of the trial I will give you detailed instructions about the law in this case. You should consider all of my instructions as a connected series. Taken altogether they are the law you are to follow.

After all the arguments has been presented and the lawyers have given their arguments, --- I'm sorry --- after all of the evidence have been presented and the lawyers have given their arguments, I will give you detailed instructions about the rules of law that apply to this case.

Then you will go to the jury room to decide on your verdict. A verdict must be unanimous. That means that every juror must agree on it and it must reflect the individual decision of each juror. That means unanimous either way. Either unanimous for not guilty or unanimous for guilty. We don' leave that we don't leave until all twelve of you have reached a unanimous verdict one way or the other.

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case at the conclusion of the3 trial. Those are my instructions before we start the opening statements of the attorneys.

MR. TOMKO: And what did you do there?

JUROR NUMBER 380: I didn't really retire. Well, I --- I'm retired, but I had a --- a medical emergency back in '93.

MR. TOMKO: All right. And I don't mean to --- I'm not trying to pry on a personal thing. A medical emergency or medical situation might affect a person's ability to maybe pay attention or make decisions or things like that. What --- what type of medical emergency was it?

JUROR NUMBER 380: It was in my ---

MR. TOMKO: Pardon?

JUROR NUMBER 380: I went in with (inaudible, coughing) --- I think they discovered the ACL. And when the surgeon, I was in Ann Arbor.

MR. TOMKO: All right.

JUROR NUMBER 380: I started bleeding out of my veins.

MR. TOMKO: Does that cause you any difficulties today?

JUROR NUMBER 380: Well, I'm still --- as you note, the right side of my body ---

MR. TOMKO: Do you take some medication for this?

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of the jury. On the other hand, if you cannot hear what a witness or lawyer says, please raise your hand immediately. And then I will understand that that means that you didn't hear something and we will have the question or answer repeated.

You can see that --- oh, by the way, it says that do not give any greater weight to questions submitted by you. If I should ask a clarified question -- and it's --- it's always that. It's just to clarify something that someone went into too quickly and I think that maybe something is confused, I might ask a question. I --- I always try never to make it about a really important matter. It's just to try to like set the scene and make sure that --- that nobody is confused.

But if I should ask a question, do not give my question any greater weight than any other question. Because you are the judges of the facts. My questions don't have any greater weight than anybody else's questions. And, again, it's only the answers that we get from the witnesses that are evidence.

You can see that we have chosen a jury of fourteen. After you've heard all the evidence and my instructions, we will draw lots to decide which decide which two of you will be dismissed in order to form a

JUROR NUMBER 380: Well, my medication doesn't bother me.

MR. TOMKO: So it's the condition that bothers you?

JUROR NUMBER 380: Not really. I mean, I function so ----

MR. TOMKO: No, I don't doubt that. But you are here --- here and it's wonderful. But we want someone to have a fair trial, we want everyone to have their full faculties and that you will pay attention and make sure that you will not miss anything. Is it possible that you might ---

JUROR NUMBER 380: My concentration level sometimes is --- (inaudible, door closing) ---

MR. TOMKO: And that's honest. Thank you. But as far as being a fair person you --- you would be a fair person?

JUROR NUMBER 380: Oh, definitely.

MR. TOMKO: All right. Thank you.

THE COURT: Mr. Prosecutor.

MR. LASZCZAK: Can I have a sec, Judge?

THE COURT: Sure.

MR. LASZCZAK: Thank you. Thank you, again, for being here. I'm going to extend counsel's ---

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your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone except the other jurors see them. You must turn them over to the bailiff during recesses. Your notes will not be examined by anyone. And when your jury service concludes, your notes will be collected and destroyed.

During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions. You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Rather, raise your hand, write the question down, and pass it to the bailiff who will give it to me. Do not show your question to other jurors.

The way this is handled is that a witness will come, we will have the direct examination, cross, maybe, redirect, recross. And, then, when --- when all of that is complete, I will look to you and say okay, now, members of the jury this is your opportunity to ask questions. If you have a question, raise your hand and I will allow time for you to write it out.

I only tell you that now because if I didn't

stroke. Is --- is one of them concentration?

JUROR NUMBER 380: Oh, I'm sure there is (inaudible).

MR. LASZCZAK: Okay. How about sleepiness. You said you get tired. Does your heart medication make you sleepy?

JUROR NUMBER 380: Yeah.

MR. LASZCZAK: In the last two-and-a-half days, when you've been here have you found yourself at times maybe sitting back in one of the benches and all of a sudden being like oh, I just missed the last five minutes of what happened?

JUROR NUMBER 380: No. I have been awake all the time.

MR. LASZCZAK: You haven't been sleepy?

JUROR NUMBER 380: No.

MR. LASZCZAK: And I'm truly trying to be very, you know, polite about this. We truly need to know that if you are selected to sit, that you are going to be able to follow along, you're going to be able to concentrate, listen, process and ---

JUROR NUMBER 380: And I want to give this person a fair chance, too. I mean, ---

MR. LASZCZAK: Okay.

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THE COURT: Let me ask you. You heard the attorney just said that --- that's --- that's obviously our concern. We don't have any long-time experience with you. We don't have any --- anyway of knowing this, only you do. Do you find that at times, if you're watching something on television or a moving, or being at a sporting event or anything, are --- are there times when you just, like, lose track of --- of what's been happening and find yourself thinking that oh, there's a gap in --- in my mind as to what I've just listened to. Do you ever find that?

JUROR NUMBER 380: No.

THE COURT: No. Has any physician or any other healthcare professional told you that --- well, for instance, do you drive a car?

JUROR NUMBER 380: Not at all.

THE COURT: Why don't you drive a car?\

JUROR NUMBER 380: (inaudible)

THE COURT: Yeah. Because it --- it related to this ---

JUROR NUMBER 380: Only because of the right side of my body is --- my foot just --- it's like I don't have any feeling. But there is feeling in there because ---

stuff about cases like this. But you don't want to be influenced by anything that you hear, if it wouldn't be about this case. Just stop listening to cases involving criminal charges until you are discharged from jury service.

Until your jury service is concluded, you are not to discuss the case with others, including other jurors except as otherwise authorized by the Court. You are not to read or listen to any news reports about the case. You also may not use a computer, cellular phone or other electronic devises with communication capabilities while in attendance at the trial or during deliberations. These devices may be used during breaks or recesses, but may not be used at any time to obtain or disclose information about a party, witness, attorney or court officer, news accounts of the case, or information collected through juror research on any topics raised or testimony offered by any witness or by any exhibits.

Now, for instance you heard the term voir dire, which is what you went through, meaning the questions given to you when you were being selected. You might have the natural curiosity to just go Goggle what this voir dire means, you know. Is it v-o-i-r d-i-r-e, whatever it is? You're not even to do that. All right.

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decide the case, I will send you to the jury room for that purpose. Then you should discuss the case among yourselves, but only in the jury room, and only when all the jurors are there. When the trial is over, of course, you may if you wish discuss the case with anyone.

If I call for a recess during the trial, I will either send you back to the jury room or allow you to leave the courtroom on your own and go about your business. But you must not discuss the case with anyone or let anyone discuss the case with you and in your presence. If someone tries to do that, tell him or her to stop, and explain that, as a juror, you are not allowed to discuss the case. If he or she continues, leave and report the incident to me as soon as you return to court. You must not talk to the defendant, the lawyers or the witnesses about anything at all, even if it has nothing to do with the case. And, by the way, sometimes it happens. You might see a lawyer or a witness or somebody in the hall and you will say good morning or good afternoon. The lawyers are trained to just politely look away. They are not trying to be rude, but we don't want even the appearance of impropriety, no communication.

We are not going to hold it against you if you

you've nodded off or lost concentration?

JUROR NUMBER 380: No.

THE COURT: In the last two days while you're here was there ever a period when --- when you just feel that you've been --- that --- that you've had a gap in --- in your mind as to what was happening?

JUROR NUMBER 380: No.

THE COURT: No? Okay. All right. With all due respect, I'm going to deny the challenge for cause. I believe that the juror --- again, you know, there is some --- some physical disability left over from incidence some years ago. But the juror has, to my satisfaction, answered --- answered the questions that quite honestly and candidly that there --- there are some deficits, but none that would affect her ability to serve as a juror. So the request for recusal for --- for excusing the juror for cause is denied. Let's go to peremptories, Mr. Prosecutor.

MR. LASZCZAK: Pass on peremptories, Judge.

THE COURT: Defense.

MR. TOMKO: No further, Judge.

THE COURT: Okay. So pass on peremptories?

MR. TOMKO: Pass on peremptories, Judge.

THE COURT: Okay. Then we do have a jury. So

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effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers? Does the witness' age or maturity affect how you judge his or her testimony? Does the witness have any bias or prejudice or any personal interest in how the case is decided? Have there been any promises, threats, suggestions or other influences that affects how the witness testifies? In general, does the witness have any special reason to tell the truth, or any special to lie? All-in-all, how reasonable does the witness' testimony seem when you think about all of the other evidence in the case?

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks question that assume or suggest that it is. Well, for example, if --- if a lawyer said was that a red car that you saw, and the witness says no, it was blue. The --- the answer is no, that car was blue. You --- you should try to put out of your mind the fact that the lawyer said that was it a red car.

On the other hand, use that same example, only the witness' statements are testimony, on the witness' testimony are evidence. If --- if the witness just simply said yes, it was a red car, well, obviously,

fourteen of the prospective jurors have been sworn. They are now the jury. You can be --- well, actually, why you are standing, my court officer will take you to the jury room and you'll become acquainted with it. We'll show you your note pads and then we will bring you out for further instructions.

COURT OFFICER: All rise for the jury please.

THE COURT: All right. To the other members of the panel, thank you much for your service. You are now to return to the first floor to see if you might have further assignments. If you don't, just a reminded that this is a public courtroom, anybody can observe these proceedings at any time. If you have the time and you want to come back and watch the trial, you're free to do so. If you don't, obviously, you can go your own way. But before you go your own way, check in on the first floor to make sure that you're not needed somewhere else. Thank you very much, appreciate it.

No. We are going to do just a couple of legal argument things right now, and so let's all have a seat for a second. Again, prior to opening statement, I just want to --- to make sure we are all on the same page. Right now I don't have any idea as to whether or not the tracking dog officer is going to lay the necessary

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You'll be given a written copy of the instructions I've just read to you. You may refer to them during the trial. Since no one can predict the course of the trial, these instructions may change at the end of the trial. At the close of the trial I will provide you with a copy of my final instructions for your use during deliberations.

My responsibilities as the judge in this trial are to make sure the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case.

As jurors, you are the ones who will decide this case. Your responsibility as jurors is to decide what the facts of the case are. This is your job and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said. What you decide about any fact in this case is final.

When it is time for you to decide the case, you are only allowed to consider the evidence that was

in the dog's ability in non-training situations.

Also, I know that Mr. Tomko raised the issue that we need to know that the dog was properly trained and had an accuracy assessment in tracking humans rather than just drugs. Now, the reason that I'm raising this now is that if the prosecutor decides to mention in opening statement that there's tracking-dog-evidence that's going to be introduced, any if it's later excluded because the foundation cannot be laid, there's a couple of problems.

First of all, for the prosecution case then there is this big gap that you told the jury at the outset that they were going to do something that you could not do. But more importantly, for due process purposes, once the jury is told that a tracking dog was involved in this case, even if --- even if they then find out later that there's no mention of a tracking dog, but there was a sweep of the area, and the glove was found, they're going to be able to figure out that okay, the judge didn't let in the evidence of the tracking dog, or there is some reason why we didn't hear about the --- the tracking dog. But they are going to have it fixed in their mind that the reason why the police were able to come to this --- to --- to this glove was that a tracking

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the larceny, the defendant possessed a weapon designed to be dangerous and capable of causing death or serious injury.

In this case the defendant is charged with committing armed robbery or intentionally assisting someone else in committing a crime --- the crime of armed robbery. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime. Second, that before or during the crime did something to assist in the commission of a crime. Third, at that time the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission or the crime alleged was a natural and probable consequence of the commission of the crime intended.

Next --- getting back to the procedures. And, by the way, there will be detailed instructions on these

-- I mean, one of the simple expedience is that you just don't mention it in opening statement. On the other hand, if you do, you know my thinking about what the consequence might be. So, Mr. Laszczak, do you want to offer any thoughts, or --- or just go onto your opening statement?

MR. HALL: If the Court (inaudible) --- there are a couple of points. First, I --- I --- don't that A would be crowds for a mistrial if that evidence came in. It is clear by the jury instructions that you will be giving these jurors, that whatever we say is not evidence. Only the facts that me in are evidence. It's on us. If we put something out in opening statement, and we don't fulfill it, it's on us, we didn't show that to them.

And you know what? Maybe they take that as a sign that we can't be trusted, but that's --- that's a burden that we take ---

THE COURT: All right.

MR. HALL: --- it is the same thing as our DNA evidence. You don't know that my expert is going to be able to get up there and be qualified as an expert.

THE COURT: That's right.

MR. HALL: Then we all get to say we have DNA

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(3:11-3:27, off the record)

THE COURT: Ready. Let's bring in the jury. Okay. Let's all be seated. Members of the jury I will now explain some of the legal principles that you will know and the procedure that we will follow in this trial. By the way, these instructions that I am reading to you and the previous instructions that I read will be made available to you. As soon as I am done ready them, we will make copies so that you'll have them available in the jury room if you want to refer to them from time-to-time.

But we --- we do this with a reading of the instructions first so that --- well, you know what it is. If you've got the complete package, you'd be reading ahead to see what the judge is going to say next and so we want this first to go through to be you listening to me. In the past we didn't even give these written instructions out so giving the written instructions now is a good backup, but we still do it the traditional way with the reading of the instructions first. Here are some of the legal principles you will need to know and the procedure we will follow.

A trial follows this procedure. First, the prosecutor makes an opening statement where he gives his

MR. HALL: --- so I believe we ---

THE COURT: But --- but yet --- what you say is absolutely right, if there's a --- if it's --- if it's a good-faith statement in opening statements, that you believe this is what the evidence would be and then it later turns around that the judge unexpectedly --- maybe even erroneously decides to exclude some testimony or exhibit, it's not a ground for a mistrial.

But, in this case, Mr. Tomko clearly laid it on the line by saying that quoting *People v Harper*, which led to *People v Norwood* that there are these pre --- prerequisites. He's questioned the certificates and now we all know with absolute certainty that according to *People v Norwood* it is reversible error to admit - tracking-evidence in the absence of evidence of accuracy of the dog's ability in non-training situations.

You, by this time, know with some certainty what the dog handler is going to say and --- and so if -- - if he gets up on the stand and says no, this is a drug dog, and because we --- we have high confidence in him, we decided to use him in this circumstance. But we've got no record of him ever tracking humans.

Obviously, that would be a situation that would invite a mistrial because you would have known in advance

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couldn't produce every witness that he or she said that they would in open statement. I just want to make sure that we are on the same page. Mr. Tomko, is there anything you would like to place on the record regarding this?

MR. TOMKO: A number of things. You know, that is exactly why we have rulings on evidence issues before trial. Because then we know with some certainty as to what is coming in and what's not coming in. In our particular case we talked about an error rate; we talked about the accuracy of the dog; we talked about (inaudible, paper rattling) issue where you have to have some type of idea of what this error rate is.

If someone comes in and testifies that hey, this happened or that happened, aren't we back to same problem as to why in the pendency of this case in 2015 to now has it not been produced? Why was it not produced when we filed a demand for discovery? Why was it not produced when we order to compel that discovery? And, why is it now being presented at trial?

The case that talks about this, not in those terms, but the *People v Perriman case*, 189 Mich App 516. This is a case that cites both in the *Harper* case and it cites the *Norwood* case. And in that particular case,

are now asking for. This case had a long history in which it's --- it's only in April that this request was made. The response was made. The --- the papers that were available to the police were made available to the prosecutor, those were given to you. You are saying, ah, but there's probably more.

You will be allowed to explore that in terms of your cross examination, but you can't --- you can't expect in the normal course of business that the --- that the police and the prosecutor will --- will think of every possible piece of paper that could relate to this dog training.

MR. TOMKO: And --- and we're not asking, Judge. We are asking for an error rate. And so show me --- show me somehow how we get to this error rate. Because we sit here and talk about a blood test and the presence of alcohol or drugs or something like that, they're going to sit there and say and they will say yes, I performed tests; I do this all the time; our error rate is ninety-five percent competence level or five --- five percent error rate; or --- or five percent error; or one percent error rate, whatever it might be.

When we talk about success in tracking humans, there has to be some type of error rate. There has to be

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When we are talking about tracking humans, there's also in the --- in the --- for the company that does the certification, which this dog used. Here is a --- a form that shared with the prosecution previously. And it --- it is scores the dog to get a passing test, not a part of training, but as part of certification. This is something that we were hoping to get with our discovery because here it --- different categories at different work stations just, as well.

The dog was unmanageable. The dog had a poor start. Excessive guiding. Disinterest in him. Failed to indicate. You know, all the things that go into a score that they achieve in order to be certified. Now, the difficulty is that this then would say hey, the --- the dog has already been rated for --- for tracking humans.

Our problem in this case is that this dog was first certified, then the certification expired and then was certified later. So now, we don't know did he barely pass the first certification? Why --- why wasn't the dog certified at the time that he was being used in this case. What's the error rate in tracking humans when he is certified, when he is not certified.

So there's multitude of problems that all

did have it, it wouldn't be admissible because (A) it's hearsay. And (B) it's not the requirement. The requirement is for non-training accuracy, which means in the field on his job accuracy. And that can only come from the officer that deals with that dog --- (audible, voice drops) So it's --- if we argue this over and over again, it's not relevant and --- and it doesn't keep the testimony from coming in.

THE COURT: And I --- I would also indicate this for the record, that this argument about the certification records for the dog is a recent vintage that Mr. Dupree has been in this from the start. He's gone through a number of attorneys. Motions have been filed, mostly talking about the chain of evidence, talking about DNA. But I do not recall a specific request for the training records of the dog.

And beyond that, the --- the prosecution is obligated to turn over inculpatory and exculpatory matters, not everything that may exist in the record of the dog. And so, I just add that for --- for the record, as well. But I think that Mr. Hall is right in saying that what we're talking about is evidence of accuracy in the dog's non-training situations. So that would not cover the exact document that you had in your hand. Your

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

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2015-003884-FC
PEO VS. DUPREE, ROBERTO MARCELLO

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 15-3884-FC

ROBERTO MARCELLO DUPREE,

Defendant.

_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA

MOUNT CLEMENS, MICHIGAN – FRIDAY, MAY 18, 2018

APPEARANCES:

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Mount Clemens, Michigan

FRIDAY – MAY 18, 2018

9:14 a.m.

* * *

THE CLERK: Case number 15-3884-FC, People versus Dupree.

MR. LASZCZAK: Good morning, Your Honor. Ron Laszczak on behalf of the People.

MR. TOMKO: And Judge, good morning. Thomas Tomko appearing on behalf of Mr. Dupree.

THE COURT: Okay. (Inaudible).

MR. TOMKO: I know that Mr. Dupree had something that he wanted to address to the Court. I'm not privy to what that is, but he wanted --

THE COURT: Oh, okay.

MR. DUPREE: I have a written objection, Your Honor.

THE COURT: Okay.

MR. DUPREE: The Defendant Dupree states that the Michigan Constitution grants the defendant the right to assist in his own defense, e.g., to confront the evidence and witnesses against him. The Defendant states that he would like to exercise that right here today. And because the general

rule is that only one person from a party may cross examine a given witness there will be select witnesses whom the Defendant may choose to examine himself, unless the Court in good discretion will allow a lawyer to follow up in the event he has any additional questions for those selected witnesses.

However the issue the Defendant raises is that in order for the Accused to be able to fairly present his argument before the Honorable Court, the Defendant need have fair, the same fair access to the Court to present the arguments and questions in the same manner as the Prosecutor. The Defendant submits that, absent good cause, that his right to present himself before the Court in the event he needs to stand to allow the Court to view his demeanor, or if that's how he is able to more comfortably present his argument he should not be without misconduct be forced to appear before the jury in shackles. The Defendant respectfully objects to leg irons being placed on his body before trial. Defendant submits that his behavior has been appropriate and will remain as such.

THE COURT: So the request then is to remove the leg irons. I mean is the Prosecution,

does the Prosecution have a position on this? This is really a matter of court safety, but I'll hear your thoughts.

MR. LASZCZAK: Judge, I don't, I mean I'm going to defer to the Court and to the Sheriff's Department. I mean I think it's up to them to determine what the safety concerns are, the level of protection that they need. And you know, obviously we're dealing with a serious crime here, as well as somebody who has a lengthy criminal history. I really think it's up to the Macomb County Sheriff's Department and the deputies in the courtroom to make that determination of whether they believe he should be taken out of shackles or not.

The other thing, Judge, that based on the Defendant's motion or whatever he wants to call it, I'm a little concerned as to what his first part of his being able to stand, ask questions and conduct cross examination on witnesses. Because he has counsel. It's not an advisory counsel. This is an appointed counsel to represent him to make sure that effective cross examination is taking place, to make sure that the Constitution is being

followed, to make sure that the Michigan Rules of Evidence are being followed. If in the event that the Defendant decides to conduct cross examination and the Court allows it, we start to flirt with a very difficult line of, he's not a lawyer, he's not trained to be a lawyer.

Obviously he can assist in his own defense and if he decides to represent himself he can. But he also needs to understand that he will be held to the same standards and the rules that I am held to as an attorney, as well as Mr. Tomko is. And we, you know, Judge, from past experiences when defendants decide to represent themselves, what ends up happening is they end up testifying through their cross examination and it just opens the door for a lot of things that counsel has worked hard to keep out and that I can't, I don't have a chance to cross examine the Defendant on. If he gets up there and makes a statement regarding something pertaining to this case and the jury hears that, I don't have a chance to cross examine his statement effectively, Judge. Creating, I mean both parties are, I'll keep it short here, Judge, you know obviously both parties are entitled to a fair trial

and it would be incredibly prejudicial for the Defendant -- I have a feeling as soon as I start talk -- it would just be incredibly prejudicial to the People, Judge, for the Defendant to conduct cross examination, make statements without me being able to cross examine him and the statements that he's making.

THE COURT: Let's deal with these things in two parts. First of all the only reason that the leg irons should be taken off is if the Defendant is allowed to cross examine witnesses or approach the podium and make statements to the Court. Then obviously if he's allowed to do that we're not going to have the shackles on because that would be highly prejudicial. And so that part's easy. If I, and I know that it will cause increased awareness and diligence by the deputies, but that's I guess the price that we have to pay for fundamental fairness. But that is if he is allowed to engage in such questioning. And I do note also that the Defendant's demeanor, his behavior throughout all of the court appearances has been exemplary. Even when I have ruled against him he has been quite appropriate in his response.

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He's been respectful. He has argued well and when I've ruled against him he has not shown any inappropriate behavior at all, so I tend to trust him. And also of course he knows that there's great risk to him if he should in the presence of the jury act out in any way by being aggressive towards his counsel, the Prosecutor, myself, my Clerk, members of the jury, that he doesn't get a new jury because of any misbehavior that he's engaged in. They will see that. That will be highly prejudicial, but he will be stuck with his own behavior because the case law is clear that a person can't by his own bootstraps create a situation where there is a mistrial. He's going to have to live with the consequences of his own inappropriate action, if hypothetically he would engage in any. But I don't think he will.

But let's go to the first part, can he independently of his counsel engage in cross examination, essentially act as co counsel in the case? Recent Supreme Court case McCoy versus Louisiana, decided May 14, 2018, it's number 16-8255 in the Supreme Court docket, again because it's only issued May 14th it doesn't have any U.S.

cite to it because it's so new. But that case dealt with a situation where a defense attorney had chosen a different strategy for a trial than his client. Basically the defense attorney wanted to admit that his client was guilty of the homicide in order to work on the next aspect, which would be the punishment stage. Namely the attorney was trying to save the client's life. The client disagreed with that. He wanted to contest both parts. He wanted to strongly contest his guilt and so there was this difference of opinion and the trial judge allowed the attorney to make the call. And so the attorney did as he said he would basically confess guilt, but then worked on the punishment stage. The U.S. Supreme Court eventually decided that that was inappropriate because a person is entitled to the effective assistance of counsel, but that doesn't mean — that means exactly that, the assistance of counsel. It doesn't mean that the attorney can ignore the client's decisions as to strategy.

I reference that case knowing that it's not exactly on point over here. But it just emphasizes again that the decisions, the major

decisions in the case are up to the Defendant. It's his life. It's his case and the attorney is only there to assist.

But, now going back to Michigan law and the standard way we do things, it is certainly a constitutional right of the Defendant to represent himself. That's clear. I don't have the case at the tip of my tongue, but the Supreme Court of the United States has made that clear. But if a person decides to represent himself it's either all in, one way or another. That is he can have an attorney there as advisory counsel, but you don't basically get two people asking questions. So Mr. Dupree is going to have to make an election here. He can either have Mr. Tomko represent him throughout this trial, in which case then Mr. Dupree will not be able to present argument or to — — well he could present argument because that's out of the presence of the jury. But when the jury is in here he would have to rely upon the cross examination and any direct examination that his lawyer would provide him. We can't have two people act as the attorney. It's either going to be Mr. Tomko or Mr. Dupree, with the decision made right

now that Mr. Dupree is going to be the one who is going to examine the witnesses. If he wants that to continue throughout the trial I will honor his request as long as, I will ask him some additional questions just to make sure that he's competent to do so. But if that is his wish that's the way it will work. If he wants Mr. Tomko to provide some questions and he would do the others, that's not going to work. So his only other choice is to let Mr. Tomko run the show as far as asking questions on direct and cross examination and Mr. Dupree will have to sit silently as any other defendant. So it's really all or nothing.

Mr. Tomko, your, perhaps you're rising to kind of clarify a point?

MR. TOMKO: Yes. Just a little bit different, what Mr. Dupree is asking that, with respect to one or two individual witnesses that he be allowed to question those witnesses and he be the one to question them. Whereas the other witnesses would be witnesses that I would question, similar to we just had a recent trial where there were two prosecutors. The prosecutor would ask questions of some witness, a different prosecutor

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of other witnesses or different cross examination. In fact one gave the closing, one gave the opening. So in a similar vein, what Mr. Dupree is asking is that with respect to individual witnesses that he be allowed to question that witness, other witnesses that I be the one to question those witnesses.

THE COURT: All right. Prosecutor, your response to that?

MR. LASZCZAK: I mean, Judge, I still think it still opens the door for a lot of possibilities that can end up detrimental to the Defendant. And again, Judge, as counsel has stated that, yes, in cases there are prosecutors who take a witness and do the direct examination and then they are, you know, counsel that would be objecting to any type of cross examination. The fact of the matter is, Judge, that if the Defendant decides to do a cross examination of one of my witnesses that I present, or he does a direct examination of a witness that the Defense decides to present, he still potentially has the ability to make statements. He still has a potential to testify on his own behalf through questioning that I do not

get to cross examine him on. It's, it's incredibly prejudicial. I mean the Fifth Amendment right to, you know, exercise and remain silent and that can't be held against you, but at the same time, Judge, you don't get to have your cake and eat it too. You have to either exercise that right and stay silent, or if you decide to engage in litigation then that has to be subject for cross examination to have a fair trial to both the People and the Defense.

THE COURT: Yeah, except that what you say would be true in all cases, meaning then that there would never be a case in which a defendant could represent himself, because the problem that you raise, which is a legitimate problem, would be endemic. It would exist in all cases in which a person represented himself or herself. And therefore it would seem if your argument is followed to its logical conclusion there could never be a case then in which a defendant could represent himself. And that is directly contrary to Supreme Court precedent, right?

MR. LASZCZAK: And I agree with Your Honor, and I guess the point that I'd like to make,

Judge, is that if in the event that the Defendant decides to conduct some kind of questioning of a witness, he has a very competent counsel sitting next to him —

THE COURT: Yes.

MR. LASZCZAK: and I believe that the Court needs to hold Mr. Dupree to the very same standard that Mr. Tomko would be held to, as well as myself. So if in the event he decides to engage in questioning and it is something that is going to be objected to, then the Court should offer him no sort of leniency, because he's going to be held, and I think case law states that. If you decide to represent yourself, that's fine, that's your constitutional right. But you will be held to the Michigan Rules of Evidence, as well as the constitutional requirements within criminal litigation. And that's all, that's all that I ask, Judge, is that Your Honor does some kind of voir dire with the Defendant that he understands what is going to be required of him and that the Court is not going to offer him leniency because now he wants to, you know, Monday night quarterback his jury trial.

THE COURT: Yeah, well what you say is a valid thing to call to my attention. And again it's absolutely true that he doesn't gain or lose anything by being a layperson trying to do this. He's still bound by the rules of evidence, the rules of decorum, the rules of procedure and that the Court is not permitted to bend over backwards because a person is acting as his own attorney. And that's a wise caution, because obviously in civil cases, especially in matters that I conducted in Probate Court, but there oftentimes both sides were unrepresented by counsel, you just can't help as a human being just offer a little bit of leeway one way or the other. But then again it's fair on both sides, because usually both are unrepresented. But certainly the law is exactly as the Prosecutor stated.

And so I just have a couple of questions for you, Mr. Tomko. First of all, as his counsel do you consent to this procedure, where you would handle some witnesses and he would handle others? And do you think it is in your client's best interest? I'd like your position on the record.

MR. TOMKO: Well a defendant, the one who

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faces the consequence of what happens in the case, when that defendant, when they tell me that they want to question a witness, well it's their case. And when I explain to them, well okay, there's good parts and bad parts to that but they insist on that, then it's really within their purview and their choice to do such a thing. Now, whether it's a good idea, bad idea, in the best interest, not in the best interest, remains to be seen. I mean that would, I could make that call only after it happens.

I know that Mr. Dupree knows a lot about his case. He knows all the details. When I first met him this case had already been pending for over two years, three years maybe. And so he was so up to date on the case that he was someone that impressed me. So when I listen to this and I listen to him wanting to ask those questions I know it's because he has thought about it, contemplated, and he believes it's in his best interest. It would be remiss on my part to say, oh no, I'm going to take that away from you and try it all myself. No, that's not the case. Mr. Dupree wants to do that. As long as he understands that there's a

consequence one way or the other. It could be very helpful to them, it can be very hurtful to him. But if he understands that, then I'm not going to stand in the way of it certainly.

THE COURT: Okay. Let me, before I ask some questions of Mr. Dupree, in Faretta versus California, Supreme Court, Faretta is, let me get you the cite on that, 422 U.S. 806, 95 Supreme Court 2525, 45 lawyer's edition 562, a 1975 case. In Faretta the Supreme Court decided on a six-three vote that the Sixth Amendment established a right to self representation and set down guidelines for pro se defense. The court said the Sixth Amendment does not provide merely that a defense shall be made for the accused, it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation and who must be confronted with the witnesses against him, and who must be accorded compulsory process for obtaining witnesses in his favor. Although not stated in the amendment in so many words, the Sixth Amendment, the right to self representation, to make one's own defense personally is thus

necessarily implied in the structure of the amendment. The right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails.

On the other hand the court noted that the right to self representation is not a license. To accept a waiver of counsel the judge has to be convinced that it has the minimal ability to conduct the trial. A, what this means is that the defendant himself might not have the skill and experience of a lawyer, and doesn't have to in order to competently and intelligently choose self representation.

However I do have to make sure that the Defendant meets the minimum standards of competency and continues to insist on self representation. If that is the case I have no right to deny self representation. And in this case the analogy is somewhat different because we're basically saying that he wants to participate as a lawyer in his defense along with Mr. Tomko, he doesn't want to replace him entirely.

I'm going to allow that to happen on, first of all I'll make some observations. We, we

did have a hearing on competency of the Defendant to stand trial and the report from the Forensic Center is that he was competent. I've also noted that he has written several motions, pro se motions, that are well researched, well reasoned. At one point I did, and I really apologize for saying this, I referred to one of his motions as gibberish when he was asking this Court to dismiss the Prosecution because the warrant relied upon some hearsay information. He was confusing search warrants with arrest warrants. And so, although a lot of the case law cited was accurately cited, it was misapplied to the actual situation. That's the only instance though in which I find that he was so completely off base. Other than that his motions have made sense, and as I said he's argued well and I've allowed him to have that opportunity. And his demeanor has always been quite appropriate.

But I do need to ask you, Mr. Dupree, these questions. You realize that there is a risk that you are taking in asking questions of witnesses, in that the jury gets to see you, gets to hear you, gets to form opinions about you based upon the way that you ask questions, about the way

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that you approach witnesses, and that they are entitled to take everything into account, including your demeanor, including the way that you ask the questions? They can also try to ferret out if you have some personal knowledge that arises from being at the scene if that seems to be the basis of your questions. In other words, if you seem to know too many facts they can infer from that that maybe the reason that you know so many facts is that you were actually at the scene of the crime. So there are these dangers which you might not be aware of.

Are you, did you acknowledge that there is risk in doing your own questions and do you accept that risk?

MR. DUPREE: Yes, Sir.

THE COURT: Okay. You also know that because you are not an attorney, as you ask questions there may be questions that are objectionable under the rules of evidence. The Prosecutor will make those objections as he must, and I will either allow the questions to go forward or I will sustain the objection as the law requires. I will not cut you any slack to allow any softening or amendment of the rules simply

because you are not a lawyer, do you understand that?

MR. DUPREE: Yes, Sir.

THE COURT: You also understand that, just in terms of the general way we do things, I think everybody regards this as a bad idea, in other words you have one of the best trial attorneys in the County, in the State, sitting next to you. There are things that even A-plus students graduating from Harvard, or Michigan, or Berkley, or some other law school, even A-plus students, if they've never tried a case the first time that they are in court give a fairly pitiful performance because you just don't know what you don't know, it is very tough to learn the craft of a trial attorney, it's very tough to ask non leading questions on direct, and although cross examination appears to be easier it is an art that really doesn't develop until after several years of doing it. Do you realize that as well?

MR. DUPREE: Yes, Sir.

THE COURT: And knowing all that you're prepared to accept the risk and act as basically co counsel in this case?

MR. DUPREE: Yes, Sir.

THE COURT: Have you thought about this for a long time?

MR. DUPREE: Yep.

THE COURT: Are you sure of it?

MR. DUPREE: I'm sure.

THE COURT: Okay. I want Mr. Tomko and his client to have a chance to confer privately for -- or have you already conferred with him on this?

MR. TOMKO: Not significant enough, Judge.

THE COURT: Okay. Then we're going to have a short delay in the trial. I want at least a five to ten minute break. I'm not putting the clock on it. I want Mr. Tomko to talk to his client to make sure that, because I don't know, I don't know anything about what the proposed defense is going to be and I don't want the two of you to have to start talking on the record about things that could prejudice your case if you stated things outloud that are a matter of trial strategy. So please take five to ten minutes right now. You can probably go back to the holding cell or one of the conference rooms.

It's up to the Deputy, wherever you think that it's safe to go. But let's do that right now so we're going to --

MR. LASZCZAK: Judge, can we just address one more quick thing before we do that?

THE COURT: Yes.

MR. LASZCZAK: Judge, after talking with Deputy Quartuccio, the K-9 deputy yesterday, going through the certificates that were talked about at length that were provided, Counsel's brought it up that there was a gap between 2010 and 2013, meaning '11 and '12 were missing. After speaking with him Deputy Quartuccio, he indicated to me that they absolutely exist, they should have been within the training department's at the Macomb County Sheriff's Department file. He called over there. They weren't. He actually procured them at home where he kept copies of the originals as well. He brought them in, provided them to me today. I've given them to Counsel for his review attached to three other things, basically a letter from the Sheriff's Department to Deputy Dave Quartuccio indicating that there was a successful dog track, signed by the Sheriff at that time, Mark Hackel,

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congratulating him. As well as another letter in which the K-9 was used from the Center Line Public Safety Department to Captain Wickersham at the time, indicating that there was a successful dog tracking.

I know what Counsel's argument is going to be, Judge. I just want to preface it and kind of get in front of it, indicating that none of these are admissible documents, Judge. The law doesn't require certification. It just requires what we've argued at length about, that the dog is trained and accurate in tracking humans. These documents were not withheld purposely. They were not in my possession. They were not in the Macomb County Sheriff's Training Department possession. They were actually at Deputy Quartuccio's home. We provided them. I understand that, you know, we are in trial, but they're not exculpatory, nor are they inculpatory, where they're going to exonerate the Defendant of anything. I'm doing what under People versus Brady and the rules of discovery through the Michigan Court Rule requires me to do. I'm turning them over to counsel and I just wanted to indicate that for the record.

THE COURT: Yeah, the point is they're not exculpatory. And as far as being inculpatory, you're not obliged to give every piece of evidence that's inculpatory, only that which you're going to use against the Defendant.

MR. LASZCZAK: Correct.

THE COURT: So I understand the argument. But we'll cross that bridge when we come to it. But I want to, I don't want to obfuscate or -- wrong word. I don't want to complicate this discussion Mr. Tomko is going to have with his client right now.

And so, please, go off and discuss this, this co counsel and right of representation matter before we tackle any other issue.

MR. LASZCZAK: Thank You, Judge.

MR. TOMKO: Thank You, Judge.

THE COURT: Thank you.

(Matter in recess, 9:43 a.m. to 9:55 a.m.)

THE COURT: So we're back in session. Mr. Tomko, have you conferred with Mr. Dupree?

MR. TOMKO: Well, yes. I've talked with Mr. Dupree and we've talked about the pros and the

cons and what would be involved. He's comfortable in going forward, knowing that there can be objections to things that the Prosecutor makes to certain questions. But he understands and he wishes to go forward and be able to cross examine, or examine individual witnesses that when they come up he'll make a decision right at that time.

THE COURT: And you've warned him about the difficulties and the dangers that he faces in doing this?

MR. TOMKO: Difficulties?

THE COURT: And you've warned him about the possible difficulties, the inadvertent things that he might do? For instance there could be a series of objections, maybe ten, 15, 20 in a row are not appropriate. I will sustain each and every one of them if appropriate. I will obviously overrule them or deny them if they're not appropriate. But I know that there are situations in which people represent themselves that they can get frustrated, and the frustration doesn't look good in front of the jury. He's aware of that?

MR. TOMKO: Certainly, Judge, by this conversation absolutely.

THE COURT: Okay.

MR. TOMKO: And that's, he wants to exercise that right. He wants to participate in his defense and do it in that way.

THE COURT: All right.

MR. TOMKO: Is that a fair statement?

THE COURT: So final words for Mr. Dupree, you've heard my additional questioning to Mr. Tomko, do you agree that you still want to do this, knowing that there's risk, for instance of not being able to get the question out that you might want, and the jury might infer some things against you because of that, simply because your questioning might be contrary to the rules of evidence? You recognize that that could happen?

MR. DUPREE: You saying questions could be contrary to what the rules of evidence?

THE COURT: Well, yeah, in other words that if you want to ask a question and it's not allowed under the rules of evidence and the Prosecutor objects and I sustain it, it's no big thing if it happens once, or twice, or three times. But if it happens a number of times in a row the jury could get the idea that you're not doing

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something right, which could very well be true, but it could also start to cause them to form an opinion against you. And I just want you to be alert to that possible danger as well, do you understand that?

MR. DUPREE: Yes, Sir.

THE COURT: Okay. And one other thing, I don't know if my Deputy mentioned it to you, but he mentioned it to me, I didn't see you when you walked in, jurors tend to look at everything, including the demeanor of people in the courtroom, the way that people are dressed. And these are the other things, and I can't help you as this goes on, but the comment was made just in terms of overall appearance, for instance to have your shirt tucked in, you realize that that's important?

MR. DUPREE: Yep.

THE COURT: Okay. All right. With that we'll, we can call the jury in and we can resume.

MR. TOMKO: Well one final matter we haven't finished addressing yet.

THE COURT: Yes?

MR. TOMKO: These documents that concern the dog tracking --

THE COURT: Right.

MR. TOMKO: it's the same issue that we have raised before. We have documents that were in the possession of a witness who was clearly identified in the incident report from back in 2012. And so when Defense Counsel requests for discovery and requests to get copies of things that are necessary, foundational basis for testimony, we would expect that they would be produced in the ordinary course. We document that as attorneys. We document it through a demand for discovery which was filed in this case. 21 days lapsed and we never got copies of the documents, so we filed a motion, we took the next step and we filed a motion and we got an order from the Court to produce these things within seven days. Lo and behold, nothing was produced. When things were produced on the ninth day then my question to the Prosecutor, well is that it? Yep, that's all we've got. Okay, great. On the tenth day a report comes in. Then when trial starts, trial started on Tuesday, today's Friday, now after trial started we're getting documents to fill in the gaps, because now they're alerted to what the argument is for the

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defense.

You know, the way I practice law is I don't try to surprise people. I file motions and things because I want to get these things clarified. I try to follow the rules. And when I follow these rules it's like, it does reveal some things. It reveals what the defense would be. I suppose this tells me that I should have done nothing, never have requested anything, and when that officer got on the stand and he couldn't produce the documents, then we'd have a problem with foundation and we could try and kick it out at that time. Well instead I was straight forward, I asked for these things from the beginning. The, the tone we're setting here is that, hey, Prosecutor, if you don't have it, just don't bother looking for it, even though you know the witness is there and even know you know you've got to lay the foundation back in 2012, back in, you know, when it happened you knew that the person was going to be involved in the case. In 2015, when the case comes up to Circuit Court you know you've got to lay a foundation, but don't bother to provide that to the Defense, even when they do the demand for

discovery, even when it's ordered by the Court.

