STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

PLAINTIFF,

vs.

STEVEN A. AVERY,

DEFENDANT.

JURY TRIAL
TRIAL - DAY 22
Case No. 05 CF 381

DATE: MARCH 13, 2007

BEFORE: Hon. Patrick L. Willis
Circuit Court Judge

APPEARANCES: KENNETH R. KRATZ
Special Prosecutor
On behalf of the State of Wisconsin.

THOMAS J. FALLON
Special Prosecutor
On behalf of the State of Wisconsin.

NORMAN A. GAHN
Special Prosecutor
On behalf of the State of Wisconsin.

DEAN A. STRANG
Attorney at Law
On behalf of the Defendant.

STEVEN A. AVERY
Defendant
Appeared in person.

****

TRANSCRIPT OF PROCEEDINGS

Reported by Diane Tesheneck, RPR

Official Court Reporter

(Jury not present.)

(Jury instruction conference.)

At this time the Court calls State of Wisconsin vs. Steven Avery, Case No. 05 CF 381. We are here this afternoon to conduct the jury instruction conference and address a few other matters that still require the Court's attention. We're obviously not in the presence of the jury at this time. Will the parties state their appearances for the record, please.

ATTORNEY FALLON: Good afternoon, your Honor. May it please the Court. The State appears by Assistant Attorney General Tom Fallon, District Attorney Ken Kratz, and Assistant District Attorney Norm Gahn, as Special Prosecutors for Manitowoc County.

ATTORNEY STRANG: Good afternoon. Steven Avery is present in person. And Dean Strang appears on his behalf. I specifically want to note that the defense thinks it proper to have conducted a discussion in chambers, informally, about jury instructions before this. I participated in that willingly. I did not ask to have my client present. I do not think he was required to be present as a matter of the Sixth Amendment or the correlative

provisions of the Wisconsin Constitution. As far as I'm concerned, it is not an issue.

THE COURT: All right. And as a follow-up to that, I will indicate for the record that the -- counsel for both sides and the Court met in chambers this morning to conduct an informal instruction conference. Agreement was reached on some matters. Some matters are still outstanding.

At this time the Court is conducting the formal jury instruction conference. And along those lines, Mr. Strang, I should ask, I don't know if you had a chance to address the subject of jury instructions with your client, but if you would like to request some time to do that, I will take a recess to permit you to do it.

ATTORNEY STRANG: I haven't done it. I don't see a need to do it. If Mr. Avery has a question, I think he knows he always can ask me.

THE COURT: All right. Why don't I do this, I will stay here, but I will go off the record for a couple minutes. I want to make sure you at least have a chance to talk to him about it before we proceed any further, because normally I do allow, and it's true, often, that the defendant doesn't choose to participate directly in the discussion

because it's legal concepts that perhaps aren't that familiar with most defendants.

But I think it's important to at least give the defense counsel a chance to speak with the defendant. So we're going to go off the record for a couple minutes.

(Brief recess.)

ATTORNEY STRANG: We have talked a little bit. Mr. Avery, I think, understands why I didn't suggestion he participate in the informal discussion of jury instructions and he knows that we are going to cover the same ground here this afternoon and your Honor will make the final decisions on jury instructions on the basis of what we do here in court.

THE COURT: Very well, I will indicate at this time that I distributed to each parties -- each party a set of proposed jury instructions that, in many cases, take into account matters on which the parties indicated agreement earlier this morning. Rather than read the instructions in their entirety, I'm simply going to ask each counsel to acknowledge on the record that they have received a copy of the proposed jury instructions which, red lined is the term typically used, but I have highlighted, in

shaded form, modifications which the Court has made to the original draft of jury instructions, which the Court gave to the parties. Mr. Strang, have you received a copy of the latest update?

ATTORNEY STRANG: I have the March 13, 2007, red lined draft copy of jury instructions which runs onto a 14th page, in my sight.

THE COURT: And, Mr. Fallon, have you received them?

ATTORNEY FALLON: Yes, Judge, on behalf of the State, we would acknowledge receipt of that very same copy, did briefly examine it prior to going on the record and it appears to conform to what our preliminary discussions resulted in.

THE COURT: All right. And I should indicate I inserted the shaded provisions in order to draw attention to changes that have been made from the earlier draft. Obviously, the final set of jury instructions will not contain any red lining of any form because a copy of the full set will be given to each of the members of the jury. Let me ask, at this point, on behalf of the State, Mr. Fallon, are the jury instructions, as they have been submitted, acceptable to the State?

ATTORNEY FALLON: Well, they are

acceptable, although, we did -- wanted to be heard briefly, I think, on an argument relative to a theory of defense. But in terms of the other matters which are set forth in this second draft of -- dated March 13th, we are in full accord.

THE COURT: All right. I will hear you with anything you wish to say about the theory of defense instruction that's found on page five of the draft, at this time.

ATTORNEY FALLON: Thank you. In an effort to succinctly get to the point, we do not believe that the theory of defense instruction submitted by the defense is one which is appropriate for submission to the jury. We do so, not because we think the defense is not entitled to such a theory of defense instruction, but only in so far as the theory of defense instruction submitted by the defense, we do not believe is sufficiently and solidly based in the evidence which was presented during the course of the trial.

And as such, we do not believe that the instruction should be given to the jury, that there's not sufficient evidence in the record from which a reasonable juror could come to the conclusion that there has been some planting of

evidence, that there has been evidence of a frame-up involving members of law enforcement and, now, apparently some unknown other person, or persons.

And as such, the evidence, we think, is deficient and invites speculation and conjecture on the part of the jurors. And we would ask that the instruction not be given because we do not believe it is based in the evidence presented.

THE COURT: Mr. Strang.

ATTORNEY STRANG: The Court's version of the theory of defense instruction on page 5 has its origins primarily in defense proposed Jury Instruction No. 9, submitted on March 10. I think for purposes of jury instructions, the theory of defense instruction that we tendered as No. 9, meets the three criteria for a Court in deciding whether to instruct a jury on any point of law.

There is -- This is an accurate statement of law and I don't hear the State to contend otherwise. The matter is not otherwise covered in the Court's proposed jury instructions. Again, I don't hear the State to contend otherwise.

And there is at least some evidence

which, if accepted by a jury, reasonably would allow the inference and the conclusion that Mr. Avery was not the person. If someone did, he was not the person who killed Teresa Halbach, or burned her body, and that others, instead, did and took actions to make it appear that Mr. Avery was guilty.

I'm don't -- I'm not going to go through the entire trial, but I think the evidence more than supports a reasonable jury in drawing that conclusion from the evidence, if the jury wishes. And that's why this is called a theory of defense instruction and that's why there are also theories of prosecution. A jury may or may not choose to accept one side's theory or the other.

But there is an adequate evidentiary basis for the instruction as submitted, No. 9. It should be given. I agreed further to modifications of No. 9, defense proposed No. 9.

The Court's modifications set out here on page five of the red line draft of instructions is acceptable to the defense. And if the Court gives the theory of defense instruction as now worded in this red line instruction, I will accept the modification of

defense No. 9.

I also, again, on the express predicate that the Court gives the theory of defense instruction as set forth here, am prepared to withdraw defense proposed Instruction No. 1 and defense proposed Instruction No. 2. Those are more specific refinements.

I recognize that I could not satisfy this court or an appellate court that the general theory of defense set forth here by the Court did not otherwise cover the matters suggested in No. 1 and No. 2 as proposed by the defense. So I would withdraw those, if the Court gives the theory of defense instruction as set forth on page five of today's draft.

THE COURT: Thank you. As I indicated to counsel in chambers, the -- as a prerequisite to a theory of defense instruction, there is a requirement that there be evidence in the record to support the giving of the instruction.

The case law suggests that the quantum of evidence that is required in order to justify the instruction is very low. There's a Seventh Circuit Court of Appeals Case, ***United States vs. Bole***, B-o-l-e, Case No. 435 F 2d, 774, which I

believe uses the phrase, however tenuous, there must be evidence to support the instruction. So the quantum of evidence that the defendant must demonstrate is not very high.

The Court believes and, again, I'm not going to go over the evidence myself either, but the defense has introduced circumstantial evidence to support its theory of defense. The defense is not required to meet the beyond a reasonable doubt standard that the State must meet in order to prove guilt. And the Court concludes that there is sufficient evidence in the record to justify the giving of a theory of defense instruction. And it's my understanding that if the decision is made to give such an instruction, that the form on page five is acceptable to both parties, recognizing the State opposes the giving of the instruction in any form.

Is that correct, Mr. Fallon?

ATTORNEY FALLON: That would be correct.

THE COURT: Okay. Does the State have any other modifications to propose to the jury instructions?

ATTORNEY FALLON: We do not.

THE COURT: Mr. Strang, before I ask you to address your other requested instructions that are still at issue, I did want to confirm that the defense is requesting that the Court give Instruction 315 relating to a defendant electing not to testify. That's an instruction the Court is directed to give if the defendant requests it.