So we're left with a situation where I have absolutely no remedy to better prepare for my case. I prepare a defense that has to do with this dog and the lack of certification. Research, prepare a cross examination, what have you, all a red herring, because now they're coming in and they're saying, here's the documents. You know, Mr. Tomko, all that time that you spent preparing and researching, looking into how you're going to cross examine, you wasted your time because now today after trial started three days, four days earlier, I'll now in the middle of trial I'm going to produce these documents. Well that's the problem that we face, that's the problem that we have. You know, now we have a situation where, okay, even without these documents now we're going to question the witness and we're going to say, he's going to say, oh yeah, of course he was trained and what have you. So, you know, I'm left chasing a red herring all because I tried to be diligent and bring the issue up ahead of time, and all because I was thwarted in my efforts to try and get these things ahead of time. I'm asking for a

remedy and the remedy that I'm asking for is, look, we filed a motion, we asked for all of this stuff before, I want the dog tracking evidence completely excluded because I'm left with no remedy whatsoever. I'm left with every kind of due process violation I can think of with trying to get prepared for trial and here we are, trial started on Tuesday, picking our jury. We just started with witnesses yesterday. Today's Friday now and here I'm left with chasing a red herring, a wild goose chase in the middle of trial, when I did everything I could to get this stuff ahead of time. It was known to the Prosecutor. It may not have been in their file. I guess I would concede that. But they knew about a witness, a witness maybe that wasn't contacted until late in the game, and now they're producing things late in the game. Unfair, I want it excluded, all the dog tracking evidence. It's unfair.

THE COURT: Okay. Today is, I need a response from the Prosecutor, but first I just want to get some dates down. Today is May 18. We started trial on May 16. Your discovery request was filed what date?

MR. TOMKO: Well, remember I'm the sixth attorney on the file. Mine was filed on April 2nd.

THE COURT: Okay. April 2, 2018.

MR. TOMKO: And 21 days from there.

THE COURT: And you had 21 days to that it should have been produced on, obviously April 23rd, okay.

MR. TOMKO: And we filed a motion to compel on April 20th.

THE COURT: Right.

MR. TOMKO: It was argued on April 30th.

THE COURT: Okay.

MR. TOMKO: The Court gave them seven days to produce.

THE COURT: And so the response should have been due by May 7th. So under the request for discovery it should have been provided by April 23rd. Under the Court's order it should have been produced by May 7th.

Just some basics, do you contend that the dog, I mean you've mentioned Daubert and Kumho Tire, do you contend that this is expert witness testimony?

MR. TOMKO: Correct. Because the --

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THE COURT: Explain why.

MR. TOMKO: A dog tracker, someone that is a dog handler, they have to be trained as a dog handler. They're an expert. They're providing testimony to the jury and they're saying that, hey, I'm trained, I'm giving information that the ordinary person doesn't have, I'm trained, my dog's trained, this is what my dog does, this is how it does it, this is how my dog is trained, this is what happened on this particular case, what's the difference between, you know, tracking and following, what's the difference between, you know, what an alert is, what's an alert, was the dog, did the dog give an alert, can the dog give an alert on command, is the dog right all the time, is the dog wrong sometimes, how is the dog employed, how do they pick up a scent, when do they pick up a scent, what did they pick up in this case, where did they follow it to. These are all things that are not within the purview of the jury. This is not lay testimony. This is expert testimony. So certainly it's the foundation for expert testimony.

THE COURT: Okay. Do you acknowledge that in the previous cases that have discussed

this, going back to People versus Harper, People versus Norwood, People versus Perryman. Perryman is a new case that we've not talked about before. It's 89 Mich App 516, a 1979 case, an appeal out of Wayne. None of these cases appear to talk about the dog as an expert witness, and of course the dog would not be an expert witness, or the handler as an expert witness. There are foundational requirements that have to be put in about the dog, but it doesn't seem that the case law of the State of Michigan treats this as an expert witness. And I know that some of this case law predates the Michigan Rules of Evidence, so you wouldn't use rule 702 or 703. But the case law doesn't talk about this as being expert witnesses. Do you at least acknowledge that?

MR. TOMKO: Well in MRE 702, the court determines that scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence. I mean this, this is a person who is qualified as an expert by knowledge, skill, experience, training or education. I don't know how they don't fit within that. They're not an eye witness. They weren't there who saw what

happened. They didn't inadvertently discover something. No, they discovered something, they're trying to connect it to this Defendant by virtue of that dog track. That is clearly within the purview of what an expert is, and they have to qualify as an expert.

THE COURT: Okay. But I think we can at least agree that the dog is not an expert witness?

MR. TOMKO: Well that creates another interesting thing, isn't the dog making a statement, an out of court statement going to the truth of the matter asserted? What the dog is doing when they give an alert, that's almost hearsay in a way. Certainly dogs can't sit on the stand and they can't talk. But then when the person is testifying as to what the dog did, that's why when we look at these cases, well the dog has to be, the officer was qualified, that the dog was trained and accurate in tracking humans, the dog was placed on a trail under circumstances that indicate where the person may have been and the trail not become so stale. So, you know, this is the foundation for the expert then to say what the dog had done. So we have, we have these dual

things going on. The dog is in some ways an expert as well, and so is the handler.

THE COURT: Okay. Let me hear from the Prosecutor?

MR. LASZCZAK: Judge, one I think to say that the handler and the dog is an expert is a far leap from what reality actually is. And Daubert is the scientific, it's the scientific realm, Judge. Nothing about, training a dog is not scientific. It's just, I mean it goes back to Pavlov's dog, where you teach them one thing, they salivate on the ring of a bell and then next thing you know they (inaudible). They just learn from repetition, routine, over and over again. Scientific data is what Counsel indicated in his previous argument I believe yesterday is when a lab tech gets up and says, well based on this DNA scientific studies show that this DNA would only be present in one, in a quadrillion people because that's scientifically proven, Judge.

The dog here is a tool of the officer, who yes is trained in how to handle the dog. The dog is trained in how to detect narcotics and tracking. But it is not a Daubert hearing, Judge.

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And in fact Your Honor is correct by indicating that the case law tells you that it's never been considered an expert. And not to mention, Judge, if in the event that the K-9 handler testifies you're going to read jury instruction 4.14, tracking dog evidence, which would be absolutely -- if we were to qualify Deputy Quartuccio as an expert and tell the jury he's an expert and a dog handler, his dog's an expert in tracking odors and human trafficking as well as detecting narcotics, and then we read them this instruction that says you've heard testimony about the use of a dog tracking, you must consider tracking dog evidence with great care and remember that it has little value as proof, that's totally contrary to what Counsel is arguing. In fact, Judge, the jury instruction says you should give it very little weight. So to state that it's expert testimony, first of all I'm not going to offer it as expert testimony because I don't believe I could establish the foundation for this Court to grant Deputy Quartuccio as an expert as a dog handler. So I think Counsel is really making a far leap with classifying the dog's ability to detect narcotics

in tracking, the Deputy Quartuccio's ability to be a dog handler as an expert. With regards to precluding the entire tracking evidence from trial, Judge, it's not the proper remedy. The fact that the case law indicates that, a certifi-, nowhere in the case law does it say certification is required to be produced to lay the foundation. It just indicates that, and we've read this numerous times, Mr. Hall's read it, I've read it, the Court's read it, but that the handler is qualified to handle the dog. Well that's going to be laid as a foundation through Deputy Quartuccio and about his training and experience and how he became qualified to be a handler of the dog. And it must be shown that the dog was trained and accurate in tracking humans. So part of that foundation, Judge, is just going to be that the dog was sent to a class, it was trained on these things. It was successfully completed, and that was done on a yearly basis. So I think --

THE COURT: Yeah, just, I know there's further argument that both sides have to make, but just on this whole notion of whether the dog is an expert, just reading from People versus Perryman 89 Mich 516, in which the use of the tracking dog was

allowed and all of the foundational requirements were met, but in that case the dog was, the dog's name was Schultz, that upon graduation with Schultz from training school they had successfully tracked humans in at least eleven of 36 attempts and explained that 25 non successes involving those situations where a person had entered a motor vehicle where the tracking was attempted and a building that disclosed no occupants, etcetera.

And so eleven out of 36 attempts was considered good enough to put the evidence before the jury. But it's this case that then strongly suggested, which the court rules then, or the instructions adopted that nevertheless, we are of the opinion that this type of evidence, though properly admissible, is to be treated with caution. Recognition of its fallibility can be found even in the opinions of those jurisdictions which permit its introduction at trial. For this reason most polled, as does Michigan, that tracking dog evidence standing alone is insufficient to support a conviction. That's standing alone.

If, if Daubert or Kumho Tire was to apply, certainly a success rate of eleven out of 36

would be woefully inadequate. And so the case law tells me that I am not to treat this as expert evidence, that I have to make a determination if there's at least some minimal reliability, but then let the jury make that determination. Along with the jury instruction that says this is very weak evidence, all of those things basically are the remedy that the appellate courts have told us that you are now seeking.

Now I realize that there's a separate argument, namely that you got this stuff late. But here's my question to you on that, the Prosecution has to present all exculpatory evidence. None of this is exculpatory. The Prosecution has to present all inculpatory evidence that it intends to use at trial. I think that the Prosecution has already indicated that they intended to have the experience with the dog testified to by the handler as to the relevant consideration. That is, has he worked with the dog in situations in which the dog has been accurate in real life situations tracking humans? You yourself Mr. Tomko have pointed out that the issue is not whether the dog is successful in test situations, in training situations, but how

has the dog reacted in real life. And there's case law also, I think it's Harper or Norwood, in which the appellate court said specifically that just evidence that the dog was certified is not sufficient, that is not the relevant consideration. So we're left with the situation where the information that you sought from the Prosecutor is interesting, has some relevance, but it is not material that on the face of it they are obligated to present without a specific request, because it is certainly not exculpatory evidence and it is also evidence that is extraneous to the case that they were going to present. You being the diligent attorney said, well I want to see if there is anything that, that comes up in the background of this dog that could cast doubt on the dog's reliability. In other words, is there some exculpatory evidence? They presented the documentation and the answer is no, there is no exculpatory evidence, that the certifications are valid, that they, that now with this latest bit of information that there's, that they are continuous. And so your, your quest to find exculpatory evidence now, although a good one, has been met

with a no answer, that none of the material that they had, or not they had, that the tracking dog handler had in his file was exculpatory. That happens a lot. You ask for exculpatory evidence, you find out there isn't any. But to now say that the case should be dismissed because the Prosecutor didn't present some extra documentation that they weren't planning to use anyway as inculpatory evidence is not consistent with the rules.

Your response?

MR. TOMKO: Thank You. Judge, two points. The first point is Daubert, sure, it applied only to scientific evidence. But Kumho Tire versus Carmichael, 526 U.S. 137, a 1999 case, it extended Daubert to all opinions based on technical or otherwise specialized knowledge. So Kumho Tire extends it to this case. So that part of the argument I think is wrong.

THE COURT: Well I respectfully disagree with you. I do not think that Kumho Tire applies, because again the dog is not an expert witness. We are simply talking about the observations that a handler makes about the well known ability known to all laypeople that dogs have a particular acute

sense of smell, that people have known for centuries that bloodhounds are accurate in sniffing out prey for various activities including hunting, that hunting dogs are well known to the human race for centuries. And so it is not a novel or scientific thought that a dog has a sense of smell which can be used for tracking purposes. So this is not the Kumho Tire extension of Daubert. This is stuff that is well within the knowledge of the average person. All we're talking about over here is how this dog has been trained and his reliability in the actual situations where his well known sense of following a scent has been used in the criminal law area. And you know, you may be right, I may be right, but I'm saying I believe it's a matter of law that this is not technically an expert witness situation for the reason I just explained and for the reason that the case law of the State of Michigan does not regard in my opinion dog evidence as, as scientific or specialized knowledge. Because the dog is not a human witness, it is not capable of being called an expert and the expert, the dog handler is not an expert because he possesses no particular skill or knowledge. And so

neither the handler nor the dog are experts under either Daubert or Kumho Tire. And if they were, Mr. Laszczak is right, we wouldn't be giving that instruction because that indicates that this is fairly tenuous testimony. You wouldn't do that if you admitted expert testimony.

Also, all of the case law that I've read on the subject out of the State of Michigan never once mentions the words expert witnesses or references rule 701, 702 or 703. So I just disagree with you on that contention. But you may continue.

MR. TOMKO: I understand, Judge. I respectfully would ask the Court to consider, you know, a dog handler, when they're trained, whether it's narcotics detection or tracking someone, what this starts out as a relationship between the dog handler and the dog. Then over the course of time there has to be a reward for the dog. It could be a favorite toy, it could be a ball, it could be something of that nature. And so then the dog has to be trained to, number one, recognize a scent when it comes to a narcotic, and then they have to act in a certain way and give an alert to the

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handler. Now we're saying that, well dogs have a sense of smell that people know and some things they do by nature, like perhaps tracking down a bird or a mouse, a cat, I don't know what it might be. Well sure, there's some innate ability because the dog's senses are greater than what the human senses are. And that's how they can pick up these scents in the first place. But to have them specifically trained to do a specific job, number one with narcotics, that's pretty easy. If it's a cocaine or bomb sniffing dog for example, there are certain qualities or aspects of those types of things that they're looking for. They have to be trained in order to do that. And the handler is then going to talk as an expert to explain how this training takes place, what the training is, was it done in this case and was the procedure followed? That's clearly within the purview of an expert (inaudible) --

THE COURT: Okay. If the documents that you're talking about would not have been presented by the Prosecution in direct examination, rather they would have talked about the dog's qualifications and training, and then the real life

experience with the dog and actual cases of tracking either, well tracking human beings, but the documents that you now have would be valuable for cross examination, but they are not initially the documents that the Prosecutor would have to put into evidence in order to establish that the dog was reliable in actual tracking situations. You might, the average attorney would even object to it as hearsay, as surplus, as irrelevant. But the point is, even if it weren't hearsay, and I really don't think it would be hearsay because it's a certification, it's not a, I won't get into that question. But suffice it to say that, in the normal course of events, and the Prosecution has told me in this case they did not intend to present these documents as part of their case in chief --

MR. TOMKO: I agree.

THE COURT: And so it doesn't appear to me that you're prejudiced by asking for them, getting them a bit late, but only a bit, you know, two days if the May 7th date is the date, and of course added to that because we're here today, but there doesn't appear to be a material shift in your ability to proceed with this trial. I mean you are

not asking for a month's delay to research this. You have the documents. You now know it's a dry well if you're trying to say that the dog had inadequate training. And so at worst you, you went down a path thinking that maybe this would be fruitful, it turns out not to be. That happens to lawyers all the time in preparation for trial. But the Prosecution is not getting away with presenting some material that was hidden from you. They didn't intend to present it in the first place. You now have it. You have it for cross examination purposes. I don't see the prejudice.

MR. TOMKO: Well, and we talk about documents of this nature, that's why we ask for them. There's one other document that we're not talking about, and that's the police report. The police report wasn't provided until the 10th day after the court order of the 30th. And specifically in our demand for discovery we asked for all police and investigation reports. We cited People versus Denning, 140 Mich App 331. We cited the court rule, MCR 6.201(b)(2). That was specifically not provided within 21 days of our request, nor was it provided within the seven days

that the Court had ordered on April the 30th. So instead we're provided it on the tenth day. That's a report. It comes as no surprise to the Prosecution that there was a report, because after all the tracking dog, Detective Quartuccio, he was mentioned that he did bring the tracking dog and that he did do certain things. And that report was written in 2012. Now when we also look at documents, these foundational documents, the Court sort of limited it to the inculpatory/exculpatory evidence. What about the request for things that have to do with expert testimony like we requested in our demand for discovery? (Inaudible) reports of any kind, anything including test results and all information required for analysis or admissibility or evidence under Daubert and Kumho Tire. So to say that we didn't request these things is a misstatement. We did request it, specifically.

THE COURT: You requested them, you now have them. They came a bit late.

MR. TOMKO: Specifically, in a demand for discovery which was (inaudible) --

THE COURT: You now have them, they came

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a bit late.

MR. TOMKO: Well, yeah, a bit late. I guess I was appointed as counsel in this case in April. On April the 2nd was the day that I submitted this. 21 days later it wasn't provided. I filed a motion, the Court granted an order within seven days to produce this and it wasn't produced. And so when it wasn't produced, now I'm formulating a defense based on there not being documents. When they provide documents they don't provide all of them. And so now we still have a defense based on that. And now after trial starts, oh Tom, all that time you spent on that defense that you could have spent on other aspects of the case, nevermind because here it is today. So I'm left with a court rule that gives a specific period of time, an order from the Court that gives a specific period of time, I have no compliance with the specific period of time, I have no remedy when they don't follow it. If I'm the Prosecutor then I feel, well in every case I don't have to follow the court rule, I don't have to follow the court order, I do have to say I didn't have it in my file and I can ask an officer that I knew from 2012, had documents and

had reports, I can ask them in 2018 if they happen to have it at home or at the office, bring it in after trial starts so now we can lay a proper foundation.

THE COURT: Okay. Do you have a case which says that if discovery is made two days late or three weeks late, that it is abuse of a trial judge's discretion to not dismiss the case?

MR. TOMKO: In the court, in the court rule it says that if there's a failure to comply with a court order to produce documents the court can fashion remedies.

THE COURT: Right, can.

MR. TOMKO: Those remedies can be exclusion of that evidence. That evidence is the tracking dog evidence.

THE COURT: And that implies that the Court has discretion.

MR. TOMKO: Absolutely.

THE COURT: In other words, if I decided to preclude that evidence it would be a matter of discretion. The Court of Appeals and the Supreme Court would say, we don't agree with it, but it's discretionary with the Judge, we're going to uphold

it. That is if I decided to exclude it. I think that would be the likely result.

On the other hand, if I said, knowing all of the issues in the case, knowing that the Defendant for years has had the essential information that a dog tracking, that the tracking dog was used, knowing that the information that is now obtained is not substantially different from the information that was immediately available in the original police report. Weighing the seriousness of the crime and weighing factors as such as did anybody appear to be purposefully withholding this information and purposely at fault in trying to delay the introduction of this information? If I determine that exclusion of this evidence is too harsh of a remedy, I think that's a discretionary call also. And just as in the case where the Court of Appeals would say we might not agree with the Judge, but it's the trial judge, it's a matter of discretion, we're going to uphold that discretion. I think that the appellate court would uphold my discretion either way.

You're thinking not? You're thinking that it would be an abuse of discretion for me to

allow this evidence in at this time?

MR. TOMKO: In a vacuum, Judge, I'm not certain. But we're not in a vacuum. What happened over the course of time, there were other evidentiary problems in this case prior to my being counsel. They had to do with the testing of the glove. The glove was to be sent out to an independent lab --

THE COURT: We're not talking, don't mix apples with oranges. We're not talking that, okay.

MR. TOMKO: Well --

THE COURT: Lookit, we're talking about the situation where your client, either by coincidence or as part of a purposeful plan has made life very difficult for every attorney appointed for him. We've had basically the A list of all of the appointed counsel in the County try to provide services for Mr. Dupree. He has fault with every one of them, and as a result of that there have been numerous delays that have been occasioned by the fact that we had to get new counsel in. He's filed some motions in pro per that, although as I said gibberish is too strong a word, basically led nowhere. They were of no

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consequence. They were motions that were without merit. I'll just put it simply as that. So there have been a lot of misdirection, a lot of, a lot of false starts as attorneys try to provide Mr. Dupree services. And a lot of delay as a result of that.

I do appreciate the fact that when you came in you found a clear path to one piece of very relevant evidence, that is the dog tracking evidence, which does not seem to have been explored fully before, in part because none of the attorneys that were appointed for him had enough time to really get involved enough in the case in order to figure out a trial strategy, because again they were only in for a couple of months before the motion to withdraw or the motion by Mr. Dupree for new counsel was filed. Therefore it's hard to, it's hard to talk about discovery requests that go back for years because we've had this constant substitution of attorneys that have delayed the start of this trial. I do think that things would be better if after April 2nd all discovery had been filed within 21 days, and then after my order of April 30th that everything had been in by the 7th. But it wasn't. But I just do not find that

anything was purposefully delayed. I do not find that any of the materials were either exculpatory, or were inculpatory in terms of the requirement that the Prosecutor had to disclose either one.

These are things that you could use for cross examination. You are going to use them for cross examination, or maybe not now because you find out that none of the materials that you requested are exculpatory. I just think that it would be an abuse of discretion for me to suppress this evidence, to not allow the truth to come out because of a few days delay.

MR. TOMKO: The one exception to what the Court is mentioning is the report of Detective Quartuccio, which was provided five days before trial, which was supposedly prepared on December 15 of 2012, and it was without explanation provided on such a late date when it should have been included really in the initial discovery because it is a police report, it is a witness that was known to the Prosecution from the very beginning, which it should have been produced to every attorney before. We did specifically request reports. That's, that's different and that is again the report of

the tracking dog officer. And again we're left with no remedy, other than to ask that we exclude this evidence.

THE COURT: Okay. Mr. Laszczak, respond to that. What about the police report from the officer, the actual dog handler, why was that so late to come in?

MR. LASZCZAK: Judge, all I can indicate is that we were working with two different agencies. Okay. We have the Clinton Township Police Department, we have the Macomb County Sheriff's Department. The dog, Deputy Quartuccio's, it's not like this was a surprise, hey, here's this, there was a dog in this case that conducted tracking evidence and you know, here five days before trial here's the report, this is the dog's name, this is who was the deputy. All this has been known to Counsel, as well as to Defendant for, since 2015 when this case originated. In fact if you'd like I can give you Deputy Quartuccio's report, along with the report in the Clinton Township Police Department and they're almost identical. I mean they, there's no new information within it. And specifically, Judge, again it's

another document that is hearsay. I can't, police reports are not admissible at trial. So I can't produce it as evidence anyways, but that shouldn't preclude my deputy to be able to come up here and give testimony as to what he did on that date with his dog as a dog handler.

To the fact that it wasn't provided, Judge, I mean I can only give answers to what I know. Obviously Your Honor is familiar with me being in this courtroom for the last month. I've had this case for approximately three weeks. I've done everything I can that I saw missing within, to get it in a timely manner, timely manner, turn it over to Counsel. I can't specu-, and I won't speculate as to why.

THE COURT: Okay. Lookit, here's my, my decision on this. The report from the Deputy who was the dog handler, and his name again is what?

MR. LASZCZAK: Deputy Quartuccio.

THE COURT: Quartuccio?

MR. TOMKO: Yes.

THE COURT: Quartuccio, is not substantially different in content from the report that was previously made available to the Defense.

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It is another cumulative report on the same information that the Defendant had before. There's no material change, there's no surprise. And although it should have come earlier, because it is cumulative and substantially similar to the information that was provided before a suppression of the evidence is not appropriate.

MR. TOMKO: And I appreciate the Court's ruling. Just for the record, I respectfully disagree. The report, the police report itself says K-9 made the scene, a pair of rubber gloves, and tracked where the track was terminated. Let me read it more clearly. A Macomb County Sheriff's K-9 made the scene and found a pair of rubber gloves by the old CVS, corner of the plaza, and tracked to the Neil Reid Park where the track was terminated. That's it. It's one sentence.

MR. LASZCZAK: Judge --

MR. TOMKO: This however -- am I missing something else?

MR. LASZCZAK: You're missing, yeah.

MR. TOMKO: Well if I am, I mean I don't want to argue if I'm missing something.

MR. LASZCZAK: I would direct you to, I

don't know what page it is, but --

THE COURT: I'm going to ask you, if you are speaking speak outloud. Because I notice that the green bars on my computer are awfully low when you are just kind of talking to each other at counsel table. So for the sake of the court reporter let's be talking to me and not each other.

MR. LASZCZAK: I would refer Counsel to the Clinton Township Police report, specifically where it indicates written by Clinton Township (inaudible) Ramlo, WM is the last two letters where it says source, while on scene Deputy Quartuccio from the Macomb County Sheriff arrived with the tracking dog to check the area for possible suspects. Action taken, the dog tracked east alongside of the shopping plaza towards Harper. The dog then tracked north along the shopping plaza lawn towards Neil Reid High School. The dog stopped on the lawn and hit on a pair of latex gloves. The dog then tracked from area of the gloves north to the Neil Reid Park, then west along the park entry drive to an area near the entrance gates. The gates were open, but the track was terminated at that point. Officer Collins was

advised of the location of the gloves and took them into evidence.

MR. TOMKO: And you're correct. I appreciate that, thank you.

In the report itself then it starts to talk about where the track was initiated. That's a little bit different. And how, what scent it was given to follow. So this is now, these are now new things that come in this report. The, you know, and you know, also --

MR. LASZCZAK: Judge, and we can compare Deputy Quartuccio's report. Upon arrival I met with Officer Ramlo, who advised the suspect exited the store located at the above location and fled on foot in a northeast direction, which is almost identical to Officer Ramlo's report that the dog tracked east alongside if the shopping plaza towards Harper. I deployed my K-9 Baxter, introduced him to the odor on the sidewalk just to the northeast of the door located at 37577 Harper. K-9 Baxter began to track for a short time to the north, to the north, turned on the sidewalk along the building. Which again, Judge, is identical to Officer Ramlo's rendition. Continuing east until

reaching the end of the building. K-9 Baxter then turns to the north along the front of the building, the grass, and alerted on a pair of latex gloves on the grass area west of Harper. Baxter continued north until reaching the driveway of north, in parentheses, Neil Reid School, of the shopping plaza. Baxter then turned to the west, continuing approximately halfway down the driveway. Once reaching the area of the driveway west of Harper near the end of the brick wall in the dumpster area of the shopping plaza it lost the scent.

I mean there's nothing new or significant in this report that wasn't provided in Police Officer Ramlo's report, when clearly he was part of the tracking.

THE COURT: Okay. We've spent enough time on this. I do not believe that the differences in style or wording are significant in terms of the substance. In any event, I do not see any prejudice to the Defendant. The additional report has been produced now. It's available for cross examination. The Defendant is in no better or no worse position than he would have been one or two years ago if this report had been made

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available then. To the extent that there are minor differences, Defense Counsel has the ability to use the report for cross examination. This is not evidence that would have been admissible by the Prosecution because it's a report, and it's inherently a hearsay document. It can only be used for cross examination. The Defense has the benefit of the original report, now this additional report, and so there is clearly no prejudice.

We've spent a great deal of time on this. I want to get the jury in. Do we have anything more before we can call the jury in?

MR. LASZCZAK: Nothing from the People, Judge.

MR. TOMKO: Nothing further, Judge. Thank You.

THE COURT: Okay. Let's call the jury in.

COURT OFFICER: All rise for the jury, please.

(Jury enters, 10:39 a.m.)

THE COURT: Okay. We can all be seated.

Members of the jury, I just want to read an instruction I previously gave. It says

sometimes the lawyers and I will have discussions out of your hearing. Also while you are in the jury room I may have to take care of other matters that have nothing to do with the case. Pay no attention to these interruptions. I know it's hard not to be aggravated to be sitting there, wondering what's happening, but believe me, we're trying to get back on the record just as soon as we can with you. That instruction is read. It's mandatory because these interruptions happen all the time. So you can be upset, you can be aggravated, you can ask me about this after the case is over. But right for now the rule is pay no attention to these interruptions.

And so we were in the process of cross examining a witness, can we have that witness recalled, please?

MR. LASZCZAK: Yes.

THE COURT: I want you to have a seat. And because it's a new day we do this traditionally, I just want to swear you in again. Just raise your right hand.

M O H A M A D Z A M Z A M I

Being first duly sworn to tell the truth,

the whole truth and nothing but the truth testified as follows:

THE COURT: Okay. Mr. Tomko, your witness.

CROSS EXAMINATION (Continued)

BY MR. TOMKO:

Q Good morning, Mr. Zamzami.

A Good morning.

Q You know, we talked a little bit yesterday about kind of the layout of things, and let me show you a couple of photographs if I may and let me see if they correspond to this, this place. Take a look at the Defendant's Exhibit A. Can you tell me what that showed?

A Family Dollar and there's the smoke shop there.

Q So it shows the smoke shop, what side of the picture, left or right?

A Left.

Q Okay. And it also shows what else?

A Family Dollar.

Q Family Dollar.

A In the end.

Q Remember, that's that L-shaped building, right?

A Yep.

Q Family Dollar is off on one side and there's some other stores that are before you get to the corner?

A Yeah, that's the empty building.

Q Okay. And Exhibit B, the next picture, what does that show?

A Family Dollar.

Q Family Dollar. It shows it all the way to the end of the building.

A To the end of.

Q Right. And it also shows the parking lot area.

A Mm hmm. Yes.

Q Yes?

A Yes.

MR. TOMKO: All right. Judge, I'd move for admission of Defendant's Exhibit A and B.

MR. LASZCZAK: No objection, Judge.

THE COURT: They're admitted.

MR. TOMKO: Thank You.

Q Now you were shown before an Exhibit Number One, do you remember that exhibit?

A Yes.

Q Okay. And that was the one where we saw the front of the store, correct?

A Yes.

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Q The store's called Smoker's Only?
A Yes.
Q Okay. And then to the left, in that there's a sign for the suntan place, correct?
A Yes.
Q All right. Do you have any idea how long that building is, where the Family Dollar is all the way to the corner?
A No.
Q Okay. But you can see from exhibits A and B, there's a, vehicles that are parked, I mean several cars can park in front of that building, a pretty long distance?
A Yes.
Q All right. Now you know, when we talk about this incident when these (inaudible) came into the store, afterwards you said that you had called the police, correct?
A Yes.
Q Okay. And then you also made some mention of talking to someone. Did you talk with someone on the phone, like a relative or something? I didn't understand what you said yesterday?
A No, I didn't say nothing about that.

Q Okay. All right. But do you recall some customers coming into the store before the police arrived?
A No.
Q All right. So if a police officer were to say that when they arrived that they found you talking with some customers in the store, that's untrue?
A I was talking with the neighbor, you know, the neighbor, the tanning salon. She come from Family Dollar after what's happening, then I was talking to her.
Q Okay, so it wasn't a customer in the store, but there was someone in the store that came all the way from --
A It doesn't come from the store, it doesn't come to the store. I was out, after I call the police, you know, then I see her outside, you know.
Q I see, so you called the police and you stood outside?
A Not stay outside. You know, inside, but by the door, you know.
Q How many front doors are in this, this Smoker's Only?
A One.
Q One front door, everyone that goes in must use the

front door?
A Yep.
Q And so this friend, this is someone that worked at Family Dollar?
A No, no. She was (inaudible). She go to the Family Dollar, then she go -- the same time what's happening. She was not in the tanning salon.
Q I see. And so she walked over and talked with you?
A Yeah, yeah. She, after what's happening I tried to call the police and I called the police. Then I was looking outside. Then I was, I look out there and she coming back from the Family Dollar. Then I was telling her, do you know what's happening? She said, no, I don't know nothing about nothing.
Q Okay. So you walked outside of the store to talk with her?
A Just by the door.
Q By the door?
A Yeah.
Q So were you standing inside or outside?
A I was, I was inside by the door.
Q Okay. How about the person you were talking to, were they inside or outside?
A Outside.

Q Outside, so the door is open and you're both talking?
A Yeah.
Q Now we mentioned the video system. There are two video systems, one that didn't record, just had pictures, and one that there are some recordings we looked at, right?
A Yes.
Q And so that system that was recording, the police came and talked to you about that, didn't they?
A Yes.
Q In fact right on the very day that it happened, when they talk with you you explain to them that, oh, I, all you need is a USB drive and we can copy onto the drive, right?
A I don't know how to use the system. That's the first time I have system. I tell them if they got, you know, I was trying to show them then. They said, do you know how to take copy of the things? I say no, I don't know. That's what's happening.
Q So you never told them that they should get a USB drive?
A If, what?
Q I mean I don't know, you told them or you didn't.

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A I tell them, if they know how to do it, do it, you know.
Q But you never mentioned a USB drive?
A How, I'm not sure of that.
Q Well do you know what a USB drive is?
A Yes.
Q You know this video system, the one that recorded, who installed this into the store?
A I did.
Q Okay. And so then you had some type of instructions to do that, correct?
A Yeah.
Q Okay. And you, when did you install it?
A I'm not really sure, you know, about days or exactly.
Q About?
A I'm not, I'm not, I'm not sure about when.
Q Okay. Well how long have you been at that store?
A Until now or --
Q When were you first there, first open the store?
A First was about, I'm not, I'm not really sure to tell you the truth.
Q Well was it in 2012?
A No, I think it's '11, 2011.

Q 2011?
A Yeah.
Q Okay. So 2011 --
A I'm not really sure exactly when.
Q Well we don't know the exact date, but about, you'd been there about a year or so before this happened?
A Maybe, I'm not sure.
Q When you opened up the store, is that when you, when you're opening up and getting everything ready, making the counters and everything, that's when you put in those video cameras that record?
A Everything was in there, the counters and everything. I buy, you know, we buy the store, it was ready.
Q Okay. So it was an existing store before you bought it?
A Yeah, same store, yeah.
Q Okay. But you wanted to add some safety, so you put in the cameras that record?
A Yes.
Q Okay. And so, so you installed them. Were they with a cable or were they wireless?
A No, cables.
Q Okay. And they hook up to the computer, right?

A Not computer, it's just a, what do you call that, monitor.
Q Monitor, okay. But it also records?
A No.
Q Well --
A There is a, what do you call it, a, that records. I don't know what you call the, DVR or something like, the system, you know, of the camera.
Q So part of --
A That's what's record, you know, but the monitor is separate, doesn't record.
Q Okay. So there's a, there's like a DVR that records. Was that part of the video system?
A Mm hmm, yes.
Q Okay. So it came in the box with everything else?
A Yep.
Q Okay. And so you hooked up and you made sure that it recorded, right?
A Yep.
Q And then time went on and then this happened on December the 15th?
A Yep, yes.
Q Now the part that records is the show, there were several cameras, right?

A Yes.
Q How many cameras?
A I'm not sure about, maybe eight of them.
Q Eight of them?
A Yeah.
Q When you look at the monitor and the recording device that's with it, do you see all eight all at once?
A Yes. If you, it depends what you, you know, the monitor, you change it up if you want four or if you want eight, if you want to see two, if you want to see just one.
Q Okay. So you can control whether you see one or you see all eight all at once?
A Yes.
Q But when it records, does it record all eight?
A Yes.
Q Okay. You know, you also mentioned that there was some money that was taken out of the cash register, right?
A Yes.
Q When the police talked with you you didn't tell them how much money exactly, did you?
A I'm not sure.

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Q Okay. But the store had just been opened at nine o'clock in the morning?
A Yep.
Q Did you have any customers between nine o'clock and when this happened?
A Yes.
Q How many?
A I'm not sure. It's been long time, so, five years, you know, that's long time.
Q Long time, hard to remember things from five years ago?
A Sometime, yeah, it's just stuff you, you know --
Q So it was, but you said it happened between nine and ten in the morning? Ten and eleven in the morning?
A Ten and eleven.
Q Between ten and eleven?
A Yeah.
Q So you'd been open for about an hour?
A Yes.
Q A little more. And you said maybe one, maybe two, how many people do you think came in the store?
A I'm not sure.
MR. LASZCZAK: Your Honor, I'm going to

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 15-3884-FC

ROBERTO MARCELLO DUPREE,

Defendant.

_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA

MOUNT CLEMENS, MICHIGAN - TUESDAY, MAY 22, 2018

APPEARANCES:

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Mount Clemens, Michigan

TUESDAY - MAY 22, 2018

9:36 a.m.

* * *

THE COURT: Okay. So we're going to start the record here. This is the matter of People of the State of Michigan versus Roberto Marcello Dupree.

Start with appearances, please.

MR. LASZCZAK: Good morning, Your Honor. Ronald Laszczak on behalf of the People.

MR. TOMKO: And Thomas Tomko on behalf of Mr. Dupree.

THE COURT: Okay. One question I have on the pre-selection and post-selection jury instructions, the rules provide that every juror is entitled to his or her own copy. In the past I've always asked Counsel if we could agree to cut that down to four copies to be shared so that when they're final deliberations there are four copies to be passed around. But I'm at your service.

Do you have any objection to us doing four copies, Mr. Prosecutor?

MR. LASZCZAK: No objection, Judge.

THE COURT: Mr. Tomko?

MR. TOMKO: Judge, I spoke with Mr. Dupree. He'd prefer if everyone had their own copy going forward.

THE COURT: Okay, all right. Then Mr. Prosecutor, I'm going to ask that you take the pre-selection instructions that I've read and have your office run off 14 copies if we could? Make arrangements for that as soon as you can.

MR. LASZCZAK: Yes, Judge.

THE COURT: I see on another matter, Mr. Evans?

MR. EVANS: (Inaudible).

THE COURT: Well let's, let's just go off the record on Dupree for a second.

(Matter in recess, 9:38 a.m. to 9:43 a.m.)

THE COURT: All right. So now we're going to go back on the record in People versus Robert Dupree, 2015-003884.

At this point, Counsel, are we ready to bring in the jury?

MR. LASZCZAK: Judge, one quick thing.

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On Friday we had a discussion regarding a mistake that was made during Mr. Tomko's cross examination. You gave me the opportunity to preserve my request for a mistrial regarding the mistake that was made. Based on discussions with my appellate department, Judge, I am not going to be asking for a mistrial. I just want to keep my objection on the record as I indicated on Friday.

THE COURT: Okay. So, and again my feeling is that a curative instruction is worse than the disease and so I will, but your objection is noted, if at the end you think that -- well we're going to emphasize the same thing anyway, that penalty should play no part. But again, for this record I want to make it clear that I don't think that the jurors had any idea that we were talking about the penalty. As I said last week, maybe two or three of them might glean that, but it was inadvertent, it was unintentional, it was quick and it was quickly smoothed over by substituting the word significant or important for capital. And I really don't see that anybody's been prejudiced.

Do you agree, Mr. Tomko?

MR. TOMKO: Yes, thank You, Judge.

THE COURT: Okay. Thanks.

All right. Let's bring in the jury.

COURT OFFICER: All rise for the jury, please.

(Jurors enter, 9:44 a.m.)

THE COURT: Okay. The records should indicate the jurors return and we can all have a seat.

Members of the jury, today we're going to go until twelve o'clock and then we're going to take our lunch break. Unfortunately the lunch break has to be longer. It's going to run from twelve until two because my other docket on Tuesday at the noon hour is going to last until about two o'clock, but we should be ready to start promptly at two.

This, when you, when you're gathering or at some break you can talk it over. I'm going to be asking you at a later time if anybody wants to stay a little later today, maybe up until five thirty, maybe six o'clock at most. But again, I would have to have unanimous consent from everybody that you wanted to stay because you have a right to get out of here at the five o'clock hour. But if

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all 14 of you said you could stay a little bit later, you can let me know at a later time. But roll that over in your mind, I'll ask that at a later time.

All right. Let's resume our testimony with getting the witness back on the stand. I'm going to ask you to raise your right hand and take an oath again, new day, new oath.

PAUL COLLINS

Being first duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

THE COURT: Okay. Have a seat, please. Mr. Tomko, cross examination, your witness.

MR. TOMKO: Yes, thank You, Judge.

CROSS EXAMINATION (Continued)

BY MR. TOMKO:

Q And good morning again, Officer Collins, how are you today?

A Good morning, Counsel, good.

Q Good. Last time we were talking, we were talking about the photographs and different evidence that was collected from this date back on December 15 of

2012. One of the things I noticed when I looked at the series of photographs you took, there were no, there was no date or time stamp on any of those photographs, isn't that correct?

A Correct.

Q And wouldn't it be more prudent to have a date and a time stamp on photographs when you're taking them as an evidence tech?

A I don't even know how that would be possible with our equipment.

Q Okay. So you're saying your equipment doesn't allow it?

A Not that I know of.

Q All right. We were also talking about this Exhibit 55, and Exhibit 55 we talked before, we said that there were four different pieces of evidence in that photograph, is that fair?

A Four different pieces of gloves, yes.

Q Okay. And we were trying to identify where any of those pieces were found as far as a specific location as found on different pictures and we talked about the possibility of using placards or number one, two, three four, and that wasn't used in our case, correct?

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A Correct.
Q Now when you handle evidence like this as the evidence tech, what's your next step in this process?
A Well after I've identified what I want to collect I photograph it and then I secure it.
Q And that's our picture of Exhibit 55, correct?
A Correct.
Q Okay. And is there any further identification that's done to these items?
A They're marked on evidence tags with a P number.
Q Okay. So before they arrived and you, this is back at the police station, correct?
A Correct.
Q And what I'm talking about is where the picture is taken.
A Correct.
Q And so when you transported them from the location where they were found to the station and this picture was taken, were they all transported in one container, one bag?
A Yes.
Q And I notice then that on the side you said there were two packages, each of those packages, those

have some swabs in them, correct?
A Correct.
Q And there would be two in each package, correct?
A Correct.
Q But in this case you used one of those packages.
A Correct.
Q A total of two swabs.
A Correct.
Q All right. So on, when we look at these items, if we look at them from top to bottom, if we call them piece number one, two, three and four just for our reference, then on piece number one you pulled out one of the swabs and what did you do?
A I used the AddiPak, applied three or four drops onto the sterile cotton tip of the collect --
Q And that's a, that's that tube that's a little bit to the left in the picture?
A Correct. It's called an AddiPak.
Q Now before you did any of this did you prepare in any way?
A By putting gloves on?
Q That's what I'm asking?
A Yes.
Q So you put your own gloves on, correct?

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A Correct.
Q Because you wouldn't want to contaminate any of the items?
A Correct.
Q And so that first number, first swab that you took, what was swabbed?
A One of the pieces of the gloves.
Q Which one?
A I couldn't tell you.
Q Well do we know what part of the glove was swabbed?
A No.
Q How about with the second swab?
A Same type, a particular area, a small particular area is swabbed and then placed back into the container and sealed.
Q Okay. Now when it comes to these rubber gloves, or latex gloves I'll call them, you're familiar with how you use those, correct?
A How you put them on or take them off or --
Q Well you're familiar with some of the characteristics of them, aren't you?
A Of the rubber, or how the glove is made up?
Q The latex glove that you put on?
A Yes.

Q So when you put that latex glove on your hand, both hands and you handle the items, and then when you took it off doesn't the glove reverse itself?
A Most of the time I think it does for sure.
Q So the person wearing the glove would then be touching the interior of the glove, correct? Their skin would be in contact with the inside of the glove?
A Right.
Q And once it's taken off then it would be on the outside of the glove?
A Correct.
Q And in our testing, when you did the DNA swab you had already testified, and tell me if I understand this, that the particular areas of these gloves that were swabbed, you don't know if it was the outside, the inside, or some other part of these gloves?
A Yeah, I don't think there's any way that I could tell what would be the inside or the outside. It would be the area that was exposed at this point. I don't know if that's the inside or the outside of the glove, though.
Q Okay. And so each time that the glove, or a

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portion of the glove was swabbed, you did not keep a record of where the swab was taken from?

A From the gloves. That's --

Q So for example on this first one we don't know if it was the outside of one area or another?

A No.

Q Nor do we know if it was on the inside?

A Correct.

Q And so the same is true with each of those?

A Correct.

Q Now if we had a pair of gloves in front of us and I just grabbed those gloves, would it be possible for DNA from my hand to transfer to that glove?

A I don't know, I'm not an expert in the transfer of DNA, just been trained how to collect it.

Q Wouldn't it be important in this case to know where the swabs were taken on each of these gloves?

A Where they were taken from, the palms or the fingers, is that what you're asking, Counsel?

Q Yeah, wouldn't you agree that it would be a good piece of information to know exactly what each swab is swabbing so that we have detailed evidence before us today?

A I swabbed a portion of those gloves.

Q But wouldn't it be a proper and a good procedure, preferred procedure, to swab and then indicate where the swab is from, and which piece of evidence?

A I don't think that you can, there's no way to visually see where DNA would be on that glove. So if you take it from the palm or the fingers, there's no way to visually see where DNA would be from the human eye.

Q Which makes it important for you to follow a procedure. Wouldn't it be an excellent procedure to have one swab and swab the outside of this, and that swab marked; then the second swab is around the outside of that one so we know where that came from; then the third and the fourth? And if you also swabbed the interior of any of these, wouldn't it be prudent to then swab with a separate swab for each of those so that then when we look at them we would know exactly where the DNA came from?

A That's not how we were trained to collect DNA.

Q Okay, all right. But separate pieces of evidence, do you put those in separate evidence bags, though?

A Depends on what the evidence is. It can be. It just depends on the situation.

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Q In this case you did not use separate evidence bags for each of these four glove pieces?
A No, because they were all gloves.
Q All right. And so if DNA was on one portion of a glove, when they're all mixed together isn't it possible that some of the DNA had gotten on the rest of it?
A It could be.
Q So wouldn't it be prudent as an evidence tech then to separate each of those things so that we knew for sure where DNA was coming from?
A They were, these pieces of the gloves were obviously all a pair of gloves. That's why they were collected and tested from one evidence tag and package in one area.
Q Well the question was wouldn't it be important for evidentiary purposes as an evidence tech to separate it out so we knew exactly where things came from?
A I didn't think so at that point because I knew these were all one pair of gloves. It was extremely obvious that they were all one pair of gloves.
Q Well at least from the point where you collected it

you combined it all into one.
A Because they were all in the same area.
Q Well, and again we talked about the dog possibly having one of these gloves in his mouth and we don't know which piece or pieces the dog had in its mouth.
A Yeah, I don't know about the dog.
Q When you found those gloves how long had they been on the grass?
A Well I know the run came out at 10:37 a.m. I arrived shortly thereafter and I don't know exactly when the K-9 unit showed up. But soon thereafter he started the track. I was notified. I know I immediately went when I was notified by radio to where the gloves were, which was about 80 yards down the end of the strip mall.
Q Can you tell anything of your, any of your observations, how long those pieces had been on the grass?
A No.
Q So it's possible they had been there for some period of time?
A Correct.
Q Can you tell how those gloves got in pieces?

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A No.
Q Is it possible that the gloves were exposed to a weed whipper and that's how they got chewed up like that?
A I couldn't say for sure.
Q Did you investigate the scene, whether or not there was any lawn maintenance that was done earlier that day or the day before?
A There was nothing obvious that there were --
Q Well, but the question was did you inquire, did you make any inquiries?
A If there was any lawn maintenance, no.
Q You did collect some fingerprints as well, correct?
A I did.
Q And those were from a laptop computer?
A I don't believe so. I think they were from the countertop if I remember correctly.
Q Countertop, okay. How about, did you look for fingerprints on the cash register?
A I don't recall if I looked for fingerprints on the cash register.
Q But you mentioned you observed a video, correct?
A Part of it.
Q And in the part of the video that you observed did

you understand anyone having come in contact with this cash register?
A I don't recall whether someone came in contact with it.
Q How about the door, any fingerprints off the door?
A I didn't see any.
Q Did you dust for any?
A On the door, no.
Q How about on the back door?
A No.
Q So when you're testing for this DNA can we differentiate the difference between someone who may have touched the gloves versus someone who may have worn the gloves?
A No.
Q And based on the way the DNA was collected you really don't have any further information to differentiate those two thoughts, touching versus wearing?
A I, there's no way for me to tell that.
Q And really when it comes to DNA, if DNA was limited to one item, when we did these, when you did these DNA swabs, we can't tell if DNA was on one item or more than one item.

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A No.
Q Fair to say?
A Fair to say.
Q And just for clarification as far as timing, it's your recollection that you arrived at approximately ten thirty?
A No, I believe my prior testimony was ten forty. The run came out at 10:37. I don't know exactly what time I arrived, but it was soon thereafter considering the reason for -
Q Did you say run came out at 10:37, what does run came out mean?
A That means it was brought into our dispatch center.
Q Okay. So you received a dispatch at 10:37?
A Correct.
Q And a dispatch would have directed you to go to this location?
A Correct.
Q And when you arrived at the location others were already there?
A Yes.
MR. LASZCZAK: Judge, I'm going to ask that --
THE COURT: Pardon?

MR. LASZCZAK: I'm going to ask that Counsel's communication with his client be kept confidential.
THE COURT: Oh, yeah, we have to make sure that we do this confidentially. It just was getting a little bit louder, that's all. Okay.
Q So are you familiar with Detective Terzo's report in this case?
A Sergeant Terzo, yes.
Q Yes, and so when Sergeant Terzo indicates that --
MR. HALL: I would object to reading of the, you can't read the report into the record. He can hand the report to the officer to refresh his memory and see if he --
THE COURT: Yeah, Mr. Hall, I agree with you, but again, since you did not handle the examination of this witness it should come from Mr. Laszczak. But that's really a minor thing.
You, the police reports are obviously hearsay, not admissible on their face. And so you can ask this witness if something refreshes his recollection, but you can't just read the police reports into the record. You know that of course.
Q Would you, would you dispute a suggestion that the

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video showed someone having a cell phone in their hand on this video at ten thirty?

A No, I only watched part of the video and I don't recall watching somebody with a cell phone in their hand at, on the video.

Q And so you didn't look at those times to be certain of the times.

A No.

Q Did you look at the video to see if the time on the video was the actual time on the clock?

A I don't recall if I did.

Q Officer, once you took the DNA samples, packaged everything up back in evidence bags, did you have any further involvement in this case?

A Once I packaged them in the evidence bag they are sealed with evidence tape, packaged with the number, case number, and what's in the container, and it's put into what we call SLAM lockers back in our, and then after that, no.

Q So your involvement ended that same day, December the 15th?

A Correct.

Q Okay, all right. That's all I have.

THE COURT: Thank you.

Redirect examination?

REDIRECT EXAMINATION

BY MR. LASZCZAK:

Q Counsel asked you a question about the photographs not having a date or a timestamp. Explain to the jury your process of when you come out to a scene to take photographs, what do you when you're done at that location, where do you go from there? How do you, do you download these somewhere?

A Yes, they are stored onto a SD card which is inside of the camera. From there, once we're back at the station at the lab here as you see in the picture there is another area where the computer sits. They are transferred from the camera's SD card to a CDR, so a disc. That is marked with the case number, the date, my name, initials. Once I transfer all of those photos onto the CD that's placed on evidence also.

Q So the camera itself doesn't indicate a time or a date in which that photo was taken?

A No.

Q Okay. And what type of camera did you say you used?

A I used a Nikon D70 -- or I'm sorry, a D90 SLR

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camera.
Q And is that a pretty high tech piece of equipment?
A It's pretty advanced.
Q You said that you completed the evidence tech training in 2008?
A Correct.
Q Did you receive any kind of additional training before or after that 2008 timeframe?
A I have.
Q And what was that? Regarding evidence tech, I should ask?
A Yes.
Q Okay. And when and what was that for?
A There was a few classes. One of them in particular to this case would be a DNA update it's called. It's an eight-hour class, basically of DNA collection and evidence collection as it pertains to DNA.
Q Do you recall when you took that class?
A It was October 22nd of 2010.
Q And where did that take place?
A It was at Oakland Community College Police Academy.
Q Let's talk about, Counsel asked you a lot of questions about the photos that you took,

specifically People's Exhibits 53, let's go to, let's go to People's Exhibit 44. Do you recall being asked questions by Counsel regarding this photograph?
A Yes.
Q And explain to the jury again, why are you, what are you trying to depict here for part of your story that you're trying to tell as an evidence technician?
A What I'm trying to depict here is, when we're trained to photograph a scene you're trying to tell a story with the pictures so you start out from the exterior, whether it be a business or a home, you get the, you try to get the address in there so you know where you're at as long there's an address there. And then as you walk into the scene, as you were walking in you can kind of get an idea of how the scene was that day. When these items were identified for me to collect out here, this is at the end of the strip mall. So one of the previous pictures was, once I got there where I could see this evidence from a distance I could also see the business that I was at, so I took a picture from the business, and then showing where I was in

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relation to the business, how close I was to the business.

Q And eventually you take, put up 43 Jeff, so this would be, 43 would be, is what you just described -- -

A Correct.

Q (inaudible) relation to the business, correct?

A This is showing that I'm standing at the end of the strip mall. This is showing the smoke, the smoke shop,

Q Could you stand up and point out to the screen where the business location is?

A Right here. So this is, you know, I'm standing at the end of the strip mall, and then as I turn right the picture that we showed previously is over in this direction here.

Q And then how about in --

MR. LASZCZAK: Can you put 53 up Jeff?

Q Do you remember being asked questions about certain pictures that you took and being able to identify what piece of the glove that was?

A Yes.

Q In this picture what are you trying to depict in People's Exhibit 53?

A I'm showing that two pieces of that rubber glove were found at the end of the flower box with the trees in it or whatever that is there.

MR. LASZCZAK: Then 54 there?

Q Would this be a closer up of what we just saw?

A Yes, that's just a little closer up.

Q And you indicated that those were two pieces of a rubber glove that it was indicated to you that the tracking dog discovered?

A Correct.

MR. LASZCZAK: Let's put up 55, Jeff.

MR. TOMKO: Wait a minute, let me, I want to object. What do you mean that the tracking dog discovered? Because I don't think that was the testimony. I think his testimony was he didn't know which piece of glove the dog tracked to at all?

MR. LASZCZAK: I mean there was a reason for him going to that area. He was told through radio communication that the dog picked up a pair of, or a rubber glove. And this is in fact where he found a few pieces of rubber glove.

THE COURT: Well the objection is partially sustained, because this is redirect but

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it's still leading. And so you can rephrase it.

And the jury of course is charged with remembering what the testimony was, what you remember the facts were. But Mr. Tomko does appear to be right, nobody has really identified so far, I think, what part of what rubber glove the dog had in its mouth. And so your statement may, I'll leave it at that. The jury is going to remember what the testimony was.

But you can pick up with a non leading question, go on.

MR. LASZCZAK: 55, please.

Q Based on what you photographed in 54, could you point on 55 to where those would be?

A Those are (non verbal response).

Q So would placards have helped you being able to identify what pieces of evidence you were photographing when laid out on this piece of paper?

A No.

Q And I think we've talked about this but, well let me ask you this question, when you were standing over, would this be the west side of the building when you were looking at photograph --

A This is the east side.

Q The east side of the building?

A The east side of the building.

Q Other than the rubber gloves, did you collect any other evidence from that area?

A From that area, no.

Q Can you describe the gloves again? Were they similar in color?

A Very similar.

Q And you've indicated that, or Counsel asked you questions about you being familiar with these types of latex gloves, right?

A Yes.

Q Is there any way to determine whether in this photograph this is for the left hand or the right hand?

A No.

Q Okay. Is there any way to determine that this was the inside of the glove or the outside of the glove?

A No.

Q All right. How about these, is there any way to determine which fingers these were possibly on?

A No way.

Q All right. And is that because of the condition of

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the glove itself, or just the type of gloves that they were?

A I would say both.

Q You indicated that you put these into one evidence bag, right?

A The gloves, yes.

Q The gloves. Is that part of common training practice, or is that a judgment call at that point?

A It's training and a judgment call.

Q Would you, if the gloves would have been maybe, let's say for example different colors, would you have put them in the same bag still or --

A Absolutely not.

Q How about a different material, instead of a rubber glove maybe you had a different type of glove, maybe a winter glove, would you have put them into the same bag?

A Absolutely not.

Q And you indicated that as of December 15, 2012, after you collected and took all of the photographs you had no more participation with that, correct?

A On that day.

Q Correct. Did you have to return to that location at some point as an evidence technician?

A I did.

Q Do you recall when that was?

A April 2nd, the next year.

Q So that would be of 2013?

A Correct.

Q And what was your purpose for return -- well where did you go?

A I went back to the business and spoke to the victim, collected a DNA sample from him for elimination DNA.

Q And what did you use to collect the DNA sample?

A A similar type cotton swab.

THE COURT: Obviously that's all we can do is wait until the drilling stops. It's a matter of concern but there's nothing we can do about it. So I think it's stopped for now, you may continue.

MR. LASZCZAK: Thank You.

Q You said the victim was at the, is that the same individual that you photographed the injury to the forehead of?

A Yes.

Q Did you, what did you do with that DNA cotton swab sample that you collected from the victim?

A It's, I collected it into a brown paper bag, same

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procedure, sealed, packaged on evidence and then I place it into our SLAM lockers at the station.

Q Who directed you back to that location on that April 2nd date?

A I believe it was Detective Friese.

Q And was he the detective or the officer in charge at that time on this case?

A Yes.

Q Thank you, (inaudible).

THE COURT: Recross examination?

RECROSS EXAMINATION

BY MR. TOMKO:

Q You know when we look at this picture on this side of the building --

MR. TOMKO: (Inaudible) --

MR. LASZCZAK: That's not ours.

MR. TOMKO: Isn't that that?

Q In this picture there appears to be several things that are lying on the ground in different places, correct?

A Correct.

Q For one, the nearest in the front on the left, a cigarette pack perhaps?

A It wasn't the focus of my investigation, so I don't

know what that is.

Q Well cigarettes were taken from the store is my understanding the allegation.

A Yes.

Q Was that collected?

A No.

Q What about any of the other items that are on the grass there, were any of those things collected?

A No.

Q And so they weren't collected and they weren't tested either, were they?

A No.

Q Does there appear to be a bottle to the right in the grass there?

A Looks like it might be a bottle.

Q All right. And can we tell how long those things have been there?

A No.

Q But they're in your pictures, so they were on the day at the time that you took that photo, correct?

A Yes.

MR. TOMKO: That's all I have. Oh, one moment.

Judge, can I ask to excuse the jury so

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that we can discuss this?

THE COURT: Sure. Okay. Let's take a short break.

COURT OFFICER: All rise for the jury, please.

(Jury exits, 10:19 a.m.)

THE COURT: Okay. The jury has been excused.

Mr. Tomko, what's the issue here?

You can be seated.

MR. TOMKO: Judge, could I speak with the attorneys and Yourself for a quick moment?

THE COURT: Sure. Sidebar?

(Bench conference, 10:21 a.m. to 10:23 a.m.)

SPECIAL RECORD

THE COURT: Back on the record. We're going to make a separate record so that, and again I'm guided, it's just fortuitous that the Supreme Court came down with McCoy versus Louisiana on May 14, 2018. That's the U.S. Supreme Court making it clear that a competent client who is not under any disability has the ability to direct strategic matters in the course of a trial.

I understood from the sidebar conference that Mr. Dupree wants his Counsel to ask some questions regarding whether or not the photographs have been altered in some way. And I'm going to let him make his record --

MR. TOMKO: And I'm happy to ask those questions. I mean between he and I we disagree as

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to pursuing those questions, because I look at it as a photo that was cropped differently from the photo that we're looking at it, both on the screen and as entered as an exhibit. Mr. Dupree is of a different opinion. I'm happy to go along and ask those questions, but I needed, I just need to make a record to say that I think that's going in the wrong direction and we disagree. I want to fulfill his wishes to ask those questions. I'm happy to do that. I wanted to make that he wants me to pursue that.

SPECIAL RECORD

THE COURT: Yeah, do you, Mr. Dupree, we'll let you speak now, do you want your attorney to ask the questions about whether the pictures have been altered in some way?

MR. DUPREE: Yep. Yes, Sir.

THE COURT: You realize that you are not an attorney and he is. He's been through a lot more trials. And I just want to acquaint you to the possible danger of that. If the jury thinks that this is a significant part of your defense it could appear to them to be, well the least harmful to

you, they might just think that this is silly. But more seriously they may think that you are reaching for straws, may reach the conclusion that you don't really have a defense because such, such a tactic is being used. And therefore skilled trial attorneys tend to avoid arguments or suggestions that pictures were doctored or that evidence was tampered with because it usually comes back to hurt the defense's case. You know, in other words if there is a serious issue of fact, let's hear it. If the Defense is raising frivolous, nonsensical things it tends to detract from the quality of the Defense case. So I understand how a skilled trial attorney might say this is better to avoid that type of controversy because

SPECIAL RECORD

it weakens our case.

But under McCoy versus Louisiana you're in charge. And so if you want your attorney to ask these questions and you are willing to take the risk that this will weaken their case, I will allow him to do it now that you have been fully informed as to the rationale why it might not be a good idea to ask these questions.

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Is it still your wish to have him ask the questions?

MR. DUPREE: (Inaudible) me looking at these photographs and these photographs being a duplicate of each other is impossible for a vehicle to be in one photograph and not be in the other photograph when it was only one set taken. And me, this photograph came from the Prosecutor.

MR. LASZCZAK: That's not accurate, Judge.

MR. DUPREE: It's got your exhibit on it. It's got an exhibit tag that didn't come from (inaudible). Okay, so that came from you. Regardless of who it came from, these photographs are exact duplicates. It's impossible for this one to have a vehicle in it and this one not to.

So, yes, I want to present it to the jury. I want them to see it and let them decide on their own.

SPECIAL RECORD

THE COURT: Mr. Laszczak?

MR. LASZCZAK: The question that, the photograph that is in question is People's Exhibit 43. The People did not provide the exhibit that

the Defendant is mistakenly using as a claim for that the photograph has been altered. That photograph has been printed out either by one of his previous attorneys or his current attorney. It is not a document which the People printed out and gave to him. And in fact, Judge, the photographs were burned onto a disc, provided over to the Defendant for his review. So somebody, whether it be a previous attorney or maybe this expert witness he plans on coming in printed it off and didn't print off the entire picture. So I want the record to be clear that that is not the document that we provided the Defendant, and in fact it's the Defendant, if anybody, who altered People's Exhibit 43.

THE COURT: Well, except we're not talking about alterations. We're talking about just simply a different perspective. One is a wider shot, one is a tighter shot. Am I correct?

MR. LASZCZAK: No, Judge. It's the, there is no, he's claiming that the photo has been altered in some fashion or form. But the photograph is the exact

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same photograph that we provided. He, somebody, this isn't a question of whether the, it's two very similar photographs. It's the exact same photograph. However the copy that Mr. Dupree has has been provided to him by either one of his previous attorneys. It's cropped differently. That's not on behalf of the People. That's on behalf of his previous attorney or his so called expert.

THE COURT: Okay --

MR. DUPREE: Excuse me.

THE COURT: if I could see the photographs? Because I thought it was just a matter of perspective. Now the Prosecution is also saying it's a different picture.

MR. LASZCZAK: It's the same picture, it's just cropped.

MR. TOMKO: (Inaudible) the Prosecutor (inaudible) the scene.

MR. LASZCZAK: You can fit this picture into the other picture.

MR. DUPREE: The difference, the difference, Your Honor, is this photo right here, a

vehicle is missing.

UNIDENTIFIED SPEAKER: Part of the vehicle is

missing.

MR. LASZCZAK: There's the red cart that's parked right next to the vehicle.

MR. DUPREE: Right, but the whole vehicle --

MR. LASZCZAK: His photograph is cropped --

THE COURT: Okay. In part for the record, this is simply a matter that, in my judgment looking at the photograph, it's the same image that is simply cropped differently. You've got, you've got a, on the far left side in the middle of the picture you have a vehicle with a shopping cart next to it. On the document, on the photograph copy that the Defendant is pointing out you can pick up the shopping cart --

MR. DUPREE: And no vehicle.

THE COURT: but there is, the blue vehicle which is in the background is still visible. The white vehicle is not visible and it

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appears to me that is just simply a matter of cropping. Moreover, there is no material difference in the field of view in terms of the things that are on the grass area. And so the difference between the two is explained first of all by simple perspective as a matter of cropping. And it is my finding as a trial Judge under rule 104 that there is absolutely no alteration, no tampering with any exhibit.

SPECIAL RECORD

It's just that we have one exhibit that was in the Defense packet of discovery that just simply has a different perspective.

Now I think that any reasonable juror will see it the same way. Therefore if these questions are engaged in, in my opinion this will tend to weaken the credibility and the effectiveness of the Defense case. But if Mr. Dupree, having been warned that's the likely result, wants his attorney to engage in that, in that task, I will direct Mr. Tomko to follow his client's, to follow his client's wishes.

Now, do you still want to engage in that task, Mr. Dupree?

MR. DUPREE: (Inaudible).

THE COURT: He does?

For any reviewing court, I've given this Defendant every possible warning I could in very plain terms that this is frivolous, silly, borders on the absurd, and that it could certainly come back to haunt him. And having been warned he still wants to do it.

One last time, Mr. Dupree, you still want to do it?

MR. DUPREE: Yes, Sir.

THE COURT: Okay. Then Mr. Tomko, you have

SPECIAL RECORD

your directions.

Let's bring in the jury.

Hold it, Greg.

MR. TOMKO: The exhibit I would seek to enter that shows the differences has some writing on the side, and so I especially (inaudible) what to do about the writing. It says cigarette pack, it says appears to be a bottle on this. So we could either trim it off, cut those words off --

MR. HALL: My problem with trimming off

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the white is it's part of the explanation as to how that piece of paper was cropped, so I would object -- or I'm sorry.

THE COURT: Right.

MR. LASZCZAK: Well, Judge, again, if Counsel, if the Defendant's wishes is to have Mr. Tomko ask these questions, how is that going to get admitted as an exhibit? How is there going to be a foundation laid? One of the foundational questions that you have to ask is does this picture fairly and accurately depict the one that you took. It doesn't. You've indicated it doesn't, Judge.

THE COURT: Okay. Lookit, I'm going to handle that under rule 104, which is a matter that can be held

SPECIAL RECORD

outside of the presence of the jury, which is what we have done over here. I will allow it to be admitted under the representation by Counsel, which appears to be the truth under rule 104, because I can use hearsay information, any information to come to a conclusion.

Mr. Tomko is going to be allowed to say that this was a photograph that was provided in a

discovery packet and we're going to mark it on that basis. But that's all you can, is that it was previously produced to the Defense as a copy of photographs that were going to be introduced. And you can then mark it as an exhibit, it will be admitted, the jury can compare it.

MR. HALL: Your Honor, if that is the instruction that's going to be given, it must be given that that particular picture, any of those pictures were not given in this format. These pictures were produced on a CD. That has to be clear to the jury.

THE COURT: Yes.

MR. HALL: And that the printing of these pictures were done, either by this Counsel or a previous counsel. But by, and we don't have to indicate that he had previous counsel, we'll just say counsel.

THE COURT: Right.

SPECIAL RECORD

MR. HALL: It is either the Defendant or his Counsel who has done the job of actually printing that out.

THE COURT: Yes.

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MR. HALL: We did not produce that picture.

THE COURT: And we'll also tell the jury that the writing on the side is to be ignored and wasn't a part of the original photograph, or that the original image that was sent over on the CD, obviously because it wouldn't pick up the printing.

When you move to admit it I will instruct the jury -- well first of all, Mr. Tomko, I will leave it up to you to make the record to say that this was provided in a Defense packet on a CD, it was then printed out and then that will allow you to have it marked to then show the witness and you can then publish it to the jury for whatever comparison your client thinks is appropriate.

I understand you don't think it's going to be helpful. He does. Again, I'm guided by McCoy versus Louisiana and the fact that we've already had a competency hearing that Mr. Dupree has determined to be competent to act, or assist in his own defense. So therefore it's coming in.

Okay. Let's bring in the jury.

(Special record concludes, 10:37 a.m.)

COURT OFFICER: All rise for the jury,

please.

(Jury enters, 10:37 a.m.)

THE COURT: As soon as you can come in you can have a seat. You don't have to wait for everybody to come in. We have to keep on standing until everybody's in, but individual jurors can make themselves comfortable and seat themselves as soon as they walk in.

Okay. Everybody's back in, let's all take a seat and Mr. Tomko, you can proceed.

MR. TOMKO: Thank You.

RECROSS EXAMINATION (Continued)

BY MR. TOMKO:

Q Now Officer we've had marked as a proposed Exhibit D the photograph, a photograph that was provided to Defense in, as part of discovery previously in this case -- and I'll show it to the Prosecutor.

THE COURT: Now, Mr. Tomko, just I think we need to clarify this, the photograph itself was not previously made available to Defense, a CD or a thumb drive, some electronic means of copying photographs was sent to the Defense and the Defense printed this out at some earlier time, is that correct?

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MR. TOMKO: That is correct, Judge.

THE COURT: Okay. With that understanding, any objection to its admission, Mr. Prosecutor?

MR. LASZCZAK: Not with that understanding, Judge.

THE COURT: Okay, all right. Thank you.

Q So Officer --

THE COURT: And what exhibit is this?

MR. TOMKO: This is Exhibit D, dated 5-22-18, Defense Exhibit D.

THE COURT: Yeah, okay, all right.

Q Let me show you that exhibit. After you've had a moment to look at that, let me know.

A Okay.

Q I'm also going to show you what was previously marked as Defendant's Exhibit C.

A Okay.

Q Now would you agree with me that Defendant's Exhibit C is what appears on the video screen in front of us?

A Yes.

Q And the new Exhibit, Exhibit D, does it appear to be altered or different in some way?

A Yes.

Q And there's some missing parts of the picture to the left, is that correct?

A Yes.

Q All right. And that would be something that's altered and different from the original picture that we're looking at here, is that true?

A True.

Q And specifically, if we look on the screen and we look at the far left in the middle of the picture there appears to be a white vehicle or an SUV, is that correct?

A Some sort of a white vehicle with the door open, yes.

Q Can you point to it just so that we're all looking at the same vehicle?

A This vehicle here?

Q Yes, that's what I'm referring to. And yet in the new exhibit, Exhibit D, that appears to be left out of the picture completely, or at least mostly.

A I cannot see that vehicle.

Q Okay. That's all I have, thank you.

A You're welcome.

THE COURT: Any redirect on that?

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MR. LASZCZAK: Yes.

REDIRECT EXAMINATION

BY MR. LASZCZAK:

Q Officer Collins, did you, Exhibit D, the exhibit that was just admitted, did you, you didn't print that picture out, did you?

A I did not.

Q Did you alter that picture in any way?

A Absolutely not.

Q In Exhibit D, do you see anything next -- let me ask you this, in Exhibit C, do you see anything next to the white vehicle?

A A red shopping cart.

Q All right. And how about in Exhibit D, can you see that? Well let me ask you this, in Exhibit C, where is that red shopping cart?

A It looks like, it appears to be at the back corner of the vehicle, or the side of it.

Q All right. Is that red shopping cart in Exhibit D?

A It is.

Q Okay. So really it's just the white portion of the back vehicle that's missing, right?

A That's correct.

Q And again, you had nothing to do with this?

A No.

Q Do you alter or change your photos in any shape or form when you download them from your SD card and transfer them over?

A Absolutely not.

Q Thank you.

MR. LASZCZAK: Nothing further, Judge.

THE COURT: Okay. Members of the jury, this is your time to ask some questions. If you have any questions raise your hand and we'll -- okay, we have a question. We have several, okay.

MR. TOMKO: While they're doing that, Judge, may I ask one follow up question?

THE COURT: Well, okay. Stop writing your questions for a second, listen to Counsel's question and the answer.

Okay, go on.

RECROSS EXAMINATION

BY MR. TOMKO:

Q The question is, in the new Exhibit D, how is it possible to have the cart in the picture but not have the vehicle in the picture?

MR. LASZCZAK: Judge, I'm going to object. I don't think he can answer that question.

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He didn't have anything to do with printing that photo.

THE COURT: I think it's fair for him, he took the photograph, he can answer that question.

You can answer the question.

A Can you ask it one more time?

Q How is it that the cart can be in the picture, but the vehicle not be in the picture?

A Obviously this picture that somebody printed out, it's a little teeny bit smaller and doesn't show the back of the white vehicle. It's the exact same picture.

Q Thank you.

THE COURT: Okay. I'll see the lawyers out in the hallway.

(Bench conference, 10:45 a.m. to 10:49 a.m.)

THE COURT: Okay. A number of questions from the jury.

EXAMINATION

BY THE COURT:

Q The first is can you collect more than one DNA sample from a pair of gloves? Your answer?

A I, I swabbed the gloves, so could there be more than one, I wouldn't know. I'm not involved in

that. I do the collection and then it's sealed up and sent to the lab.

Q I take it it's somebody else's job then to interpret what the job has?

A Correct, Your Honor.

Q Okay. Can you explain again the process you used to collect DNA from the gloves, step by step? Just explain that first and then there might be some follow up.

A Okay. So the gloves from the scene were collected, taken into a paper bag, secured into my vehicle, transported back to the station. Once I get back to the station I pull out a clean sheet of paper, put it up on my table that you saw the pictures of. I put new gloves on and pull out the DNA swabs, the sterile DNA swabs. Then there is what we call an Addipak, which is sterile water. And that is used to moisten the tip of the cotton swabs so it can collect some sort of evidence, if there's any DNA evidence there. Then from there after it's moistened I swab a particular area of what I'm trying to collect DNA from, place it back into the original packaging, then into a paper bag sealed with evidence tape, package a, put an evidence tag

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on there which has, every evidence tag has its own particular number. And the information that's on there is my name, date, case number and what particular piece of evidence or what particular item is in that package in case you can't see it. For example, you know what you're looking at, what case it's involved with and it is taken, annotated into another book prior to putting it into the SLAM locker at the police station.

Q Okay. Now, we saw a vial or two in the picture lying on, I think it was brown paper, is that correct?

A Correct, Your Honor.

Q Okay. So what happens with that vial, do you pour the contents of that vial into the glove, or do you take that vial and you use it to dampen the swab, or what do you do?

A That vial from the Addipak, which is the sterile water, is used to dampen the, the cotton swab.

Q Okay. And what is the liquid?

A It's a sterile water.

Q Oh, so it's water, it's just a sterile water?

A Correct, Your Honor.

Q I take it it's sterile to make sure that there's no

contamination?

A Correct. And then once you're us-, once I use one of those, the Addipak that you see in the picture is discarded.

Q Okay. So you don't actually pour the contents, the water in the vial into the gloves, you just that water to dampen the, is it a cotton swab that you're using?

A Yes.

Q Okay. All right. And now this continues, can we see the new picture?

So Deputy Schumacher(pn), take Exhibits D and C and take them over to the jury.

And the question is going to be with regard to the white truck next to the shopping cart on the left side of the picture. So all the members of the jury can quickly pass those down.

Okay. Deputy Schumacher, could you go up and stand with both Exhibits C and D in your hand in a place kind of just to the north of the juror in Seat Number Seven and just hold them both up? Okay. Hold them both up separately.

Okay, all right. So the question to you, Officer, is what is the relevance of the white

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truck, slash, shopping cart?

A Zero.

Q Okay. Did it have anything to do with your investigation?

A No.

Q And again, the reason why these pictures are a little bit different, what is your explanation?

A I really don't know, Your Honor. But obviously it was already stated that when they were printed out by the Defense it was probably just a little bit different format. But the white vehicle has zero to do with anything. It's obviously just one photo. I mean, the lady in the middle is in the exact same position. I don't --

Q Okay. Did you even notice the white truck at the time that you were taking the picture?

A No, Your Honor. No relevance.

Q Did your investigation have anything to do with where that truck was located?

A None.

Q Okay. I suppose one more follow up question. In the bottom right corner there's a white blotchy thing on the exhibit that's, and that shows both in Exhibit C and D, although I think in D it's

yellowed in a little bit. By the way, as far as the writing and the yellowing in on Exhibit D, which you don't have, the Deputy has, did you do anything, you don't have any idea where the writing came from, do you?

A No, Your Honor.

Q All right, all right, so we're clear on that.

Now, okay, the, okay, we're back up, with regard to the items that you were concentrating on, is there any difference in what you observed either between C or D, the exhibits that the Deputy has in his hand?

A No difference, Your Honor.

Q Is anything moved?

A No.

Q Okay, all right. You can put, let's bring the photographs then, Deputy.

Okay. Did you make any estimate as to the size of the glove that was found? Or the gloves that were found?

A No, I'm not experienced. I mean I wear these gloves all the time, they're either, come in a small, medium, a large or an extra large. I didn't look at that. I didn't pay particular attention to

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what size they were.

Q Okay, all right. But on the, on the, I take it there was one glove that was found intact and the other one was ripped up, is that what you think it was?

A Yes, Your Honor.

Q Okay. Did you notice if either of those gloves had any indication of the size, like on an inside label or printed on it somewhere?

A Not in my experience, there's no, any kind, no size stamped in or anything like that. That rubber is so thin I don't even know if you could get a stamp on there.

Q Okay, all right. Now this next question you, I don't know if you can answer this, so I preface it with that remark. The question from the juror is, is there any DNA of the Defendant on any pieces of evidence found in this case? This is a question put to you based on your knowledge.

A I would, I don't know, Your Honor.

Q That wasn't your job?

A Correct.

Q You were just collecting it and then you sent it to somebody else to try to identify DNA?

A Correct.

Q That's how it works?

A Yes.

Q How far is the location of the evidence tech office from the smoke cigar shop, that is the number of miles?

A This shopping plaza is very near the intersection of Harper and Wellington Crescent, which is about a half mile north of Metro Parkway. And the police station is located, I would have to say probably four miles, four to five miles, somewhere in there.

Q Okay. The next question, this is not for this witness, but the question was already answered in the stipulations that allowed Mr. Tomko to admit Exhibit D. Who provided the photo shots to the Defense Attorney? It was, the police gave a copy of the CD, of a CD with all of these photos to the Prosecutor's Office. The Prosecutor's Office then delivers a CD, a compact disc to the Defense Attorney and then the Defense Attorney can print it out as he or she wishes. So initially it's the police photograph. The Prosecutor's Office is in charge of making discovery, that is providing the photos to Defense Counsel. But it's done in an

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electronic format on a computer disc and then it's up to the Defense Counsel to print it out. So that answers that question. And that was already talked about in the discussion that allowed Exhibit D to come in.

This next question, I'll just read it because I'm not quite sure, but you might know what it refers to. The juror says, this may be too specific, but is it not protocol to undo duct tape to swab, that is dust at the ends of the tape where fingers were used to separate from the tape roll? Can you follow that question?

A If you give it to me one more time I bet I can.

Q This may be too specific, but is it not protocol to undo duct tape to swab dust at the ends of the tape where fingers were used to separate from tape roll?

I don't think this is referring to the gloves. I think there was some reference to some previous photograph that you took regarding duct tape, do you recall that?

A I do.

Q Okay.

A There was duct tape that the victim stated he was bound up with.

Q Right. I guess, well I don't know, but whatever you testified, I remembered seeing some shots of duct tape.

A Yeah, on top of a box behind the counter.

Q Did you get any evidence off of that one way or the other?

A Not that I know of. I swabbed it for DNA and I submitted those.

Q I think that this is helping us hone in on the juror's questions. Was there an attempt to lift some prints from the duct tape? And I get it, because the juror is saying at the ends of the tape where fingers were used to separate tape from roll. In other words if somebody is holding some duct tape with ungloved hands --

A Yes.

Q -- it would seem that there would be a really good impression possibly for a fingerprint where you're holding the roll of tape before you start peeling it back. Was that attempted?

A There is a process that's used, but that would be for fingerprints. And you mix a liquid with a print dust and that's applied to the sticky portion of the duct tape. And that, in that case you

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would have to unroll the duct tape, but I did not do that.

Q. Okay. Is there a reason why you did not do that?

A. Well, gloves were found at the scene and I was notified that gloves were used by Sergeant Terzo. So in that case there wouldn't be any fingerprints available except for, I wouldn't totally eliminate that because there is a possibility there could be a suspect that doesn't have gloves on or it was not viewed correctly. So I would keep all my options open for that. I did not do that with the duct tape though in this case.

Q. And the reason you didn't do it was because why?

A. I just didn't think that there was a reason to try to lift fingerprints from the duct tape.

Q. Okay, all right. This next question might have the time period wrong. It says was there a reason given to you by the detective as to why you were asked to go back to the smoke shop a year later to take DNA from the victim? Why wait a year? First of all let's deal with that first, was it a year?

A. No, Your Honor.

Q. When did you go back?

A. It was December 15 of 2012, was the date of the

incident. And just a little over four months later is when I went back, of the year 2013, April 2nd.

THE COURT: Okay. So it wasn't a year, but it was about four months.

A. Right.

Q. Why, so I guess the question is still valid, why wait the four months?

A. I don't know. I don't know, I got that directive from the detective. He requested that I go there and do that. That is protocol in some, in some situations, where we either get elimination fingerprints or elimination DNA. Because if it's found that the suspect, or the victim has DNA, well it's going to be obvious that the victim has DNA at the scene, right? So the elimination is to say, okay, well that's his, so we can eliminate that DNA and focus on this one.

Q. So that could explain it. But in this case I take it that the detective doesn't particularly tell you why she or he wants you to go back, just go back and get this, right?

A. Correct, Your Honor.

Q. Okay. How long did it take to complete the photo shoot and dusting and collecting the evidence?

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That is what was your total time on scene?
A I don't know. I can't recall exactly. I know that I was there quite a while. In these situations it takes a lot of time to go through and sort out, everyone's got their own jobs, the responding officer, the supervisor and then my job is to photograph the scene, collect the evidence, package it up and then I transport it back to the station. Then I have more stuff to do back there processing the evidence. Then I have a report to do. I have some more reports to do. But at the scene it was a while, probably a couple hours at least.
Q While you were there did it rain or snow at all?
A No, not that I recall.
Q While you were there was it windy, did things get blown around at all?
A I don't recall any wind or anything that stuck out in my head, Your Honor.
Q So while you were at the scene was anything changing about the scene?
A No, not that I can recall. I don't think so.
Q And again, your total best guess now estimate is to, well if you got there, you said that you're using as a benchmark something, a call came in at

10:37, you were there shortly after, give just kind of an est-, a ballpark figure of when you wrapped up, if you remember?
A Somewhere probably at twelve thirty or one o'clock. I would say that would be normal.
THE COURT: Okay. I think we've asked all of the questions and all of the follow ups related to the questions that the jurors asked. And so Mr. Prosecutor, any further questions for this witness?
MR. LASZCZAK: Nothing further, Judge.
THE COURT: Mr. Tomko?
MR. TOMKO: Yes, quickly.

RECROSS EXAMINATION

BY MR. TOMKO:
Q So when you got the DNA swabs, part of the procedure that you went through too, you said you put those in some type of an evidence bag?
A I do.
Q Do you recall the evidence number?
A I don't.
Q Would looking at your report help you refresh your recollection?
A For sure.

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THE COURT: Didn't we already do this before?

MR. LASZCZAK: We did.

THE COURT: I think this was already in direct, or in your original cross examination.

MR. TOMKO: The number, I was looking for the number of the --

THE COURT: Okay, all right.

A And what piece of evidence were you looking for, Counsel?

Q Well let's start with the DNA swabs, that's what I started with.

A DNA swabs from what piece of evidence?

Q The DNA swabs that were taken from the gloves.

A From the gloves, they were taken and placed on evidence tag P63553.

Q 6355?

A 63553, correct.

Q And the gloves themselves, do they have the same evidence tag?

A No.

Q What's the tag for the gloves?

A 63554.

Q And the, was there a separate tag for the duct

tape?

A There was.

Q Do you recall what that was?

A 63555.

Q And any DNA attempted to be taken from the duct tape?

A The, those DNA swabs were placed on 63556.

Q Thank you.

A You're welcome.

Q And that's all I have. Thank you.