ATTORNEY STRANG: I am requesting Pattern Instruction 315, and as worded on page 12 of today's red line draft, it is acceptable to the defense.

THE COURT: All right. The Court will include 315, then. And it's also my understanding, Mr. Strang, that although the defense has other proposed instructions to offer, that there's not a dispute about the instructions that are already in the draft. Is that correct?

ATTORNEY STRANG: That's right. That's right and wrong. I will be arguing that some additional defense instructions should have been included but, you know, subject to that argument, the wording of the draft I have in front of me is acceptable.

I will make an extemporaneous suggestion, and suggestion only, that Pattern Instruction 58, as modified, and that appears

near the bottom of page 8, might -- might be better moved to either page 12 or page 13, either right before or right after the 460, the closing instruction, just as a matter of flow. But that's -- that's a suggestion only. It also could go right after 103 on page 1 or page 2. It looks, to me, out of place where it is on page 8, but that's, you know, a suggestion, at most.

THE COURT: All right. My logic in placing it there, and keep in mind that it's actually part of the opening instructions that the Court typically gives, it's not always included in the closing instructions. But since it relates to information about the case that the jury might request to see, I placed it right after 155, because 155 addresses a somewhat similar issue as it relates to requesting that exhibits be sent to the court -- or to the jury room, and pointing out to the jurors that the exhibit is received, whether it goes to the jury room or not. But I don't have particularly strong feelings about its placement. I don't know how the State --

ATTORNEY STRANG: That's a pretty good rationale and I'm going to accept placement wherever the Court thinks it best. I just thought I would

offer the suggestion.

THE COURT: All right. I also think, with respect to 315, which is the last instruction the Court gives before the closing instruction, I think its placement, as the last thing that the jury hears before the closing, is deliberate, probably in recognition of the importance of the defendant's right not to testify. At least that's the way I have always interpreted it. And I hate to take that away from the defense, unless the defense feels otherwise --

ATTORNEY STRANG: No, I'm in complete agreement with the Court on that.

THE COURT: All right. We'll then move on to the instructions that were requested by the defense, that are still part of its request. And as I understand it, No. 1 and 2 have been withdrawn, so that takes us on to proposed Instruction No. 3, relating to chain of custody.

ATTORNEY STRANG: Yes, your Honor, 1 and 2, which are in the March 8, 2007, submission, are withdrawn. No. 3 is not withdrawn, although, as I suggested, informally, in chambers, I readily would accept a substantial modification of this instruction.

The nub of the legal point that I wish communicated to the jury is that the Court's decision to admit an exhibit, as opposed to admit testimony of a witness, the Court's decision to admit an exhibit says nothing about the weight that the jury ought to give the exhibit, or any other exhibit. And so the concept I want to capture is the same one that the legislature captured in Section 909.01 of the Wisconsin Statutes.

It's the same concept that the legislature drives at in Section 901.04 of the Wisconsin Statutes which, you know, concerns preliminary determinations of admissibility, conditional admissibility; 901.03 may be another Wisconsin Statute that goes to the concept that, determining something admissible doesn't mean that the exhibit is what the proponent claims necessarily, just means that a jury so could find, reasonably. And it doesn't mean anything about the weight. The Court hasn't passed on the weight of an exhibit by admitting an exhibit.

Why does it matter here? Well, we have got 501 marked exhibits. Almost all of those have been admitted. It's just a handful or two,

I don't know the precise number, but it's a small number of the marked exhibits, that were not also received by the Court. Much of the physical evidence here is hotly disputed in terms of its meaning, its importance, the weight that ought to be given to it.

And, you know, I don't think the instructions, otherwise, cover exhibits very well. It is true that Pattern No. 148 refers to other evidence, but there remains some ground that can be covered and should be covered, quickly an uncontroversially, within the scope of defendant's proposed Instruction No. 3. So that's my argument there.

I overlooked one point that I want to go back to, if I may, while I'm thinking of it, in the Court's red line instructions. And that is at page 6. It's the last paragraph in the instruction on elements of the crime of felon in possession of a firearm.

Now, we have stipulated the truth of the second element, so the State need not prove, did not need to offer evidence to establish the second essential element of the offense of felon in possession of a firearm. It's established by

stipulation. I think -- and I can't cite a case, because I can't call it to mind and I haven't had time to look at it -- but I think there is constitutional authority that, not withstanding a stipulated element, the Court still not -- may not instruct a jury that it must accept an essential element of an offense as conclusively proved.

It is clear to me that the Court may instruct a jury that it may accept the second element in this offense as conclusively proved. And, again, the element is not in dispute. But, ultimately, this goes to the fundamental role of the jury, as the finder of facts and the ultimate arbiter of whether a person will be convicted of a crime.

And I wish I had a case to cite or the source of the authority. But I just -- I have the sense that must accept a stipulation as an element goes one half step too far. And I just -- I wanted to alert the Court and counsel to that potential constitutional infirmity in the instruction, if I'm right.

The element remains stipulated. We're not going to argue it. You know, we're not going

to argue to a jury that it's not proven. We're not backing off the stipulation. A jury certainly may and should accept that stipulation. I just don't know that the jury must, as a matter of the right to a jury trial.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Ordinarily, I would say that counsel might have something that's worth our concern here. But I think first and foremost, when the issue is not in dispute, that, for all intents and purposes, I think, moots out a concern regarding the language choice between must and may, in terms of accepting that particular element of fact.

Secondly, there is a common sense perspective here, and that is, if the issue is not in dispute, it's as if the element is not there. It's not part of the crime, because it's not a matter, in which case there's nothing for the jury to consider on that particular point. So, why create an issue with the language choice, when there is no issue to be had. So I think, from that common sense perspective, this is a concern that we need not spend more time on than it's duly noted.

And, by the way, and third, it is the

language that is the proffered choice of the Jury Instruction Committee.

THE COURT: All right. I hesitate to speak from memory about cases that I haven't read in years, but I do recall that this matter came up before, I think it was the ***Villarreal*** case or ***Villarreal***, however it was pronounced, where the court required -- or the appeals court required that a personal waiver be taken from the defendant, as opposed to a stipulation by the parties, because it involved an element of the offense.

The language that the Court is using is from the form instruction and I believe it is used deliberately and this is why I believe it is used in that fashion. By stipulating to the element, that is, the defendant personally stipulating to the element, the State is precluded from offering any evidence to the jury as to the defendant's status as a felon.

If the Court gave a jury instruction that said simply that the jury may accept the fact that it's conclusively proved, that would indicate that the jury has some discretion in the matter. And if the jury had some discretion in the matter, it would seem to be unfair not to

allow the State to introduce some evidence to try to put any question the jury might have, out of its mind.

So that the Court -- As I understand it, that's the trade off. The benefit the defense gets is that the State is prohibited from introducing any evidence regarding the defendant's status as a felon. But it would seem to me that to reciprocate for that, the State shouldn't be in a position where it might be penalized by being prohibited, on the one hand, from presenting evidence, and having permissive rather than mandatory language used so that the State -- that the jury could still find against the State.

So I think the language of the Pattern Instruction has been time tested and I think there is a reason for it, so I'm going to leave the pattern language as it is.

Mr. Strang, you may continue.

ATTORNEY STRANG: Thank you. Defense proposed Instruction No. 4, I was persuaded to withdraw --

THE COURT: Just a second. Actually, you finished your argument on No. 3, but I don't know

that I heard back from the State. We kind of got diverted by the other language.

ATTORNEY FALLON: Right.

THE COURT: So, Mr. Fallon, what's the State's response to defense proposed Instruction 3?

ATTORNEY FALLON: Thank you. Our position, in a nutshell, is that it's unnecessary. And it is unnecessary because we think, if you take all of the instructions in toto, it answers the questions, concerns of the defense. Specifically, counsel referred to Instruction 148. I would draw the Court's attention to the remaining -- the last couple of sentences in Instruction 148.

Again, you have Instruction 155, about exhibits, you also have Instruction 300, about credibility of witnesses. And while I may be prepared to concede that I can conceive of a situation in which an item of evidence, all by itself, so physically significant and conspicuous, such that this instruction may have some -- requested instruction may have some merit or some weight, the evidence in this particular case, given the fact that this is a circumstantial evidence case based on powerful scientific evidence, that significance was all

presented in the context of testimony from the witnesses.

And because of that, coupled with the Instruction 148 on objections of counsel and receipt of evidence over objection, the definition of evidence, the definition of exhibits and, finally, I think the instruction that the Court gives, that you tell the jurors, if I have given you any impression as to what I think the results should be, or the significance of the evidence, and I'm paraphrasing, admittedly, then you should disregard it and trust your own interpretation, your own memory and come to your own conclusions in this case.

And I think when you we're looking at something like this, you have to take the instructions as a whole, and in their entirety, to evaluate the evidence. Because, otherwise, we could have a list of jury instructions that would go a hundred pages. I mean, you could come up with an instruction for virtually every circumstance that occurs in a trial.