THE COURT: Okay. May the witness be excused?

MR. LASZCZAK: Judge, can I ask a follow up question?

THE COURT: Oh, sure.

REDIRECT EXAMINATION

BY MR. LASZCZAK:

Q You indicated that you took a swab of the victim on April 2, 2013, correct?

A Yes.

Q Did, and you placed that into evidence?

A I did.

Q Did that get an evidence tag as well?

A It did.

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Q Do you know that off the top of your head?
A Off the top of my head, no.
Q If looking at your report, would that refresh your memory?
A Yes. That evidence tag was P052284 for the DNA elimination sample.
Q Thank you.
MR. LASZCZAK: Nothing further, Judge.
THE COURT: Okay. Thank you.
All right. Now may the witness be excused?
MR. LASZCZAK: The witness may be excused.
THE COURT: Okay. Thank you very much. You may step down.
A Thank Your Honor.
THE COURT: Lookit, I feel the need for a short break. Let's make it short, just about five minutes and we'll be right back and the Prosecutor will call his next witness.
COURT OFFICER: All rise for the jury, please.
(Jury exits, 11:11 a.m.)
THE COURT: Okay. The witness is excused

and we're in recess.
MR. LASZCZAK: Thank You, Judge.
MR. TOMKO: Thank You, Judge.
(Matter in recess, 11:11 a.m. to 11:23 a.m.)
COURT OFFICER: All rise for the jury, please.
(Jury enters, 11:23 a.m.)
THE COURT: Okay. The jury has returned, we can all be seated.
Mr. Prosecutor, call your next witness.
MR. LASZCZAK: The People are going to call Detective Barbera.
THE COURT: Okay. Please raise your right hand.

J E F F R E Y B A R B E R A

Being first duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:
THE COURT: And your name again is?
A Jeffrey Barbera.
THE COURT: Okay. Your witness, sir.

DIRECT EXAMINATION

BY MR. LASZCZAK:

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Q Detective, how are you currently employed?
A By the Clinton Township Police Department.
Q And what is your current assignment?
A I'm a police detective, assigned to the Criminal Investigations Division.
Q How long have you been with the Clinton Township Police Department?
A Just shy of 23 years.
Q And how long have you been a detective?
A 15 years.
Q Were you a detective in 2012?
A Yes, sir.
Q And at that point how many years were you a detective for?
A I was promoted in January of 2003, so it had been about nine years.
Q And back in 2000, December of 2012, did you happen to go to a Smoker's Only Shop located at 37557 Harper Avenue?
A Yes, I did.
Q All right. And who directed you to that location?
A Detective Michael Friese.
Q And do you recall what your purpose was for attending that location?

A Detective Friese requested some assistance in recovering video and still images from a security camera at that location.
Q At that time were, were you kind of technology savvy at that point?
A Moreso than Detective Friese.
Q And do you recall the specific date that you went to that location?
A December 21st, I think it was a Friday.
Q And would that be of 2012?
A Of 2012, yes.
Q Did anybody else accompany you when you went to that location?
A I only recall myself and Detective Friese.
Q And when you got to that location did you, what exactly did you do when you got to that location on that date?
A I have very little independent recollection. I remember being shown where the video system monitor was, and that the clerk or the owner had no knowledge, or very little knowledge in how to pull up any images from it.
Q Did you, were you familiar with this type of system at that time?

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A Not this specific brand or anything. I kind of used prior knowledge of other systems to figure out how to rewind the dates and search for what we needed.

Q All right. And did you, were you able to extract anything from the system, like from a hard drive or anything, anything like that?

A Not directly from that system to some other form of media. I was able to review it, but I was unable to burn it to a disc for example or put it directly to a thumb drive.

Q All right. So what process did you use to obtain any kind of video footage?

A I used my department issued cell phone and I recorded right from the screen.

Q And explain to us how you did that?

A At Detective Friese's direction of what he wanted recorded I would fast forward or rewind to a point in the video. I'd hit play on the security video, hit record on my phone and hold it to the screen for the number of scenes or seconds or whatever duration that I was instructed to do so.

Q All right. And when, how many, did you get one long video? Did you kind of just take multiple

individual videos?

A I ended up taking shorter videos, about eight shorter videos, like between four and 30 seconds each.

Q And what did this video footage consist of? What did (inaudible) when you were viewing it, if you recall?

A The overall was the armed robbery that had occurred at that location. At least that's how it, you know, what it depicted. What I recorded was for Detective Friese to have images, suspect images that he was going to later use to try to identify a suspect.

Q And did these eight short little clips include video or footage from the interior of the store?

A Yes, they did.

Q Okay. Did they include any footage from the exterior of the store?

A Yes, they did.

Q Why not just remove the entire system and take it back to the Clinton Township Police Department?

A A couple reasons. One, for practical purposes, it'd be like taking the front door off the building because you needed fingerprints and we didn't want

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to leave, we normally won't leave a business like that unprotected with no video. Secondly, a lot of that stuff is proprietary software, so if I take it and I take it back to the office and I can't hook it up to another TV and set it up exactly the same way. I don't know that I could have done the computer forensics on the hard drive in order to extract the video with that software issue.

Q So in your opinion this was the, would this be the best way to obtain the footage then?

A It was the best way I felt to preserve the evidence.

Q Do you recall, while watching the footage do you recall, you said you indicated that it depicted that an armed robbery had taken place, correct?

A Yes.

Q How many individuals did you see while watching that footage during that event?

A Two or three -- suspect images?

Q Yes.

A Two or three.

Q Okay. Did you capture these images?

A I did. I recorded them on my department cell phone.

Q Did you ever capture still images?

A I did. Again at Detective Friese's request I captured two suspects, three images of one and two images of the other, again that he was going to use hopefully to try identify somebody.

Q So then there were eight, correct me if I'm wrong, there were eight short video clips and five still images that you captured?

A Yes.

Q And if you were to see those still images again would you recognize them?

A I would.

Q Have you reviewed them in the past?

A I have.

Q I'm going to hand you People's proposed Exhibit 57, 58, 59, 60 and 61.

MR. LASZCZAK: May I approach, Your Honor?

THE COURT: You may.

Q Do you recognize these five photographs, still images?

A I do.

Q And are these the five still images that you captured when you were taking the, reviewing the

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video footage?
A They are. So after I returned to the police station I put the video, transferred it to my computer assigned to me at my desk and then I would do, I did screen shots in order to get these images.
Q Okay. And those images were saved onto a disc as well?
A They were, and they were turned over to Detective Friese.
Q Okay. And do those screen shots fairly and accurately depict what you actually captured when you got back to your police station?
A Yes, sir.
MR. LASZCZAK: Judge, I'd ask that People's Exhibits 57 through Numbers 61 be admitted as evidence.
THE COURT: Mr. Tomko?
MR. TOMKO: I'm sorry?
THE COURT: Any objection?
MR. TOMKO: No objection.
THE COURT: Admitted.
Q Let's start with, this is the Exhibit 57.
THE COURT: Take a look at the, on the

screen he's referring to.
A I'm looking here at the (inaudible) 57 (inaudible). Yes, sir?
Q And this is a, can you explain what the picture depicts of?
A A suspect as described by the victim in the, outside the building on the Harper side of the building.
Q And so this would be from an exterior camera?
A I'm not sure if it was an exterior camera, or a camera from the interior that shot through the glass of the outside.
Q So the next numerical, 58 I believe. Is that marked as 58 on yours?
A It could be either 59 or 60.
Q Again, is this, what does this picture depict of?
A Again the same, from the same camera. So either from the interior of the building, shooting out into the parking lot, to the glass door, or outside.
Q There's a timestamp up top, do you see that timestamp?
A I do.
Q Did you verify that timestamp with current time

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when you did (inaudible)?

A I did not.

Q Do you have that photo in front of you?

A I do.

Q That's marked as?

A 58.

Q 58. Again?

A Same camera, same view, different suspect.

Q So there was three possible, three suspects during (inaudible)?

A In these images, yes, sir.

Q Other than capturing these still images in the video footage, did you have any other participation in this case?

A No, none whatsoever.

Q Thank you. Nothing further.

THE COURT: Cross examination?

MR. TOMKO: Yes, thank You, Judge.

CROSS EXAMINATION

BY MR. TOMKO:

Q And good morning, is it Detective Barbera?

A It is.

Q Good morning, Detective Barbera. Thomas Tomko is my name, and if I can just ask some questions just

to follow up so that I have a better understanding of what went on this day. You had, prior to ever going to this smoke shop -- well first of all, when was the first time you went to the smoke shop?

A On that day, the 21st of December of 2012.

Q You're saying the 21st of December. Is this the day that you used your phone to make copies?

A To record these images and make these stills, yes, sir.

Q Okay, all right. So let me show you, I'm not certain of the date, would a record written by Detective Friese, would that refresh your recollection as to the date?

A Could I explain how I garnered that December date if I haven't looked at it since then?

Q Yes, please.

A I was able to review the CD with the eight videos and the five still images on them. The disc was created by me and the creation date for that disc, so each individual file has a creation date, shows December 12, 2012. Excuse me, December 21st, 2012 -- getting my 12-12's mixed up. And it shows about four o'clock in the afternoon is when I created that disc. So I would have been there on that day,

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and quite honestly I work seven to three, so if I'm still in the office at four o'clock on a Friday afternoon I'm finishing up this disc and handing it to Detective Friese.

Q So it would not have been on February 12, 2013?

A No, sir, no, sir.

Q Any explanation why there would be confusion between those two dates?

A We, the police department, and I'm not 100-percent sure on how the transfer of records went, but when the police department transferred from one reporting system to another the clerks in our department had to transfer supplemental reports. And I think, it's just my understanding that some of the supplemental reports, when they were transferred over that was the date that was generated, or Detective Friese didn't write a report until that date in February. I'm not privy to either possibility.

Q So there's a, perhaps another explanation but we'd be kind of speculating (inaudible)?

A I'm sure on the December 21, 2012, date, because that's when I would have created the CD.

Q Okay. And that comes from your computer or from

your phone?

A That date?

Q Yes.

A From the computer at work. So when I put all of the images onto one CD and burned it to a CD, it has a creation date on that.

Q Okay.

A And that's, still holds true on that disc. Sorry.

Q Okay. The date that's on your computer, that's the current date?

A That's an accurate date, yes, sir.

Q That comes from the internet, or the online?

A Yes, sir.

Q Okay, all right. Now what was your purpose on the 21st of December in going to that smoke shop?

A Detective Friese asked my assistance in recovering video or still images.

Q Okay. Who all went there?

A Just Detective Friese and I.

Q Okay. And so Detective Friese was running the show?

A It's his case.

Q Because he's the detective in charge of the case?

A He is.

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Q He's in charge of lots of things. You're familiar with the things that he's in charge of?
A In a general term, sure.
Q On that particular day, being in charge was the goal to get a copy of a video?
A Yes.
Q Okay. Because previously did you have any information that the owner of the store had said, hey, if you have a USB drive we could copy all this stuff?
A I have no knowledge of that.
Q Okay, all right. But the officer in charge, you would expect that he would have knowledge of that?
A Yes, sir.
Q If that was true?
A Yes, sir.
Q All right. And so on this date, December 21, did you go to the store with a USB drive?
A I don't recall. I, because I do the computer forensics or I've done the computer forensics here, I travel with CDs, DVDs and thumb drives.
Q Okay.
A If on that trip out we jumped into his car and I didn't grab mine, my bag and stuff, maybe I didn't

have any with me. But I would have, knowing that we were going there for video I would have probably grabbed CDs, DVDs and thumb drives.
Q Okay. So you have a tool kit of sorts that you carry with you when you're going to capture a video?
A Yes, sir.
Q And you're not sure if you had it with you or didn't have it with you that day?
A I'm not sure.
Q You would guess that you would have, though, because that's what you were going there for?
A Yes, sir.
Q Okay. Did you talk to the owner of the store?
A I'm sure there was a conversation. I don't remember speaking to him directly.
Q Okay. Do you know if he explained that he had just installed this within a year earlier?
A No, sir, I don't know.
Q Okay. Did he tell you that he installed it himself?
A No, sir, I don't know.
Q Did he tell you that he had the manual when he installed it, did he have the directions?

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A No, sir.
Q Did you ask him when he installed it?
A I did not.
Q Did you ask who installed it?
A I have no recollection of any conversation with him at the scene.
Q Did you ask for the directions that he may have had that came with the system?
A I did not.
Q What brand was the system?
A I don't know.
Q So again, making the copies that you did make of the video, this was at the direction of Detective Friese?
A Yes, sir.
Q Was there any direction that, hey, we should make a copy of the entire video?
A I don't recall that conversation at all, no.
Q So at least you weren't told to do that?
A Correct.
Q Did you say on your own, hey, we should record this whole video?
A No, sir, I did not.
Q Okay. So beyond not being told, you didn't make a

decision that, hey, we should record the whole thing?
A No, sir.
Q Now when I say record the whole thing, really there's several different cameras, correct?
A There were.
Q And there were several different then videos?
A There would have been, each camera angle would have provided a different view, yes.
Q Because for example you mention there's one with these exhibits of these individuals, but that was taken from inside the store looking outside the store?
A Or there's a camera outside. I don't recall which.
Q Okay, all right. And then there was at least another angle which had something to do with a cash register?
A Yes, sir, behind the counter there.
Q And there was another angle of the front door, people coming in the front door.
A Yes, sir.
Q And going out the front door.
A Sure.
Q So do you remember how many different camera angles

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there were?
A No, sir.
Q Who make, why just the ones that you recorded on your iPhone?
A I believe that Detective Friese was looking just for images that he could use later for identification. He never indicated that he wanted the whole incident recorded, or captured or saved; that he specifically pointed me towards images or camera angles that we could possibly do identification from in the future.
Q All right. So with these, with these individual photos that we have, these are still photos from the video, correct?
A They're, pause the video and then make a video from that paused video, yes.
Q And you were operating the --
A Yes, sir, back at the -- so I didn't make these until we got back at the station.
Q Okay. But the video at the store, you were operating it so that you could pause it?
A Yes, sir.
Q So you could make it go forward and back?
A Yes, sir.

Q And so when we chose to pause it at one particular image, that you chose to do that.
A I'm sorry, sir? I made this decision, or Officer Friese over my shoulder made the decision of what he wanted video of. So those are the eight videos. I take those eight videos on my phone back to the office, and I'm sitting at my desk when I pause the video to make these still images. And yes, then I made the decision based on the clarity of the picture and the identification.
Q Did you, you took this on a cell phone, correct?
A Yes, sir.
Q And this was a department issued cell phone, correct?
A Yes, sir.
Q So then once you took those photographs, then you took your cell phone and you put it into an evidence bag, correct?
A No, sir.
Q But isn't that now a piece of evidence, at least the images on it?
A The images from the cell phone, or excuse me, the video from the cell phone, plugged into my computer and therefore copied from my phone to the computer

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are exact copies, all the way down to the computer 20-digit, 30-digit hashtag, they would be the same.

Q But we have to, we have to trust that that's true because we don't have the iPhone in front of us, correct?

A That's correct.

Q And so it's possible, inadvertently or intentionally, something off the iPhone may not have gotten onto the computer.

A No, sir.

Q But we know in, that certainly anything that was at the store, we certainly don't have the complete copy from the store.

A That's true, sir.

Q So we have partial copies of the store video on a cell phone, correct?

A Yes, sir.

Q And then you're saying those were copied then to a computer.

A Yes, sir.

Q And then from the computer made into a disc?

A Yes, sir.

Q And then from the disc images made? Or from the computer?

A From the computer the eight videos, I pulled these five pictures off those eight videos and I put them all on one disc together. So the eight videos and the five still images all went on the one disc.

Q Okay, all right. And you were aware though that this was an investigation about an armed robbery, correct?

A Yes, sir.

Q And there was no video captured showing anyone being armed, is that fair to say?

A I don't recall.

Q You certainly didn't transfer anything to your iPhone to show that anyone was armed.

A Just those eight videos, sir.

Q And when it comes to the video that you did capture with your iPhone, is it fair to say that there are no images of this individual wearing gloves.

A I don't recall, sir.

Q Is it fair to say that there are no pictures of, in the video, of this individual wearing gloves?

A Again, I don't recall, sir.

Q And what about this individual who is carrying a carton of cigarettes?

A It looks like he's wearing gloves in the image.

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Q All right. And can you describe the gloves?
A Because of the quality of the pictures, only that it appears to be gloves because of the difference in skin tone. I can't tell if it's a logo on the top of the hand, or if that's a tear in the glove. But that's the best I can describe is that it's --
Q And which exhibit, just so it's clear, which exhibit are you talking about?
A Well 59, 60 appear to depict the same.
Q Is this the one on the screen that we're talking about?
A Yes, sir.
Q So, and are you saying that this is the individual, in all of the video and pictures, this is the one that is shown having the glove on, correct?
A No, sir. That's not what I'm saying. I said I don't recall gloves on the other two. But as we're specifically speaking about these still images it appears that that person in this image has gloves on.
Q And this person has a purple top on, a white glove. The white gloves, does it appear to have any other coloring to it?
A I can't tell from the image.

Q It does have a mark on the back of the gloves, is that true?
A It does.
Q Does it appear that the palm and fingers appear to be black?
A Can't tell if it's a color or a shadow, sir.
Q And this is (inaudible), what number is this?
A 57.
Q To 57, would you agree that this is a person that was described as a 250, 300 pound person?
A Sure.
Q And it's unclear from this picture if that person is wearing any sort of gloves, is that true?
A Can't see his hands, sir, so I have to agree with you.
Q And the final person?
A It's 58. In 59 you can see his hands a little better.
Q And it appears to be --
A Or excuse me, 61.
Q (Inaudible) glasses?
A Yes, sir.
Q Does that person appear to be wearing gloves?
A The two images that I have, the two exhibits, no

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sir.

Q Because there's two exhibits of the same person?

A This is a different stride, yes, sir.

Q So was your purpose in going and trying to get this video, was that to preserve evidence of an armed robbery?

A As I said, the officer in charge may have directed to me more to focus on pictures of the suspects for purposes of future identification.

Q How about for purposes of evidence in the future?

A Again, what we have from what I've reviewed from the video and these still images, it appears that Detective Friese wanted me to preserve images of the suspects for future identification.

Q So you would agree with me, as far as any of the preserved video that you copied on the iPhone and made copies of us, that nowhere in any of those is there an indication of a weapon?

A Not that I recall.

Q And but for this one picture of a person holding the carton of cigarettes, of all of the things that you've captured and produced for us there is no evidence showing anyone else wearing gloves?

A I can't say that. I did not go through the eight

videos, frame by frame, looking for people with gloves, even reviewing for today.

Q But as you sit here you don't recall that?

A I don't recall.

Q And you're familiar with computers, correct?

A I am.

Q And you're familiar with iPhones, correct?

A I am.

Q And you're also familiar with the ability of either an iPhone or a computer to change photographs on, by their nature, by their software?

A No, I'm not. Not in the basic function of an iPhone.

Q Well there's things like Photoshop, we've all heard of that.

A Oh, sure. Yes, sir. I meant not on, not inadvertently, no.

Q Okay. But someone could intentionally change them?

A Sure. Not these images.

Q All right. And that's all I have. Thank you.

A Okay, sir.

THE COURT: Redirect examination?

REDIRECT EXAMINATION

BY MR. LASZCZAK:

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Q Detective, you indicated you got eight little clips, right?
A Eight video clips, yes sir.
Q Okay. Is it possible to put these eight clips together to make one continuous video?
A Not to my knowledge, no.
Q Did you in fact, you had nothing to do with, once you turned it over to the Prosecutor's Office did you ever have any contact with these eight videos again, in editing them in any shape or form?
A Once I turned them over to Officer Friese I never had anything, any contact with them again.
Q And you said there was a, do you know if eight means that there were eight cameras, or does eight, meaning that you took eight separate clips?
A There are eight video files on that disc, so I would --
Q Okay. So (inaudible) --
A So each time I hit record and then stop would make one video file. So I did that eight times.
Q Okay. So you could have been watching the same camera and did eight start and stops?
A From reviewing a little bit of the video there's more than one camera view, but yes.

Q Okay. Have you had an opportunity to watch the videos prior to today?
A I glanced, I didn't review them for, like an evidence tech for content. I just verified that those were the ones that I took.
Q And if you were to see a video would you be able to determine the, if the eight clips you took are depicted in there?
A I reviewed the disc for that. That's my disc that I produced and I handed it to Detective Friese. So those eight video clips are the eight clips that I recorded. And those five still images are five still images that I recorded from those eight clips. That's my work.
Q So my question to you then is, if you were to see a video today, watching that video would you be able to determine that those eight files are accurately depicted in that video?
A Do they accurately represent what I saw? Yes, sir. I'm sorry for confusing your question.
Q Okay. Maybe I'm asking it confusingly. You said that there's eight different files, right?
A Yes, sir.
Q And my question to you is is that if you were to

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see the video today on this screen, would you be able to determine by watching that video if all eight of those files are within that --

A Yes, sir, I should be able to. Yes, sir.

MR. LASZCZAK: Can we play it?

MR. TOMKO: Judge, I would like to, I have an objection I would like to give outside the hearing of the jury.

THE COURT: Okay. Let's take the jury, but this will only be a two-minute break.

COURT OFFICER: All rise for the jury, please.

(Jury exits, 11:55 a.m.)

THE COURT: Door is closed, Mr. Tomko, what is your objection?

MR. TOMKO: Judge, the objection is to playing the video over and over and over for each witness that comes up here, I think that is completely inappropriate. It was already admitted as an exhibit, the videos and the photographs. So these things already have been admitted as far as I understand it. If I'm wrong, please correct me. But there's no sense in playing them over and over for him to say that, yes, these are the videos that

I took.

THE COURT: Before I hear from the Prosecutor, this is the fifth witness. We've only played the video for the first witness, and now this would be the second time around. It's only the second time, so it's not every witness.

MR. TOMKO: And then I would presume then the same argument could be made for Detective Priese, so then we'd be playing then it now three times. I mean --

THE COURT: Well, I hear your objection, let's hear from the Prosecutor.

Your purpose for this?

MR. LASZCZAK: Judge, the purpose is that Detective Barbera indicated that he took eight short clippings. The jury has seen one video. My purpose of showing this video is for him to indicate that those eight short clips are within the one video that I've indicated the jury has already seen and been admitted. It's a proper way of making sure that the eight that he showed is depicted on, and that nothing's missing. Because I mean we've already heard this argument from the Defendant previous, is that the police have somehow

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altered or planted or changed evidence that has been presented in this case, which is totally untrue. But my, now, Judge as a strategy purpose I need to make sure that the jury is absolutely clear that there are not eight videos and they're only seeing one, that there are eight clips that are contained within this video.

THE COURT: Yeah, Mr. Tomko?

MR. TOMKO: Well, Judge, I think, correct me if I'm wrong, we've already admitted it and they're before the jury. The jury can look at them, that's fine. If he, you know, wants to say, he already testified that these are his clips, this is what, this is what he's done. The reason for playing it again, I'm not certain. I don't understand.

MR. LASZCZAK: Because he's not, Judge, he --

THE COURT: No, hold on.

Two reasons why this should be played. First of all there was cross examination about specifically what this detective did, and now on redirect examination it is quite proper for the Prosecutor, because of the cross, to say okay,

let's have a complete presentation now of what you did, what's on the tape that you put on the computer. So plain and simple without any other reason, this is fair redirect examination.

Secondly, there was a suggestion because of the introduction of Exhibit D and Exhibit C, there is now put at issue in this trial a suggestion because of that objection, or because of the issue raised by your client that something may have been fabricated or altered, I think it is now fair for the Prosecutor each time we're dealing with a piece of physical evidence that he has the right to show what the work product was of the detective and get testimony out that this is the complete, unaltered version of what he originally saw because it's something that your client has put in issue. And, well those two reasons are sufficient.

So we're going to play the videotape. Let's bring the jury back.

MR. TOMKO: Thank You, Judge.

COURT OFFICER: All rise for the jury, please.

(Jury enters, 12:00 p.m.)

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THE COURT: Okay. We can all be seated.
Mr. Prosecutor, you can proceed.
MR. LASZCZAK: Thank You.

REDIRECT EXAMINATION (Continued)

BY MR. LASZCZAK:

Q Detective, would reviewing the video, would you, reviewing the video, would you be able to determine if all eight of those clippets were within that video?

A Yes, I would be able to.

MR. LASZCZAK: At this time, Judge, I'd ask that we play the video.

THE COURT: Okay. Go ahead.

MR. LASZCZAK: For the record, Judge, it's Exhibit Seven.

THE COURT: (Inaudible), okay.

(Video played, 12:01 p.m. to 12:03 p.m.)

Q (By Mr. Laszczak): And Detective, would those, would this video accurately depict those eight clippets that you took?

A Those are the eight single images all put together as, eight videos that I took that are all now put together as one, yes.

Q Thank you, Detective.

MR. LASZCZAK: I don't have anything further, Judge.

THE COURT: Okay. Recross?

MR. TOMKO: Yeah.

RECROSS EXAMINATION

BY MR. TOMKO:

Q Just from that video we saw, it seemed like when you were recording that there was one that was centered. Were there other images that were playing around it? Like one TV screen with several images?

A I don't know if it was that, sir, or if it was over the top of the monitor you were seeing live in the background, the light from the background. I'm not sure.

Q All right. That's all I have. Thank you.

THE COURT: Okay. Members of the jury, your opportunity to ask questions. If you have questions raise your hand and write them out.

Okay. We have one, certainly. Anybody else writing? One other question being written. Okay. Take your time. Anybody else writing questions? No other hands raised, we'll take a look at these two and be right back.

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(Bench conference, 12:05 p.m. to 12:06 p.m.)

EXAMINATION

BY THE COURT:

Q So Detective, a couple of questions. First, have you utilized your department issued cellular phone to record images like this before this or after?

A I have.

Q How common is this, to use your own phone?

A First, it's a department issued phone, so it's like any other piece of equipment around there, so I'm not putting it on the same phone as my pictures of my kids or anything. Secondly, if I get to a, if I'm asked to help with video like this and I can't figure it out, how to download to a thumb drive or how to record it, it's my next best route of preserving the evidence.

Q Okay. And what type of cell phone was it?

A It was an iPhone, it would have been a three I think, three or four. It was several iPhones ago.

Q Because this was 2012.

A Yes, Sir.

Q So whatever, was it the latest version of the iPhone that was out at the time, or like one or two years behind?

A The department wasn't purchasing the latest. It probably would have been the older version, the last one before that. Then it gets recycled. After they take them from us they go back into the township and --

Q Okay. How big, slash, long can a video be made? In other words, I suppose this question is asking how long continuously can you take a video using that iPhone?

A (Inaudible) my personal iPhone use?

Q No, no, no.

A No, no, I'm sorry.

Q (Inaudible) --

A My knowledge of this will be my personal iPhone use, until you run out of storage space. So minutes to hours.

Q Okay. So it doesn't limit you to like a 30-second clip, you could just keep on, if you had like an hour and 15 minute video to record, you could keep it going continuously for an hour and 15 minutes?

A As long as it doesn't exceed my memory space on the phone.

Q Or that the power would run out?

A Correct, yes, Sir.

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Q Okay. How easy is it to transfer longer videos from the phone to the computer?
A Other than the time it takes to do it, it's the same process. You plug the phone into the computer, the computer recognizes the phone and it's drag and drop that file. So a longer file might take more minutes to transfer over.
THE COURT: Okay, all right. I think that concludes the questions from the jurors.
Any follow up questions from the Prosecutor?
MR. LASZCZAK: No, thank You, Judge.
THE COURT: From the Defense?

RECROSS EXAMINATION

BY MR. TOMKO:
Q So when you were taking video that day you didn't run out of battery on your phone?
A No, sir.
Q And you didn't run out of memory on your phone?
A No, sir.
Q Thank you.
THE COURT: All right. May this witness be excused?
MR. LASZCZAK: This witness may be

excused, Judge.
MR. TOMKO: Satisfied, Judge.
THE COURT: Okay. Thank you.
Okay. You can step down, Detective.
Ladies and gentlemen, we're going to break for lunch. Come back at two o'clock. We should start pretty close to two o'clock, depending upon what the other docket takes. So maybe be here about five to.
And then think this over because I'll ask this when we get back, I'm proposing that we stay until about five thirty today. I'm telling you this now so that if any of you want to turn on your phones and talk to somebody back home to see if you can stay a little bit later you can do it. And again, even one, one veto is sufficient. We'll stay until five thirty unless even one of you says, no, I can't, I can't stay that long. Because we don't want to inconvenience anybody and I've already made the promise that you can be out of here by five. I tell you this before lunch so that you can think it over or check it out. And we'll see you at two o'clock. Thank you.
COURT OFFICER: All rise for the jury,

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please.

(Jury exits, 12:10 p.m.)

THE COURT: Okay. The door is closed.

Let me ask Mr. Laszczak, how many more witnesses do you have?

MR. LASZCZAK: Three, Judge.

THE COURT: Three. Do you think you'll be done today?

MR. LASZCZAK: I anticipate my ability to be finished by the end of today to be highly, to be likely.

THE COURT: Okay. Mr. Tomko, you have a witness who just for availability, let me know, is it a she or a he, when will that person be available?

MR. TOMKO: The, two witnesses we have in mind. One is an investigator, a former investigator, we heard a comment about investigating. Another is a DNA person. The DNA person is not available tomorrow. She comes from Lansing. If we knew we were being done today I could ask her to be here. But if I don't know that I can't get her here tomorrow. I can get the other witness here, either this afternoon or tomorrow.

THE COURT: So your DNA person you can't get tomorrow at all?

MR. TOMKO: I can't.

Yeah, her name is Howenstine. She's testifying in Grand Rapids in a federal case and she can't be here tomorrow.

THE COURT: Okay. Three witnesses?

MR. LASZCZAK: Correct, Judge.

THE COURT: From the Prosecution's direct point of view, how long will you be on direct with them?

MR. LASZCZAK: It will be very short, about the length of time, if not maybe a little bit less than I was with Detective Barbera. Maybe a little longer. Two of these are lab technicians, Judge, or forensic scientists. And then Detective Gilbert is in between.

MR. TOMKO: Detective Friese I suppose, too?

MR. LASZCZAK: No, no Detective Friese.

THE COURT: Well that suggests to me that we're going to finish the Prosecution's case today. Your next witness, if we finish a little bit earlier could be the investigator.

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MR. TOMKO: The investigator is nearby in Warren. The DNA person is in Lansing. So if I call her I can get the DNA person here today possibly, if we know, because we're making her do that drive we have to pay for her of course.

THE COURT: Well the County will pay for it, what I -- but this is going much more slowly than I thought. But, well I'll tell you what, I'm going to, well I'll just be ready to foot the bill. We're going to try to move quickly. You know, due process does not allow me to, to tell you how fast you should move or not move, but if we all try to move concisely today, we could still get your DNA person on. So why don't you have her here, because otherwise it's a long delay in the trial and it pushes back the start of another trial. So I think that the County will bear the cost of having her be here on standby. Okay. Thank you.

MR. TOMKO: Okay, thank You, Judge.

THE COURT: Okay. We'll be back at two o'clock.

MR. LASZCZAK: Thank You, Judge.

(Matter in recess, 12:14 p.m. to 2:33 p.m.)

THE COURT: Okay. We're back on the

record in the People of the State of Michigan versus Roberto Marcello Dupree.

I will indicate for the record that Mr. Dupree is not with us. There is a note that I have from a Juror in Seat Number Nine. He has concerns he wants to discuss. We're going to bring him out here, okay.

Sir, why don't you come up to the podium up here. I don't know what concerns you want to discuss, and so I want to ask you do you want to discuss things with me first privately in chambers, or here on the record?

JUROR IN SEAT NUMBER NINE: I'm fine discussing on the record.

THE COURT: Okay. We're on the record. Mr. Dupree is not here. I have no idea what you're going to say, but I do feel like I have to address your concern. What is it, sir?

JUROR IN SEAT NUMBER NINE: Yeah, the victim was, is my question was in regards to if we have businesses, family businesses around the general area, or and live in the general area, what kind of, you know, what do we do in situations like that? This is where you start to feel kind of

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uncomfortable, impartial, you know, not sure, you know, how to handle the situation. So --

THE COURT: Okay. So you're saying that you have some family or some connection with the area in which this armed robbery took place?

JUROR IN SEAT NUMBER NINE: So Rivercrest Restaurant is named after my family's business, which is the line of apartments where I live and was Farmer Jack's and now Value Center.

THE COURT: Okay. I see your concern. But unless the lawyers want to raise an issue, I guess I'm just going to thank you for raising a concern. The law says that in order to have a problem or conflict or be disqualified that there has to be something very, very significant in terms of the contact. The kind of contact that you described seems to have nothing to do with the Defendant. You don't know the Defendant. Has, I, I guess I'm grateful that you came up and told us this, but I'll tell you what I'm going to do, I'm going to talk to the lawyers off the record in the hallway and then come back to see if any of them have any questions or any thoughts as to what I should do. Okay.

JUROR IN SEAT NUMBER NINE: Just something I figured I'd share.

THE COURT: Pardon?

JUROR IN SEAT NUMBER NINE: I said it was just something I wanted to share, for the simple fact is before the Court basically were unaware of any of the circumstances in regards --

THE COURT: No, no, I understand. But you understand, Macomb County is a big county.

JUROR IN SEAT NUMBER NINE: Sure.

THE COURT: We've got like 850,000 people, and so almost a, in almost every case nobody knows anything, but the same goals apply to counties with 15,000 people in which if there is, if there is an allegation of a break in or if there is a fight at Dooley's Bar or something, everybody's been to Dooley's Bar, the whole town knows almost everybody else. The same rules apply there, which is that you really have to have something which would really make you feel like you could not be an impartial juror because you have just too much of a connection with the business or what has happened.

Your description, I believe, does not

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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File Only

STATE OF MICHIGAN

IN THE 16TH CIRCUIT COURT FOR THE COUNTY OF MACOMB

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. File No. 2015-3884 FC

ROBERTO MARCELLO DUPREE,

Defendant.
_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA, CIRCUIT COURT JUDGE

MOUNT CLEMENS, MICHIGAN - WEDNESDAY, MAY 23, 2018

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Mount Clemens, Michigan

Wednesday, May 23, 2018

10:32 a.m.

* * * * *

THE COURT: All right. We're back on the record on the matter of People versus Dupree and this is file number 2015-003884. Let's have appearances, please.

MR. LASZCZAK: Good morning, Your Honor. Ron Laszczak on behalf of the People.

MR. HALL: Jeffery Hall on behalf of the People, Judge.

MR. TOMKO: And Thomas Tomko on behalf of Mr. Dupree. Mr. Dupree has something to say to the court. I don't know if ---

THE COURT: Oh, okay.

DEFENDANT: I, I would like to reserve the right to testify, if I choose to.

THE COURT: Of course.

MR. TOMKO: Yeah.

THE COURT: Yeah, we're not at that point yet.

DEFENDANT: Okay. I'm just making sure.

THE COURT: Yeah. No. No, either way, I

have to make a separate record with you so that you understand that you have the right to testify if you want, you have the right not to testify.

DEFENDANT: Yeah.

THE COURT: But just to kind of go over what the options are, to make sure that it's a free and knowing choice.

DEFENDANT: Yeah.

THE COURT: Okay. Good. Okay. And I think we're ready to bring in the jury then. Bring in the court.

COURT OFFICER: Okay. All rise for the jury, please.

(At 10:34 a.m., jury enters courtroom)

UNIDENTIFIED JUROR: Good morning.

THE COURT: Okay. The record should indicate the jury is back. We can all be seated. And let's resume where we left off with the witness. Please take the stand again. And new day, we typically administer another oath, so raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

MS. YOUNG: I do.

resumed testimony and re-sworn by the Court at 10:34 a.m.,

testified as follows:

THE COURT: Okay. Have a seat, please. Counsel, you may continue.

MR. LASZCZAK: Thank you, Judge.

DIRECT EXAMINATION CONTINUED

BY MR. LASZCZAK:

Q Good morning, Ms. Young.

A Good morning.

Q How are you?

A Good.

Q Good. All right. So, yesterday we kind of left off with talking about contamination and what you do to prevent contaminating any type of evidence that you are doing an analysis on. And one of the things that you said is is that you're fully, you're in a lab coat; right?

A Yes.

Q You have a mask on.

A Yes.

Q You're wearing gloves.

A Yes.

Q And you kind of clean your surface with a bleach

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solution to make sure that any leftovers from previous testing would be destroyed.

A Correct.

Q All right. So, let's kind of continue on that line of questioning. Explain, explain, first of all, DNA. What is DNA? I mean, we all know the term DNA, but that's actually an acronym for something; correct?

A Sure.

Q What is it an acronym for?

A Deoxyribonucleic acid.

Q All right. And how, how does DNA, how do you, can you create DNA?

A Like I can't create DNA with what I'm doing. I mean, I guess in theory, someone could create DNA in a lab somewhere, but I can't do that with the type of instruments and technology and, that I have available to me.

Q All right. So, let me ask you this question. Can DNA be destroyed?

A Yes.

Q In, in what form or fashion?

A So, chemical can destroy DNA. Extreme heat could des, could destroy DNA. And just over extended periods of time, enzymes can break down DNA. So, those are ways

that DNA can be destroyed.

Q Can, so, let's say, for example, we have person A and person B and they each touch this pen.

A Okay.

Q Person A touches the pen, person B touches the pen. Can person A's DNA and person B's DNA create a new DNA?

A It would not appear like a person C ---

Q Correct.

A --- where it would --- no. It would not look like one single person, a single new person. It would look like a mixture of two people, which is what it, what it would be.

Q So, if you were to swab this pen knowing that person A and person B touched it and DNA was present, what would you see if, when you conducted testing? Or what would you expect to see when you conducted testing?

A I would expect to see DNA from two individuals.

Q How about, when you're conducting your testing, explain the instrument that you use to determine if DNA is present.

A So, there's multiple instruments, but the final instrument that actually separates out the DNA pieces is called the genetic analyzer. And what it does is it separates those pieces of DNA that I'm looking at and it

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can give me then a graphical representation of what the DNA profile looks like.

Q And we've heard testimony about the sixteen locations or it, in a DNA analysis. What does that, what does that mean?

A So, I'm looking at areas of DNA that are known to differ amongst individuals. Because over ninety nine percent of all human's DNA is the same and there's a good reason for that. You, we all need our heart muscles to work and pump, you know, the blood; right? We need our lungs to work and, and all of that. So, most of our DNA is the same. Those things that code for functions that are necessary to life. But there are, is some DNA that isn't really known to code for anything, at least not that we know of right now, and that DNA is very different amongst individuals. And, so, I'm looking at areas of DNA that is known to differ amongst individuals and then I can compare evidence profiles to profiles from known individuals.

Q All right. So, you're familiar, I think we, I indicated to you that you're familiar with the lab report of SH-13-663; correct?

A Yes.

Q All right. And there were items in which you analyzed

or analyzed and compared to other data; correct?

A Yes.

Q All right. Which item did you actually ana, analyze for DNA?

A So, I generated the DNA profile for the buccal sample from Roberto Dupree.

Q All right. And when did you generate that DNA analysis?

A It was in April of 2016.

Q Okay. And at that time, 2016, are you still, did the DNA, or forensic biology industry change from a sixteen site location to something else?

A Yes.

Q Okay. And was, what was that?

A So, the Michigan State Police moved to a new kit called Fusion and that has more locations than the sixteen that were available at the time that the original analysis was done.

Q So, let's say you are looking at a, an analysis that was done in the past with only sixteen locations and now you're looking at, you're trying to compare it with something that uses twenty four locations. What do those extra locations mean, if anything, at that point?

A So, first I need to say that those, those locations do overlap. So, the kit that I have that has the, the

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additional locations, it also has the original sixteen. But the additional results that I get from the reference sample mean nothing because I don't have anything in the evidence to compare them to, so they just extra at that point.

Q So, you do an analysis on the buccal swabs indicated as Roberto Dupree; right?

A Yes.

Q And when you ex, what do you, how do you extract the DNA from that buccal swab?

A So, I add chemicals that break open the cells and then there is other material, cellular material in the, in your cells other than DNA. There's proteins, things like that, fats. And I don't want that, I just want the DNA. So, then I add other chemicals that separate out the DNA from the rest of the cellular material. So, at that point, I have jut DNA in liquid form and that's the, it's called a DNA extract at that point.

Q And with this DNA extract, what do you do with it?

A So, I, I do a quantification step that tells me how much DNA I have. Then I make the copies of the DNA at those locations that I know differ amongst individuals. I run that on an instrument and then I can get that computer generated picture, or DNA profile of what the DNA looks

like.

Q And when you say you make copies of the DNA, are you making just one copy or are you making ---

A Billions.

Q Billions of copies. Okay. And how does the computer instrument, I mean, 'cause we can't see DNA; right?

A Right.

Q I mean, with the naked eye, you cannot look at something and say, here's DNA.

A Right. Correct.

Q All right. So, we have to use special instruments to, or you have to use special instruments to detect DNA; right?

A Correct.

Q All right. How do these instruments determine that DNA is present when we can't see it with the human eye?

A So, when I'm making those copies, a fluorescent tag is added and the camera, there's a camera inside that genetic analyzer, and as the DNA is passing through it, the camera can pick up on the fluorescents from that tag and that's what it can read.

Q And when you're doing this analysis, do you have any sort of controls to make sure that, you know, something that you're supposed to see exists or something that

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you're not supposed to see doesn't exist ---

A Yes.

Q --- for lack of better terms.

A Yes.

Q And, and what are those controls?