And I just do not believe that was the intent of the drafters of the model instructions. And as such, I think the instructions, as a

whole, deal with the issue that they raise in their proposed Instruction No. 3. So it is unnecessary and that's our basis -- basis for denial.

ATTORNEY STRANG: Brief reply, because we went around and around about this in chambers and the Court posed a very good question on when would there ever be an item of physical evidence that had significance, independent of the testimony about it, which I really thought was -- really -- I thought it was a fascinating jurisprudential, the question in the end.

And the thought finally occurred to me, over lunch, and this goes all the way back to Dean Wigmore. And I don't mean Wigmore in evidence after other people took it over, I mean Professor and Dean Wigmore when he was alive and what he described as an autoptic proference. And the classic example he gave was a knife with dried blood on it, an item that was so powerful, in and of itself, that its significance was carried in its presence and its physical quality.

And we have something pretty close to what Dean Wigmore would have called an autoptic proference here in, for example, a flattened

bullet fragment found in the garage, a Toyota key found in the defendant's bedroom. Again, this was 1880 and 1890, when people were having these arguments, but I simply think that the concepts covered by the -- the three statutes I cited on admissibility as a preliminary question and authentication. And the basic concept that admissibility does not determine weight is something that the instructions don't otherwise cover and should be.

THE COURT: All right. Well, as counsel indicated, the Court and the attorneys had a fascinating, academic discussion in chambers this morning about whether or not there might be some piece of physical evidence that would warrant some instruction in addition to the standard instructions that are given in all criminal cases.

I indicated that I did not feel that this case presented that type of situation. Taking exhibits, for example, such as the Toyota key, certainly as it's been offered by the State, the State may well argue that that's a significant piece of evidence against the defendant because it was found in his trailer and alleged to contain his DNA.

On the other hand, the defense, I don't think I'm anticipating too much here, will no doubt argue in its closing that if the key had been in the defendant's trailer some time before the last time he left it, one would have expected that it would have been found before it was, as the trailer was searched on a number of occasions.

So -- And all of these conclusions relate to testimony that was received from various witnesses. In some cases, I'm sure the State -- or the defense will be relying on evidence from the State's witnesses to support its argument.

But I think that that situation demonstrates that this particular case doesn't seem to suggest that there is any piece of physical evidence that, by itself, is capable of only one conclusion and one conclusion only, and that somehow by not giving further instructions, which would risk appearing as though the Court were commenting on specific pieces of evidence, something that the Court tries to avoid, and I believe I'm directed to try to avoid, I just don't see that it's necessary. So the Court is

going to decline to give an instruction along the lines of that suggested by the defense in its proposed Instruction No. 3.

Next, we move on to defense proposed Instruction No. 4. Mr. Strang.

ATTORNEY STRANG: Yes, thank you, your Honor. That's the one I started to say, I think that I was persuaded in chambers, and remain persuaded, that is a topic adequately covered by Wisconsin Pattern Criminal Jury Instruction 300. And that Pattern Instruction 300 gives adequate legal support for an argument the parties may want to make. And I withdraw No. 4 for that reason.

No. 5 has been modified. And as modified, incorporated into the Court's red line draft today. The modification is acceptable to the defense. And provided the modification, on experts and the jury not being bound to accept an expert's opinion, remains in the final instructions, I'm pleased to withdraw defendant's proposed Instruction No. 5.

Defendant's proposed Instruction No. 6, also I view as having been modified and incorporated into the Court's red line draft today. I accept the Court's modification. And

assuming that remains in the final jury instructions to be given in this case, I would withdraw anything more from defendant's proposed Instruction No. 6.

Defendant's proposed Instruction No. 7, I understand the Court to be inclined to deny. It concerns the general topic of spoliation. I do not withdraw this instruction and I ask the Court to reconsider its position.

I want to recognize, if for no other reason than that one always ought to recognize the obvious, that the United States Supreme Court has spoken to an issue related to spoliation in the due process context, though, not in the context of an adverse inference that a jury might be invited to draw, but not required to draw.

The Supreme Court decisions, the leading decisions are ***Arizona*** against ***Youngblood***, earlier discussed in this trial, I think as recently as yesterday. And ***California*** against ***Trombetta***, also discussed in this trial. I understand and recognize, as a matter of due process, only bad faith destruction of evidence material to innocence or guilt results in a due process remedy for the defendant, dismissal of charges,

or suppression of other evidence.

Here, I'm interested instead in an adverse inference. Evidence has come in, evidence can come in, consistent with the due process clause, if the Court is right about suppression rulings that it has made.

But the question here is what inferences should be available to the jury and should the jury be informed are in the array of choices as a matter of law. And the State here, there's more than adequate testimony to show that the manner in which the State recovered bone fragments could have led to destruction or loss of those bone fragments. The failure to photograph could have led to human remains not being recognized or recovered at all at the scene.

And by volume here, Dr. Eisenberg testified that she thought she only had about 40 percent of a complete human skeleton. So the possibility that remains were not recognized and recovered at all is real and reasonable on this record.

We also had the proffered testimony of Deb Kakatsch, the Manitowoc County Coroner, excluded by the Court on the State's motion, and

over our objection, that would have gone to the prospects for a more successful recovery of human remains, with the assistance on the scene of a forensic anthropologist and a forensic pathologist.

So, where the record would support an inference that material evidence, that is, human remains, may have been destroyed or not recovered at all, because of the means employed by the State, an adverse inference ought to be available to this jury for spoliation. And it ought to be available on the same standard it would be in a civil case. The criminal accused, the person accused in a criminal case, surely can't be at an evidentiary disadvantage when compared to a civil defendant arguing over liability or money.

I think, here, that the actions to which Special Agent Thomas Sturdivant testified, were deliberate in the sense of intended actions chosen as a matter of free will from the options that Mr. Sturdivant saw available to him. I don't contend that Special Agent Sturdivant acted in bad faith. I'm not going to argue that he did.

Although, of course, the good or bad

faith of any witness is for the jury to decide in the end. But I don't think we have to show bad faith and evil purpose, or motive, to establish that actions are deliberate or intentional simply in the ordinary sense of not being accidental or involuntary.

So, for those reasons, I think the Court should give something like defendant's proposed Instruction No. 7. I always would consider some modification, if the language is clumsy, or overstates the point. But I have not heard either the State or the Court suggest a willingness to modify Instruction No. 7. And so I advance it with the proviso that I have just added.

THE COURT: All right. Before I turn it over to the State, I do have one question. I'm having trouble determining the other inference that might be drawn if the bones had been collected in a different manner. It's my understanding that -- I don't know that any of the experts disagreed with the fact that the bones were those of one human being, that the forensic dental information identified the human being as being the victim in this case or that the -- I think that Dr. Fairgrieve

said something about the effect that as if it had been like an intact skeleton that was just burned in one place and stayed there, perhaps he could tell where it was burned.

ATTORNEY STRANG: Now, the Court is going to the point. A core point of Dr. Fairgrieve's opinion is that we will never know where this body was burned because of the manner in which the recovery was undertaken. The absence of photographs and the absence of the careful approach to the recovery.

And he described what a proper recovery approach would have been in the view of -- in his own view as a forensic anthropologist. And as he said, we don't know. One of the reasons we don't know, and will never know, in his view, where the body was burned, is because of the manner of recovery.

Now that can cut both ways. But it's an issue material to guilt or innocence. That is, it is quite possible to hypothesize that, had the recovery been done properly here, Dr. Fairgrieve or Dr. Eisenberg would have been able to give a professional opinion, to a reasonable degree of certainty within the field of anthropology, that

the area behind Steven's garage was not the site on which this body was burned, originally.

That clearly would suggest, it wouldn't be conclusive but it would suggest, Mr. Avery's innocence. Since it's a lot less likely that he would have brought bones to a place more closely associated with him, if he had burned them at a more distant place.

It's also possible that a better recovery would have allowed one or both of those experts to conclude that the area behind Mr. Avery's garage was, in their professional opinion, the site of the cremation or incineration. That would have tended to strengthen the State's argument for guilt for the reasons conversed as those I just suggested.

But either way, it's material to guilt or innocence. And because we don't know and because the recovery was the State's effort here, the adverse inference should be available, although, of course, not forced on the jury.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Thank you. I couldn't agree -- disagree more with counsel, and I come up with at least six reasons why this instruction

should not be given. First of all, counsel says, well, we don't know where the other 60 percent of the remains are. Well, that may be true, but it seems to me the most logical, the most plausible, the most reasonable explanation is that they were consumed in the fire.

Secondly, Dr. Eisenberg did testify, and this is uncontroverted because Dr. Fairgrieve didn't bother to look at the bones. And she found no evidence of breakage, spoliation, or damage to those bones, after they were exposed to the fire.