A So, at every step I have both a negative control and a positive control. So, the negative control is just the chemicals that are used and, so, that shows that there's no DNA in the chemicals themselves that I'm using. And then I also have a positive control, which is a sample that I know the DNA profile from, and I also know that it should work because I know there's DNA present. So, if somehow something happened where I didn't get DNA from that positive control or it was not the right DNA profile, I would know that something had gone array. That did not happen in this case, but that's what the purpose of that control is, or those controls.

Q And you indicated that that didn't happen in this DNA analysis, of what, the buccal swabs of Roberto Dupree; correct?

A Correct.

Q All right. So, you have these controls, you make millions or billions of copies of the DNA, you put it through the instrument, and what happens?

A So, then I get a, a computer generated printout, essentially a, a picture of the DNA profile. And that's what I can then compare to other things.

Q All right.

A Other samples.

Q And did, did you, in fact, get a computer generated printout of the DNA profile?

A Yes.

Q Did you compare it to anything?

A Yes.

Q Okay. And with, who did, or what data did you compare it to?

A So, I compared it to the data that was previously obtained by Monica Barylski for the rubber glove swabs.

Q And how, when you're comparing these data, these two pieces of data, what, how are you comparing them? Are you using an instrument or are you just taking the two sheets and comparing the results of each?

A Yes.

Q Okay. And when you're looking at the previous data and the data that you generated, what are you looking for?

A So, as I said, I, I have those areas of DNA that I'm looking at. Well, each of those has a, the area has a name. So, I can look at the results for that area in

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the evidence profile and then find that same name, that same, we call it locus, or location, in the reference sample and then see, do those types, those, do those DNA types match up. Do the numbers that I have over here, match the numbers that I have over here. And then I do that at all of the areas that I have results for and at that point, I can determine whether there was a match or an exclusion.

Q And when you say reference sample, what are you referring to?

A A buccal sample. It just means a, a sample from a known individual.

Q Okay. And that known individual in this case was Roberto Dupree?

A Yes.

Q Okay. So, you compare the two datas and ultimately do you come to a conclusion?

A Yes.

Q Okay. And what is your conclusion when you compared these two pieces of information?

A So, the DNA from the rubber glove swab was a, there was at least two donors associated with the sample. There was a major donor, which just means somebody that contributed more DNA to the sample than another person.

Then there was also minor, a minor donor or donors. The minor donor is insufficient; there's not enough data from the minor donor to make any comparisons. The major donor was sufficient for comparisons. I did compare that major donor to both Roberto Dupree and Mohamad Zamzami and Mohamad Zamzami is excluded as being the major donor and Roberto Dupree matched the major donor types from the rubber glove swabs.

Q Okay. So, Mohamad Zamzami excluded as a major donor completely.

A Yes.

Q All right. Mr. Roberto Dupree matched the major donor.

A Yes.

Q Do you, as part of your analysis, do you get any kind of statistical calculation or ratio?

A Yes.

Q Okay. And what is that?

A So, the purpose of that is to give weight to that match. Because, in theory, I could say that DNA types match, but if they would match one in every five people, as opposed to one in every five thousand people, or five million people, that really makes a difference; right? To the weight of that, that match or association. So, that's the reason that statistics are, are performed. I

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do those statistical calculations for three different ethnic groups, just the three that are the most common in the State of Michigan, that's the only reason for those three. And the, it's also done to show that regardless of a person's ethnic background, those numbers are gonna be roughly similar. Meaning, you know, back to my previous example, they're not gonna be one in five in one ethnic group and one in five million in another. They're gonna be roughly similar, regardless of a person's ethnic background.

Q So, what are the three most common ethnic groups in the State of Michigan that you conduct these calculations for?

A Caucasian, African American, and Hispanic.

Q All right. And did you do those three mathematical statistics in this case?

A Yes.

Q All right. Let's start with Caucasian. What was the ratio or number that you came up with?

A So, the, the statistic is giving the probability of selecting an unrelated individual at random, having DNA matching the DNA from the rubber gloves. So, a simple way of saying that is, I'm walking down the street, I randomly point at someone. What is the chance is that

that person has DNA that matches the rubber gloves? So, in this case, it would be in one in eight point six eight one quintillion in the Caucasian population.

Q And quintillion is obviously a very large number.

A Right.

Q Meaning that it's possible, but what?

A So, what it's saying that if you had eight, if you somehow could have eight point six eight one quintillion people, which you can't because that's many, many times the world's population, all in a room, a very big room, that you would expect only one person in that room to have the same DNA profile as the, the major types from the D, from the rubber glove swabs.

Q And let's talk about the, let's go to the African American population. Did you conduct a calculation for that ethnic group?

A Yes.

Q Okay. And what was your result of that?

A One in one hundred and sixty point eight quadrillion.

Q Okay. So, a quadrillion, is that more or less than quintillion?

A That is less. So, a quintillion is one with eighteen zeros after it and quadrillion is one with fifteen zeros after it.

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Q Okay. Again, an incredibly large number; right?
A Yes.
Q Significantly more than the world's population?
A Yes.
Q Okay. And the same kind of analogy would be, hold true to the African American population; right?
A Yes.
Q If you were to walk down the street and point out to somebody ---
A Correct.
Q --- it would be one in, one, one in one hundred and sixty point eight quadrillion chance of that that person matched the DNA profile.
A It would be expected that only one in --- yes. It, only one in a hundred and sixty point eight quadrillion people would have that, that same, those same DNA types.
Q Okay. And how about, lastly, the Hispanic ethnic background. Did you conduct a statistical analysis on that?
A Yes.
Q And what was your result?
A One in seven point eight two five quintillion.
Q All right. And, again, the same theory and analogy stands behind that as well.

A Yes.
Q Do you know when the analysis was done on the, on the evidence sample that you were comparing the, your buccal swab analysis to?
A I believe it was done in late 2013 or early 2014.
Q And did you have any contact or any, did you partake in any of that analysis regarding that sample?
A No. No.
Q All right. When you come up with your findings you obviously generate a lab report?
A Yes.
Q Okay. And is that lab report reviewed by anybody?
A Yes.
Q And who would that be reviewed by?
A So, it has to be someone that is qualified to do the same type of DNA testing that I did in this case. So, it's called a peer review, so it has to be someone that does the same job that I do and is qualified for the same things. And they look over everything and make sure that I followed procedure and that they agree with my conclusions. That, they, and they also look for things like typos and, and whatnot in the report as well.
Q Okay. And are you aware that this was, that was done in

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this case?

A Yes. It has to be done or the report can't be released. That's the way our computer system works, as a check to make sure that that can't happen. Both a technical or peer review and an administrative review, review have to be done before the report can be released.

Q So, I kind of asked you a question just a few questions ago about never having contact with the evidence sample in which you were comparing the buccal swab to.

A Correct.

Q Correct. Let me just ask an additional follow up question on that. The, you never touched those previous swabs; correct?

A Correct.

Q From the rubber gloves. Never had them at your station.

A Correct.

Q The only thing you, basically what you were working on was what? The ---

A I had the DNA from Roberto Dupree.

Q Okay. And you compared that to a computer generated report that Monica Barylski conducted.

A Correct.

Q All right.

MR. LASZCZAK: Nothing further, Judge.

THE COURT: Okay. Cross examination?

MR. TOMKO: Yes. Thank you.

CROSS EXAMINATION

BY MR. TOMKO:

Q Good morning.

A Good morning.

Q Do you go by Halvorson Young or Ms. Young?

A It's, Ms. Young is fine.

Q Well, whichever you'd prefer, 'cause it's your name after all.

A Thank you.

Q Good morning. My name's Thomas Tomko and if I could follow up with some questions.

A Sure.

Q The, the lab itself, I mean, it sounds like it's pretty sophisticated; would you agree?

A Yes.

Q And there's lots and lots of procedures that are followed.

A Yes.

Q For example, you wear a mask and you wear gloves and, and a lab coat when you handle things; correct?

A Correct.

Q Okay. Things are stored in a certain way too; aren't

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they?
A Yes.
Q How are they stored?
A So, swabs and items of clothing and things like that are stored in a climate controlled, locked room, limited access. And then the DNA extracts that I spoke about are stored either in, either in a refrigerator or a freezer, depending on how long they're gonna be in that state.
Q Okay. Do you have a desk at your place of employment there?
A I do.
Q Okay. You would never, for example, store, you know, cuttings or any DNA sample that you would be testing, you would never store it in your desk; would you?
A I would not.
Q Okay. In fact, that would be a violation of the procedure that you typically follow?
A That would be a violation of our procedures, yes.
Q Okay. And that'd be subject a peer review, with a, they make sure that you're following procedure.
A They would, but there would be no, like, our computer system, I have to say where I'm putting things and there wouldn't even be a possibility for me to say that I'm

putting it in my desk.
Q Okay.
A So, there, there's no way that that could be part of it, but, no, I don't store things in my desk.
Q And that's a good thing, because we don't want things to be contaminated, misplaced, anything like that.
A Correct. More for the security aspect of it. My, my office is not considered a secure location, so, I, that's the reason that I cannot bring items to my desk.
Q Okay. All right. You know, when you get things, I mean, you, you get them from other places. And I'm, I'm talking specifically DNA. When you get things that you're gonna test and you're gonna look for DNA, those things are sent to you.
A Any item that we are processing needs to be brought to us by a law enforcement agency, unless we are collecting the items ourselves.
Q And then you, when you're describing it, as you've described, you're relying on the description that's given to you.
A Yes.
Q So, for example, if something said, was a, you know, was some cuttings from a rubber glove, you're accepting that as true because someone else told you that.

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A Yes.
Q But you, for example, you didn't verify whether or not something was from a rubber glove or from some other place.
A No, there wouldn't be, for, for, for my job, for what I have, there's no, there would not really be a way for me to do that.
Q Okay. All right. And if, if we were, for example, my pen, if we were going to today try and get DNA off of that and, and something was sent to you and, and you received it today, say it would happen very fast, which isn't true in a normal case, but would you be able to tell when that DNA was placed on an item?
A No.
Q Okay. So, there's no, no way to test age of DNA.
A No.
Q Because your test, this was in 2016.
A The, when I, when I did the comparison and I ran the samples from Roberto Dupree was in 2016, correct.
Q Okay. So, you, you, anything that you did, you couldn't verify that something was from 2011, 2010, 2012, there's no real way of knowing when, when that DNA sample was generated?
A So, there's no way of knowing when DNA was deposited on

an item, correct.
Q Okay. What about types of, you know, our bodies are, are made up of lots and lots of different things. We have skin and muscle and fat and all kinds of things. When you're looking at DNA, as you did in this case, do you have a way to tell where this DNA came from?
A I, that would not be part of what I would do. There would not be any, your DNA is the same in all of the cells in your body, so there's no way for me to know with my process what type of DNA there is. That would typically be done, as much as possible, in the evidence screening part before the sample comes to me.
Q Okay. So, for example, there's DNA in saliva.
A Yes.
Q There's DNA in blood.
A Yes.
Q There's DNA in skin cells.
A Yes.
Q Tear drops.
A There could be.
Q Okay. Sweat.
A Yes, there could be.
Q Perspiration. And in this case, anything that you tested involving this case, there is no determination as

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to what the source of DNA was.

A. Correct.

Q. Okay. And, of course, you know, you talk about your procedure and how you store things and such, you really can't speak to how things were stored before they came into your possession.

A. Correct.

Q. All right. Now, in this case, what, what exactly were you dealing with when you were working on this test for DNA? It was, there were mentions of a buccal swab; correct?

A. Yes.

Q. Now, is that the actual stick with the cotton on the end?

A. Yes.

Q. Okay. And, so, this cotton swab then, you would trim this and make a cutting out of it?

A. Right. Typically, an en, the entire swab is not necessary, so a portion of that would be cut off in some fashion and then put in a small tube for the DNA analysis.

Q. Okay. All right. And things that were identified previously as rubber glove swabs, that's just something that was already in the data bank, if I can say it that

way?

A. I don't know what you mean by that.

Q. Well, in, there's a report, it's record number five, and I'm, I'm looking at the top and it says, cuttings identified as rubber glove swabs previously analyzed.

A. Correct. That ---

Q. So --- I'm sorry.

A. No.

Q. When we say previously analyzed, that means somebody else did it.

A. Correct.

Q. Okay. In your lab, do you sometimes receive physical items?

A. Yes.

Q. Okay. Say, for example, a, a pillowcase. Is that an example of something you might receive?

A. Sure.

Q. Okay. And, so, if you received a pillowcase, what would you do if you were looking for DNA?

A. It would depends on the case circumstances, what type of DNA might be present. It's not really possible for me to examine the entire item for any kind of DNA, so, but typically I would start with a visual examination to see if I saw any stains that be, could be consistent with

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biological material, and then kind of go from there. If, if I, if the sample was positive or, you know, or negative for blood, semen, saliva, depending on what was needed, then possibly the glove, the pillowcase could be swabbed for skin cells. It really just depends on the case circumstances.

Q And you might do, do some things to determine where you might find something on an item like that. Like put it under a, a black light or, or something that would reveal where DNA might be found.

A So, I could look at it under an alternate light source, yes.

Q Okay. All right. And let's say, in our, in our example pillowcase that up, up in a particular corner, you said, aha, I think there might be some DNA in that area, what would you do?

A I, depending on what type of DNA it was, I could do a presumptive test for, for, if it, I thought it might be semen, I could do a, a presumptive test for that. And if it was positive, do a confirmatory test. And if that was also positive, I could take a, either a swabbing or a cutting of that area, put it in a tube for DNA.

Q Okay. And as part of your procedure then, if you did find some DNA in an area, would you document where on

the item the DNA was found?

A Yes.

Q How would you do that?

A I could either take a picture or draw a picture or just describe in words where the DNA was located.

Q Okay. And why is it important to do that?

A So that, one, because sometimes where is relevant to the sample. And also, so that if anybody ever needed to look at it again, they would know exactly what had been done and where on the item had already been tested.

Q All right. In this case, did you ever receive any physical items?

A The only items was, or the only item was the portion of the buccal swab from Mr. Dupree.

Q Okay.

A That I received.

Q Okay. Are you aware of anything else being received by the Michigan State Police in connection with this case, as far as physical items go?

A Other than the, the gloves and the duct tape?

Q Well, yes.

A So, the only items I am aware of are the rubber glove swabs, duct tape swabs, and a, a buccal swab from Mohamad Zamzami. Those are the only things I'm aware

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of.

Q. Okay. So, were the rubber gloves ever sent to the Michigan State Police Lab?

A. I actually don't know if the, if we got the rubber gloves or if we got swabs. That's kind of prior to where I come into the picture.

Q. Okay. Do you ever know if the Michigan State Police Lab swabbed any rubber gloves?

A. I'm not sure.

Q. Okay. Let's say, for example, we had a rubber glove in front of us and we were going to swab this rubber glove, would you be careful to note where the swab was done on the rubber glove?

A. Me personally, if I was going to swab a rubber glove, I would probably swab all of where I think it came in contact with the hand, but I would note that, if that's what you're referring to.

Q. Sure. I mean, let's, let's say the, the thumb area, would you, would you say, hey, I got a swab for the thumb, that, that might be important?

A. So, if I was taking multiple swabs, I would say I took one swab from the thumb, two swabs from the index finger, something like that, if I was going to do that. But if I was gonna swab a rubber glove, I would swab all

of it and I would indicate I swabbed all of it that, that could've come in contact with the hand.

Q. But wouldn't you consider perhaps the inside of the glove versus the outside of the glove?

A. I would if I could determine that, which sometimes you can and sometimes you cannot with gloves.

Q. Well, I don't understand, because if you're the one make, doing the swab, if you, it's easy to swab the outside, then you'd reverse it, you'd swab the inside. Would you separate those things?

A. It depends if you could tell how it was worn or not. Again, you know, something like a gardening glove, it's easy to tell the inside from the outside and in that case, I might only swab the inside. Some sort of, you know, examination type glove, like a doctor would wear, it might not be easy to tell that and you might kind of, for lack of a better term, hedge your bets, and swab the entire glove. Or if it was obvious what was the inside, you might only swab the inside. It really depends on what it looks like when it's received.

Q. What if it were in pieces?

A. Again, it really depends how big the pieces are, how close in proximity they were found. You might swab them separately, you might not. It really just depends on a

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lot of things.

Q Would you be caution though, if it was found in pieces and spread out over an area of, you know, twenty, thirty yards, would you then want to know, okay, which piece and then swab it separately from another piece that was further away from another piece?

A That would be what I would do, yes. If they were found a, a distance apart, I would not combine those.

Q Would you consider that a prudent procedure?

A It, it really depends on how far apart and what kind of information you have, saying if those are, were originally one item or not. It, so, it really depends, but I would say if those things were found quite far apart, that it would, it would be probably a good idea not to combine them.

Q Say the distance of this room, that far apart, would that, that be a, one of those situations where you wouldn't want to combine them?

A I can only say that I would not want to, but that doesn't mean that it would be wrong if someone else did combine them. I, I would not.

Q Would it also be important to know the nature of the glove? And what I mean by that is, you wear gloves all the time when you're analyzing things.

A Yes.

Q We talked about that. Okay. And when you take a glove off, what happens to it?

A I throw it in the garbage.

Q Okay. But itself, does it reverse itself or does it just come off?

A It depends on how I take it off, but typically it would reverse itself.

Q Okay. And it would depend also on the size of the glove in relation to your hand; wouldn't you ---

A Like how tight it is?

Q Yeah.

A Yes.

Q Yeah. Because if a glove is super loose, I suppose you could pull it off and you touched only the inside of it.

A Correct.

Q If it was very tight, you might pull it off and it'd reverse itself.

A Correct.

Q So, in a situation like that, would it be important if you were testing a glove to know whether or not it was reversed or whether it was pulled off?

A So, it, it's one of those things where it would be nice to know that, but you can't always tell.

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Q DNA on a glove, is it, does it tell you one way or the other if the glove was worn or whether if, if the glove was just picked up?
A The DNA itself cannot tell me how it was deposited. I don't know how the DNA got on the glove, all I can say is that the DNA is pre, is present on the glove.
Q Would you agree with me if it was, if it was just picked up, you would expect to find DNA on the outside, where it was touched; is that ---
A Yes.
Q It's possible to find DNA.
A Possibly. If there was enough DNA, you know, whether DNA is deposited or not depends on, you know, how much DNA is on the, the surface of the hand when it's, when it's deposited. So, it, there might be DNA if you just pick up a pick up a glove and touch it briefly or there might not be.
Q And if a glove was taken and it was not reversed, then you would expect the DNA would be primarily inside the glove.
A Primarily I would expect that, yes.
Q I supposed where it's touched, I suppose that too.
A Possibly.
Q Okay. Do you have certain cut offs when you are doing

testing for DNA as, as ---
A Yes.
Q There's different types of cut offs. There's an analytical and a stochastic cut off.
A Yes.
Q Can you explain what an analytical cut off is?
A Sure. So, anything that, so, the instrument that, that I use, the genetic analyzer, there is something like background noise. So, we have a threshold, called the analytical threshold, and above that, it's not expected that what you're seeing is considered, would be considered background noise. And then there's a stochastic threshold and above that, you're very confident that what you're seeing are true DNA types.
Q Okay. So, if we, if we had a chart, an analytical would be in, in one way, stochastic would be in another area?
A Correct.
Q And when you're graphing this out on that chart, if the, if it rises above the first level, then it meets the analytical level.
A Correct.
Q But if it doesn't go above the stochastic level, it's, it's not quite confident enough to get above that level?
A At that point there, I would not be able to use that

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data in certain situation.

Q. Okay. But if it's, certainly if it's above both cut offs, then it's something, ah, we can rely on it?

A. Yes.

Q. Okay. What are the levels that are used at your lab?

A. So, it depends on what kit was used. So, currently for the Fusion kit that I'm currently using, that Mr. Dupree's sample was analyzed with, it is, I believe, two hundred and seventy five at the time, it's two hundred and fifty now, I, I think. And then nine hundred for the stochastic.

Q. Okay. So, the two hundred and fifty, that, is that lower that the industry standard?

A. There isn't an industry standard per se because every kit has to be validated at a, at every location with that genetic analyzer. So, that, those thresholds are dependent on the validation performed in that lab.

Q. And is that a lab setting or is that a manufacturer or the machine setting?

A. That is a lab setting.

Q. Okay. And, so, you don't have, you can't tell us whether there is higher or lower or the same as whatever the industry standard is?

A. There, there isn't an industry standard, but I'm saying

is another lab, say, I'm just throwing out there Ohio, might use something that's a little bit above or below that. But that, again, is based on what their in, how their instrument works and their kits in their location.

Q. Okay. All right. Speaking of these tests and cut offs and things, with the, the, the DNA analysis that you did, what is the, the error rate? The rate that there might be a mistake?

A. There isn't an error rate with regard to DNA testing.

Q. So, DNA testing is a scientific test.

A. Yes.

Q. And you're saying there is a zero error rate?

A. I'm not saying there's a, a zero error rate, but the, if, if everything is done correctly, the test will work correctly. So, there's no error rate in the sense of, like a certain amount of time, even though everything's done right, the result is wrong. That's, that's what I hear, what I think of when I hear error rate and that's not the case. If everything is done correctly, it's always going to give the correct result. Now, a certain person could botch something, but that's not, that wouldn't be considered an error rate and it wouldn't be fair to say, compare my work to someone else's and say, oh, we're just gonna average those things, all the times

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that that person, you know, did something wrong compared to the, you know, zero times, let's just say, that I did something wrong, and then say, oh, between the two of them, it's, you know, seven percent or something like that. That would be, that would be right or fair to do. So, the DNA process itself doesn't have an error rate and it wouldn't be right to average all of the DNA scientists in the country to come up with some sort of error rate. So, there is not an error rate for the process.

Q Testing DNA is a, is a process; would you agree?

A Yes.

Q And the process relies on machines; correct?

A Yes.

Q Okay. And machines do wear out though; is that true?

A They can.

Q Okay. And is a, and a machine can be, start out being very accurate and then be less accurate over time?

A I suppose in theory, but we have to constantly be checking the accuracy.

Q Okay. Was that, what's the frequency of testing the accuracy?

A Well, every time that that, every time a batch is done, that positive control, with it working appropriately,

that's, that's one of the checks. Additionally, the instruments get yearly maintenance, so that's another check.

Q Okay. And at the Michigan State Police, how long have you been doing the DNA tests?

A Since 2007.

Q Okay. So, between 2007 and now, has there ever been an instance where there was a machine failure where, oh, we have to correct something?

A There can be instances where instruments fail, but when something fails, it doesn't work. It doesn't give a wrong result. It, somebody's DNA doesn't just become someone else's DNA, it just doesn't work.

Q Has there ever been an instance of that?

A I'm sure there have been. We have power, we have power outages sometimes that halt the process.

Q No, I just mean in your experience, we talked about machines, we talked about them wearing out, we talked about how they have to be checked for accuracy.

A Sure.

Q Has there ever been an occasion in all those years when there was an instance where, oh, the machine's not being accurate, not, not being appropriate, we have to maintenance this machine?

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A Sure. Absolutely.
Q Okay. How often does that happen?
A Maybe once or twice a year.
Q Okay. That, you're guessing though?
A I, I am. I just, because I don't always hear about it. If I'm, if it, if I'm not part of it, I might not hear. So, I only know the times where I hear about it.
Q Okay. Have you ever been part of something like that?
A I'm sure I have been.
Q Okay. All right. All right. But as a summary, in fairness though, the, basically what you're testing at the lab, you get what you get.
A Yes.
Q Kind of colloquial, but ---
A Sure.
Q --- you're, you're testing whatever it is that comes into you.
A Yes.
Q Okay. And you're not, you're not, and in this case, you weren't searching for like a pillowcase or a glove, you weren't searching for DNA in a particular location, nor were you searching for an explanation as to how it got there.
A Correct.

Q Okay.
MR. TOMKO: One moment. And thank you very much. I have no more questions.
THE WITNESS: Thank you.
THE COURT: Re-direct?
MR. LASZCZAK: Just a few follow up things or points.

RE-DIRECT EXAMINATION

BY MR. LASZCZAK:
Q Ms. Young, how, how can, how can one deposit DNA on an, on an item or some surface?
A So, they could come in contact with that surface or in another way, their DNA could be deposited on that surface.
Q All right.
A Through a, kind of an intermediary step.
Q And you're familiar with a buccal swab; right?
A Yes.
Q Okay. Are you familiar with how buccal swabs work?
A How they're collected or ---
Q Or how they're collected, I should say.
A Sure. Yes.
Q All right. And in this case, you analyzed a buccal swab that was in, that was titled Roberto Dupree; right?

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A Yes.
Q Okay. And Roberto Tupree would be to, would mean to you what? A human?
A Yes. I mean, we would not receive, we would not accept in a reference sample if we were under the impression that it was not from a human.
Q Okay. And based on your experience, how are buccal swabs conducted?
A Collected? It's a swabbing of the inside of the cheek.
Q Okay. So, that would be, and, and that can collect many forms of DNA; could it not? Or is it one sort of, I mean, 'cause we, counsel asked you can you get DNA from blood?
A Yes.
Q How about saliva?
A Yes.
Q Skin cells?
A Yes.
Q All right. So, if we're swabbing the inside of the mouth, could we get multiple types of DNA forms, I guess, so to speak?
A Typically the intent of that swab is to collect buccal cells, which are the skin cells inside your cheek. Those cells would be present in saliva. In theory, if

you rubbed real hard, you could get blood, but the typical intent would be to be getting the skin cells of the, the inside of the cheek.
Q And when you're conducting your analysis, you don't, you don't determine or it's not part of your process to figure out what type of, or where the DNA came from, whether it be a blood or a skin cell or saliva.
A That's not part of my, my job when I'm doing DNA analysis.
Q All right. So, let's say, for example, I am outside, it's hot out, I'm working, I'm sweating, and I end up getting a cut on my head. And I take my hand and I wipe my head and then I kind of wipe my mouth, 'cause I got cottonmouth, you come along and you swab my hand. Is it possible that there's multiple forms of DNA on my hand?
A Yes.
Q Okay. And all of, could all of those multiple forms be analyzed for possible DNA?
A Yes.
Q Okay. How about this analytical and --- what was the other sto ---
A Sto, stochastic.
Q Stochastic.
A Yes.

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Q You gave a number as two fifty and nine hundred.
A Yes.
Q Correct? What is the, two fifty, what does that mean? Two fifty what?
A So, it's relative fluorescent units. And the reason that, for the part, the relative part is that they're, they are relative. So, there's not any way for me to compare them to anything else. It's just how much fluorescence, that, it's a level of fluorescence. Remember I said that the, the DNA sample goes through a camera and it picks up the fluorescence? So, that's part of that. So, it's picking up, it's showing me anything that's above a certain level.
Q All right. And when you run the, when you ran the analysis on the buccal swab for Roberto Dupree, you would, you got an analytical and a, and a ---
A Stochastic?
Q Stochastic evaluation; right? Or no?
A Yes. So, each kit, so, the original samples were done, done with the PowerPlex 16 hot start kit. That kit is validated for certain thresholds at our lab. I used the Fusion kit, which is a different kit, that is also validated in our lab and has different thresholds because it's a different kit. So, those thresholds that

I was talking about were just the thresholds that were in place when I, for what I used, for what I did.
Q So, let me ask you this question. What happens if you run something and it doesn't meet those thresholds?
A You would get no, no result. If it was below both thresholds, you would get no result.
Q Okay. And clearly that didn't happen when you were analyzing Mr. Dupree's DNA swab; correct?
A Correct.
Q Because if it did, you wouldn't have been able to come to your conclusion then.
A Correct.
Q All right. And the same would hold true for Ms. Barylski's testing; correct?
A Correct.
Q All right. Just one last question. So, I gave you an example of, you know, me touching my head, which had sweat on it, a cut with some blood, and then maybe some saliva. Those are all different types of, or different forms of DNA; right?
A The, the DNA should be the same, but they are different cell types.
Q Different cell types. So, say you were able to separate the sweat cells, the blood cells, the skin cells, and

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the saliva cells. If you tested each one individually, would you get the same result, that it was my DNA?

A Yes.

Q Okay. Thank you.

MR. LASZCZAK: Nothing further.

THE COURT: Okay. Mr. Tomko?

MR. TOMKO: Yes. Thank you.

RE-CROSS EXAMINATION

BY MR. TOMKO:

Q Lots of talk about a buccal swab. That's a piece of plastic with a cotton on the bot, on the end of it?

A Yes.

Q So, if I stuck that in my mouth and I rubbed it, I would give it to you to test and you would make cuttings and you would do a test; right?

A Yes.

Q Okay. If I took that same swab and then I rubbed it on my pen, could it transfer from the swab to the pen?

A Yes.

Q Same thing if it were a glove. I could swab my mouth and rub it on a glove; correct?

A Yes.

Q If I had a rubber ball, say I was holding a rubber ball and I had a dog and I tossed it to the dog, that dog put

it in his mouth and came back, and now we tested it, what would we find?

A You could find dog DNA, in theory, on that.

Q Okay. What happens if there's dog DNA on a sample that you receive?

A The kit that I have is human specific, so most of the time, the dog DNA would not have, cause any problems. If there was an overwhelming amount of dog DNA, it could, what I would call, gum up the system, in which case, I would potentially not get a result just because there was so much in there that the process that I'm doing couldn't work, there wouldn't be room for it to move around with the overwhelming amount of dog DNA. That could, in theory, happen.

Q Well, when you're testing an item, would it, would it reveal whether or not there was any dog DNA at all on the item?

A With the type of testing that I'm doing, that would not be indicated.

Q Okay. So, if a glove were laying on the ground, dog it in its mouth, then it was tested, there would be no indication in any of your test crosses whether or not there was saliva from a dog, indicating that a dog picked it up?

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A Correct. Not with what I'm doing.
Q All right. That's all I have. Thank you.
THE COURT: Okay. Members of the jury, now it's your opportunity to ask questions. So, okay, we have a hand raised, we have another hand raised, we have another hand raised, and another hand raised. Okay. So, we'll wait. Anybody still writing a question? If so, raise your hand. Oh, okay. We'll go back and take a look at these.
(At 11:24 a.m., bench conference off the record)
(At 11:26 a.m., bench conference concluded)
THE COURT: Okay. So, the first question is, from your data ---
MR. LASZCZAK: Your Honor, we're waiting for ---
THE COURT: Pardon?
MR. HALL: Mr. Tomko has not come in yet.
THE COURT: Oh, Mr. ---
COURT OFFICER: He stopped in the clerk's office. Here he is.
THE COURT: Oh, okay. Okay. So, we're all back in the courtroom. From your data, you mentioned three demographic groups. So, what would your summary

of your findings be, specifically what group was less likely or more likely to have contributed the DNA to the gloves?
THE WITNESS: So, just based on the strict numbers, the largest number is the Caucasian population and the smallest number is in the African American population. But there, there really isn't a big difference between those numbers. And our findings have found that there's actually a lot more difference within an ethnic group than there is between ethnic groups. So, the differences in those numbers is really not, not relevant to determining --- you can't use those numbers to say, well, it's more likely than that the person is of this ethnic background. Those numbers are too similar and there's too much variation within an ethnic group to use the numbers for that purpose.
THE COURT: Okay. Well, and again, in terms of your expression of one in something quadrillion and one and something quintillion, are those statistics true regardless of which ethnic group somebody's in?
THE WITNESS: So, basically, yes in the sense of it's very, it's a very rare profile regardless of a person's ethnic background. And the fact that those numbers are not completely exactly the same, is really,

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it really doesn't, it doesn't really matter.

THE COURT: Okay. Using Monica B's data, that's the other person in the crime lab that had testified, is this common practice for you to use somebody else's data to compare the buccal samples?

THE WITNESS: So, yes. She was actually on maternity leave when the buccal sample came in, so that's why I did that comparison. But she would've done the exact same process if she had run the sample herself. She would have run DNA on the Mr. Dupree's sample and then compared it to that, that data that she previously generated. There'd be no reason to re-run any samples. That's not how, how it works with DNA. All comparison that are done later are always done to data that was, that was previously generated. There's no reason to re-run act, the actual sample, the physical samples.

THE COURT: When taking DNA from a sample, how important is the way that it was collected, how important is that? That is, you know, with regard to contamination?

THE WITNESS: It's extremely important on how it was collected. And there's --- it's extremely important how it's collected.

THE COURT: Okay. If you DNA from a major and minor donor, meaning two different people I take it: correct?

THE WITNESS: Yes.

THE COURT: Does that indicate that there is contamination?

THE WITNESS: No. A lot of items have DNA from more than one donor, for a variety of reasons. You know, even, it'd be possible, even though this is my coat, say you swab the neckline, quite possibly I'm the major donor, but maybe the lady that dry cleaned it is the minor donor. It doesn't mean that there's contamination. A lot of items have more than one donor for perfectly innocuous reasons.

THE COURT: But then that would mean that both you and the lady who cleaned your coat touched it. It wouldn't suddenly mean that you didn't touch it just because somebody else's DNA is on it.

THE WITNESS: Correct.

THE COURT: Okay. Oh, similar. Based on all the DNA testing that you are able to identify, are you able to identify the ethnicity of the Defendant and, if so, which group is it?

THE WITNESS: No. The testing that I do does

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not identify the ethnicity. The only reason that I give it for those ethnic groups is, again, to kind of show that regardless of a person's ethnic background, that it's a very rare profile. The type of testing that I do does not determine ethnicity and I cannot figure out ethnicity from it. I know that there's, is the type of testing you hear about in the news, but that, that's not the type of testing that I do.

THE COURT: Okay. At what temperature does DNA break down and be of no use?

THE WITNESS: There isn't a specific temperature. So, I can't say, but, you know, obviously we get samples that are, have been in like arsons or something like that, where there's fire, and, you know, sometimes they just don't work at all. Sometimes you might get a partial profile, which just means you get some DNA at some areas, but not a full profile. There isn't a specific temperature, but obviously something that's fire hot is, is not gonna be good.

THE COURT: Is DNA affected by direct sunlight?

THE WITNESS: The UV rays can break down DNA, but, again, what you would get would be, you would get less DNA or you would get potentially no DNA. It

doesn't change the DNA pro, the DNA types or the profile of whatever DNA you do get, you might just get less of it or, or none of it.

THE COURT: Well, in line of these questions, I think probably the purpose of this is to find out if DNA was exposed to heat or direct sunlight, could it break down in such ways to give you a false/positive, that is to create a profile identifying somebody who really wasn't the person?

THE WITNESS: No.

THE COURT: That's not possible?

THE WITNESS: No.

THE COURT: Okay. So, if DNA degrades by heat or sunlight, it just makes it unusable?

THE WITNESS: It, it could, yes.

THE COURT: Okay. If that --- okay. Now, you mentioned you can transfer DNA from a swab to an item; correct?

THE WITNESS: Yes.

THE COURT: In this circumstance, did you ever receive the gloves personally?

THE WITNESS: I did not receive the gloves personally.

THE COURT: So, you're relying upon the data

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from some other scientist; correct?

THE WITNESS: I'm relying on what I'm told the sample is labeled as gloves, but I did not swab the gloves myself and I, I don't actually know if the, if we received swabs, where, Clinton Township swabs the item or if they gave us the gloves, I don't know that.

THE COURT: And, again, you weren't asked to say what kind of human biological substance was being analyzed, whether it be saliva or sweat or skin, you were just, you were just testing to see what the DNA came back to; correct?

THE WITNESS: Correct.

THE COURT: And, so, the reliability of whether or not the gloves were swabbed comes from somebody else, like back at the police department, I take it?

THE WITNESS: Possibly, or there might have been someone at the lab prior to myself who swabbed them. I, I don't know that.

THE COURT: Okay. Would that matter to you?

THE WITNESS: No.

THE COURT: Okay. Oh, and is there any chance that dog's DNA could be --- well, I'll put it this way. Is a dog's DNA distinguishable from human's?

THE WITNESS: Yes, it is. The kit that I use is specifically human, so dog DNA shouldn't show up, but there are kits for dog DNA. But we don't, at the Michigan State Police, do that type of DNA testing, but basically, dog DNA should not show up in my, as a result in my test.

THE COURT: So, when we're talking about like a major and minor donor in this instance, the minor donor you are not able to identify; am I correct?

THE WITNESS: Correct.

THE COURT: I mean, is it possible you were not able to identify that because it was a dog DNA or is it unidentifiable DNA from another human?

THE WITNESS: It would be very unlikely that it would be from a dog. It, it is, it was, it is more likely that it would be from a human.

THE COURT: Okay. I think we've gone through all of the questions and all those suggested by the jury's questions. We have another question though, Greg, would you pull the other question now.

UNIDENTIFIED JUROR: Your Honor, I have, I have another question.

THE COURT: Okay.

(At 11:36 a.m., bench conference off the

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record)

(At 11:37 a.m., bench conference concluded)

THE COURT: Okay. The lawyers are back. Okay. The question is, if you get DNA and there is a major and minor donor that you find in a sample, what, if anything, does that tell you about whether or not the DNA was contaminated?

THE WITNESS: It doesn't mean, it does not mean that the DNA was contaminated, it just means that another person or their DNA somehow came in contact with, with that item. So, again, there's, there's a lot of ways that that happen and we'd like to all think that, you know, just because this is my folder, that there's nobody else's DNA on it, but that's just not the case because somebody else could've had their hands on this desk and then I put my, my notebook down. It does not mean that a sample is, has been contaminated at all. The vast majority of what I see now is actually mixed samples and it doesn't indicate, indication, it, it does not indicate contamination. It just indicates that there's small amounts of DNA on things that can be transferred to other things.

THE COURT: Is there an analogy to help out over here in terms of fingerprints? That an object

could have --- do you, do you do fingerprint analysis?

THE WITNESS: I do not.

THE COURT: Okay. But you understand fingerprint analysis; right?

THE WITNESS: Yes.

THE COURT: So, I mean, a given object could have like a, this gavel over here, it could have my fingerprints on it ---

THE WITNESS: Sure.

THE COURT: --- because once every two years I use it for something. And if my court officer touched it, it could have his fingerprints on it; correct?

THE WITNESS: Sure.

THE COURT: And if my secretary touched it, it could have her fingerprints on it.

THE WITNESS: Sure.

THE COURT: And all that would tell us is that I touched it at one time, my court officer touched it at one time, and my secretary touched it at one time.

THE WITNESS: Correct.

THE COURT: It wouldn't tell us who touched it first.

THE WITNESS: Right.

THE COURT: Or who touched it last.

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THE WITNESS: Right.

THE COURT: But you wouldn't consider it contaminated simply because it had three different sets of fingerprints.

THE WITNESS: Correct.

THE COURT: Okay. Is it normal procedure to use a swab versus the actual item, that is in this case, the gloves?

THE WITNESS: So, it's really a judgment call with every item, whether it gets, whether a cutting of the sample is taken or a swab. Typically, possibly on like a stain on clothing, say a blood stain, maybe that would, that little stain would be cut out, but keep in mind, the DNA process that I do, I have, I have a tube that's only about two inches tall, so whatever I'm doing DNA on has to fit inside of that. The entire glove is not gonna fit inside the, the tube. So, in theory, one could take a cutting, but then if you take a cutting of the, the glove, you're only getting the DNA from that, that small area that you have cut. As opposed to, if you swab it, you're getting the DNA that you've collected from the entire glove. So, any item that's too big to fit in a tube, has to be either have some sample of it collected either by a swab or by a cutting.

Typically, we, at the Michigan State Police, swab items unless, like I said, maybe it's a blood stain the size of a pencil eraser; that maybe you would cut out. But, but it is very typical for the item to be swabbed so that you can maximize the amount of DNA that you're collecting for the DNA process.

THE COURT: Okay. Any more questions from the jurors? If so, raise your hands. Seeing none, we go to the attorneys, any questions, Mr. Prosecutor?

MR. LASZCZAK: Just two follow up questions, Judge.

RE-DIRECT EXAMINATION

BY MR. LASZCZAK:

Q The, a question was asked that, is it import, is it important on how DNA is collected.

A Yes.

Q And your answer was that it's very important; correct?

A Yes.

Q Can you explain as to why?

A Because anything that could introduce any other DNA to the sample should be avoided. So, obviously if I'm swabbing an item, I want to be careful; right? So, I'm using distilled water, I'm being careful not to sweat on the swab as I'm collecting something, I'm careful not to

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spit on the swab as I'm collecting it. Those things are very important that, you know, a, that, to keep the process such that only the DNA that's on the item gets collected onto the swab and that I'm not introducing my own DNA to the process.

THE COURT: I do want to indicate for the record that the chief judge told me that the contractor had agreed not to be doing any drilling while we were in trial today. I want both attorneys to be very aware of the fact that we need to hear every word that is spoken from the witness and that this obvious breech of etiquette and this falsehood by the contractor is something that we're just going to have to put up with from time to time. It happened a lot this morning before we went on the record, it's now only happened once in this trial, but we never know when it's gonna happen again. If it any time you think that things have not been clear, indicate that to me.

Any members of the jury, if the, if you ever have a situation where you have lost track of what was being said because of the noise, please raise your hand and we will have to go over it again.

I have to protect this record, this is intolerable that the County should allow this to happen,

but it's happening and right now, because the contractor seems to be out of control, I can't do anything about it.

Mr. Prosecutor, anything further?

BY MR. LASZCZAK (continued):

Q So, you indicated that you do certain things, you take certain precautions to prevent any kind of DNA that shouldn't be present; correct?

A Yes.

Q All right. And some of those things would be like wearing robber gloves?

A Yes.

Q All right. How about, you indicated, you know, you bleach your area.

A Yes.

Q What about if you were unable to bleach your area? Could there, could there be another way that you would, or another item that you could use to make sure that the surface then, which something is laying on, there's no contamination?

A You could use clean paper and do your work on top of clean paper, if you could not bleach the area. I actually bleach area and have clean paper, but if, you know, there was, if for some reason I couldn't bleach

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the area, I could put clean paper down to work on top.
Q And you indicated before the drilling started that some kind of sterile water?
A Yes.
Q All right. And those are all preventative measures to make sure that there is no transfer of DNA on something that shouldn't be present.
A Correct.
Q All right. Now, again, say, for, you know, you, you take the preventative measures that you normally do and, for example, somehow you sneeze and something ends up on the DNA, does that mean that now that you've sneezed and your DNA is possible on the item that now that item is contaminated?
A The item, so, the, by the strict definition of the word contaminated, I have contaminated that sample, but that doesn't mean that the original person's DNA is not also present, 'cause it would be, it would just now be mixed with my DNA.
Q Okay. So, it doesn't change the previous DNA in any shape or form.
A Correct.
Q All right. And then you kind of talked to the jurors about this a little bit, but let's say, for example, I'm

the only one that's held this notebook, arguably that my DNA is on this; correct?
A Most likely.
Q All right. And I set this down and could I pick this back up and have another source or another person's DNA on the notebook now?
A Yes.
Q Okay. And because why?
A Because someone else touched that counter before and a small amount of their DNA got transferred onto your notebook. It could happen.
Q And let's say that you then swab this notebook, would you expect to find my DNA?
A Probably.
Q Could you, would you expect to find another donor of DNA?
A So, I would not necessarily expect to see their DNA, but I also would not be surprised to see another person's DNA.
Q And if there was another person's DNA, again, that would have no effect or change on my DNA being present on this notebook.
A Correct.
Q Okay. And the same analogy would apply to the rubber

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gloves then; correct?
A Correct.
MR. LASZCZAK: Nothing further.
THE COURT: Mr. Tomko?
RE-CROSS EXAMINATION
BY MR. TOMKO:
Q So, yesterday I think we talked about contamination a little bit and you said contamination would be something like bacteria or mold.
A It would be any DNA that's in the sample that basically shouldn't be there. So, it could be bacterial DNA, DNA from mold. It could be other, other ways as well.
Q Okay. So, really, when we're, we're kind of saying contamination, but we're really, are we really meaning commingling?
A Yes.
Q Okay. And, so, when we get to this idea of, of commingling, when you say there, in your testing that there was a minor donor, you can exclude a dog as the minor donor.
A I would not expect the DNA to be from a minor donor.
Q Okay.
A I mean, the, a dog to be the minor donor.
Q Okay.

A Yes.
Q Okay. So, it's, it's a person's DNA.
A It, yes.
Q Okay. All right. And you, you also mentioned that it's extremely impor, important how things are collected when we're talking about DNA.
A Yes.
Q Would you, if you had separate items of evidence and you wanted to test for DNA, would it be important to keep those items separated?
A Yes.
Q Okay. And say, for example, you took those items and you squished them all together, well, now it's possible that DNA was on one of the items and somehow got transferred to the others?
A Sure.
Q Okay. And if DNA was on one item, but not on the others and if you swabbed all of them, is it possible then, okay, collectively we're saying there was DNA when really it was only on one item?
A Yes.
Q And in the example, you know, of, of touching a pad of paper and then setting it down and, and picking it up, you, you can't tell whose pad of paper it was; correct?

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A I, I don't, I would not know whose pad of paper it was just based on the DNA, no.
Q And you just go to a point where it's major and minor based on the number of cells that were picked up.
A Basically.
Q Okay.
MR. TOMKO: One moment.
BY MR. TOMKO (continued):
Q So, in, as far as testing and making conclusions, is it better if you would receive a, an item, like a glove, or that you receive cuttings from a swab?
A It does not make any difference to me what I receive.
Q Okay. So, it doesn't change your ultimate conclusion.
A No.
Q Okay. But it might change observations concerning the source.
A Are you saying, like if I got the glove, I might, I might see a blood stain and, and swab that blood stain and say, hey, there's a possible blood stain here, as opposed to, if I just get the swabs and just doing DNA?
Q Possibly, yes, I suppose.
A Then, yes.
Q But I, I think what I'm more concerned with is, swabbing the inside of a, of a glove, then you could then say for

certain, aha, it came from the inside of the glove. If you just have a collective sample from anywhere on, on gloves or pieces of gloves, you can't be as specific, I guess, as to where that particular DNA came from.
A Correct.
Q And, so, in some ways, we talked about a pillowcase and we're talking specifically about a glove in this case, it's like, well, all right, you, you can't tell us someone wore the glove, if they had, it was only found inside, only found outside, or if they just happened to touch it sometime.
A I cannot tell that based on my results.
Q Okay. Thank you.
THE COURT: One last clarifying question from me. This is a water bottle I use, but let's say I've never used it. And let's say that since it's manufacture, it was handled by about, say, three hundred people, some in the gym, some here in the courthouse, and then somebody gave it to me and I never touched it. Is there any way at all that if three hundred different people have touched this and all contributed their DNA to it, that somehow, by happenstance, all their DNA together could meld in such a way as to create a false/positive and create my DNA on this?

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THE WITNESS: No.

THE COURT: Okay. And, so, when we're talking about a contamination, contamination would have the affect of maybe making a sample to be unusable, but it would never create a false/positive; is that fair?

THE WITNESS: That is fair. Typically, what contamination does is it confuses the sample because, in theory, it could make a sample that was just one person now two or three people, which makes the sample interpretation more complicated. So, the three hundred people on your water bottle would complicate the sample and it might make it such that I would say that the, the DNA from it is too complex to be interpreted, but it's not going to create a, a profile. It would just be too complex.

THE COURT: Okay. Because the court asked the question, any follow up?

MR. LASZCZAK: I have one follow up question, Judge.

RE-DIRECT EXAMINATION

BY MR. LASZCZAK:

Q You indicated that if you were to receive a glove, you would swab the entire thing, during counsel's questioning. Do you remember that?

A It, it depends how the glove was submitted to me, but I would, I would, if I could determine inside of the glove, I would definitely swab the entirety of the inside of the glove.

Q And then you would analyze that swab; right?

A Yes.

Q And if DNA came back on that swab, there would really be no way of telling which part of the glove that DNA was on; right?

A Right. It could've been from any part of ---

Q That was swabbed.

A --- that it, was swabbed, correct.

Q Thank you.

THE COURT: Okay. Mr. Tomko?

MR. TOMKO: I have no further questions. Thank you.

THE COURT: Okay. Thank you. May the witness be excused?

MR. LASZCZAK: This witness may be excused, Judge.

MR. TOMKO: Yes, Judge.

THE COURT: Thank you. You can step down.

(At 11:52 a.m., witness excused)

THE COURT: Mr. Prosecutor, your next

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Witness?

MR. HALL: Judge, at this time, the People do not have any further witnesses and the People would rest.

THE COURT: Okay. The People rest. Turn to you, Mr. Tomko, it's six minutes to twelve, my intention was to go to about twelve thirty today, do you have a witness ready to go?

MR. TOMKO: We do, Judge. We have a preliminary matter though before any further witnesses.

THE COURT: Okay. All right. I still want to go 'til about twelve thirty, so we'll excuse the jury for about, like maybe a ten minute break. Okay. Thank you.

(At 11:53 a.m., jury excused from courtroom)

THE COURT: Okay. The room to the jury door is closed (sic). Ms. --- why don't you have a seat yet, I think we have a motion coming up. Mr. Tomko, do you have a motion?

MR. HALL: Do you need a second, Tom? 'Cause I can do mine real quick or ---

MR. TOMKO: Do you want to do that?

MR. HALL: Do you, yeah, I'll do that, if you need a minute. I think he's making a phone call right

now, or a text.

Your Honor, I just have another matter. We have our trial for this afternoon. The jury room isn't full. We have --- how many?

THE CLERK: Eighty one.

MR. HALL: Eighty one juries held, or jurors held. I told her to hold onto them, but it's the court's call. We have one more witness for this case today. I'm not sure how long we're gonna take. We're, we're getting on the verge, and I know defense counsel's not here, but this is procedural ---

THE COURT: Yeah.

MR. HALL: --- we're getting on the verge ---

THE COURT: We're talking about another matter. Okay.

MR. HALL: --- We're getting on the verge of, if the, the court wanted to use another day, and like I said, I'm tie-capped, I have that vacation in two weeks, where I'm gone for a week and a half. If, if this goes too far, I, 'cause I can't guarantee how long this trial's gonna take.

THE COURT: I have no idea how long, but my hope is that we're going to, again, and we're talking, Mr. Tomko, we're not talking about your case, we're

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talking about another case that Mr. Hall is going to be trying. But perhaps you can help out in this. My hope is that we would be done with testimony of the prosecution today and that the witness then that you have would also be able to have been completed this morning, but that's not gonna be the case. Since you're here though, you can help us. How long do you think the direct examination will go on the one witness that you're ready to present today?

MR. TOMKO: Twenty minutes.

THE COURT: Twenty minutes. Okay. So, if it was twenty minutes on direct, twenty minutes on cross, if we came back at one thirty, we could start picking a jury by about two thirty in your case, Mr. Hall. And, again, I'm not pressuring you one way or the other. I know that you want to try this and so I'm just letting you make the call. Do you want to, to ---

MR. HALL: I, I would prefer to hold them, because ---

THE COURT: To hold the jury? Okay.

MR. HALL: --- he said, you know, Mr. Tomko says twenty minutes, but these are estimates. We, we could go faster; it could take longer. If it takes longer, so we held the jury a little bit longer, it's

not that big a deal.

THE COURT: Okay. Okay.

MR. HALL: They're here for the whole day anyway.

THE COURT: So, we'll hold them and if we start picking the jury at three o'clock, we start picking the jury at three o'clock.

MR. HALL: We, yeah, and if, by that time, Mr. Evans will be here, we will be able to consult with you.

THE COURT: Got it.

MR. HALL: And, and he may have a different take on it than I do, so ---

THE COURT: Okay. So, we'll hold them. Okay.

THE CLERK: But they can go to lunch?

MR. HALL: Yes, they can go to lunch. Yeah.

THE COURT: And then we have a number of things, we have a number of things, so let me, again, Mr. Tomko, back on the record now in the matter of People versus Roberto Marcello Dupree. I'm assuming, if I'm correct, that you have a motion?

MR. TOMKO: Yes, Judge. I motion the, for a directed verdict in this case. As we listened to the testimony, a couple things were clear. Number one, the

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complaining witness in this case, never ever identified Mr. Dupree as a person who was even present in the store that particular day.

Beyond that, as we listened to any of the witnesses, we don't have anyone that particular day that seen Mr. Dupree in this store. We know that there was a witness that they didn't bother to bring or, or present, a young lady who was walking by, who the evidence tech said that he even talked to. She was a person that, she had seen two people in the store, those, she was never, never called to testify nor did she.

The only thing we have is a, a video and when you look at this video, it's, other than a bald head, that's the only confirmed that we have of, you know, Mr. Dupree being a person who was even present. What we have is speculation from people who watched the video who then are somehow concluding that Mr. Dupree was in the video.

We have DNA. DNA on a glove that was found, I don't even know how many yards 'cause no one testified, but we saw the pictures or the photographs that showed some distance away from where this store was. No indication of how long they had been there. No indication of how, how they got in the condition that

they were in. They were, they were ripped up. Our theory is is that they were ripped up perhaps by a, a weedwhipper or some other reason. We have no explanation whatsoever. We don't even have a photograph of the person that they're saying is Mr. Dupree wearing gloves.

And, so, we have no identification whatsoever for Mr. Dupree, except by complete speculation and we would be asking the jury to speculate.

We had a video, of course, that, that was partial, that was presented in court. This, this partial video, it, it doesn't help us with identification. And it would, has, it would force the jury to speculate as to whether or not it was Mr. Dupree.

Once again, our position is it wasn't him at all. And speculation and conjecture, that's not how we submit to a jury. While the prosecutor might argue, well, you know, this is circumstantial evidence; I would disagree. I would say the, the direct evidence, the most direct evidence, what we brought up in the very, very beginning, before trial started, the most direct evidence was the complete video. And that complete video was not available. It was not available, not

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through anything that Mr. Dupree did, but by selective choices that were made by the police. They chose not to record the entire video. They chose not to, to recover the actual video itself.

Instead, what they did is they copied it onto one device, copied it on a second device, and then made a CD out of it. Well, you know, that, that leads to very difficult problems.

We, we didn't see a, we didn't see a gun. We heard Mr. Zamzami talk about a gun and he couldn't describe it, he couldn't tell us anything about it. It was supposedly on video that we don't have. The same thing with the police officer, the sergeant who testified, she said that, well, oh, I saw this or that in the video. But this is her interpretation of a video that we don't now have.

So, the instruction that we would be asking for, and the instruction that we should consider now, not as an instruction, but just as a point of view is that, look, these things should be presumed against the prosecutor, not most favorable to the prosecutor. It should be presumed against them because they are the ones that let this, this potential evidence (unintelligible) and not be here. And instead embark on

a speculation and conjecture that, (a), there was even an armed robbery and may, there appeared to be robbery, I guess we'll, we can say from the video, there's a question of fact on that line. But was there an armed robbery? I don't know. And was Mr. Dupree there at all? And the, that leads to complete speculation and conjecture.

We, we listened to a line-up not being conducted to try and, to try and say, hey, Mr. Zamzami, had even see this person before. We heard about two customers that were in the store. Okay. What did they see or what didn't they see? The one miss, completely missing witness, who actually saw two of the people outside of the store. And, you know, Mr. Zamzami's failure.

So, you know, based on, based on all of this, our position is, number one, it wasn't an armed robbery. It is a robbery, but armed? I don't know. It's speculation and conjecture.

When it comes to was Mr. Dupree there? No. Speculation and conjecture. The connection that they try to make with the gloves and the, and the dog and such, dog tracking, we know that that's sub --- you gotta be very cautious with this dog tracking. All the

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people that walked across that track and the person, the one person that wasn't called, that came from the store, and, and apparently walked back to the store, walked through the exact same track that they're saying that this dog had walked on.

All that being said, you know, at best, there is, there is, there is speculation and conjecture. We're, we're asking them to guess through this whole process.

So, our position is that, no, there's not sufficient evidence to go forward for the remainder of the trial and we'd ask for a directed verdict. So, our request is for a dismissal, Judge.

THE COURT: Mr. Prosecutor?

MR. LASZCZAK: Judge, in light of the most favorable to the non-moving party, which would obviously be the People in this motion. Judge, counsel's argument, however entertaining, is somewhat inaccurate, if not a lot of it being inaccurate.

There is direct evidence that an armed robbery took place. Mr. Zamzami came in here, testified that an armed robbery took place. Three suspects came in, one pointed a gun at his head, he was then bound up, dragged to the back of the store while they ransacked his smoke

shop. We have video of that taking place. Counsel indicates that, you know, an armed robbery didn't take place because the video doesn't show it. What counsel's failing to understand and realize is that testimony is evidence too. Mr. Zamzami indicated that he saw a gun. I believe he indicated that he thought it was silver in color. He also indicated that the black male who presented the gun and, to his face decided to hit him across the forehead with it.

Secondly, Judge, we have video which indicates that three suspects took part in this armed robbery, one of them being a heavyset, bald lighter skinned, possibly white male, who looks very close to Mr. Roberto Dupree, the Defendant in this case.

Also, Judge, also, Judge, the video indicates that the suspects left through the front door, headed in a left direction, which I believe would be in a northeast direction. A K-9 was called out to the scene. A track was started, a track led directly to a pair of rubber gloves that counsel indicates there was no distance in, in which those gloves were found, which I believe that is an, also an inaccurate statement. I believe Detective Collins said that there was approximately eighty yards away from the location of the

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smoke shop. The dog hit on those gloves, picked them up, the K-9 handled told him to, told the dog to drop them, the track continued and ultimately terminated behind a, behind the building toward, by a half hall.

Those gloves were collected, Judge. They were sent, they were swabbed, they were sent out to the Michigan State Police Crime Lab, were done, were analysis take, took place, where Mr. Zamzami was specifically excluded as being the major donor to that DNA. That DNA was stored and ultimately, Judge, Detective Gilbert detected a lead in which Mr. Roberto Dupree was a possible suspect. A warrant was submitted to the Macomb County Prosecutor's Office and was author, authorized.

Detective Gilbert also received a search warrant for a buccal swab of Mr. Roberto Dupree to compare to the DNA that was found on the swabs from the rubber gloves. That DNA, that buccal swab was sent out to the MSP. You heard Andrea Young and Monica Barylski indicate that based on their analysis and their expert testimony, that Mr. Dupree was a, in fact, a match to the major donor in the DNA that was found on the, the swabs from the rubber gloves.

Circumstantial case, Judge, circumstantial

evidence is just as good as direct evidence as you're very familiar with. Circumstantial identification is just as good as a direct identification.

Judge, there is more, there's an overwhelming amount of facts and evidence in this case for a jury to go back and consider whether the Defendant is guilty or innocent and I believe that we've surpassed that burden and I ask that you deny the Defendant's motion based on my allocution of what has happened since in the trial.

THE COURT: Okay. The motion is directed verdict is respectfully denied. Of course, the test here is whether there is evidence on each element of the crime and, of course, the other mandated provisions is, is that this evidence has to be viewed in the light most favorable to the prosecution, resolving all credibility issues in favor of the non-moving party.

There is certainly testimony that a gun was used; that came from Mr. Zamzami himself. That's sufficient even without, you don't have to have a photograph or a videotape of the gun; the testimony is sufficient.

The photo of one of the persons involved in the armed robbery certainly looks like the Defendant. The K-9 tracking evidence is admissible. It did lead

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from the front of the store to where the glove was found. The gloves were swabbed, sent to the lab for testing, it came back positive for the DNA of the Defendant.

In these circumstances, there's not only some evidence, there is substantial evidence on each element of the crime. This is not a matter of speculation at all. This may be a circumstantial evidence case in large part, but it is a solid circumstantial evidence case. And, so, the motion is denied.

MR. LASZCZAK: Thank you, Your Honor.

THE COURT: Okay. Let's get, we have one probation violation matter and then we'll take a short break, but I --- let's go to twelve thirty on the trial, so let's stick around for a little bit.

(At 12:06 p.m., hearing recessed)

(At 12:14 p.m., hearing resumed)

THE COURT: All right. Are we ready to bring back the jury?

MR. LASZCZAK: Ready, Judge.

MR. TOMKO: Yes, Judge.

THE COURT: Tell Greg to bring the jury in.

THE CLERK: I will.

COURT OFFICER: All rise for the jury, please.

(At 12:15 p.m., jury enters courtroom)

THE COURT: Okay. The members of the jury have, let's see, let's make sure everybody's in the proper seats. Yeah, they, everybody's returned, we can be seated. Mr. Tomko, call your first witness, please.

MR. TOMKO: Yes, thank you, Judge. We would call our first witness, Marlene Whittie.

THE COURT: Come on up please. Raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

MS. WHITTIE: I do.

MARLENE WHITTIE

called by the Defendant and sworn by the Court at 12:16 a.m., testified as follows:

THE COURT: And your name is?

THE WITNESS: Marlene Whittie.

THE COURT: Okay. Have a seat, please.

DIRECT EXAMINATION

BY MR. TOMKO:

Q And good morning.

A Good morning.

Q State your name once again.

A Marlene Whittie.

Q Okay. And, Ms. Whittie ---

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THE COURT: Spell the last name for the record.

THE WITNESS: W-H-I-T-T-I-E.

THE COURT: Okay.

BY MR. TOMKO (continued):

Q Ms. Whittie, are you currently employed?

A I am.

Q And where?

A I work for an insurance agency. I also work for, for you.

Q Fair enough. You were previously employed though.

A Correct.

Q And where were you previously employed?

A City of Warren Police Department.

Q Okay. And in the City of Warren Police Department, what was your capacity there?

A I was in the patrol division. I served as a patrol officer, as well as field training officer and evidence technician.

Q Okay. When did you first work there?

A I was hired January 11th, 1995.

Q Okay. And when did you last work there?

A October 2015.

Q And the, you had a title when you retired? What was

that?

A I did. Evidence technician.

Q Okay. And, so, you have then experience then as an evidence technician.

A I do.

Q And tell us the beginning and ending dates for your experience as an evidence technician for the Warren Police Department.

A I was, became an evidence technician in 2012.

Q Okay.

A So, I served the last three years as an evidence technician.

Q Okay. To become an evidence technician, did you have to do something?

A I did. I attended college courses.

Q Okay. Tell us about those college courses.

A I attended Schoolcraft College. The Department sent me through the classes and they specified in evidentiary collection and processing.

Q Okay. And how long did those courses last?

A Three months.

Q And how many courses did you take?

A Eight.

Q And, so, in your capacity as an evidence technician, did

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you have opportunity to employ those skills at the Warren Police Department?

A Yes.

Q And what types of things did you do?

A I processed crime scenes, photographed crime scenes, recorded autopsies, collected evidence.

Q Okay. And, so, are you familiar with the, the procedures for collecting evidence as an evidence technician?

A I am.

MR. TOMKO: And, Judge, we would move --- oh, I'm sorry.

BY MR. TOMKO (continued):

Q Have you testified before in court?

A Yes, I have.

Q And about how many times?

A Over five hundred.

Q Okay. And in those over five hundred times that you testified as an evidence technician before?

A I have.

Q And can you tell us how many times?

A This? Probably twenty. More than twenty.

Q Okay. And you are familiar with the, the procedures applicable to an evidence technician?

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

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10/9/2018 12:05:40 PM
File Only

2015-003884-FC
PEO VS. DUPREE, ROBERTO MARCELLO

STATE OF MICHIGAN

IN THE 16TH CIRCUIT COURT FOR THE COUNTY OF MACOMB

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. File No. 2015-3884 FC

ROBERTO MARCELLO DUPREE,

Defendant.
_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA, CIRCUIT COURT JUDGE

MOUNT CLEMENS, MICHIGAN - THURSDAY, MAY 24, 2018

APPEARANCES:

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EXHIBITS:
None

Mount Clemens, Michigan

Thursday, May 24, 2018

10:45 a.m.

* * * * *

THE COURT: Before we bring the jury in, Mr. Tomko?

MR. TOMKO: Yes, Judge. The next witness that we'll be calling is Julie Howenstine. She's here, she's gonna testify DNA-wise. She has written a report and she also, I have also have a copy of documents that are bound. It's a three page document, which starts on April 11th of 2017 and it goes through April 18th of 2017. These are emails back and forth before, between former counsel, Ken Vernier, and Julie Howenstine. They go back and forth. Now, I've been asked to, for both of these, to request that they be admitted as exhibits once we've laid a foundation for them.

THE COURT: How can you lay a foundation? We're talking about the report of an expert; correct?

MR. TOMKO: Correct.

THE COURT: Reports of experts are hearsay and are not admissible. Look it, I'm aware that some judges in some counties will let the reports come in. And also aware that oftentimes attorneys don't care and,

as my old friend and evidence professor Jim Robinson once said, all evidence which is not objected to is admissible. But, well, I guess I'll ask the prosecutor. Do you have any objections to the admissions of these reports?

MR. LASZCZAK: Yes, Judge. I would object based on the report completed by Julie Howenstine, it's admissible, or it's not admissible, it's a hearsay document, it's a document that was made in preparation for litigation. And second of all, Judge, the email conversation is between former counsel and Ms. Howenstine, again, Judge, are hearsay documents, they're not admissible under, under any rule of evidence and I'd, I'd ask that they be kept out as exhibits.

THE COURT: I think the prosecutor's right. And what would be the purpose? I mean, the witness is gonna be on the stand, she's gonna be testifying. Anything that's in the report, you're an experienced enough attorney, you can draw it out in questions. We don't need it and it is hearsay. So, again, I'm asking what's, is there something novel that I'm missing that you --- I'll listen. What do you have?

MR. TOMKO: Mr. Dupree would like to explain.

DEFENDANT: No. I, I just want to address

the issue and have it recorded for appeal purposes because this document from Speckin Forensic Laboratory that Ms. Julie Howenstine submitted, was a document informing Mr. Teichman, who was my, one of my past attorneys, that Detective Brian Gilbert on 4/3/17 submitted buccal swabs to be tested at her laboratory. And I have an order that we argued about yesterday that Jeff Hall received, that, that Jeff Hall sent to Detective Brian Gilbert, stating that he wanted him to submit the gloves for testing. And, and the judge ordered Mr. Hall not to send the swabs with the gloves. He ordered them to send the gloves because the swabs had nothing to do with the chain of custody. Mr. Hall and Detective Brian Gilbert took it upon themselves to submit the swabs anyway, violating the judge's orders.

And the email that I'm, I'm referring to, that's got, it's, it's several texts going back and forth between my then attorney, Mr. Kenneth Vernier. She clearly stated in one of her emails that the DNA analysis done on the second set of swabs taken from the glove from in my case, gave insufficient cellular material left to, to provide any DNA. She clearly said there was no DNA left from these gloves. And the, the only time she received my DNA was from swabs that

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Detective Brian Gilbert submitted, violating Judge Michael Servitto's order. Which he specifically said on record on 3/28/2017 and 3/29/2017, he specifically instructed them not to send any swabs with the gloves and he sent swabs anyway. That's why I want it to be made part of the record. If you deny it as coming in, I have no problem with that. I just want it to be made part of the record so it'll be saved.

THE COURT: Okay. Look it, assuming that everything that would be on those documents would be the truth, it still falls under the ambit of the hearsay rule because it is a statement not made under oath, out of court, not subject to cross examination, and it's offered for the truth of the matter stated therein. Although you are passionate about this defense, your passion and your recognizable interest in this matter, obviously, is not sufficient to cause the court to change or bend the rules of evidence. What is hearsay for one, is hearsay for the other, so the reports have to be excluded. So, let's bring in the jury.

MR. LASZCZAK: Thank you, Judge.

COURT OFFICER: All rise for the jury please.

(At 10:51 a.m., jury enters courtroom)

THE COURT: All right. The jurors have

returned, we can all be seated. I'm gonna ask Mr. Tomko to please call your next witness.

MR. TOMKO: Yes, we'd like to call Julie Howenstine to the stand please.

THE COURT: Okay. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

MS. HOWENSTINE: I do.

JULIE ANNE HOWENSTINE

called by the Defendant and sworn by the Court at 10:52 a.m., testified as follows:

THE COURT: Okay. Have a seat please.

DIRECT EXAMINATION

BY MR. TOMKO:

Q And could you state your name for the record and spell your last name please?

A My name is Julie Anne Howenstine. Spelled H-O-W-E-N-S-T-I-N-E.

Q And are you currently employed?

A I am.

Q And where are you employed?

A I'm employed by Speckin Forensics LLC in Lansing, Michigan.

Q Okay. And what is that employer's business?

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A It's a private consulting group on forensic sciences.
Q Okay. And give me an example of some other forensic sciences that are involved in that group?
A Well, I'm their biology and DNA specialist. We also have document examiners, document specialists, latent print examiners, firearms examiners, footwear impression examiners. Pretty much --- medical examiners, retired, that are now expert witnesses reviewing work from active medical examining offices. Pretty much any aspect of forensic science. People in testing narcotics, people testing toxicological substances. Anything that you might question that has forensic value, we have someone who's a consultant that can address those issues.
Q Okay. And your role there, you said was what again?
A I'm their forensic biology and DNA specialist.
Q Okay. And how long have you been in this role?
A About seven and a half years now.
Q Okay. And what do you do there in, in that role?
A I'm actively involved in testing for biological fluids, so I have a wet lab for biology. And then I am their forensic expert who reviews DNA analysis done either by government laboratories or private laboratories.
Q Okay. And, and, so, you're familiar with DNA analysis?
A Yes.

Q Okay. And you've been qualified as an expert in the past?
A I have.
Q To get to this level though, you must have had some sort of education. Could you tell us what your education is?
A My formal education is a bachelor of science in microbiology and then a master's and eventually a doctorate in veterinary medicine. Following a year and a half of practice of veterinary medicine, I was employed by the Michigan State Police Department and assigned to the serology laboratory at that time, which is biology now, back in 1985. I worked with the State Police for twenty five years, from '85 until 2010. I was one of the two State Police forensic scientists who started their DNA laboratory, doing the validation work, the data base, a lot of continuing education, all the way through present. I was sent annually to continuing education workshops for association meetings, where papers were presented and DNA topics were discussed. And then when I became employed by Speckin, I continued to go annually to either a workshop or a meeting, read journals, I'm a member of the American Academy of Forensic Scientists, to present date so, I receive that journal. I do a lot of internet searches for present,

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current topics in DNA analysis so that I can read papers and attend workshops relevant to what's going on up to this very day.

Q. Okay. So, in summary then, you, you have experience in testing for DNA; is that correct?

A. Yes. I did DNA analysis in the wet lab from 1991 until 2010.

Q. And, of course, then you generated in, documents that you interpreted; correct?

A. Yes.

Q. Okay. And then even through today, you continue to interpret DNA results.

A. I do. And I take annual proficiency tests on DNA analysis interpretation.

Q. Okay. And is it important to stay up to date with training on, in this area?

A. Absolutely.

Q. Why would that be?

A. It's a rapidly evolving field of science.

Q. Okay.

MR. TOMKO: Judge, we would move to have Ms. Howenstine certified as an expert in DNA.

THE COURT: And, Mr. Prosecutor, any questions or objections?

MR. LASZCZAK: No, Judge. No objections.

THE COURT: Okay. She will be regarded as an expert witness in the area of DNA analysis.

MR. TOMKO: Thank you.

BY MR. TOMKO (continued):

Q. So, Ms. Howenstine, we're here today about a case involving Roberto Dupree. Were you involved at all in this matter in any evidence?

A. Yes, I was.

Q. When were you first involved?

A. The end of 2016.

Q. Okay. So, in 2016, what were you contacted to do?

A. I was asked to review the documents created by the Michigan State Police Forensic Science Division in two different laboratories and interpret the data and advise as to whether or not I agreed with the methodology, the protocol, and their conclusions.

Q. Okay. Did you receive such information?

A. I did.

Q. Okay. Do you recall when you received it?

A. I don't know the exact date. It's identified as case number 191 of '16 in my laboratory and I usually do two hundred and fifty cases a year, so I would guess it was mid to late year 2016.

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Q Okay. Did you spend some time reviewing that documentation?
A Yes, I did.
Q Okay. What was that documentation in general?
A I received the laboratory reports that were authored by the Michigan State Police Department Forensic Science Division. And then the data that supports the laboratory reports, which would include work sheets, case notes, and work product for the DNA analysis, which is an electropherogram.
Q Okay. Did you re, receive some information of any testing by Monica Barl, Monica Barylski?
A Yes. Ms. Barylski was the first DNA analyst, who did the DNA analysis of the questioned samples in Mr. Dupree's case.
Q Okay. Which samples are, are you talking about that she looked at?
A They had swabs identified as coming from a pair of latex gloves, and they had swabs identified as coming from duct tape.
Q And have you reviewed the results that the MSP had given you from her analysis?
A Yes.
Q Okay. Did you ever receive anything else?

A Subsequent to my review of the work done by the Michigan State Police Department's Forensic Science Division scientist, I was asked to do a second sampling of the latex gloves and repeat the DNA analysis.
Q Okay. But before ever receiving a latex glove, did you receive anything that you were asked to review, as far as any type of evidence? Like some cuttings?
A Well, prior to receiving the actual glove that I eventually received in this case, I was provided extract tubes, which were created by the Michigan State Police Department in their initial testing and, or analysis of, in 2014. I got those in February of 2017. And it was, as I said, the extracts of both the latex glove and the duct tape. And I advised that I would rather swab the latex glove itself rather than simply re-run the DNA analysis on the extract that had already been prepared by the Michigan State Police Department. So, I did receive a second submission for testing in April of 2017, which was one torn latex glove.
Q Okay. So, let's, if we break it into pieces, you received a, a vial --- and when you say extract, what do you mean?
A The DNA process for analysis is taking whatever your evidentiary item is, and in this case they were actually

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swabs created by the Clinton Township Police Department, I believe, from the latex gloves. And then the swab material itself is cut off of the swab after it dries and put into a small polypropylene plastic type tube. And you take that tube and process it by adding chemicals to break open the cells, chemicals that help to break up materials other than DNA so that you can clean the DNA up and you can spin it to the bottom of your little tube and remove all of the extraneous material and then re-suspend that into a buffer that preserves the DNA, for then taking it through the process of PCR, STR, DNA analysis.

Q Okay. So, but in the beginning, just to simplify then, in the beginning, you have two tubes; one was from duct tape, ones was from gloves, according to how they were marked.

A Yes.

Q Okay. All right. And then the, you had requested that, hey, what about the gloves themselves. You requested the, that the gloves be sent to you.

A Correct.

Q Okay. Did you receive several items of gloves or what did you receive?

A I received one manila envelope that was marked to

contain a latex glove and there was a single glove that was mostly in tact, but torn, in that envelope.

Q Okay. So, the item that you received was, was, was, it was almost all of the glove, but, or, or was all of the glove or, and it was torn?

A It appeared to be the entire glove, with a tear.

Q Okay. So, not just a, one finger piece or anything of that nature?

A No.

Q Okay. All right. And, so, when you received the two vials, did you do anything with the duct tape vial?

A No, I did not.

Q Okay.

A I, I returned it to Clinton Township Police Department.

Q Okay. Did you do anything with the other vial that was marked as being cuttings from a rubber glove?

A Yes.

Q And what did you do?

A I used that tube to place the second set of swaps that I collected from the latex glove that was submitted to me in April of 2017.

Q Okay. Okay. So, wait, so, there's a couple things you did. The first thing you did is you, you had the rubber glove and you said you swabbed it?

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A Yes.
Q Okay. When you swab something, what do you do to prepare to swab something?
A I use sterile cotton tipped swabs and I use sterile distilled water on one of the two, usually my cotton tipped swabs are packaged as two in one sterile sleeve we call it, packaging. And I would take one and add a couple drops of distilled, sterile distilled water to that, use that to swab the surface where I'm collecting cellular material. And then take the second dry swab and swab again to remove any residual liquid or cellular material that wasn't picked up by the wet swab. I dry the swabs in my laboratory. I then cut the swab material, the outer swab material, where the cells would have collected, and put that into a polypropylene extraction tube. But in this case, I'd been provided with a polypropylene extraction tube that had been originally used for the extraction of the first set of swabs from the latex gloves by the Michigan State Police Department. And because I knew that I had a very small quantity of cellular material to begin with that was extracted, I suspected what remained on the swab that had al --- the, excuse me --- the glove that had already been swabbed, would be very little cellular material.

So, I combined two samples.
Q Okay.
A My set of swabs into the tube that contained what remained of the DNA that was extracted from the first set of swabs by the Michigan State Police Department.
Q How can we be sure that when you were handling these things that you didn't get some of your own DNA on some, on anything?
A I follow the same evidence handling procedures that I was taught by the MSP and taught to the analysts that now work at the MSP. I did not work in the Northville Laboratory, which provided the initial testing, but I, in the Lansing Laboratory.
Q So, explain to us that protocol. What do you do, for example, with your hands when you're handling these items you mentioned?
A You start by washing them well with antibacterial soap and drying them and then putting on a pair of latex gloves. And before I put my latex gloves on, I put on an aerosol protecting mask so that I'm not coughing or sneezing or breathing any DNA material onto my sample. And then using the sterile gloves, sterile water, you clean the surface with, I use a bleach dilution solution. Some people use alcohol or other chemical

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sterilizers. I lay down a clean sheet of white paper. All of the racks that I use, any of the cutting tools I use, fresh individually sterilized and packaged scalpel blades, to cut the swab material. Everything should be sterilized. And even so, there may be DNA that drops from the ceiling. We, we're aware that the sensitivity of our technology these days, it is possible to have very low level amounts of DNA, even using these protective methods. But that is what I do to attempt to be sure I didn't introduce any additional DNA.

Q So, being familiar with the State Police protocols and you, would you say your protocols are similar, if not exactly the same as those at the State Police Lab?

A They are the same because I was trained there and they follow the same procedure that I was trained in.

Q All right. So, then did you perform --- well, let me back up. 'Cause you said that when you received that vial, it was marked as coming from a latex glove. You said it was a, a small quantity; correct?

A Well, the, the vial itself contained nothing visible, but it's actually microscopic quantity of DNA in the bottom of the vials that's been dried down, so there's no liquid any more, but it's the, the extract of the DNA recovered from the first set of swabs of the latex glove

into it.

Q And, so, the minimum material in there, is that from your observation of what was in the vial?

A No, it's from my observation of their worksheets.

Q I see.

A They had prepared quantitation worksheets of how much DNA was recovered from the first set of swabs of the glove, and it was low quantity.

Q So, when you started out, you knew you had very little material.

A Very little in the tube.

Q And, so, then your purpose then in swabbing the glove was to see if there's additional material to assist with testing?

A Correct. To try to pick up any cells that may have been missed with the first set of swabbings and add them to the extracted DNA from the glove, to get as much DNA as possible to attempt to get data or informative DNA analysis results.

Q So, did the, did you personally, did you perform some DNA analysis on what was now in that vial, with the combined which you received and the new swab from the gloves?

A I did not.

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Q What did you do?
A We have subcontracted a certified laboratory to do our DNA analysis when we have re-tests of DNA samples.
Q And in this case, what laboratory was that?
A Universal Forensics.
Q Okay. Are they local? Where are they?
A They're from Somerset, Pennsylvania.
Q Okay. And, so, then I imagine somehow that was transported to them?
A Yes. It was FedExed to them.
Q Okay. And did, did you receive some results?
A I did.
Q Okay. Well, initially, did you receive any, any results, I suppose?
A Initially, I received an email from the analyst that I regularly confer with on the results of any DNA testing I've submitted to him. And he said it was insufficient cellular material for reported DNA types.
Q Okay. So, if something's insufficient, what, if we can characterize that, what would insufficient mean? Are there different levels of things that, that have to be present in order to find out what this DNA's all about?
A Yes.
Q And what are, what are those levels?

A May I backup and just briefly explain the process itself?
Q Sure.
A DNA analysis?
Q If that's helpful, yes, please do.
A I mentioned that, use chemical to break these cells open to release the DNA from the nucleus and remove everything but DNA. Following that procedure, you quantitate it, you put it through a real time DNA that, that targets only a certain site to say how much is there. And then you take that and you have to usually amplify it. You don't recover enough DNA to get visible results on your analysis, you copy it. And that's a procedure called amplification. When you're amplifying, you add little florescent tags to what are called the primers, the little pieces of DNA in our analysis kit that go in and find the correct --- it's a lock and key kind of thing --- but the correct site on the correct piece of DNA that they are created for. And from that, they copy it. But each of these strands now of DNA that are copied, have a florescent tag and we use a system that has five different colors of florescence, and then it's run through capillary electrophoresis, where these little piece of DNA are going through a, kind of a jello

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matrix, in a very thin tube, and passing a detector that creates light flashes of the different five colors that tells us what size piece that is, how much DNA is there, and how fast it's moving through the tube, and the smaller pieces move faster than the larger, so that helps us identify the size of the DNA piece. Okay.

So, going backward to the flashes of light, the, the intensity of the light flash from these dyes that have five different colors, that tells us the quantity of DNA that's present there. And from that, you get a chart at the end point, software is, is in, interpreting these flashes of light from the detector to create a peak of a certain height, and the higher the peak, the more DNA is present.

So, when you're saying, is there a standard? It's, it's what's called the relative florescent units, the height of that peak, how many of those intensity florescent units are present, is there enough there for us to call it a certain threshold?

Q Okay.

A Because when, when our DNA is running through, you've got, in a mixture, you know, several pieces for each genetic site that we're looking at and, and the technology we use looks at twenty four different sites,

which is why we need five different colors, so that you can separate all these pieces from these various sites. The technology has also what's called chatter or background noise and, and you want to be sure that the piece of DNA, the florescent tag isn't some kind of background dust or any other particular matter that may fluoresce in any way. It has to come up above what's called the analytical threshold. And that's set at about two and a half times the average height of the background noise.

Q Okay.

A And once it reaches the analytical threshold, this is, again, based on relative florescent units, it is considered real DNA. A reliable piece of DNA that can be interpreted.

Q Okay. So, back in 2014, I think, that was the first, first data you received; correct?

A From the State Police Lab, yes.

Q And that one, you received it, but, I mean, they, they did a test ---

A In 2014.

Q In 2014.

A Yes.

Q And, so, that, we heard that there's an analytical

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level, but we also heard something about a stochastic level. So, if the analytical level is just to see if you're identifying some things or the right thing in DNA or, what's the ---

A It's to decide that the peak that you're seeing on your chart, which is call the electropherogram, is a piece of DNA and not something else.

Q Okay. What's the pertinence, as it involves the test back in 2014, on the stochastic level?

A Stochastic levels are a little more difficult to comprehend, because they're largely created for exactly this type of sample. These samples that don't have whole lot of DNA in there and the sample also has a mixture of more than one person's DNA there. And the stochastic level is set in the laboratory according to whatever that particular laboratory decides is the threshold, they call it the stochastic threshold. And, again, it's an RFU value, a relative florescent unit. So, it means that the peak that you're now interpreting has to get above a second level. First, we know it's DNA, it come above the analytical, but does it exceed the stochastic threshold. And that is set so that you can, when you're looking at your data set that includes more than one person, or even if it only has one person,

be certain you have all of the DNA types from all of the donors present in your interpretation.

Q 'Cause we heard about types and we heard that one type of test has sixteen types, or really fifteen types, one's male or female, and that's what we're talking about? Those sixteen types?