Third, the manner of recovery, counsel cites, would lead one to logically infer that this instruction should be given. But there's another explanation as to why the remains were found the way they were and why such an opinion that counsel wishes could have been expressed, may not have been able to be expressed, in any event. And that is, the manner of recovery should be juxtaposed with the manner of incineration.

The State's theory is correct and accepted by the jury. It wouldn't have mattered if that was a funeral pyre which was being

attended to, where its fuel load was constantly being adjusted and that the remains of the person in the fire were constantly stirred up and exposed to the heat, flame and temperatures, such that we only have 40 percent, roughly, of the remains. So there are plenty of plausible explanations which support the theory that it would not have mattered.

Finally, third, reference to a witness' testimony is excluded offers us no help whatsoever.

Fourth, the ***Neumann*** standard clearly states that spoliation inference instruction should not be given in the absence of clear, satisfactory, and convincing evidence that the party intentionally, deliberately destroyed evidence, mere negligence does not suffice. And on that standard, we're woefully short.

And, finally, there is the common sense argument for rejection of this and it is also based on the evidence in the trial. Is it not more likely that that was the place of Teresa Halbach's final remains, when it is but a few feet away from the spot where she was last seen alive? So for all those reasons, we think the

spoliation instruction must be rejected out of hand. Thank you.

THE COURT: All right. I'm sure there can be situations when a instruction such as that proposed by the defense would be appropriate. I believe that that's a logical reading of the stated ***Neumann*** case cited by defense counsel in support of the request. That case, which the Court read, was a situation where an individual admitted that he deliberately destroyed relevant evidence; specifically, a gun and a suicide note, I believe.

In this case, the Court doesn't find -- there may be a question as to whether or not the collection of the elevant -- collection of the evidence was done negligently. I believe that would be a fair characterization of what Dr. Fairgrieve testified, that he felt he would have done it more carefully.

But I don't think that there's any interpretation of the evidence, that the Court can see, where it was done deliberately, with an intention to destroy evidence, or render its value meaningless. At the time, the representatives of the State thought they had evidence that they -- that was helpful to them,

that they would want to preserve.

Whether they took steps that were most effective in preserving the evidence may be subject to doubt. But I haven't heard anything really that their motivations were subject to doubt, which is that they were trying to preserve evidence.

Their people did not -- on the scene, did not, perhaps, have the training of Dr. Fairgrieve. But I'm simply not aware of any facts that would amount to either intentional expolia -- destruction of evidence, bad faith actions on the part of the State, whatever the standard might be, that would justify giving an instruction such as the one provided, and the Court is not going to give it. So that requested instruction is denied.

ATTORNEY STRANG: The next instruction is defendant's proposed Instruction No. 8, this concerns prior inconsistent sworn statements. I think the Court ought, at a minimum, give this jury some instruction on prior inconsistent statements. It readily could be appended to Pattern Instruction 300 on the credibility of witnesses, wouldn't have to stand alone.

But it's odd, that in this state, although Pattern Instruction 300 gives a number of different considerations that a jury specifically ought give the witness, the concept of changing one's story, of making an inconsistent earlier statement, is omitted from that, and I think that's a significant omission.

We have at least two rules of evidence that I can think of off the top of my head, Section 906.13 of the Wisconsin Statutes and Section 908.01(4)(a), that are addressed specifically to prior inconsistent statements. These are understood, at least by lawyers, to bear on the credibility of witnesses.

And we ought to let jurors in on that secret and tell them, specifically, that they can consider a witness' prior inconsistent statement in weighing the credibility of the witness. It matters here. I don't know of any witness whose credibility is more central, both to the defense that Mr. Avery has presented, and to the State's response, than Lieutenant James Lenk.

Of course, the credibility of every witness is important, but he may be first among equals, or close to that, in this case. And I

can't imagine I would get serious argument from the State about the importance of both sides attached to Lieutenant Lenk and Sergeant Colborn here.

And Lieutenant Lenk was shown to have made materially different statements, under oath, than he made on the same topic here at trial. And he was, in fact, impeached on cross-examination, with two prior sworn statements, that I think a jury could find are materially inconsistent with his testimony on direct examination on the question of, when did he arrive at the Avery property on November 5, 2005. This jury should be told, specifically, that it can consider those prior inconsistent sworn statements in weighing his testimony.

Now, I will readily offer to accept a broader statement of prior inconsistent statements. Indeed, I would accept a modification that removed the reference to sworn statements, or remove the reference to any witness by name, as a less favorite alternative, to get some instruction that treats the topic of prior inconsistent statements.

There certainly were other witnesses who

were impeached here with prior inconsistent statements, albeit unsworn. Scott Tadych comes to mind. Blaine Dassey comes to mind. Bobby Dassey may have been, my memory doesn't serve me entirely at the moment on that. And there may be others that I'm not thinking about at all. But I know it was not just Lieutenant Lenk. What made him different is, I believe he is the only witness who was impeached by a prior sworn statement.

I could live without that, if -- if the Court wanted to broaden the concept, because the basic concept of considering credibility in the light of whether someone changes his story, goes beyond whether the statement is sworn or not. It's important enough that it ought to be addressed for the jury in considering credibility.

I think there's no question about the legal accuracy of defendant's proposed Instruction No. 8. I also think that Pattern Instruction 300 does not adequately cover the topic and no other instruction really comes close. So I do seek something like defendant's proposed Instruction No. 8.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Much like a previous offered instruction, our argument with this instruction is that it is unnecessary and adequately covered elsewhere in the instructions. And even with concessions that counsel is prepared to make with respect to identifying the persons who gave inconsistent statements at trial, the instruction as proposed still is unnecessary.

We disagree with counsel that the Pattern Instruction 300 is not adequate; 300 has several points which I think are -- directly bear upon this situation. Although it did not expressly mention a prior inconsistent statement.

But just taking, for example, the focus that the defense has chosen to place on Lieutenant Lenk and Sergeant Colborn, just for instance. One, the first issue under 300 is whether the witness has an interest or lack of interest in the result of the trial.

The third, the clearness or lack of clearness of the witness' recollection. The apparent intelligence of the witness, the bias or prejudice, if any, that a witness shows. Possible motives for falsifying testimony.

And, finally, all other facts and circumstances during the trial, which tend either to support or to discredit the testimony. And I think through the years lawyers have made a living out of attempting, and sometimes on occasion, successfully, discrediting witnesses based on inconsistent statements.

And, again, there's nothing that precludes the defense from arguing vigorously that because Lieutenant Lenk said, in an earlier proceeding this past summer, that his recollection was that he arrived at the scene at 6:00, and it turns out, in reality, after checking all the pay logs and records and whatnot, he arrived on the scene somewhere around 2:00; defense is certainly free to argue with that inconsistency, whether under oath or not. Falls within one of those parameters that the jurors are instructed on.

So I think for that reason, coupled with the fact that the other authorities cited by the defense; 906.13, 908.01, ***Vogel vs. State***, all they simply stand for is the proposition that prior inconsistent statements are, or may be, considered independent substantive evidence.

Counsel says, well, we should let the jury in on that little lawyer secret.

Well, the reality is, there is no point to it. Because if they were not independent substantive evidence then we would not be able to get up and argue in front of the jury the significance of those statements, and as such, the instruction is unnecessary. Thank you.

THE COURT: Anything else, Mr. Strang?

ATTORNEY STRANG: I think I would be repeating myself.

THE COURT: All right. Well, we went over most everything this morning, but there's a reason why we have a formal instruction conference. As I listen to the parties I am very uncomfortable with giving an independent instruction on this issue, because I think it draws undue attention to it.

For example, I'm not sure that -- I don't think it's more important than some of the other bulleted items listed in Instruction 300. But I think it may be reasonable to add a bullet, another bullet, to 300 that does not draw attention to it, but at least lets the jurors know they can consider it.

What I would suggest is another bullet

in 300 that allows the jury to consider the consistency or inconsistency with any prior statements of the witness. If I look at the testimony of the witnesses who were questioned on inconsistent prior statements, and that's not limited to Mr. Lenk, as the parties indicate, there's others. And in many cases their testimony was consistent with what they said previously and in some cases, on some elements, inconsistent.

The comments in former Instruction 320 (a) suggest a separate instruction is not required because of the fact the jury is allowed to consider it. But I think it might be worthwhile clarifying to the jury the right -- or the fact that they can consider it. So that's my suggestion.

ATTORNEY STRANG: And I said that I would accept that suggestion and I do.

THE COURT: And I'm indicating consistency as well as inconsistency.

ATTORNEY STRANG: I accept the suggestion. And if the Court adds that bullet point, I will consider No. 8 modified and I will withdraw anything more from it.

THE COURT: Mr. Fallon, any comment from the State?

ATTORNEY FALLON: We need a minute, Judge. If you are going to do this I think it has direct bearing on perhaps 180 and we want to talk about that amongst ourselves. What was the language you were considering, Judge?

THE COURT: Actually, I'm going to preface it with the following, so it will read as follows: The degree of consistency, or inconsistency, with any prior statements of the witness.

ATTORNEY FALLON: If the Court is contemplating that amendment to 300, then it seems to me -- Well, does that apply to what we have are inconsistent representations of statements made by the defendant and does that then entitle the State to argue same. It seems to me -- I realize he did not appear as a witness, but there are a couple of statements, and we're thinking primarily of the statement to Sergeant Colborn and then a statement elicited by the defense in the beginning of the trial to Mr. -- is it Pearce -- Beach, Mr. Beach and there is an inconsistency there. So what --

THE COURT: You have the better of me here, I don't have it in my head exactly what statement

you are talking about or what the content was.

ATTORNEY FALLON: The extent of the contact between the defendant and Teresa Halbach. There's two different versions attributed to the defendant.

THE COURT: Mr. Strang.

ATTORNEY STRANG: I'm interested in hearing -- I remember generally the testimony of the two men, Beach was the last witness on the first day of testimony and, of course, Colborn came later, but I'm interested in hearing more since I can't remember exactly what the inconsistency was.

THE COURT: What's the State's recollection of what was said?

ATTORNEY FALLON: Beach basically said that she -- the statement of the defendant was that she was here, took a picture, left, went down the road and turned left, or words to that affect. And, then, I left out one, 447 --

ATTORNEY STRANG: Right.

ATTORNEY FALLON: -- which is now that we know what all the evidence is, that's an interesting rendition of the facts, but I will set that aside. Then you have Sergeant Colborn's visit, I believe, on the night of the 3rd?

ATTORNEY STRANG: Yes, Thursday, the 3rd, 7

or 7:30 in the evening, something like that.

ATTORNEY FALLON: And his explanation is is there's more contact, other than she came, took a picture, and left. And there's a brief discussion, she was paid. So does that very same proviso for credibility, if you're going to put that bullet in for the general instructions, does it go in for statements of the defendant?

ATTORNEY STRANG: Well, I mean I have got to be -- Court's entitled to some intellectual honesty here and the fact is that the answer is yes, in that, you know, if an out of court declarant statement is admitted, under 908.05, it may be impeached or supported, as if the person had testified.

Now, with a defendant, there's, of course, a constitutional overlay here, because he wasn't a witness in the sense that the jury would understand that term at the trial and he has a right not to testify and his silence can't be considered against him. So the State would be well advised to be very, very careful about how it argues his earlier statements, in part, because as I understand, the State has agreed not to refer in argument to a statement to which

Detective Remiker testified and another alleged statement to which Bobby Dassey testified.

But, here, the statements to Mr. Colborn, alleged statements to Mr. Colborn, the alleged statements to Mr. Beach, are statements that were disclosed and that the State properly can argue, if the State has not agreed not to argue those two statements. There's no reason the State would have to agree not to argue them.

And if the State sees inconsistencies, as a matter of intellectual honesty, it's entitled to draw the jury's attention to those, even though the defendant is the alleged speaker. But the State also has to be very careful not to run afoul of ***Doyle***, or ***Griffin***, or commenting on a defendant's silence and decision not to testify at trial.

So there's room for the argument, 908.05 would suggest that, to the extent Mr. Avery is an out of court declarant, whose statements are admitted, for purposes of credibility in -- at least in some ways, treated like other witnesses. There's room, the instruction would apply, and it's just treacherous territory. And that's --

that's all I'm saying.

And I will add on this, that lest anyone think I have completely taken leave of my senses, the reason I so readily agreed to adding the term consistency, as the Court proposed, is that there is an evidentiary basis for that.

Prior consistent statements are treated different -- differently under the rules of evidence, than prior inconsistent statements. But, at least one witness, Lisa Buchner, had her credibility bolstered again by the introduction of prior consistent statements, through Detective Wiegert -- Investigator Wiegert. So there's an evidentiary basis for adding the term consistency and that's why I agree to it and I continue to agree to it. I mean I hope that helps.

THE COURT: Let me -- Let me suggest this, first of all, I'm going to take the words, the degree of, out of there. I didn't insert them the first time and as I'm thinking about it I'm not comfortable with those.

ATTORNEY STRANG: That's fine.

THE COURT: What if -- So in 300 I add a bullet for consistency or inconsistency with any prior statements of the witness; and in 180, add a

bullet that says consistency or inconsistency with any other statements of the defendant.

ATTORNEY FALLON: That's fine.

THE COURT: Does that do the job for both parties?

ATTORNEY STRANG: Sure. I think that's -- again, I will stand on what I just said, about what the perils are, for the State, in making the argument and there would be perils for us in making the argument, too, in opening the door on comment about Mr. Avery's statements or lack of statements. But with those qualifications, that's acceptable.

THE COURT: All right. And, obviously -- So it will read consistency or inconsistency with any other statements of the defendant. And obviously, there, statements of the defendant, refers to statements of the defendant that were admitted into evidence at this trial, with the understanding there will be no comment on the fact the defendant didn't give other statements at the trial. I'm sure all of you are aware of that.

All right. Mr. Strang does that address, then, I think the No. 9 was the theory of defense instruction, which I believe has been addressed; does that --

ATTORNEY STRANG: I have already addressed it and only one remains, which I did not submit in writing. It was an issue I raised briefly in chambers this morning, concerns the State's cross-examination of Dr. Fairgrieve. And the background is this, the State was pursuing what I thought was a perfectly appropriate line of cross-examination of Dr. Fairgrieve on the fact that he did not prepare a report.

In the main, Mr. Fallon's questions were unobjectionable and they were good cross-examination. One question, and it was the last question that he asked in this area, before moving on, but one of the questions, I thought, crossed the line. And I had the court reporter prepare just a very brief excerpt of that question and the answer only, which I will read. The question was:

Question: And that's so when the gentleman who happens to be on the other side of the prosecution by the Crown, so that they would have fair notice of exactly what opinions you were going to express so they would know what they were?

Answer: Yes.

I did not object at the time. I decided, at the time -- First of all, I was slow on the uptake. It seemed like it crossed a line to me. I wasn't as quick as I should have been in articulating, to myself, the reason that crossed the line. I did not object at the time.

Rather, at the next break, I raised the issue informally with Mr. Fallon. I think I probably even told him I was going to ask the court reporter to read back that testimony to me or prepare a short excerpt, because I could not remember exactly what Mr. Fallon had said, that had rubbed me wrong.

The court reporter did prepare the short excerpt I just read, a little later. I raised this informally in chambers, and I don't even remember when, but it was well after Dr. Fairgrieve was off the stand by that time. And the problem is, the suggestion that we did not give the State fair notice of Dr. Fairgrieve's opinion.

We did. We complied with Section 971.23 -- well, whatever the provision is that requires the defense to give notice of expert opinions. It's true that we didn't give a

report, to the State, from Dr. Fairgrieve. But we're not required to do that under the discovery statute. That's one of two options.

We chose the second option, which was to provide a summary of it, his expert opinion and its basis. We also provided his curriculum vitae. The State objected to the adequacy of our notice. The Court directed us to provide some further, more specific notice of Dr. Fairgrieve's opinion. And we did that. Once we amended our notice of his opinion, there was no further complaint from the State. And I think our discovery obligation was met and, therefore, as a matter of law, there was fair notice of his opinion.

Now, again, the fact -- the mere fact that he didn't prepare a report is a fair subject for cross-examination. And the questions immediately preceding the question I quoted today, were unobjectionable, in my view. But I had no strategic reason for not objecting.

Indeed, I knew at the time it was a problem. If my -- if my manner of handling it was a waiver, then, it was a waiver without a reason, without a strategic choice, or a -- or a

good -- a good reason on which I could defend my waiver. And the intention, as I told folks off the record, which doesn't count, I understand, was to seek a brief curative instruction, not make a terribly big deal out of it, but I thought it was worth a curative instruction. I still do.

At this point, I think the curative instruction should not refer to -- or need not refer to Dr. Fairgrieve, or even to the State. There's no need to scold at this point. A curative instruction could be that, you know, something to the effect that both parties provided adequate notice, as required by law, or fair notice as required by Wisconsin law, the opinions of their experts, wouldn't have to be anything fancier than that.

And I asked the Court to give, somewhere in the final instructions, a curative instruction along those lines. I also asked the Court forbid a State argument that it was not given fair notice of Dr. Fairgrieve's opinions. I think it was. I think we complied with the discovery statute in that respect.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Thank you. Much ado

about little. As counsel acknowledges, the questioning and cross-examination was clearly appropriate, the point simply being that Dr. Fairgrieve, who at every point in the past in his career had issued a report, did you issue a report in this case. That's fair cross-examination, nothing to apologize for.

This -- Every now and again, as a prosecutor, we're entitled to throw a net or a lifeline to counsel. I don't see his need to fall on the sword here, or accept some kind of reprimand from who may review this case in the future. It's entirely unnecessary.