A No, those are actually sites.

Q Sites, okay.

A And the type is the individual marker, if you will, at that site.

Q At that site. Okay. All right. So, what's the situation if you have something that isn't above that stochastic level from a test in 2014?

A You have DNA types that you know are DNA types, so they are interpretable, but you cannot use them for a conclusive association to an individual, or at least you could not back in 2013, or '14, and you could not, I think up until about 2016.

Q What did you observe from the results that you were sent from the Michigan State Police as it concerns those 2014 results?

A I agreed that it appeared to be DNA from more than one donor, but there is a major donor to this mixture, who -- and the major means the person who contributed more

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DNA than the second person. It's a mixture of at least two; one is a major, one is a minor donor. I agreed that the DNA types that were detected, and they were running the system that used, called PowerPlex 16, that used primers for sixteen different genetic sites. And one of those is the sex determining site called amelogenin, and the other fifteen are variable. So, you have data set of, potentially up to fifteen different sites with variable data. They didn't obtain data at all fifteen sites, at least no complete data, I believe they have data at fourteen out of the fifteen and one of the fourteen had an imbalance, so that not really, for the major donor, that was not really interpretable for conclusive association either. But they had thirteen genetic sites where the data was sufficient for them to do a calculation, a statistical calculation, which I checked and agreed that was done correctly as well.

Q And that would be for analytical, but did it exceed the stochastic level?

A It would not have exceeded what was set in 2014.

Q Okay. And ---

A But I don't know what the set was when they did the comparison to the reference sample, which was generated in 2016.

Q So, do I understand correctly that if, if you, you run a DNA test and if it exceeds the analytical level and it exceeds the stochastic level that it would be sufficient to make a conc, a conclusive association?

A Again, those levels are set by each laboratory that is performing analysis and that was the definition of what those levels were for and what, how they were using them.

Q Okay. So, the levels, when you sent the sample that you received, you still have the glove, you added some things to it, that mixture, when you sent that mixture to the lab, what was the first response?

A Their response that it was insufficient for conclusive association and that was due to the fact that it was a mixture, again, of DNA, from more than one donor and some of those types were not exceeding their stochastic threshold.

Q So, not enough to make a conclusive association.

A Correct.

Q When you contacted them later, did you get some more detailed information?

A I asked them to send me their electropherograms, so those are the charts that are coming off of the computer that interprets those flashes of light as the samples

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are moving past the detector, and I have, you know, thirty years of interpreting, well, twenty five years of interpreting the charts, so I was able to look at that and see that there was indeed data, it did not meet that stochastic threshold, so it was not reportable by University Forensics, but the data is interpretable because it was above the analytical threshold.

Q Okay. So, we got some things that are above the analytical level, but not about that stochastic level.

A Correct.

Q Above the analytical level, where you can analyze, what did you observe?

A A mixture of at least two DNA donors, possibly three. And there did appear to be a major donor and one of two minor donors contributing to that sample.

Q And how is that related, if at all, to Mr. Dupree?

A I had the charts that the State Police had already prepared for Mr. Dupree and were actually prepared now using a different kit for DNA analysis because they were done in 2016 and not 2014, so they were actually using the same kit that Universal Forensics, my laboratory uses. So, I had his reference sample to compare directly his chart, his electropherogram, to compare directly to the electropherograms from the second set of

swabs that I prepared combined with the remaining extract from the Michigan State Police Lab's first analysis of the gloves.

Q And any association with Mr. Dupree?

A I believe that his types were consistently seen in the mixture, but not all of them because there was, as there often is with low quantity DNA analysis in a mixture of types from more than one individual, what we call the stochastic effect. That's what you set the stochastic threshold for and that's kind of difficult to explain too. I'm old enough to remember playing marbles when I was quite young. And when we play marbles, you put them all in a circle that you've drawn and then you try to hit them with a marble that you shoot in. The stochastic effect is like the primer being your shooting marble or a marble you're throwing into the circle. If you have a hundred marbles in there and eighty them are black and twenty of them are white, when you either shoot it or throw it in, you only, you would expect you'd probably hit white, right? Eighty/twenty.

And unfortunately with DNA analysis, that happens twenty eight to thirty two times and each time that your primer goes in and attaches to, say, the white marble, it now creates twice as many white marbles. So,

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the next go around, your primers going in, if it only hit at the white, it's going into a hundred and sixty white with twenty black and it's con, and it keeps decreasing the number of, the probability or the frequency of occurrence for how many times those primers would attach to the minor donor types. That can even happen with major donors when you're talking about very small quantities. And if it happens to copy or amplify only certain types, you don't see some of the data that you, that would have come from the individual.

We, we know this by studying lab created mixtures, where one person's DNA doesn't show all of it's, their DNA types as it's diluted down to a very small quantity using this kind or hit or miss with the primers, trying to find these pieces of DNA to copy. That's a stochastic effect. It means that you can have, you can amplify it or, or copy it three times if you split your sample up and get different results in all three, and you look for the best two out of three. That's why that threshold's created.

Q So, so to simplify it for somebody like me that doesn't, doesn't know any of this stuff except from what's explained to me, basically when you get DNA in a small quantity, you're duplicating it over and over and over,

and then now you can, you can chart it.

A Right.

Q But it's', but it's dependent upon what you're duplicating.

A Correct.

Q And, so, if there's two or three different people's DNA on there and you happen to hit one or another, it's gonna be the one that's duplicated more often. And to ensure that you have a good result, you want to eliminate that problem, that randomness of getting the minor or the major, and that's why if, if it's above the stochastic level, it's more conclusive.

A Right. You're basically saying that everything, if everything is above that stochastic level, you feel you've got all the data that's in that sample. You haven't missed anything by those random stochastic effects.

Q So, in your interpretation, the analytical level, first of all, you, it came back and said there was an insufficient sample.

A For them to report out any DNA types, yes.

Q But then when you asked for more detail, you found out, well, there's some that was above this analytical level, but it wasn't above the stochastic level.

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A Right. They had data, they, that I could visualize that was above analytical threshold, so you can interpret it, but it didn't exceed the stochastic, which in our laboratory, Universal Forensics, at least when it was run in 2017, they would not report those out.

Q So, if it's not, if it wasn't above that stochastic level, then it's not sufficient to make a conclusion association.

A Correct. That was their protocol.

Q And that was the result you received from that lab you sent it to.

A Yes.

Q Okay.

MR. TOMKO: Then that's all I have. Thank you.

THE WITNESS: You're welcome.

THE COURT: Okay. Mr. Laszczak?

CROSS EXAMINATION

BY MR. LASZCZAK:

Q Good morning.

A Good morning.

Q All right. So, it's, you're employed with Speckin or -- -

A Speckin.

Q Speckin Labs.

A Forensics.

Q And you've been there seven and a half years; right?

A Yes.

Q Now, when you were assigned this case, you did not do any kind of DNA extraction yourself; correct?

A That is correct.

Q Yeah. So, everything was sent off to this Universal Forensic Lab in Pennsylvania.

A We have actually two different labs that we sent DNA analysis to, but that was the one this was sent to at this time, yes.

Q All right. And the first time you sent out just the vials that you received from the Michigan State Police Crime Lab; correct?

A No.

Q Okay. What did you send out first?

A I only sent one submission for DNA testing.

Q Okay. And that was a combination of your swabbing of the glove, along with the cuttings from the Michigan State Police Crime Lab.

A No. It was the cuttings of the two swabs I prepared from the glove that was given to me, secluded ---

Q Okay.

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A --- put into the tube that had the remaining extract of DNA that was ---

Q Already analyzed.

A --- the product of the result of the analysis that the State Police had done in 2014.

Q Okay. And prior to you sending that combination out, you reviewed the Michigan State Police Crime Lab reports and case notes and whatnot; correct?

A Yes.

Q All right. And based on your review of those reports and case notes, your findings were compare, would you agree with what the Michigan State Police Crime Lab scientists found at that point; correct?

A Yes.

Q Okay. In that there was DNA present at what you, I believe you testified you, thirteen of those fifteen sites?

A There were DNA types present at all fifteen actually.

Q All fifteen.

A One is the amelogenin site for sex determination and fourteen are variable sites. One of the fourteen sites, they did not have a complete data set that was consistent with coming from Mr. Dupree. They had what we call allelic dropout, if you assume that his DNA was

in that mixture. And, again, they had data that you could visualize that was actually below that analytical threshold. So, they could not use that for any kind of association. So, there was useable, interpretable data ---

Q Okay.

A --- at fourteen of fifteen, including the amelogenin.

Q And that useable data or interpretable, interpretable data indicated that of those fourteen of the fifteen sites, Mr. Dupree's DNA was present.

A They were consistent with his reference profile, yes.

Q And then you indicated that you took your independent swabbing of the glove with a, basically what we've heard testimony of, of like a long Q-tip; right?

A Yes.

Q Okay. And you would also agree that you were working with small amounts of DNA; right?

A Yes.

Q All right. And obviously, that glove had a, glove, to your knowledge, had already been swabbed in the past?

A Correct.

Q Correct. So, when you re-swabbed it, it's very possible that there wasn't, there was very little or no DNA present when you conducted your swab.

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A That is possible.
Q All right. So, then you do these swabs and you send it out to the lab and, first, you get a response back that it's inconclusive; right?
A That it was insufficient, again, to generate a report on the data.
Q Okay. And do, are you familiar with what their analytical thresholds are and their stochastic thresholds are?
A Their analytical threshold, I believe, is seven hundred, I'm sorry, the analytical is set at seventy five relative florescent units, and I believe the stochastic is seven hundred relative florescent units.
Q And, but you received reports back from that, their testing; right?
A I received a report and then also requested and received their charts from the computer interpretation of the analytical run, called the electropherograms.
Q Okay. And that would be the same report that you would've looked at for the, somewhat similar to the report that you looked at from the Michigan State Police Crime Lab; right? Where you get these peaks that you're looking at, at these sites?
A Those are the electropherograms.

Q Right.
A And, yes, they're, they're similar, although their software for interpreting ---
Q May, may be different.
A --- the, the analysis is different. And the report was only telling me what they would reportable data at the questioned sample that I sent. Because there was no reference sample sent for comparison.
Q Okay. And you would agree too that when the original analysis was done by MSP, they were using, I believe what they call a PowerPlex 16 kit; right?
A Yes.
Q Which only analyzing, in simplistic terms, or detects sixteen DNA sites or locations within a DNA; correct?
A Right.
Q Al right. And then eventually, MSP went to the twenty four location site.
A Yes.
Q All right. So, obviously, what, you would agree that when the comparison was done, you could only compare the original sixteen sites that were tested back in 2014; right? The extra sites, on the twenty four strand, could not be used because there was nothing to compare them to.

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A Mr. Dupree's sample run by the Michigan State Police Lab in 2016 was done using the twenty four ---

Q Correct.

A --- site kit, so there was reference data on all twenty four genetic sites.

Q Correct.

A From his sample.

Q But you don't ---

A So, I could compare it to the additional sites because the second sampling DNA testing done by Universal Forensics also used the fusion kit, which is twenty four genetic sites.

Q But I'm talking, what, I'm referring to the PowerPlex 16.

A The initial PowerPlex 16 could only use the ---

Q Could only compare those sixteen to the sixteen that was, or the six, the same sixteen.

A Sixteen of the twenty four that was done on the reference sample. That is correct.

Q So, you review all this statistical and graphic, graph information from the Universal laboratory; right? And you agree that your con, your, based on your experience, obviously you've been doing this for a long time; correct?

A Yes.

Q Thirty plus years.

A Yes.

Q That there were, Mr. Dupree's DNA was present at those sites.

A I wouldn't say his DNA is present, but his genetic markers at those sites that gave data that was interpretable were consistent with the mix, coming, as being part of the mixture. Unfortunately, this goes back to the, setting these thresholds and interpretation versus reporting out an actual association, a conclusive association to a reference sample, you have to have the data for the laboratory above that stochastic threshold. And the MSP interpreted their data, but my laboratory would not report out the data, so I can't say there's a conclusive association.

Q Okay. But you can't say that Mr. Dupree was specifically excluded then as well.

A Correct. I could not exclude him as a possible donor to the second DNA analysis on the swabs that I created combined with the DNA material that had been preserved from the first sampling.

Q And we've heard a lot of testimony about, you know, how DNA is constructed, how it can be, become on an item,

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and obvious, unless somebody took Mr. Dupree's DNA and put it on that glove, at some point, a reasonable conclusion was, is he had contact with that glove; would you agree?

A We've done a lot of testing now with what's called secondary transfers, so I no longer say that the presence of someone's DNA means they had contact with the sample, because we're finding that DNA, especially in low levels, and with the sensitivity of the tests that we're running can be detected from sources other than someone having touched or contacted the item.

Q You're familiar with the major/minor donor term; correct?

A Yes.

Q All right. And during your review of these graphs, would you agree that there was point, points on those sixteen DNA locations, that Mr. Dupree's DNA was a major donor?

A Yes.

Q Okay. And, again, you cannot state here today that Mr. Dupree specifically was excluded as a possible major or minor donor?

A I cannot.

Q And, lastly, the analysis in which was, that the MSP

did, you would agree with today as well?

A I found no technical or interpretational errors in what they had done.

Q Thank you.

MR. LASZCZAK: Nothing further.

THE COURT: Re-direct?

MR. TOMKO: Thank you.

RE-DIRECT EXAMINATION

BY MR. TOMKO:

Q DNA can be transferred from one item to another though; correct?

A Yes.

Q So, if someone put one of the cotton tips in their mouth and swabbed it and if you rubbed it on something, it could transfer?

A Yes.

Q Okay. But the, but based on your results that you received from the independent lab, is the ultimate conclusion that there's not sufficient DNA for conclusive association?

A Yes. Universal Forensics concluded it was insufficient quantity of DNA for conclusive association.

Q And did you agree with that, based on your review of their, their testing and the method they used?

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A Yes.
Q And you've --- all tight.
MR. TOMKO: That's all I have. Thank you.
THE COURT: Re-cross?
RE-CROSS EXAMINATION
BY MR. LASZCZAK:
Q And the, the response that you got back from Universal Lab, that there was insufficient data was based on the sample or the swab in which you took of the glove; correct?
A Combined with what remained of the extract from the original swabs taken.
Q Okay. So, that, you can't say today that Universal Lab determined that it was insufficient data to compare an association with MSP's original swab, or MSP's testing of the original swabs?
A No.
Q Okay.
MR. LASZCZAK: Nothing further. Thank you, Judge.
THE COURT: All right. Members of the jury, your opportunity to ask questions. We have a number of hands raised and so let's start writing them out.
(At 11:38 a.m., bench conference)

(At 11:40 a.m., bench conference concluded)
THE COURT: Okay. We have several questions. The first is, you testified that each lab is different and uses different stochastical or analytical levels. Is that what you, first of all, is that what you testified?
THE WITNESS: Yes.
THE COURT: Okay. Well, first of all, why does each lab use different levels? Why the difference at all?
THE WITNESS: There's variation among the instruments that are used. They are different models, like different models of cars. So, certain instruments show different variability and sensitivity and for that reason, they set their own threshold. Also, theoretically, the buffers they're using, the water, the chemicals, these can all influence the data collection. And then they also have to validate each kit, running known samples and mixtures created from known samples, for sensitivity levels and everything else. So, their, their in lab validation is what gives them confidence is setting these values.
THE COURT: Well, do you know what levels MSP uses?

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THE WITNESS: It changes with each kit and, in fact, has changed with the same kit as they create more data and they've done more interpretations. For the fusion kit, which is what was run in 2016 at present, they've now set their thresholds at two hundred and fifty for the analytical threshold in relative florescent units, and the stochastic threshold, I believe, is set at nine hundred. I don't think that has changed since the last time I reviewed their protocol. For the PowerPlex 16, which was what was run in 2014 on the original swabs collected from the latex gloves, and this is from memory, I believe they were setting their thresholds at seventy five for the analytical threshold, and somewhere about two hundred and fifty RFUs for the stochastic threshold.

THE COURT: Okay. Well, just so that we're clear again, 'cause this relates directly to the juror's questions over here as to why each lab has different levels, the analytical level is the level at which a scientist like yourself is satisfied that we really have DNA here; is that correct?

THE WITNESS: Yes.

THE COURT: As opposed to something like sugar water or something like that.

THE WITNESS: Or specks of dust that cause a flash of light.

THE COURT: Right. Okay. All right. And the stochastical levels? How do you spell that? Stochastic?

THE WITNESS: S-T-O-C-H-A-S-T-I-C, sto, stochastic.

THE COURT: Okay. So, stochastic level is the level which the lab says, ah, we have confidence not only that this is DNA, but it's a large enough sample that we are confident in giving a conclusion based on it.

THE WITNESS: Confident that all of the data in the mixture is present.

THE COURT: Okay. And, so, at the analytical level, you know it's DNA; correct?

THE WITNESS: Yes.

THE COURT: Is it somewhat of a subjective judgment then to say what your stochastical level is?

THE WITNESS: Yes.

THE COURT: So, different scientists could disagree on that?

THE WITNESS: Yes.

THE COURT: Oh, and these numbers, two fifty,

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nine hundred, we don't have any units per unit, it's kind of, you know, it's kind of like a meaningless number. Can you relate that at all? What does two fifty relate to? What does nine hundred relate to? Two hundred, two hundred fifty beats per minute, thumps per second? I mean, I'm throwing out, obviously a silly word just to try to draw you out as to what, what do those numbers mean?

THE WITNESS: The number, the unit of measurement for that number is called the relative florescent unit. RFU. And what it is is the intensity of the light that's detected by the camera that is part of the genetic analyzer that is determining the presence of these frag, fragments, their size, and the quantity based on that intensity of light in relative florescent units. So, two hundred and fifty relative florescent units are less than three times, or more than three times less intense than nine hundred relative florescent units.

THE COURT: And obviously a florescent unit is also just some universally agreed upon, but when it was originally set, some arbitrary standard?

THE WITNESS: The instru ---

THE COURT: But like, for instance, light

bulbs are measured in lumens; do you know that?

THE WITNESS: Right. It's, it's like a lumen, yes.

THE COURT: Okay. So ---

THE WITNESS: And the RFU is like a lumen. It's the unit of intensity of the flash that's detected by the optics of the camera that's used in the instrument.

THE COURT: So, whoever originally said that a candle is one lumen or whatever, that stuck and now everybody uses that? That's kind of a similar thing here; correct?

THE WITNESS: Yes. It's, it's an actual physical measurement that the people who engineered this instrument that detects these flashes of light, determined that a certain intensity ---

THE COURT: Okay.

THE WITNESS: --- of light is given that unit. That ---

THE COURT: And at some point, it's bright enough to show that this really is DNA and at some point, it's a higher point, it's bright enough for people to subjectively then say, we are confident in the results?

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THE WITNESS: Yes. And the brightness is representative of the quantity of DNA.

THE COURT: Right.

THE WITNESS: So, so, the fact that it's bright enough to be called analytical means there's enough DNA there, and the height of that peak, because the, the software that interprets these flashes of light in RFUs, creates a peak for that flash of light of a certain height that's measured in those relative florescent units.

THE COURT: Okay. So, the more DNA you have, the brighter the result?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: And the higher the peak on your electropherogram.

THE COURT: Yeah. The higher the peak. But the peak is just simply a graph of the intensity of the light.

THE WITNESS: Yes.

THE COURT: Okay. Why didn't you swab the glove and submit that, then swab the glove with extracts and submit two samples?

THE WITNESS: Because I was requested to

submit only one sample and I was trusting that the chain of evidence was appropriate to guarantee that the DNA extract from the first swabs came from the same glove as the swab that I was preparing. And I was afraid, if you will, or concerned, that if I sent only my second set of swabs, the DNA would be insufficient to get my data up above the analytical level, so there would be nothing to interpret. If I sent only the extract, what remained, because that's the leftovers from what the State Police had already used of the original DNA from the original set of swabs to create their electropherograms, their end product, what remained was such a small quantity, if I ran that alone, I did not believe it would come up above the analytical level. So, I was hoping that by combining both of these very small quantities, I'd get enough DNA to get interpretable data.

THE COURT: Well, except when you're swabbing the glove, you really didn't know if you were going to hit on any DNA. You didn't know if you were going to be able to pick up anything. Am I right?

THE WITNESS: Correct. All the cells may be gone.

THE COURT: Because the, whatever DNA that might've been on that glove might've been swabbed up the

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first time around.

THE WITNESS: That's right.

THE COURT: And if you had the vial, you knew that some of the DNA that had been in that vial had already been used up in the previous test; correct?

THE WITNESS: Most of it had been used.

THE COURT: Most of it. So, that right from the get go, you were wary of the fact and guarding against it, you just might have, not have enough left over to come to a level of reliability. Would that be fair?

THE WITNESS: Yes.

THE COURT: Because if you, if you were confident, you would've just, I take it you thought that, you were really then in a position to re-test what the Michigan State Police Crime Lab did because you knew that most of the DNA that they had tested had been used up in the test.

THE WITNESS: Correct. So, I believed if I tested what remained of their original extract, I might not get any data that was above that analytical threshold.

THE COURT: So, you thought you had, probably as you started off, too little in the vial to test,

because it was used up legitimately in the first test; right?

THE WITNESS: Yes.

THE COURT: You're not saying that the Michigan State Police wrongfully got rid of that stuff, it just, it has to be used up in this test, I take it; correct?

THE WITNESS: Yes. They, they set a quantity for their, what they call target amount of DNA to run their analysis to hopefully get all of their data to come not only above the analytical threshold, but above the stochastic threshold, so that it becomes reportable and useful for conclusive association.

THE COURT: Okay.

THE WITNESS: So, their protocol is set to use a certain quantity of DNA from their extract. And it just happened that the quantity of DNA that they needed to run their analysis, used the majority of the sample that they had extracted.

THE COURT: Okay. And by swabbing of the glove, it was only a hope without any real expectation one way or the other, but it was only a hope that you would pick up some additional DNA so that you would have a bunch of DNA sufficient to make a test.

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THE WITNESS: Correct.

THE COURT: All right. Did you swab the inside and outside of the glove for DNA?

THE WITNESS: Yes. I swabbed all surfaces.

THE COURT: By the way --- well, I'll let that go. Does the lack of DNA provided by MSP extracts plus your swab, or swabs sent to Universal directly correlate with inconclusive results? You may have already answered this. I think what the question is, it --- well, I'll just ask the juror's question first. Does the lack of DNA provided by MSP extracts plus your swabs sent to Universal directly correlate with inconclusive results?

THE WITNESS: Yes.

THE COURT: Okay. Do you know what part of the glove was swabbed prior to your receiving it?

THE WITNESS: I do not.

THE COURT: By the way, do you know if the glove that you received was the glove that was swabbed?

THE WITNESS: I assumed that it was because that was my request to the Clinton Township Police Department, that they send the glove, actually I thought it was a pair of gloves, that had been previously sampled so that I could create a second sampling.

Everything I received, as I said, was in one envelope and it was one mostly intact glove, and that envelope did have marks on it and initials from the MSP laboratory. So, I believe it was perhaps only one of two gloves that was sampled by the MSP, but it was one of the pair of gloves that were originally sampled.

THE COURT: Also, what is your procedure for swabbing the gloves?

THE WITNESS: I take two sterile cotton tip swabs that are in a sleeve and remove one first and add sterile distilled water, only a couple of drops, you don't want to have a lot of liquid, you'd want just enough to be able to remove cellular material from your surface. And then after, I swabbed both the inside and the outside with that one swab. I took a, the second swab was dry, and swabbed again, same surfaces, trying to pick up any residual liquid or cellular material.

THE COURT: Okay. I think we've kind of covered this in previous questions, but again, you stated that the Michigan State Lab, the analytical level of seventy five, the stochastical level is seven hundred. What is the Universal Lab's level for each?

THE WITNESS: Actually that's inverted.

THE COURT: Okay.

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THE WITNESS: I believe that the Universal Lab has set their analytical threshold at around seventy five RFUs.

THE COURT: Okay.

THE WITNESS: And their stochastic threshold around seven hundred. The State Police Crime Lab for PowerPlex 16, if I remember correctly, set their analytical threshold at seventy five RFUs and their stochastical threshold around two hundred and fifty for the PowerPlex kit. And then later their testing on the reference sample from Mr. Dupree was done using the fusion kit, and that was, at least the present levels, that has been changed from what they initially set them at, and their present levels I know, are two hundred and fifty analytical threshold RFUs, and nine hundred RFUs for the stochastic threshold.

THE COURT: Do you know if both the State Police Crime Lab and Universal use the same instruments, the same sensitivity level, the same stuff?

THE WITNESS: I do not.

THE COURT: So, is one of the reasons why one lab could differ from another is that they have more sensitive equipment and they have greater confidence in their equipment?

THE WITNESS: It's, it's not really even a matter of confidence, it's just the performance of that equipment. Because you run a number of tests when you're validating the new instrument, or you're validating a new kit, when you change from PowerPlex 16 to Fusion, you run lab prepared samples. And you run a number of them, in various conditions, to determine the performance of your instruments. So, they both have probably the same amount of confidence in their data, but one instrument apparently is more sensitive than the other. And that would be the Universal Forensic instrument appears to be more sensitive than the State Police instrument in that one is set at nine hundred. So, for the State Police to trust that they have all of the data, that the sensitivity of the instrument has created peaks for all of the DNA types that are in this mixture, they set it at nine hundred. It has to exceed that level. And, and my consulting lab uses a lower level. But that is also, as you've already said, somewhat arbitrary. It, it is based on, you know, maybe, all of our tests have shown that we start to get drop out of alleles that don't come above the stochastic threshold in our known created sample at seven hundred, so we'll set it at seven hundred. And then maybe the

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State Police says, well, we're seeing them at seven hundred, but I'm gonna set it at nine hundred, so that I'm being even more conservative in my interpretation of my data.

THE WITNESS: Well, while you were at the Michigan State Police Crime Lab, did you ever think that what you were doing was sub-par or not according to proper standards?

THE WITNESS: No.

THE COURT: Okay. Can repeated swabbing of an item remove enough DNA so that subsequent samples have insufficient DNA for analysis?

THE WITNESS: Absolutely.

THE COURT: Do you think that may be what happened here?

THE WITNESS: Interestingly, because I ran the question sample, or my, my laboratory, Universal Forensics ran with the fusion kit, and the State Police had run in 2014 with the PowerPlex 16, the fusion kit is designed, and the reason they're using it now is it gives you more data, 'cause now instead of sixteen genetic sites, they're looking at twenty four, but it also has built into the chemistry of it, the ability to overcome inhibition from different things so that you

can actually copy the DNA more faithfully, get, get more quantity. So, actually, my data set was very similar in RFUs to what was done on PowerPlex 16, using probably less DNA, but with more sensitivity to this kit for being able to copy it.

THE COURT: Okay. In your opinion, did the Michigan Lab have enough DNA for positive identification when they did it the first time around?

THE WITNESS: Yes.

THE COURT: Okay. And also, this is not from the jurors, this is from me, 'cause I get to ask questions too. I think you said that you agree with the statistical probability that the Michigan State Police had come up with about the quadrillion to one or quintillion to one ratios. Do you remember those ratios?

THE WITNESS: I'd have to look them up, Your Honor. I know that they were, I think in the quadrillions, for the most common type.

THE COURT: Okay.

THE WITNESS: Like a hundred and sixty quadrillion.

THE COURT: Okay.

THE WITNESS: Does that sound right?

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THE COURT: But even if it were one quadrillion, a quadrillion is more than a million; right?

THE WITNESS: Yes.

THE COURT: More than a billion?

THE WITNESS: Yes.

THE COURT: And a trillion would come after that. And a quadrillion would come after that. And then a quintillion after that; correct?

THE WITNESS: Yes.

THE COURT: And each of those are bumped up by ---

THE WITNESS: Three.

THE COURT: --- mathematical powers; right?

THE WITNESS: By three zeros.

THE COURT: Okay. Now, so, again, so, do you take issue at all with the statistical probability of what the Michigan State Police reported?

THE WITNESS: The only issue I would have is in saying that when they originally created their data using PowerPlex 16 and set their thresholds where they did, at that time, had they been able to compare it to the reference sample of Mr. Dupree, they would not have had nearly as many of the genetic sites that would be

used, used according to their own protocol, in that statistical interpretation. So, the statistics, and, and, so, therefore, had they only been able to use, of the thirteen that they used in the statistic in 2016, had they only used those that ex, had exceeded their stochastic threshold, and according to what I know is the protocol of that time, they probably would've only run on the statistical calculation on maybe half, maybe six or seven, of those thirteen sites. And, so, then your number of association would've been one in the millions or billions, instead of one in the quadrillions. Most probably. But because they were doing their comparison later, after they changed their protocol to fit a different kit, the protocol then for interpretation. So, so, I, that's my only issue. Not that I disagree fundamentally that the data is there and that, given what we know now about interpretations and the fact that the thresholds are set the way they are. At the time, in 2014, not being above their stochastic threshold on many of those sites would've had to have of say, said they were not able to make conclusive association as well.

THE COURT: Okay. But, again, you weren't in a position to just re-run the MSP test, because you

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didn't have the same amount of DNA that they did. Is that a fair statement?

THE WITNESS: That is correct.

THE COURT: Okay. All right. Going back to the attorneys, the court asked some questions, the jury asked a number of questions, obviously the attorneys get another round of questions. We go to the defense first, then your questions?

RE-DIRECT EXAMINATION

BY MR. TOMKO:

Q So, one of the assumptions in, in all of your testing was that you get what you get, I, I suppose, because you just got a vial full of stuff from MSP, and you weren't sure if it was from one glove, several gloves, several pieces?

A Correct. I, I really had no information, other than that on the State Police reports it said gloves, plural, so I assumed it was a pair of gloves, which I think on their, again, I'd have to look at the report, but I think their report, in doing their inventory, said a pair of gloves or ---

Q Okay.

A And then what I received was one glove. And I didn't, I don't have, I did not have any information, because it

was collected not by the State Police Lab, the initial set of swabs, assuming there was more than one, there may have only been one swab. But what was collected by Clinton Township PD was not put into the notes or referenced, other than a swab collected from pair of gloves.

Q Okay. And, so, it's possible that the vial that you had and when you, you, you swabbed this glove that you were sent, that perhaps it had no DNA at all.

A No. I know there was some in there because the quantity recovered. I, I had read the worksheet on how much DNA per volume was in that extract tube, and I also knew how much they'd removed for their analysis. So, I knew there was a small, very small quantity of DNA remaining in that tube.

Q Well, possible based on the results of this from major donor, minor donor, different minor donor. We don't know where it would, where that DNA and what the source was; do we?

A No. And, in fact, I may have misspoken in agreeing that Mr. Dupree is the source of the major DNA in the DNA extract that the State Police prepared in that, even with the number in the quadrillions, you can't be certain that you've identified that individual as being

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a donor or the major donor. It just gives you the weight of the association. His types are present and it got that statistical frequency of occurrence that an individual with that, those types would be expected to see, be seen in one out of every, I believe, it was a hundred and sixty quadrillion, African Americans? Was that correct? I should look at the data.

Q Just for ---

A But as an example. Even so, even though it's been dis, debated in the community of forensic science for years and years and the FBI at one time made what they called identification statements, they have since backed off of that. So, a DNA analyst will not say to you, even with these statistics, that this is absolutely proof that this individual's DNA is in this mixture.

Q And, so, back when this test was done back in 2014, the, the thresholds we said, analytic seventy five, and two fifty for State Police. Your lab that you sent it to, wasn't two fifty, it was seven fifty. Seventy five and seven fifty.

A The State Police thresholds of seventy five and two fifty were in 2014 for the PowerPlex 16 kit. It varies from kit to kit as well, because, as I said, some of them are more sensitive because they, they are able to

overcome inhibition and other thing, issues.

Q And, and so, compared to a stochastic cut off of seven fifty, at two fifty, they would say, oh, we can positively identify people at three hundred, three fifty, all --- they would be able, they'd be saying, hey, we can identify more people. Whereas if the seven fifty cut off was used stochastic, that's more conservative.

A It is, but it's designed that, a different kit with a different laboratory, running a different --- even, even the same instrument model within the laboratory, you can see variation between the models of three instruments in the same laboratory. So, those thresholds are set for a certain instrument being used for this analysis, with a certain kit, in a certain laboratory.

Q And since that time, With the kits that they use later, Michigan State Police, they raised that stochastic level and said nine hundred?

A They did.

MR. TOMKO: And that's all I have. Thank you.

THE COURT: Okay. Mr. Prosecutor?

RE-CROSS EXAMINATION

BY MR. LASZCZAK:

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Q You would agree that the Michigan State Police Crime Lab had enough DNA in their first analysis to be able to complete a DNA extraction and analysis; right?
A Yes.
Q Okay. And when you sent yours out, there wasn't enough for Universal Laboratory to come with a conclusory statement; right?
A Yes.
Q Right. But there was enough DNA for you to be able to look at the reports and interpret the DNA that was reported.
A I could look at the electropherograms, which are the chart that's prepared by the software interpreting the data as it comes off the instrument, and interpret them, yes.
Q Okay. And, again, that interpretation did not conflict with the original interpretation that the Michigan State Police Crime Lab did.
A It did not.
Q Okay. Ultimately, it concluded that Mr. Dupree's DNA was present at thirteen of those fifteen locations.
A And that is where I may have misspoken in agreeing to that. I would agree that his DNA types were present in most of the DNA data that was generated from the second

set of swabs combined with the old extract. But I can't be certain it was his DNA.
Q Okay. But nobody else has Mr. Dupree's DNA mixture, other than himself and an identical twin; right?
A Not exactly, if you're looking at all nine billion bases in his genetic sequence. But in terms of his STR DNA types, yes. A number of other people could have the same types. And even though we do create a statistic by extrapolating from frequency data bases of the different types seen at these different sites that are tested, in forensic science, even if you have one in a hundred and sixty quadrillion frequency of occurrence, meaning that one out of only a hundred and sixty quadrillion people would have that combination of types at these thirteen genetic sites that are tested, you can't be certain that there isn't someone else on the planet that would have that same set of DNA types.
Q But logically, we don't have one hundred and sixty quadrillion people on planet Earth; right?
A That is true.
Q We have about, we have about seven billion people; would you agree with that statement?
A Yes.
Q Approximately.

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A I believe we're up to about seven and a half.
Q So, if the statistic is one and, if you're a Caucasian, one in eight point six eight one quintillion, logic tells us that there should only be one of those people on planet Earth, because we don't have quin, eight point six eight one quintillion people present.
A Correct. Although we usually look at the most common of the frequencies. And I believe there was one in the quadrillions. Was it African American?
Q The African American population being one and a hundred and sixty point eight quadrillion.
A Yes.
Q Okay. That ---
A That would be the number we would generally use to say, you know, you look at this many people. Because a conservative --- again, these are not exact numbers, these are estimates of population frequency based on a pretty conservative set of statistical analysis. But we would use the most conservative.
Q Okay.
A But, yes. A hundred and sixty quadrillion.
Q And, I know we're kind of hammering home this whole analytical, stochastic threshold. Just because the numbers are different amongst labs and amongst machines,

doesn't mean one machine or one lab is more accurate than the other; correct?
A Correct.
Q That, all this means is, is that for this machine, for the lab to be confident in their machine's testing, this is what they've set these analytical thresholds at and the stochastic thresholds at.
A Yes.
Q Okay. Thank you.
MR. LASZCZAK: Nothing further.
THE COURT: Okay. May the witness be excused?
MR. TOMKO: Yes, Judge.
THE COURT: Okay. Mr. Leszczak?
MR. LASZCZAK: Yes, Your Honor.
THE COURT: Okay. You're excused. Thank you very much.
THE WITNESS: Thank you, sir.
(At 12:09 p.m., witness excused)
THE COURT: Okay. Mr. Tomko, your next witness?
MR. TOMKO: We need to excuse the jury, Judge.
THE COURT: Okay.

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COURT OFFICER: All rise, please.

(At 12:09 p.m., jury excused from courtroom)

THE COURT: Okay. The door is closed. Mr. Tomko, what would you like to present to the court?

MR. TOMKO: We have no other witnesses to pre, the present. The only question is whether or not Mr. Dupree wishes to exercise his right to testify or to not testify.

THE COURT: Okay.

MR. TOMKO: And with that, I would, I would question him. So, Mr. Dupree, you understand that you have a right to testify in this case.

DEFENDANT: Yes, I do.

MR. TOMKO: Okay. And that's an absolutely (sic) right. We could, no one could stop you. Me or the judge, no one could stop you from testifying, if you wanted to; do you understand that?

DEFENDANT: Yes.

MR. TOMKO: Okay. And alternatively, if you chose not to testify, even ---

DEFENDANT: Let me ask you a question.

(At 12:11 p.m., brief off the record discussion)

MR. TOMKO: And if you chose not to testify,

then, then no one could force you to testify; you understand that?

DEFENDANT: Yes, sir.

MR. TOMKO: And that the jury will be instructed that if you did not testify that that could not be used against you.

DEFENDANT: Yes, I understand.

MR. TOMKO: And with those understandings, and I'd like the, the court or the prosecutor to explain any further, your choice in choosing to testify or not to testify is what?

DEFENDANT: Not to testify.

THE COURT: Okay. I just want to make it clear to you, sir, that the instruction says, every Defendant has the absolutely right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way. So, that will be the instruction that will be given. And that is consistent with what you have told me, that you wish not to testify.

DEFENDANT: Yes.

THE COURT: But I just want to emphasize that the alternate choice is still yours. That if you did testify, you have that absolute right. Obviously

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there's risks in doing that because then it changes the focus from almost every other part of the trial to just whether or not the jurors believe you, because that's just the way that it happens in real life. The focus is on you. But it's one of these choices that you don't get to have any kind of do over. You know, if you're acquitted and happy with the result, you're never gonna second guess this choice that you made. If by chance you are convicted, you'll probably always regret the fact that you did not testify. Do you understand what I'm saying?

DEFENDANT: Yes, sir.

THE COURT: Okay. And now knowing all of that and taking all of your thoughts, your lawyer's advice, my comments into consideration, again, the bottom line choice is yours. I just want to hear from you again, what is your choice?

DEFENDANT: Not to testify.

THE COURT: Okay. Thank you. So be it. I take it, with that, Mr. Tomko, that you rest?

MR. TOMKO: That's correct, Your Honor.

THE COURT: Yes. What?

DEFENDANT: I, I do want to, I, I would just state on the record that I still object to any

alternative instruction when it implies about the Video evidence.

THE COURT: Any what instruction?

DEFENDANT: The, the, the, it was alternative, it was a motion that was file that Your Honor stated that you would give when, when you get ready to instruct the jury. In that, in that motion, it was dealing with the video evidence being exclusive. You denied the, the vid, the, the evidence already, the video evidence, the motion. But at the same time, you said you would wait and see if we still wanted the alternative in, obstruction, objection, I mean, alternative instruction. And I'm not, I'm, I'm objecting to that. I don't want it.

MR. TOMKO: I understand. Judge, Judge, I submitted a, a gave a copy of requested jury instructions to the prosecutor, I'll tender a copy to the court. You're gonna see in there where I have requested a special instruction, this would be ---

DEFENDANT: But I ---

MR. TOMKO: I'll deal with it ---

DEFENDANT: I'm referring to ---

MR. TOMKO: I understand.

DEFENDANT: --- the alternative instruction

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that came with the initial motion.

MR. TOMKO: On, on page two, under special instruction, the instruction I was going to request is that the prosecutor has not offered complete video of the Smokers Only store and as this evidence was under the control of the prosecutor, could've been produced by him and no reasonable excuse for the prosecutor's failure to produce the evidence was given, you may infer that the evidence would have been adverse to the prosecutor's case. That was the instruction that I wish to request and Mr. Dupree does not want the ---

DEFENDANT: But that's, that's not the restrict, instruction I'm referring to. I'm referring to the instruction that the motion that was filed, not this instruction. Is this, is this an alternative instruction?

MR. TOMKO: That's the instruction that would be the result of that motion.

DEFENDANT: That's the instruction? I'm objecting to it.

THE COURT: What instruction are you actually asking for? And you can just phrase it in your own words, Mr. Dupree. What do you want me to tell the jury?

DEFENDANT: I'm, I'm just objecting. In his motion, in the, in the initial motion that he filed to have the video evidence excluded, his, his, one of his motions that he filed to have video evidence excluded, it was an alternative instruction included with that motion. I objected to the alternative instruction. You, Your Honor had already denied the motion to have video excluded, but you waited, you said you would wait and see if later on, if me and Mr. Tomko would still, would like to have the alternative instruction. And I objected to it. That's the instruction that I'm referring to, that's in that particular motion.

THE COURT: Well, this is, in effect, that instruction. I allowed the video to come in with the possibility that I would allow you and your attorney to present to me an alternative instruction ---

DEFENDANT: Okay. Well, I'm objecting to it.

THE COURT: If you're objecting to it then I won't give it. But beyond that, it says here, the prosecutor in this case has not offered the complete video from Smokers Only store. As the evidence was under the control of the prosecutor and could've been produced by him and no reasonable excuse for the prosecutor's failure to produce the evidence was given,

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you may infer that the evidence would've been adverse to the prosecutor's case.

The problem with that instruction is that the evidence, the testimony shows that it was not under the control of the prosecutor. That the police went to the Smokers Only store, could not extract, or could not get the images on a USB drive, and so therefore the next line is also not factually true. It says, no reasonable excuse for the prosecutor's failure to produce the evidence was given. A reasonable excuse, which the jury is free to believe or disbelieve, was given, which is that the police officer could not get the imagines on a USB drive and the prosecutor can't produce that which the police do not retain.