Again, the sole point is that he always writes a report, but he didn't write a report in this case, fair cross-examination.

The other way of looking at this -- because that's all that was intended by the question, by the way. Another way of looking at this is that, as counsel aptly noted, they have two ways of complying with the provisions. One, was to write a report, one is to give a summary. They chose a summary.

Don't beat yourself up now or second guess your selection, your choice, they chose a

summary, not a report. Doesn't mean I can't ask the question, that you always wrote a report every other time in the past, but you didn't write one here.

So, again, he's saying a waiver without knowledge, a waiver without strategic reason; that's not true. It had already occurred. It occurred back in January when the original report was submitted. So for that context, the State does not intend to argue that we didn't have notice.

Although, I would note, inferentially, and I still do, that the amended disclosure contained an opinion which was different than the opinion rendered on the stand regarding the possibility of the burn barrel being the primary burn location. So, for what that's worth, they were different.

But the intent of the argument that the State will make is simply that he always writes a report and he didn't write a report this time. That's the point of the question. And they had the opportunity to choose, as I said, summary or report. They chose summary, but that's their right. So I don't think -- There's much ado

about nothing.

ATTORNEY STRANG: Well, I do need to be heard in reply, because as I conceded, the general line of questioning, cross-examination, was appropriate. And if the questioning had stopped where Mr. Fallon says he meant to stop, or with the point he says he meant to make, it would have been appropriate. If this had stopped with, so you always write a report, this is the first time in your career you haven't written a report. Fine, unobjectionable.

This question went the next step. It went farther. It was, you know, by not writing a report, then, in essence, there is not fair notice of exactly what opinions you were going to express to the counsel for the other side, so that they would know what they were. And I won't reread this, I'm paraphrasing it, but I read verbatim, the final question. And that -- the implication that there was --

THE COURT: Read it verbatim again.

ATTORNEY STRANG: Sure.

Question: And here now I wish I had gotten the preceding question, but it was -- I think the preceding question probably was what

Mr. Fallon said, which is, this is the first time you have not written a report, something like that.

So the question in issue begins:

Question: And that's so when the gentleman who happens to be on the other side of the prosecution by the Crown, so that they would have fair notice of exactly what opinions you were going to express so they would know what they were?

Answer: Yes.

I will give it to the Court. Now, did Mr. Fallon mean to do anything wrong? No, he was pursuing a fair line of questioning. He went one question too far in my view. It's a slip of the tongue. It happens in the heat of battle. Lord knows in cross-examination I have asked one question too many at various points. But this was objectionable and I missed it. I didn't make timely objection.

THE COURT: All right. Here's what I'm going to do. If -- As I understand it, Mr. Fallon, your point was not that you didn't get some discovery in this case that you were supposed to get, but rather that he always prepares a report in

all his other cases, but he didn't in this one.

ATTORNEY FALLON: That was the intent and the focus of the question. And it wasn't until afterwards that I gave some thought about the fact that the amended disclosure held one opinion that was different. But like I said, you already ruled on that matter, so.

THE COURT: Let me ask this, do you intend to make reference in your closing to the fact that, not that you didn't get a report that you should have gotten, but to the fact that it's significant he did not prepare a report in this case.

Here's the -- I'm not precluding you from doing that. All I'm saying, let me get to the point. If you say something like that in your closing, you will have to add, and let the jury know, something to the effect, I'm not saying we didn't get a report that we should have gotten, but it's significant he didn't prepare a report. Do you understand?

ATTORNEY FALLON: Right. Maybe we're just coming at it from different angles. Our argument is not that we didn't have notice, the argument we want to make. The argument is, he didn't write a report.

THE COURT: Okay. I'm only saying that, if

you choose to point that out to the jury --

ATTORNEY FALLON: We have an obligation, I see what you are saying.

THE COURT: And I think that addresses, Mr. Strang, your concern, because you have acknowledged that he was entitled to show the jury that the witness usually prepared a report but did not here.

ATTORNEY STRANG: Yes.

THE COURT: As long as there's not an implication that somehow the State didn't get something to which it should have been entitled.

ATTORNEY STRANG: As long as there's no implication that the State did not get fair notice, which is what the question implied. And I would like that cured, and it can be cured in a general way.

THE COURT: I'm not -- I don't view it as a significant part of, you know, the many weeks and exhibits worth of evidence that came in in this trial. I don't think it warrants its own instruction, but I will caution the State that if it raises that issue in any fashion in closing, that -- that it reference the fact that the State is not claiming that it didn't get some notice it should have gotten. Before we leave jury instructions, I

don't recall if I have asked the parties on the record if the verdict forms are acceptable.

ATTORNEY FALLON: They are to the State.

ATTORNEY STRANG: Yes.

THE COURT: All right. I will make the -- the modifications in 300 and 180, that were placed on the record. Otherwise, I will leave the jury instructions as they were submitted to you today, with the exception of removing the red lining. Other than the defense requested instructions that the Court has already been denied, does that resolve the issue on instructions?

ATTORNEY STRANG: Yes.

ATTORNEY FALLON: Yes.

THE COURT: Before we break, Mr. Strang, I understand you wish to ask the Court to reconsider a previous motion made by the defense concerning the request to excuse a juror.

ATTORNEY STRANG: I do. I will not name the juror, but this is the juror we have discussed before, who previously served on a civil jury, in a lawsuit brought by a witness here. And I think I can name the witness without disclosing too much. The witness was Lieutenant -- I'm sorry, Detective David Remiker of the Manitowoc County Sheriff's

Office.

As I understand, some years ago, it's a 1999 civil lawsuit, Detective Remiker sought some compensation for injuries he alleged in connection with an automobile accident. And our juror sat as a juror at the trial of that civil action. She was among those who voted for the jury verdict in that case.

And I don't -- I didn't look here to see whether that was a unanimous civil verdict, or a 5/6ths civil verdict. But my recollection is that when she was questioned about it, she acknowledged that she voted either with all the other jurors or with the majority that determined the verdict in the case.

We went back to -- Not -- Not -- I shouldn't say we, that's a royal we. Mr. Buting and I asked our defense investigator, who is not a lawyer, to go look at the file in the earlier civil case, and he did that.

Copied the Summons and Complaint, gave us copies of the minutes from at least some of the days of the trial and the special verdict form. And, then, also copied an excerpt of testimony from one witness. I think she -- a

medical doctor who testified for the plaintiff, Detective Remiker.

And that's why I asked the Court yesterday to obtain the entire file in Mr. Remiker's case and bring it here so the parties could look at it. The Court did that, the box is in chambers. It's about the size of a box of 10 girl scout cookie boxes that I got recently in the mail.

And I flipped through it. I don't know whether counsel for the State have availed themselves of that opportunity, but the Court was kind enough to obtain the file and it's in chambers. Here's what appears, at my glance through.

The defense that the insurance company or the other -- the driver, who apparently caused the accident in that case, presented to the jury, was that Detective Remiker was malingering and ought not be compensated, or ought not, at least, obtain the full compensation that he sought. And it looks to me, again, at a cursory glance, like much of the trial was fought over whether Detective Remiker was malingering or not, about the lower back injury that he described.

In that sense, his credibility was critically at issue. And this is -- this is just a real nice tight example of that. And I'm reading from pages 11 and 12 of the testimony of the -- a plaintiff's expert, Dr. Diana Lampsa, L-a-m-p-s-a. This is a partial transcript of proceedings in the civil case. Beginning at line 10 on page 11 of the partial transcript:

Question: Do you understand that Dr. Dahl, D-a-h-l, at one point in his statement of opinions, used the term malingerer to refer to Mr. Remiker?

Answer: Yes.

Question: Would you describe or define, for the jury, what's meant by that term?

Answer: Well, malingering is basically lying. Malingering is basically lying for specific result, like a person might malinger if they are lying to get out of work, or if they are lying to get money in a court settlement, you know, making up symptoms, or exaggerating physical symptoms for a specific gain. It's a specific kind of lying.

Question: Can everyone hear Dr. Lampsa? I think everyone is comfortable with your voice

level there.

Answer: Okay.

Question: Do you believe that Mr. Remiker is a malingerer?

Answer: No, the kinds of comments I just made a couple minutes ago, I described somebody who is absolutely opposite of a malingerer. He's, you know, very straight forward, straight shooter, just an honest kind of job, kind of guy, my impression. Likes sports. Likes, you know, to me, the profile -- I can't remember if he was a boy scout or not, but the kind of guy who's in the boy scouts and mom and apple pies, totally a straight character. So nothing like that.

And evidently Dr. Dahl, was the defense medical expert in that case, and that's what I get from the context. So that, it looks to me, is like -- like a large part of the trial issue was Detective Remiker's credibility. Clearly, when the jury returned a verdict of over $170,000, that credibility determination was resolved in Detective Remiker's favor. And this juror was part of that credibility determination.