So, the special instruction would probably have been denied anyway, but in view of the fact that the Defendant objects to the special instruction, that won't be given.

Now, with regard to the remainder, you are also asking for an instruction, Mr. Tomko, that Detective Friese and Dana Empsin (phonetic) are missing witnesses whose appearance was the responsibility of the prosecution. You may infer that these witness's testimony would have been unfavorable to the

prosecution's case. Mr. Prosecutor, what's your response to that?

MR. LASZCZAK: Judge, I would object to that instruction being given to the jurors as well. Your Honor, we presented counsel with a witness list, as well as an amended list, witness list. Those two individuals were not part of our witness list. We did not plan on, on calling them as witnesses in this trial. Therefore, all of the witnesses that we gave notice to the Defendant, that we anticipated on possibly using at trial, were provided. None of them were excluded, nor were they ever requested from us to be produced. Counsel has his subpoenaing powers. He had the ability to ask for a specific witness to come in and testify. We've, have not been, we did not hold any of these witnesses from coming into court and testifying. So, Judge, to come at the end of trial and say, and try to kind of, you know, enter around the corner or sandbag that we didn't provide witnesses, and for the jury to hear that, is incredibly prejudicial, nor is it fair. It's not.

THE COURT: Okay. Mr. Tomko, your ---

MR. TOMKO: Yeah. Judge, first Detective Friese. Detective Friese was the officer in charge of

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the case, he was the one that did the investigation, directed the investigation. He's the officer who told, told Detective Bar, or Detective Barbara to only make video of certain parts of this ---

THE COURT: But this is not the 1970s, where the prosecutor has to list and then call or give a reason for not calling all res gestae witnesses. The modern rules are that the prosecutor discloses in discovery everybody would could've been a witnesses, then lists who will, who he or she wishes to call. And I'm told, and I can check the witness list, but I think Mr. Laszczak is right, there's no indication that they ever said to you, or to Mr. Dupree, that they were gonna call Detective Friese, or Dana Empsin. And, therefore, even if you argue that he's the detective in charge, or that somebody's some res gestae witness, they don't have to call them. Right?

MR. TOMKO: Well, then that's their choice. I think that makes a whole other case. Dana Empsin is a little more interesting because she was one of the two people who physically observed any of the people who were involved in the robbery. I discovered again by, you know, the, Detective Collins ---

THE COURT: Then you had subpoena power, you

could've required the prosecutor to produce those people.

MR. TOMKO: And that would be great when we asked for names and addresses and phone numbers and we don't get any addresses and phone numbers of folks, then we're left in a position where we couldn't have them here if we wanted to.

THE COURT: Well, but that's a different matter. Friese and Empsin are not listed, they are, therefore, not witness, missing witnesses whose appearance was the responsibility of the prosecution. So, that jury instruction cannot be given.

MR. TOMKO: Okay. Thank you, Judge.

THE COURT: Any others? Aiding and abetting is being given.

MR. LASZCZAK: Judge ---

MR. TOMKO: There, each of these jury instructions, I have not, I've been handed today the request from the prosecutor. I don't know if all of them are included or not included.

MR. LASZCZAK: Judge, I can tell you the, from ---

THE COURT: Okay. I'll tell you what, just give me a second. The two of you confer so that you can

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figure out what, by agreement, is in or out, and I'll be back to decide any disputes. Give me about three, four minutes. And I'm doing this before, and as soon as we're done with this, we're gonna go to closing argument. Thank you.

(At 12:22 p.m., hearing recessed)

(At 12:32 p.m., hearing resumed)

THE COURT: Okay. We're back on the record in People versus Dupree. The prosecution has given me the verdict form. It looks simple and plain and absolutely correct. Do you agree, Mr. Tomko?

MR. TOMKO: No objection, Judge.

THE COURT: Okay. As is tradition, it has not guilty listed as first choice and guilty as the second choice. So, that looks good. As far as the jury instructions, let's have a short hearing on jury instructions before you have to give your closing arguments so that you can confidently predict what the court will be reading or not. I have the packet from Mr. Laszczyk. So, two questions, I, well, just you tell me, is there any dispute onto, about jury instructions?

MR. LASZCZAK: No, Judge. We powered through the jury instructions and I believe we've come to an agreement that the instructions included in the packet

that you have encompass all the requested instructions.

THE COURT: Okay. Including mere presence is not enough?

MR. LASZCZAK: Judge, we decided that 8.5 does not necessarily fit ---

THE COURT: Okay.

MR. LASZCZAK: --- and therefore will not be included in there.

THE COURT: Okay.

MR. LASZCZAK: Correct, Mr. Tomko?

THE COURT: Yeah. Yeah. No, I see it, yeah, it won't fit. I mean, I understand if he's present, it's consistent with guilt and he's saying he wasn't present at all, so that wouldn't work. Okay. All right. Lastly, as far as the order, the, my set finishes off with definition of a dangerous weapon.

MR. LASZCZAK: Judge, you, that was a, for some reason, the copier did a duplicate. You can rip that off, it's included ---

THE COURT: Okay. So, the last one, 11.19 definition of a dangerous weapon is already included prior to that; correct?

MR. LASZCZAK: It's already included in the body of the instructions, Judge.

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THE COURT: Okay. And, so, the last thing that it looks like I'm telling them is, you may return only one verdict --- oh, so, on each charge? No. Mark only one for each count. There's only one count; right?

MR. LASZCZAK: There's only one count.

THE COURT: Pardon?

MR. LASZCZAK: I said there's only one count, so ---

THE COURT: Yeah. So, take that off.

MR. LASZCZAK: We can 3.24 off.

THE COURT: And, again, that has to be taken off of each and every one of the fourteen copies. Or actually twelve copies now.

MR. LASZCZAK: I only made twelve copies, Judge.

THE COURT: Okay. Twelve is fine. And then while we're here, let's talk about, I think there is two other issues relating to the jury. One is what shall we do about juror in seat number nine? Mr. Tomko has presented a memo saying that it appears to be discretionary with the court if a juror raises a problem during the course of the trial, whether that person should be excused. Of course, this is a little bit different in that we are not excusing a juror midway, we

are just saying that we are going to designate one of our alternate choices for the person who had possibly a potential problem. Mr. --- yes?

MR. TOMKO: Which is the same, has the same affect. If you excuse a juror, you're, or if you call him excused as an alternate, same result. We're ---

THE COURT: I, well, except there's this one different result. When you excuse a juror midway through trial, that person goes home and that cannot participate in further jury deliberations if somebody gets sick. Whereas if they are designated as an alternate, they go home, but with the instruction not to do any research, not to read, not to do anything ---

MR. TOMKO: Oh, that's true.

THE COURT: --- because if it takes more than a couple days and they're needed back, they could still participate. So, there is that slim, but I think, significant difference. So, I guess, well, and let's talk about the other juror. Juror in seat number eight. I can't remember exactly, but I think she's saying that if she's gonna stay on this jury, she can't be here tomorrow, and I don't know if that means tomorrow and beyond because there's a vacation, or just tomorrow and she could be back on Tuesday after the holiday. But I

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guess off the cuff, my preference would be to excuse both jurors in seats eight and nine, 'cause it seems to me to be, to cover the bases for the two jurors who really are best to excuse. But I'm not the trial lawyer, so I'm gonna sit back and listen to what each of you say. Let's take them individually. Let's take number nine first. The defense wants number nine excused, what's the position of the prosecution?

MR. LASZCZAK: Judge, I mean, I know we did a little bit of questioning of the juror. I don't know if we got a full voir dire of that juror to, to determine if it should be an excuse for cause. I've had an opportunity to talk to the chief appellate attorney at our office. Basically, he gave me the same conclusion, Judge, as the opinion in the case that Mr. Tomko gave, that it ultimately comes to the court's discretion. But the bottom line is is that that juror's gotta be able to answer that they can be fair and impartial. So, I don't know if we need to an additional voir dire process and make sure that he can un, take the facts of the case, take the law as you instruct it to him, and use those and only those to determine guilt or innocence and that he can maintain that with a fair and impartial mind.

THE COURT: Okay.

MR. LASZCZAK: Because if he answers yes, Judge, if he says, yes, I can do that and I can be fair and impartial, then he's, then he doesn't meet the burden to be excused for cause.

THE COURT: Yes. So, the question is, do we want to do that? If we did that, do we want to do that with him now, before closing arguments, or after closing arguments?

Hold that in abeyance because this somewhat hinges upon what should we do about juror in seat number eight. Mr. Prosecutor, what's your position on whether juror in seat number --- because, I mean, obviously she could be back again, but we're gonna, if she remains on the jury, as the statistical probability is that she will, then we're gonna delay the deliberations until, well, I guess it would start today.

MR. LASZCZAK: Next week possibly.

MR. HALL: Today and then Tuesday.

THE COURT: So, what do you think? I want your position first.

MR. LASZCZAK: Well, my position on her, Judge, is to just make her one of the alternates.

THE COURT: Okay. Mr. Tomko, agree or disagree?

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MR. TOMKO: Number eight, Mr. Dupree, he, he would wish to retain her on the jury and not just designate her as an alternate. So, he, he and I both understand that she could be back on Tuesday, but, again, she, she expressed a problem with Friday. So, Mr. Dupree ---

THE COURT: Okay. All right. We'll go to closing arguments, we'll see, maybe by happenstance, the luck of the draw, will take care of the situation. If it doesn't then we'll do a separate, on jury number nine, we'll continue a voir dire to find out his bottom line response. And with juror in seat number eight, we'll also call her out separately to find out if Friday means more than Friday. If it means days into next week, then we'll use an alternate designation for her. If it just means Friday, we'll let them deliberate the rest of the day and come back on Tuesday, I guess. Okay. So, with that, are we ready then to bring in the jury for closing argument?

MR. LASZCZAK: The People are ready, Judge.

MR. TOMKO: Ready, Judge.

THE COURT: Okay.

MR. LASZCZAK: Oh, you know what? We'll just queue up the technology first.

THE COURT: Sure. Okay. Yes, make sure ---

MR. TOMKO: Oh, the prosecutor did mention that their, that in, in closing, intended to use a still photo, which was not entered as a separate exhibit. It was one of the stills that was from the video. And, so, that's something a little bit different than what the jury has. They can see it in the video, of course, if they reviewed it, but I told him that I certainly would object to that. It's not entered as a separate exhibit, it's, it's part of an entire video. And, so, for use in closing, I would say, no, we should use the, either use the whole video, but don't use just one little snippet out of it.

THE COURT: And your position on that, Mr. Laszczak?

MR. LASZCZAK: Judge, I will clear that issue up real quick. We're just going to queue the video up and pause it at that particular point. So, there should be no ---

THE COURT: Oh, so, you're just gonna pause it?

MR. LASZCZAK: Correct. So, the, the video's ---

THE COURT: I mean, it's practically the same

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thing, but, again, it's part of an exhibit. It's a continuing exhibit. Each image on that video could be stopped at any time. And, so, I've got no problem, I think it's totally consistent with the rules of evidence to allow an exhibit to be shown or not shown in closing argument, for a video or a movie to be stopped at a frame. It's all part of the same exhibit.

When the Zapruder film was going through the Kennedy assignation it's got a number of frames. I know the technology's slightly different, but it's been fair game for decades to slow down that video frame by frame to see what it shows. In a like manner, it's fair game to show down this video, so ---

MR. TOMKO: Thank you, Judge.

THE COURT: It's an exhibit, it can be used. Okay. Thank you.

MR. LASZCZAK: Thank you, Judge.

THE COURT: Okay.

COURT OFFICER: All rise, please.

(At 12:42 p.m., jury enters courtroom)

THE COURT: Okay. The record should indicate that the jurors have returned. We can all be seated. Mr. Tomko, I turn to you first, are there any further witnesses you wish to call?

MR. TOMKO: No further witnesses. The defense rests.

THE COURT: Okay. Turning to you, Mr. Laszczak, are there any rebuttal witnesses that the prosecution wishes to call?

MR. LASZCZAK: No rebuttal witnesses, Judge.

THE COURT: Okay. We're at that time set for closing arguments. The members of the jury are once again reminded that the statements of the attorneys, even in closing argument, are not evidence. They're merely intended to help you understand how each side views the case. Except unlike an opening statement where the presentation has to be somewhat clinical as to what the evidence might show, the lawyers are now permitted to engage in persuasion and argument. It's their time to not only tell you how they view the case, but to argue their respective sides as to how this case should come out. So, we're gonna hear first from the prosecutor, then the defense will have an argument, and then the prosecutor gets a rebuttal. The Defendant does not get anything to say after that, so if you would be looking for the defense to come up and answer something that was heard in the prosecutor's rebuttal, it's against the rules, it doesn't happen. So, it's just

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gonna hear three arguments; the prosecutor's closing, defense closing, and then prosecutor's rebuttal if they want. Okay. Mr. Laszczak, you have the floor.

MR. LASZCZAK: Thank you, Judge. Judge, is the screen on for ---

THE COURT: Oops. It should be on.

MR. LASZCZAK: Okay. Gotta love technology. All right. So, we finally are at the point in which you guys have probably all been wondering whether we were ever gonna get here. You know, I mean, when we originally started this trial, we told you that, last Tuesday, you'd probably be done by the end of Friday and here we are Thursday, almost a week later. So, I want to start by thanking each and every one of you. I know you guys have been incredibly patient and attentive in listening diligently. And I appreciate that and I thank you in advance, so ---

And one of the things that I talked about during voir dire a lot is this whole reasonable doubt term. And we gave hypotheticals, we gave examples, we gave definitions, and ultimately I tried to paint a picture for you of a puzzle. And I told you that when you would be shopping in the store to buy a puzzle, you look at the front of the box and it tells you what the

picture of the puzzle should be when you go further.

And I told you in this case that the front of the box is going to be a video of an armed robbery that took place. An armed robbery that took place December 15th, 2012 at the smoke shop located in Clinton Township (unintelligible).

And, in fact, you actually got to see one of those pieces of the puzzle. You got to see, or hear, Mr. Zamzami come in and testify to you on what happened that day at his store. And he told you that it was approximately in the early morning hours, he was working in his store, it's a smoke shop, sells cigarettes, tobacco. And that a gentleman, a black gentleman came in, was on his cellphone, was asking him questions about types of cigars and cigarettes that he sold. And then the next thing you know, he had a gun pointed in his, at his head. That two more individuals came in, tied him up with duct tape, dragged him to the back of the room, and they robbed the store. You got to hear that piece of the puzzle. Mr. Zamzami's version of what he, what took place at his store, building that big picture.

You got to see the video from the surveillance footage. The video showing a black male in the store. A video showing two additional suspects entering the

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store; one lighter sk, one light skinned male, heavier set, approximately two hundred and fifty to three hundred pounds. And a thinner black male enter the store. You got to see these individuals, the light heavy set male, go the cash register, pop the cash register, take the money out, pocket it. You got to see to see the other black male take the cigarettes off the shelf, put them in his coat pocket to try and conceal them. And ultimately you got to see the location in which they exited the store, the same door that they entered, the front door. And when you were looking that camera, you saw that they exited the store and they headed in a left direction.

Mr. Zamzami indicates for you that he was able to free himself from the duct tape and ultimately did what any other person would do and they called 9-1-1.

Another piece of the puzzle, the Clinton Township Police Department comes out and Sergeant Terzo indicates to you that she's the officer that arrives at the scene first. One of the first things that she goes is, she indicates to you, that she speaks to the victim, Mr. Zamzami, she gets preliminary information, and then she orders or requests two additional police tools to be present at the scene; an evidence tech and a K-9

tracker.

You heard Deputy Quartuccio indicate to you that he was the closest to the scene, he was there relatively short after the call came out. Another piece of the puzzle that we're building to this armed robbery. He indicated that Baxter, his K-9 dog, is trained in tracking, or tracking humans. He indicated to you that that's exactly what Baxter did. He was presented to the location in which the subjects were last seen, obviously outside the front door. He detected an odor and he continued tracking. He continued tracking to about eighty yards from the front of the store and ultimately hit on a pair of rubber gloves. Rubber gloves that we heard so much testimony about.

Some things to note of about Mr., Baxter, the dog. You indicate, you heard that Detective, or Deputy Quartuccio indicated to you that at no point from the track of the front to the gloves did he, did his dog lose that scent. He did not have, have to recast. What you heard was, when the dog maybe lift his head up and lost the scent, he would then circle it back around to pick that scent back up and continue tracking. But there's no testimony to that. Baxter tracked directly from that door to those pair of gloves.

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Ultimately, the track ended shortly thereafter, by a half wall, next to an entrance to I believe what he indicated was a school off Neil Road.

Again, another piece of this puzzle in place to give you this big pic, picture about an armed robbery.

You got to hear from Evidence Tech Collins, indicating to you that he took a numerous amount of photographs so that you could, along with putting that big picture puzzle together, see the story in which the crime scene was when he arrived. Because crime scene photographs, he takes approximately, I believe, fifty five of these photographs, gives you the broad picture of where he's at, the type of store, the address. Gives you an interior photo, footage, so you can understand what type of store this is, the location of the store, the way things are set up with, inside the store. Gives you a picture of the backroom, how things are scattered about, indicating --- because Mr. Zamzami indicated that these three suspects tried to exit the back of the, the back of the building.

Mr. Zamzami told you that my back of the storage room did not look like the photographs that you see in the, in the, Evidence Tech Collins' photographs.

There wasn't boxes scattered all over, there wasn't stomp marks, there wasn't lottery tickets spewed across the floor.

You also heard that the evidence tech did exactly, as soon as he was notified of the gloves, he went over there, took pictures, he collected them, processed them, bagged them, and swabbed them. All part of an evidence tech's job.

He takes these gloves back to the Clinton Township Police Department to make sure that there's a sterile environment, or as sterile as possible. He gloves up, he uses a fresh sheet of paper, he uses his swabs, swabs the gloves, puts them into a vial, marks them with a property tag number, seals the bag, and puts it into the slam locker.

Now, I suspect that you're going to hear argument that his processing of this scene as an evidence tech didn't meet the standard protocols and procedures that evidence techs maybe are taught or learned. And you're gonna hear that argument through Ms. Whittie's testimony. And interestingly enough, Ms. Whittie got up on the stand and indicated that she would've done things different. That standard protocols and procedures for evidence techs would be different

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when collecting these types of DNA.

Now, she agreed that some of the things that Mr., Officer Collins did was accurate. She said, I would've took this picture, then I would've moved a little bit closer, and I would've took this picture, then I would've moved a little bit closer, and I would've took this picture. And then I would've marked them with placards and then I would've took a picture with all of it, including the placard.

Well, that's interesting because she was an evidence tech with the City of Warren and when I said, asked her specific questions about her previous work, specifically a case in which she was an evidence tech at, not one photo had an evid, had a placard in it on evidence that she was taking photographs of.

She also indicated that Officer Collins didn't take any photo identification picture with Mr. Zamzami and that she would've done that in her case. Well, I asked her, well, that's funny because in this case that you photographed, there was a victim with no photo identification next to it.

She also indicated that, in that case, there was a discharge of a firearm. She didn't complete any kind of DNA swabs. She didn't do any kind of

fingerprint lifting. So, she stood up on the stand and she tried to discredit Officer Collins' credibility as an evidence tech, yet everything she indicated she would've done, she never did in her practice, or at least in that case.

And, in fact, remem, remember, she is here based on being paid as a witness for the defense. And, in fact, she only gets paid if she can find something of evidentiary value that she needs to come into court and testify to. She doesn't find something, she doesn't come to court, she doesn't get paid.

You heard the, Officer Collins indicate that he sent these, put them in the slam locker. Eventually, there rubber glove swabs were sent out to the Michigan State Police Crime Lab, along with a buccal swab of Mr. Zamzami for exclusionary purposes.

Ms. Barylski got up on the stand and indicates that she's a forensic scientist. She specif, she specifically deals with forensic biology and testing DNA. She's been doing it for a number of years. And that she's been in court, testifying, and qualified as an expert many times.

She gave up here, she came up here and she, gave very technical terms and tried to put them into

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plain English meaning, but ultimately indicating that she was able to extract DNA from the rubber glove swabs. She put that into her instrument, where sixteen different genetic locations were detected and analyzed and compared that to Mr. Zamzami's buccal swab DNA analysis. And what did she tell you? He was specifically excluded as a major donor. And he never touched those rubber gloves.

Then you heard from Detective Gilbert and Detective Barbara. There's gonna be argument about, well, you didn't see the whole video, there was never a gun in the video. Remember in voir dire we talked about what is evidence? And all of you agreed that evidence is not only what we see on videos, it's not only what we see through pictures, but it's all, evidence is also, comes from witnesses and their testimony.

So, Mr. Zamzami got up on the stand and told you, I had gun pointed in my face, I thought God was telling me today's my day to die. That's evidence. Mr. Zamzami has no reason to come here today and make the fact of a gun being involved in the robbery up. He doesn't gain or benefit anything by making that up. In fact, I guarantee you, if we would've asked him, he would've preferred there wouldn't have been a gun,

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884- FC

vs.

ROBERTO DUPREE,

Defendant/Appellant.
_____/

Appendix A – Transcripts

FILED by Macomb County Circuit Court
10/9/2018 12:05:55 PM
File Only

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STATE OF MICHIGAN

IN THE 16TH CIRCUIT COURT FOR THE COUNTY OF MACOMB

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. File No. 2015-3884 FC

ROBERTO MARCELLO DUPREE,

Defendant.
_____/

PROCEEDINGS

BEFORE THE HONORABLE CARL J. MARLINGA, CIRCUIT COURT JUDGE

MOUNT CLEMENS, MICHIGAN - THURSDAY, JUNE 28, 2018

APPEARANCES:

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TABLE OF CONTENTS

WITNESSES:

None

EXHIBITS:

None

Mount Clemens, Michigan

Thursday, June 28, 2018

2:08 p.m.

* * * * *

MR. LASZCZAK: Good afternoon, Ron Laszczak on behalf of the People.

MR. TOMKO: And ready, Judge. Thomas Tomko on behalf of Mr. Dupree.

THE COURT: Okay.

THE CLERK: And this is case number 15-3884-FC, People versus Dupree.

THE COURT: All right. Mr. Tomko, have you taken a look at the pre-sentence investigation report?

MR. TOMKO: I have reviewed that Judge. I did share a copy with Mr. Dupree and I did not get the input from Mr. Dupree, he did not wish to speak about the PSI. But as I review the report itself, I reviewed the calculation of guidelines, I have no objections to them.

THE COURT: Okay. And the sentence guideline range appears to be a 135 to 450 months based upon what you believe to be an accurate calculation of the scoring on the guidelines?

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MR. TOMKO: That's correct, Judge.

THE COURT: Okay. And Mr. Prosecutor, do you agree that the guidelines are scored correctly?

MR. LASZCZAK: I do, Judge.

THE COURT: All right. So, in this case, I note however that because this is a habitual fourth involving a listed offense that the Michigan Department of Corrections is recommending a minimum period of 25 years consistent with the statute. So that we have to be talking at least 25 years on the minimum term. Is that right, Mr. Prosecutor?

MR. LASZCZAK: That is correct, Your Honor.

THE COURT: Mr. Tomko, any comment on that mandatory minimum?

MR. TOMKO: Yes, Judge. That mandatory minimum, the, the objection I have is as, as I looked at this and I looked at the mandatory minimum, 25 years is 300 months.

THE COURT: Right.

MR. TOMKO: So, this 300 months, I thought about it and thought about it and I thought, you know, what this really does is it takes away the discretion of the court. And while the similar, the, the issue is, is not the same as, you know, in *Elaine* (phonetic) versus

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U.S., it still raises some, some of the similar concepts, because it sets, it takes away discretion, it sets a mandatory minimum.

And, so, when I looked at this too, I looked at the issue of departures and I looked at, well, you know, we have guidelines, we have departures of the guidelines. Of course, they're not mandatory because of *Lockridge* (phonetic). But when I looked at *Steenhouse* (phonetic), I looked at factors for going above or below the guidelines because we want to have a reasonable sentence.

And, so, as we looked at that, the thought occurred to me is that, well, when we look at departures and, and something different from what the calculated guidelines are, we're looking at things that aren't already included or, or not accounted for in the guidelines.

Our situation today, when we look at the guidelines, what it is already accounting for is prior record variables, not just in general, but, you know, serious ones and non-serious ones; PRV-1 and PRV-2.

And, so, I thought, well, is not a mandatory minimum really a departure or change from these guidelines? And the answer is yes, of course. But is

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also something that's already taken into account in the guidelines? I would submit to the court, yes.

And, so, I would say, well, if it were looked at, if this mandatory minimum were looked at as a request for a departure, then why, why is it that we've already accounted for them in our calculation of guidelines? If, for example, we didn't double consider it, consider it as a PRV factor and consider it as a mandatory minimum, then our guideline range would change. We would have zero points for PRV-1 because of, we wouldn't have the serious felonies. And our guidelines range would jump, would then change to 108 to 180, and with the habitual, 108 to 360.

So, now, the, the guideline range, with a minimum of 300, that means our discretion is now between 300 and 360.

And I know it, it seems like a strained argument because it's something that we don't ordinarily do when we're looking at guidelines, however, when I, I looked at this, I said how on Earth do we get away from this counting something that's already been counted? And what I mean by that is counting as a prior record variable and also then having a mandatory minimum.

THE COURT: Well, wait, I'm not following.

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Look it, I'll put it this way: if, we'll just use some numbers for a sake of argument. If the guidelines showed, properly scored showed that the sentence would be 135 and 240 two months say, then I guess I would at least be troubled by the thought that, although the guidelines called for a maximum of 240, that the mandatory minimum of 25 years comes out to 300 months, and so we would have 60 months more than the guidelines would call for. I could see a possible *Lockridge* argument or other Federal Constitutional argument about a mandatory minimum that exceeds what the guidelines call for.

But if the guidelines call for any sentence as being presumptively proportionate between 135 months to 450 months, the fact that we have 300 months being recommended by the Michigan Department of Corrections, and we're not saying that necessarily would be my sentence, it could be higher, it can't be lower obviously. But I don't see an argument based on *Lockridge* or any other Constitutional argument. Perhaps you could rephrase it so you could guide me better to what you're talking about.

MR. TOMKO: I, I appreciate what the court has explained. The one thing though that's, that's not

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part of, of what the court explained is the way that we get from, to these guidelines, this 135 to 450 ---

THE COURT: Right.

MR. TOMKO: --- we get there because we've already considered high severity felonies ---

THE COURT: Right.

MR. TOMKO: --- under PRV-1. And the high severity felonies are also the reason for having a mandatory minimum.

THE COURT: Oh, I see.

MR. TOMKO: And, so, what I'm suggesting is that, in a way, we're double counting. We're giving him points for high severity felonies and we're saying a mandatory minimum for high severity felonies.

And, so, now we've, we've taken and shrunk our, our discretion. We had 135 to 450, is what's calculated without any mandatory minimum, as calculated using also the habitual offender, because without habitual, it'd be 135 to 225.

So, we've incorporated a number of things. We have a habitual offender and we also have PRV-1 and, on top of it, we're saying that there's a mandatory minimum of 300. So ---

THE COURT: Well, except, go back to what I

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was saying. Is that if, it's not really double counting, it's just saying that of these possible ranges, because of the 25 year mandatory law, that you are telling the court that anything below 300 is not allowed. I just don't see that as a severe restriction on the sentencing judge's constitutional authority because you are still not forcing the judge to go over the guideline score of 450 months. You're allowing a score as low as 300. So, it doesn't seem to me that, although there is an argument that you've articulated, because I mean I understand it, it doesn't seem to me that the restriction that you're talking about even comes close to being an unconstitutional argument based upon separation of powers.

MR. TOMKO: And ---

THE COURT: And I think the legislature can tell trial judges that for certain situations that we need mandatory minimums. We do it in first degree murder, why can't we do it in habitual fourth involving crimes of violence?

MR. TOMKO: And the, the, the difficulty I have is that we want to have sentences that are reasonable and we want to have the court to exercise discretion based on, well, the facts of the case and the

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individual before them. And, so, what we've done if, if we apply both the mandatory minimum and the habitual, instead of 135 to 450, now we're saying it's 300 to 450. We've, we've shrunk that area of discretion.

THE COURT: Okay.

MR. TOMKO: The difficulty I have is that, well, to get there, we have to count things multiple times. We have to count this PRV-1 and we also have to count his habitual and we have to account as a mandatory minimum.

THE COURT: Yeah.

MR. TOMKO: If we eliminated, for example, the scoring of PRV-1, we would, we would change. Instead of 135 to 450, we're now in a 108 to 360 ---

THE COURT: Well ---

MR. TOMKO: --- which now would shrink the discretion between 300 and 360. So, again, by, by virtue of counting things duplicity, we've now created a restricted discretion and a higher sentencing guideline range.

THE COURT: Okay.

MR. TOMKO: And, and if I were to argue, for example, for a departure from the guidelines, say we didn't the, the, the mandatory minimum, I could be

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arguing that, well, we should be down at 135, the lower end, based on different factors and things.

And I would argue things that aren't already included in that. I would argue, oh, perhaps, you know, the, the person being sorry for what they did, taking responsibility, things that may not be taken into account anywhere in the guidelines.

But here, I, I can argue nothing to go below the 300 and yet I've got multiple things that get me to that minimum of 300. And yet it's very different from a depart, it's an upward departure of the minimum with something that's already been considered. If, if I were to forget the minimum for a moment, the 300 minimum, again if the guideline range was 135 to 450, and I then argued something that was already considered in the guidelines, the response would be, well, that's already adequately taken into account in the guidelines, Mr. Tomko, we, we're not gonna consider that. That's what *Steenhouse* tells us.

THE COURT: Okay. But, look it, you can still argue and, because, for this reason, that it might make a difference. I mean, in my sentence I might say I would have given Mr. Dupree a sentence of 180 months if I could've done so, but I can't. And then you would

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have an argument that isn't merely theoretical, it would make sense to an appellate court because you would have a trial judge saying I would've given something less except I feel constrained by the mandatory statute that the legislature passed to give at least the 300 months for the 25 years.

And, so, I will listen to your arguments as to where you think I should fall in terms of a sentence, so that objection can be better preserved. But I will say this, that although your argument is thoughtful, I do not think it is mandated by the current status of the law. And, nor do I find it persuasive as a trial judge, that we have a double counting that is effectively taking away the expression of the trial judge.

And I want you to know that when I was standing in your shoes making similar arguments after *Booker* and *Apprendi* came down, I was really frustrated that Michigan trial judges would not listen to what I thought were reasonable arguments, that you can't be upping the sentences on the basis of things that the legislature tells you or that you can't be going with guidelines that are locked in because that is a violation of the separation of powers.

And, so, I was very resentful of the

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legislature saying that we have these mandatory minimums or that we had scoring guidelines which were mandatorily applied to only be departed when they are compelling and substantial reasons on the record.

Finally, under *People* versus *Lockridge*, after I was out of your end of the business, the Michigan Supreme Court finally saw the light. So, I'm grateful for that because it returned some level of discretion and reason into the sentencing process.

But as much of a fan of *Booker* and *Apprendi* and *Lockridge* as I am, I really am not persuaded by your argument here, but you've preserved it for the record.

MR. TOMKO: And thank you, Judge.

THE COURT: Okay.

MR. TOMKO: I mean, I, stated in a different way, the Sixth Amendment, Fourteenth Amendment are really the, the, the push behind the arguments that I'm making. I certainly wanted to preserve those if there would be a future need.

THE COURT: I understand that. In addition, the Michigan Supreme Court, there are federal constitutional arguments that you raised, I will give you that on the record.

MR. TOMKO: Thank you.

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THE COURT: Okay. Mr. Prosecutor, what's your thoughts?

MR. LASZCZAK: Judge, I would just ask that based on the statute, the way that the guidelines were scored and I'd ask that the court follow the mandatory minimum of 25 years in the Michigan Department of Corrections and I'll leave the rest to the court at this time.

THE COURT: Okay. Any thoughts from probation?

PROBATION OFFICER: No, Your Honor.

THE COURT: Okay. Any further things that you want to say, Mr. Tomko, before we turn to your client?

MR. TOMKO: No, Judge. I think I fleshed out what I needed to say.

THE COURT: Okay. Mr. Dupree, let me hear from you.

DEFENDANT: For the record, I'm requesting that all court costs, fines, and fees be waived. And I'm still proclaiming my innocence and I'll be vindicated on appeal. I guarantee it.

THE COURT: Yeah. I'm taking it into account here, but I know that you once --- oh, no. No, you pled

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no contest in front of Judge Chrzanowski, so you never did give a statement, so that --- so, what you're saying now is not inconsistent. Okay. Anything else that you want to say?

DEFENDANT: No.

THE COURT: Okay. First of all, I will give the sentence and then I'll give the reasons for it. It is the sentence of the court that the Defendant be sentenced to a term in the Michigan Department of Corrections for a period no less than 30 years nor more than 60 years. That's 30 months, I'm sorry, that's 360 months at the minimum to 720 months at the max, with credit for 1,000 days served. He must not have any verbal, written, electronic, or physical contact with Mohamad Zamzami, the victim, either directly or through another person. And you must not be within 500 feet of Mr. Zamzami's residence, school, or place of employment.

You must pay restitution in the amount of $1,700.00 to Mohamad Zamzami as a condition of parole. You must pay $68.00 State costs. You must pay a crime victim's assessment in the amount of $130.00. You must pay court costs of $600.00. And you must pay attorney fees --- Mr. Tomko, what are the attorney fees?

MR. TOMKO: The attorney fees are a little

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different from what they had. $7,349.00.

THE COURT: How much?

MR. TOMKO: $7,349.00 is my bill. I know there were prior counsel and I don't know what their bills are.

THE CLERK: What was your amount again? There's a sheet in there that I put in there.

MR. TOMKO: $7,349.00.

THE CLERK: It's (inaudible), there's like different attorneys listed on it.

THE COURT: The total that I have was over fourteen thousand dollars for all of the attorneys that were listed.

THE CLERK: Specifically, $14,200.00.

THE COURT: How much?

THE CLERK: $14,200.00.

THE COURT: Okay.

THE CLERK: That's divided up as follows ---

THE COURT: Go on. Read it.

THE CLERK: For current court appointed counsel, Mr. Tomko, is $5,825.00.

THE COURT: Right.

THE CLERK: Prior court appointed counsel, Randy Rodnick is $1,200.00. Prior court appointed

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counsel, Adil Haradhvala is $1,750.00. Ken Vernier, $1,050.00. Don Teichman, $1,875.00. And expert witness, Marlene Whittie, was $2,500.00.

THE COURT: Okay.

THE CLERK: Now, Mr. Tomko, in this recommendation, it's $5,825.00. You're gonna grant the $7,349.00 that he's asking for today?

THE COURT: Yes. I mean, there were extraordinary services and a very long trial and so I'll grant the seven thousand amount. What was that again? Seven thousand?

MR. TOMKO: $7,349.00.

THE COURT: $7,349.00 is the amount that's ordered.

There's a separate matter and that is that during the closing argument, Mr. Dupree, after having been examined as to whether or not he wanted to testify and having made a record that he did not want to testify, in the course of closing argument, very knowingly, purposefully, and cynically made an outburst in which he feigned to be crying and was saying, I'm innocent, and so he was trying to induce some sympathy on his behalf, in which was a transparent, rather poor attempt at playacting. But it was obviously meant to

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try to put before the jurors his statement of innocence in a way that would not allow him to be cross examined and it was disruptive of the trial. I told him then that he was found in contempt of court and we would save the punishment until the time of sentence. And for that contempt, he is sentenced to an additional 93 days, that will run concurrently with the sentence of 30 to 60 years. But he's also fined $7,500.00 for being in contempt of court for the purposeful outburst.

Now, the reasons for this sentence is that, first of all, it has to be proportionate. It is proportionate. The guidelines call for any sentence between 135 months to 450 months and the 360 months of the sentence falls within that range, slightly above the midpoint, but it is reflective of the sentence guidelines in Michigan which take into account similar offenses across the State, similar offender characteristics. We trial judges are told that a sentence has to be proportionate, but we can rely upon the guidelines to give us some idea of what a proportionate sentence is. I did not go with the lowest, I did not go with the highest, I picked something above the midpoint, but I do believe that it is proportionate to the crime in which a person was put

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in great fear of his life and was clearly a crime of violence.

Also, I will indicate that notwithstanding the Defendant's protestations of innocence, the evidence was overwhelming, convincing beyond any possible doubt, it was based upon DNA evidence that was recovered not far from the scene of the crime, that was connected to the scene of the crime with a tracking dog, and I'm sure that Mr. Dupree has probably gone over this in his mind time and time again, if he hadn't have ripped off those gloves and left them behind, he probably never would've been caught. Why he decided to leave the DNA evidence behind is a mystery, but on examination and cross examination of the Michigan State Police forensics experts convincingly, to an absolute certainty, pointed out that there's no way that DNA can be cross contaminated so as to falsely produce somebody's DNA. DNA can be contaminated in a way that it can't be tested, it can be contaminated in that there are other DNA samples mixed in with it, but you can't mix one or two persons DNA to come up with a totally artificial, new DNA. And, therefore, it's beyond all doubt that the DNA that was left behind was that of Mr. Dupree. It was found within several hundred yards of where the robbery

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took place and it's connected to the scene of the crime by the tracking dog and the evidence of the tracking dog was received, it was received with a cautionary instruction that juries are given, and the jury still found it to be conclusive.

So, there's no doubt that he is the person who committed this crime.

I would also note that the instant offense occurred on December 15th, 2012, at which time the Defendant was on parole. So, he's not only a habitual offender, fourth offense, this is not only a crime of violence, but the crime actually occurred when he was still on parole, indicating yet another factor why the sentence of the 360 months is proportionate at the bottom.

The Clinton Township Police did not receive verification from the Michigan State Police forensic science division that the DNA collected at the scene matched the Defendant's DNA until October 22nd, 2014, which was after Defendant was discharged from parole, so there was no parole consequence to the fact that he committed this crime while he's on parole. But I cannot be blinded to the fact that as a matter of actual fact, he was on parole at the time that he committed this

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crime. So, at the time, when he was saying I'm, I've reformed, I'm going to lead a different life, I'm going to leave my prior record of felonies behind, I will not commit another crime like that again, he quite contemptuously committed yet another offense of violence, putting somebody's life in peril.

So, those are the reasons why I believe that the sentence is proportionate. I know that, according to the records from an offense of April 30th, 1992 and a conviction on that offense of April 7th, 1995, Mr. Dupree was ordered to spend 12 to 30 years in prison from a sentence dated May 17th, 1995. Obviously the 12 years in prison didn't really teach him a lesson.

And he committed another crime September 3rd, 2005, in which he was sentenced to only one to 20 years in prison. He was again out, discharged from parole on November 1, 2013, but in spite of the long years in prison previously, he just went right back to the commission of another crime, indicating that outside of prison, this man is a danger to society and very unlikely to be rehabilitated. Perhaps with the longer prison term now, he'll come out with a better sense that he has to be rehabilitated.

So, that's the sentence of the court.

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MR. TOMKO: Thank you. Just confirming, Judge, you did grant the credit for time served?

THE COURT: The time served is 1,000 days.

MR. TOMKO: 1,000.

THE COURT: And I will say this also, just add this for the record, that I know that I already previously made a record that Mr. Dupree was very artful in trying to create delays in this trial and at the same time, well, he did those delays by continually insisting on new counsel or finding fault with his previous counsel. And I think we went through four or five attorneys before Mr. Tomko. And, so, he was playing the system in this regard, that he would complain about his right to a speedy trial, but then he would make a speedy trial impossible by either firing or not cooperating with new counsel. So, the new counsel would stay on for a time, he find fault with them, or find some way to cause them to have to withdraw, which would then set up a further delay, which then further buttressed his claim for a denial of his speedy trial rights. And he played that game for quite some time.

Again, just as his outburst in court when defense counsel was giving closing argument, it was a calculated and rather transparent move. It did not work

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and I just placed this on the record to indicate that, once again, his ploy was rather transparent and not successful.

But in trying to make a determination as to what is proportionate, I've reconciled myself to the sentence that I did give and not anything higher for this reason. Mr. Dupree is a smart man. He knew right from the start that he was facing the 25 year mandatory minimum. That's the reason why the plea in front of Judge Chrzanowski fell through. And, so, I kind of put myself in his shoes, I guess I would do the same thing. That I would try every ploy possible to avoid a long prison term, including firing counsel, not cooperating with counsel, raising speedy trial objections. And I really can't fault him for that. I mean, the man's entire life was at stake and, so, in spite of the fact that it was annoying at times, I guess at this point, I understand it and I decided not to add any more time, whether it be months, years, weeks, or even minutes for that because that is understandable. I understand why he did it and, so, I've not decided to add any further time to his sentence because of his tactics during the trial. Thank you very much.

MR. TOMKO: Thank you, Judge.

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MR. LASZCZAK: Thank you, Judge.

(At 2:36 p.m., hearing concluded)

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STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

CERTIFICATE

I, Rebecca A. Russell, Certified Court Reporter in the State of Michigan, do hereby certify that the foregoing pages, 1 through 25 inclusive, comprise a full, true, and correct transcript of the proceedings taken by means of video recordation without the benefit of a court reporter present in the matter of the People of the State of Michigan versus Roberto Marcello Dupree, file number 2015-3884-FC on Thursday, June 28, 2018.

I further certify that I, Rebecca A. Russell, will assume no responsibility for any events that occurred during the above proceedings for any inaudible responses by any party that are not discernible on the video of the proceedings.

/s/Rebecca A. Russell

REBECCA A. RUSSELL, 4105
Macomb County, MI

Mount Clemens, Michigan
DATED: 10-5-18