So the argument, again, is that, because

of the ritual way in which we instruct jurors to decide the credibility of witnesses here, and we have argued this afternoon, at some length, over Pattern Instruction 300, in criminal cases. And what should be added and what should be considered and what's fair game in determining credibility.

Because of that ritual way in which we instruct jurors, as judges of the fact -- of the facts, to determine credibility, I think this juror, now, is objectively biased. She's gone through that ritual, that process, as a judge of the facts, once, within the last seven years, as to Detective Remiker.

His credibility matters here too. And ought to be considered on the trial record here, just like every other fact ought to be determined on the trial record here, supplemented only by a juror's common sense and experience. Her experience proves this special role that we occasionally ask people to fill, as a judge of the facts, in a lawsuit.

And the determination of Detective Remiker's credibility, on a whole different set of facts, was not apparently an incidental issue

in the prior case. It's not incidental here either. He's a fairly important witness. I played a clip of him in the opening statement, my opening statement, a clip of a dispatch discussion, that went right to our theory of investigative bias and tunnel vision.

He testified here. He offered a statement of the defendant, of which neither the State nor the defense had prior notice. He is one of the people who met with Mr. Avery on November 4. He's with the sheriff's department that we accused as being the source -- of the original source of the bias against Mr. Avery. He was involved actively in the identification and collection of evidence, not just for a week in November, 2005, but again, on March 1 and March 2 of 2006.

In fact, I think on this record, he's the only Manitowoc County Sheriff's employee who was actively involved in collecting or identifying evidence in March, 2006, in the search of Mr. Avery's garage. I don't think he was involved at all in the search on the same days in March, 2006, in Mr. Avery's home; that's my recollection of the testimony. But I think he

did play a role in the garage. May have been the only Manitowoc officer inside the evidence tape, so to speak, in March of 2006.

So the juror did the right thing by bringing the issue to the Court's attention. I will accept, because it's for the Court to decide, from her demeanor and her answers, whether she's subjectively biased and the basis of her prior role with Detective Remiker and knowledge of him.

But I think there is objective bias here. This isn't like a casual acquaintance. It isn't like somebody we might size up because we run into them at the grocery store. This is a judgment the juror once has made and I think is unlikely to reconsider.

As I noted by a loose analogy the first time I argued this, even with professional judges, judges of the law, when they are wrong in their judgment and a higher court reverses them in this state and sends the case back down, there's enough of a presumption that the judge will be reluctant to reconsider his or her earlier judgments in the role of judge of the law, that the parties are entitled to a

substitution, without a showing of prejudice again, on remand, under Wisconsin law.

There are in, again, a loosely analogous context, there are United States Supreme Court decisions that consider the question, for example, of vindictive resentencing, after a reversal on appeal and a remand and the defendant gets a higher sentence. There's constitutional law on that, because the Supreme Court recognizes the institutional bias that all of us acquire, in favor of our earlier judgments once thoughtfully rendered.

And it's asking a lot to expect a lay person in -- in the special role of judge of the facts, to decide credibility this time, without considering the judgment she made about credibility the last time she was a juror in a case involving Detective Remiker.

So I think that's asking too much. It's not reasonable to expect her to be able to do that. I think she's objectively biased here, without casting aspersions on her character, I don't. To the contrary, she was right to raise the issue. She was conscientious to raise the issue. But now that it's out, and now that we

know something more about the 1999 civil case involving Detective Remiker, I think she should be relieved of further duties on the grounds of objective bias.

THE COURT: Does the State wish to be heard?

ATTORNEY FALLON: Yes, thank you. We would oppose the excuse -- the striking for cause or the excuse of this juror. We're going to begin with our presentation with the law. A prospective juror is objectively biased if a reasonable person in the prospective juror's position, objectively, could not judge the case in a fair and impartial manner. That's a citation from ***State vs. Mendoza***, 227 Wis. 2d, 838, with a citation to ***State vs. Erickson***, E-r-i-c-k-s-o-n, at 227 Wis. 2d, 758.

In ***State vs. Faucher***, at 227 Wis. 2d, 700, Supreme Court noted, quote, The circuit court is particularly well-positioned to make a determination of objective bias and it has special competence in this area. It is intimately familiar with the voir dire proceeding and is best situated to reflect upon the prospective juror's subjective state of mind, which is relevant, as well as to the

determination of objective bias.

Finally, as a backdrop, we ask the Court to once again consider ***State vs. Kiernan***, K-i-e-r-n-a-n, at 227 Wis. 2d, 736. And that case was -- dealt with the concept of whether a veteran juror, as it was known at that time, could set aside prior opinions or knowledge in Judge Kiernan's case, solely on the evidence presented at her trial.

I think those are the appropriate legal standards. The most recent case on objective bias is ***State vs. Dale Smith***, 2006 Wisconsin 74. And that was, I believe, the case of the administrative employee of the District Attorney's Office out in juvenile court sitting as a juror in a felony case in downtown Milwaukee.

Those are our legal standards upon which the Court must make a determination of objective bias. Now, let's look at the facts and apply them to the law here. First and foremost, the juror sent a note. The juror is the one who called this matter to the attention of the parties, having recognized Detective Remiker after seeing him testify, and not beforehand.

The Court, at the request of the parties, conducted a voir dire of the juror. The juror reported no recollection of that case whatsoever. But when pressed, all that the juror could recall is something about the left lumbar being the focal point of the trial. All that could be recalled was the nature of the injury.

The juror could not recall whether Detective Remiker even testified. Could not recall the amount of damages awarded to Detective Remiker. Did recall that he did prevail and that he was awarded some money and she thought perhaps $100,000. But she could not recall any of the circumstances. She could not recall the length of the trial, or as I already said, the focus of the trial, a trial that occurred six, to possibly seven years before this trial.

I think it's apparent and a reasoned inference could be drawn that there have been no contact whatsoever between the juror and Detective Remiker in the intervening years. So applying the standards, then --

Oh, there's one other distinction. While we do not diminish the significance, as it were, of Detective Remiker's role in this case,

the case against Steven Avery will clearly not rise or fall solely on the basis of the testimony offered by Detective Remiker.

Whereas, in contrast, if everything is as counsel represents, and I believe it to be the case, Detective Remiker's role in his own case was far greater, far more significant than this case. And I say that because, then we have to evaluate the fact that that's true. And the juror has no recollection of that.

Then, let's take that reasonable juror standard, a juror in this position, a juror who has no memory of those facts or circumstances and were somehow to conclude that she's objectively biased, and as counsel would suggest, in favor of Detective Remiker, because in that case 10, or perhaps 12 other jurors, found his version of the events credible and, thus, awarded him damages for the accident in which he was injured. I think not. There is no basis for that.

Then, you couple that fact, with the representation that the prospective juror made, as I recall, during the voir dire. The juror reported that no other juror was aware of the service previously performed. The Court asked,

in fact, I believe, instructed the juror, not to advise any of the other jurors in this case of her previous experience with respect to Detective Remiker.

All of that, coupled with the fact that this juror came forward on their own, I think it's clearly a reasonable inference that if a problem did develop, if circumstances did come to light, that somehow the great light of memory was revealed to her, the juror would tell us. But we already have the assurance of this juror that that would not affect deliberations in this case, the assurance that that knowledge would not be imparted to any other juror.

And this is the subjective component here that counsel alluded to and is reflected in the case law, the Court had the opportunity to assess that juror's credibility. And under all of these circumstances, the Court made a reasoned determination at the time, which we ask the Court to sustain now, is that the juror is not objectively biased or subjectively biased. And we would ask the Court to deny the request.

THE COURT: Mr. Strang.

ATTORNEY STRANG: In reply, let me -- let

me try this. I wouldn't be offering analogies if I had something specifically on point, but I don't think either Mr. Fallon or -- and I know I haven't found anything directly on point. This appears to be a pretty new issue.

But let me try this. Let's suppose, instead, that this juror were a high school teacher or a college professor. And when Detective Remiker had walked in and testified, the juror had said, oh, my gosh, I remember now, six or seven years ago he was in my class. He was a student of mine. I had forgotten the name, but I remember the face. He was a student of mine and, you know, now that I think about it, I think I wrote him a letter of recommendation. And the juror tells us that. And we explore and we find out that it was a glowing letter of recommendation.

Now, I don't know that I believe this juror here on the issues that go to subjective bias and what she does or doesn't remember, but the Court gets to decide whether or not it believes the juror. And that's why, primarily, I'm relying on objective bias.

But let's suppose the Court was

satisfied in my example of the teacher/professor who writes the letter of recommendation for the student from six or seven years ago and now remembers. And the Court is not to remember much more than, I wrote him a letter of recommendation.

Well, if we dug a little further into the file and we found that it -- not only was it a glowing letter of recommendation -- or letter of recommendation, it was a glowing one. And if we dug further and found that there were people specifically asking the teacher, or the professor, not to write the letter of recommendation, urging upon the teacher the fact that she ought not write a letter of recommendation for this student.

I can't imagine that the Court wouldn't find objective bias and excuse the juror. Well, here, by way of analogy, a $170,000 verdict, in the face of opposition by the defense in this case, is a pretty glowing letter of recommendation. And is a glowing letter of recommendation endorsed by this juror, in spite of, evidently, you know, witnesses and arguments from counsel, that the letter of recommendation,

so to speak, the verdict, ought not be delivered.

Just, again, setting aside subjective bias, which the Court can judge, objectively, this doesn't look reasonable for the outside person to say, what you ruled for this guy once as a juror and now you are here, supposed to be judging him again, as a matter of his credibility, but on entirely different evidence, and without considering your earlier judgment on his credibility.

It doesn't feel reasonable, objectively reasonable. It doesn't look objectively reasonable, I suggest. And it's not so much that I'm worried that the State is depreciating Detective Remiker's role in the trial. It's really, I'm worried, if anything, the State is depreciating the role of the juror.

It matters. What she did matters, in the 1999 civil case. That was an important function. She filled it. She filled it on, presumably, the evidence she probably should consider there in deciding his credibility. I don't think we can ask her to set that judgment aside now and to make the judgment anew on a different set of factors entirely. It's just not

reasonable to expect that one would be able to do that. And that makes her objectively biased, if not more.

THE COURT: All right. The starting point is to take a look at the standards that the Court is to apply when a challenge is made to a juror on the grounds of objective bias. And that is the challenge that the defense is making here this afternoon.

The law on the subject was recently restated in the ***Smith*** case that counsel for the State referred to. It's a quote taken from the ***Faucher***, F-a-u-c-h-e-r, case, and sets forth the test as follows:

The focus of the inquiry into objective bias is not upon the individual prospective juror's mind, but rather upon whether a reason -- a reasonable person, in the individual prospective juror's position, could be impartial.

When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. However, the emphasis of this assessment remains on the reasonable person, in light of those facts

and circumstances.

When a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion for prior knowledge.

And although this is termed objective bias, rather than subjective, there is something of a subjective component to it. The Court also noted, this I believe is in ***Faucher***: The circuit court is particularly well-positioned to make a determination of objective bias, and it has special competence in this area. It is intimately familiar with the voir dire proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind, which is relevant as well to the determination of objective bias.

I think what the court is getting at there is the fact that the basis for objective bias is often statements made by the individual juror in question and the court has to make a

determination as to the credibility of the juror in that circumstance.

The Court has already ruled that the juror in this case is not subjectively biased and I don't understand that to be challenged today. Reviewing the information that she provided when the Court voir dired her earlier in the trial, I will first note that this matter came to the Court's attention at the instigation of this juror.

That is, after she saw Mr. Remiker testify, she connected his face with his name, recognized that she had sat on a jury in a civil case in which he was a plaintiff, approximately seven years ago. Didn't feel that it caused her to be biased in any way, but recognized it could be an issue for the Court and brought it to the Court's attention.

When I voir dired her, I asked her if she remembered whether he testified in the case, that was one of the first questions that I asked, because it would be directly relevant on the issue of whether or not she was influenced as to his credibility. And she indicated that she did not remember if he testified as a witness in the

case. She said that on more than one occasion when I was questioning her.

She thought that the trial was approximately a week long. She remembered that it was a civil case and that the defendant -- or the plaintiff was awarded some damages. She indicated, I believe, that she thought it was around a hundred thousand dollars.

When I asked her an open ended question about what she remembered about the case, she said, what I remember about it is a lot of discussion about the lower left lumbar of the back and that it involved an accident down on the I-system, with a couple of other vehicles, that's about it. She didn't remember anything about the individual witnesses who testified at the trial.

She indicated there was nothing about her experience as a juror in that case that would affect, whatsoever, her service in a juror in this case. And since she didn't remember whether or not Mr. Remiker testified, it wasn't worth asking a question about what affect -- what she thought of his credibility or what affect it might have, because she didn't remember him even testifying in the case.

The Court, first of all, with respect to her credibility, finds her to be a very credible individual. It was her own forthrightness that led to the matter coming to the Court's attention in the first place. She indicated she really doesn't remember much about this trial that took place seven years ago; specifically, she doesn't remember not only anything about Mr. Remiker's testimony, if he did testify, but not even whether he did testify.

In light of the fact -- I have trouble remembering all of the testimony that took place in the early stages of this case, I certainly can't find that her -- her statement to the Court is unreasonable in any way. I suspect most people would probably be in about the position she was.

There's no indication that she had any connection with Mr. Remiker, either before or after the case on which she sat as a juror. So the question, then, comes down to, is a person in this juror's position someone who could not reasonably be expected to be fair and impartial in this case, even if the Court finds that she's not subjectively biased. And the Court concludes

that -- I don't think this is a particularly close case. I don't think she's objectively biased at all.

I took a look last evening at a number of objective bias cases. The closest one that I actually found, or the most analogous one on the facts, I thought was the ***Faucher*** case itself, in the sense that it involved the opinion of a juror on the credibility of a witness who was expected to testify at the trial in that case.

And during the course of voir dire in that case, the issue came up before the trial started. It was rather obvious that the juror involved held strong opinions concerning Hayes' credibility. And Hayes was a witness.

For example, the juror said that, I believe she had been a neighbor of the witness for some time. Her parents were still neighbors of the witness. She indicated on voir dire, I know she's a person of integrity and I know she wouldn't lie. She then agreed with defense counsel's restatement -- I guess it was a him, the juror in that case -- that based upon his knowledge of Ms Hayes as a next door neighbor, he believed she would not lie about anything.

There was a lengthy history between the juror and the witness that the juror was acquainted with in that case. And the court found, and I think rightfully so, that if you have got a juror who says I know this person, I know them well, and I know they wouldn't lie, that's not a particularly close case.

That's what objective bias is all about. Even though the juror later stated that the juror could put that feeling aside and the appeals court actually upheld the trial court's determination that the juror was not subjectively biased.

In this case, the Court believes there are a number of contrasts between the facts in this case and that case. First of all, there was never any type of close relationship between the juror and Mr. Remiker. It's not a case of an acquaintance at school, at work, or any situation where the juror would have had an extensive opportunity to form an opinion about the witness' credibility.

Even more significantly is the fact that the one contact took place nearly seven years ago. It's hard for the Court to say that the

juror objectively has an opinion of the witness' credibility that she could not be expected to set aside when she doesn't recall if he even testified in the case. There's no -- She doesn't appear to have an opinion as to the witness' credibility that the Court has to ask whether or not the juror could objectively set aside.

Let's assume -- If one assumes that she remembered Mr. Remiker, or remembers him testifying, the argument would have to be, that because this juror found Mr. Remiker credible in a civil trial that took place seven years ago, that no person in this juror's position could objectively evaluate Mr. Remiker's testimony in this case.

That is, I don't think, even if she did remember his testimony, unless there was some reason why she couldn't set aside an opinion that she was convinced he would never lie, that she would be objectively biased and be forced to leave the jury in this case. But we don't even get to that because I find her testimony to be very credible that she doesn't remember if he testified in that case.

It's one thing to pull out a transcript

today that's something that a witness said seven years ago at that trial that reflects on Mr. Remiker's testimony, but, objectively, I think most people, over seven years, would not have a specific recollection of that.

There may be some people who could, but the Court finds that this juror is not one of those people. And even if there was some recollection, finding that someone was credible on one occasion, doesn't mean that you can never judge their credibility again.

I know, as Mr. Strang was speaking, and last evening as I was thinking about this, I was trying to come up with analogies myself. I recognize the fact the Court has -- I see police officers testify on a regular basis, often at suppression hearings, if I make a determination in one hearing that they are credible, I'm not sure that that disqualifies me, for the rest of my judicial career, from evaluating their credibility again at a later hearing.

Granted, I'm not a juror, I'm a judge, but if the question is objective bias and I, because I determine them to be credible one time, could never do it again, that would leave the

judicial system in tough straits.

You know, from my own experience, I have had officers testify in front of me, sometimes I find their testimony credible, sometimes I don't. Doesn't mean that I necessarily think they are lying or not, but you can objectively evaluate credibility in those situations, I believe.

And certainly the situation involving this juror doesn't get close to that, because she only had one contact with Mr. Remiker. It was nearly seven years ago, and she doesn't appear to remember much about it. It's a very far cry from all of the other cases in which objective bias has been found.

I don't believe there's any evidence here to suggest this juror is objectively biased. And, therefore, the Court is going to, again, find that she should not be removed from this jury, that there's no basis to remove her on the grounds of either subjective or objective bias.

Counsel, let's take a 15 minute break and, then, please meet me in chambers.

(Proceedings concluded.)

STATE OF WISCONSIN)
)ss
COUNTY OF MANITOWOC)

I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 22nd day of January, 2008.

_____
Diane Tesheneck, RPR
Official Court Reporter