

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

PLAINTIFF,

JURY TRIAL

TRIAL - DAY 21

vs.

Case No. 05 CF 381

STEVEN A. AVERY,

DEFENDANT.

DATE: MARCH 12, 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.

JEROME F. BUTING
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

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1 THE COURT: At this time the Court calls
2 State of Wisconsin vs. Steven Avery, Case No. 05 CF
3 381. We're here this morning for a continuation of
4 the trial in this matter. Will the parties state
5 their appearances for the record, please.

6 ATTORNEY KRATZ: Good morning, Judge. The
7 State appears by Calumet County District Attorney
8 Ken Kratz, Assistant Attorney General Tom Fallon,
9 and Assistant District Attorney Norm Gahn, appearing
10 as Special Prosecutors.

11 ATTORNEY STRANG: Good morning, Steven
12 Avery is present. Jerome Buting and Dean Strang
13 also present on his behalf.

14 THE COURT: The first item of business
15 today is for the Court to issue its decision on
16 three outstanding motions. The Court has already
17 heard argument on these motions. I'm ready to issue
18 the decisions at this time.

19 The first motion the Court will address
20 is a renewal from the defense of its fair testing
21 motion; that is, a motion that was filed
22 pre-trial by the defense, last summer, asking for
23 permission to have an observer present while the
24 Wisconsin State Crime Lab was performing analysis
25 of various pieces of evidence.

1 The defense counsel argues that the
2 defendant in this case was prejudiced because the
3 defense was not permitted to have an observer
4 present while DNA testing was conducted of a
5 bullet, by Sherry Culhane. Ms Culhane testified
6 that during the testing process, some of her DNA
7 made its way into a control sample that should
8 not have contained anyone's DNA.

9 She believes it happened as a result of
10 saliva that came from her mouth while she was
11 speaking to observers from within the lab who
12 were being trained at the time. Ms Culhane
13 testified that there was no evidence of
14 contamination in the test of the extract from the
15 bullet itself, which is found to contain Teresa
16 Halbach's DNA.

17 The defense argues that this account
18 given by Ms Culhane demonstrated the defenses
19 need to have an observer present during testing.
20 The observer might have suggested splitting the
21 extract from the bullet as a control, before the
22 remainder of the test was completed, in order to
23 determine whether Teresa Halbach's DNA was, in
24 fact, on the bullet, or somehow found its way
25 into the abstract -- into the extract through

1 contamination.

2 An observer may also have seen, argues
3 the defense, how Teresa Halbach's DNA may have
4 gotten into the extract if it happened through
5 contamination. As a remedy, the defendant asks
6 that the Court suppress the test results, or in
7 the alternative, if suppression is not granted,
8 instruct the jury that the State resisted a
9 defense request to observe the testing process.
10 The State's testing totally consumed the sample.
11 And the State withheld the Crime Lab's
12 contamination log until it was specifically
13 requested by the defendant.

14 Both parties acknowledge in their
15 argument that the test, which the Court must
16 apply, is that set forth in the United States
17 Supreme Court case of ***Arizona vs. Youngblood***;
18 that is, unless a criminal defendant can show bad
19 faith on the part of the police, failure to
20 preserve potentially useful evidence does not
21 constitute a denial of due process in law. The
22 issue boils down, then, to whether or not the
23 State was guilty of bad faith in this matter.

24 The evidence that the defense cites as
25 evidence of bad faith on behalf of the State is

1 the following: First of all, the State resisted
2 the defendant's initial request to observe the
3 testing.

4 Second, the State did not disclose the
5 Crime Lab's contamination log history to the
6 defense at the time of the original fair testing
7 motion. The argument is that earlier disclosure
8 may have allowed the defense to succeed in its
9 earlier motion.

10 Third, that the State did not provide a
11 copy of the contamination log as part of the
12 defendant's original general discovery request.

13 Fourth, the defendant expressed its
14 concern about contamination at an earlier stage
15 in this proceedings and Ms Culhane's testimony
16 demonstrated that contamination occurred.

17 Fifth, the defendant personally
18 expressed his concern about being framed at an
19 early stage in the trial.

20 And, sixth, there is no clean sample
21 left for the defendant to test because the
22 extract that was found to contain the victim's
23 DNA may have already been contaminated and
24 the -- there is not sufficient DNA left on the
25 bullet to independently test.

1 The Court concludes that those facts do
2 not demonstrate a finding of bad faith on the
3 part of any representatives of the State.

4 With respect to the first part of the
5 defendant's request, that the State resisted its
6 request to observe the testing, the law in
7 Wisconsin is that the State had a right to resist
8 that request. Relevant are Wisconsin Statute
9 Section 176.79 (1), as interpreted in the Court
10 of Appeals case of ***State vs. Franszczak***,
11 F-r-a-n-s-z-c-z-a-k, a 2002 reported decision.

12 The Court in that case summarized the
13 law under the statute as follows: All evidence,
14 information, and analyses of evidence submitted
15 to the Crime Lab by law enforcement is privileged
16 and, therefore, is off limits to a defendant
17 prior to trial. The same is true as to the
18 analyses of such evidence by the Crime Lab. This
19 privilege also bars any effort, by a defendant,
20 to examine Crime Lab personnel as witnesses prior
21 to trial.

22 There is an exception with respect to
23 such evidence as is subject to discovery under
24 Section 971.23 and, in fact, discovery was
25 exercised here and the State did present

1 materials. The point is there's nothing improper
2 about the State's initial resistance to the
3 defense request for fair testing. It's
4 authorized under the statute.

5 The second State argument is that the
6 State did not timely disclose the contamination
7 log history to the defense, or the Court's
8 original decision might have been different
9 because the defense argument for observation
10 would have been stronger.

11 The Court would not have ruled
12 differently on the original motion, even if it
13 had known of the existence of the contamination
14 log earlier. Frankly, the Court is relieved to
15 know that such a log is kept as an aid to
16 defendants who are able to make use of it in
17 cross-examination, as the defendant did in this
18 case.

19 The Court believes it is far preferable
20 to have a contamination log than if the Crime Lab
21 was hiding its mistakes. I will also note there
22 is no evidence to suggest the contamination log
23 demonstrates any fraud on the part of the Crime
24 Lab in its history, as the defense referred to in
25 other State Crime Labs as part of its original

1 argument.

2 The defense also argues that the State
3 did not provide a copy of the contamination log
4 as part of the defendant's general discovery
5 request. The Court wasn't really presented with
6 information to suggest whether or not the
7 contamination log would have been within the
8 scope of the original request made by the
9 defense.

10 However, it appears that the State did
11 provide a copy of the contamination log, to the
12 defendant, upon specific request for the log, and
13 the Court believes that the defense was able to
14 effectively use the information from the
15 contamination log in its cross-examination of Ms
16 Culhane. That is, the Court doesn't believe
17 there was any prejudice to the defense in the
18 conduct of its case.

19 The fourth argument advanced by the
20 defendant is that the defense expressed concern
21 for contamination, and in this case contamination
22 admittedly occurred as Ms Culhane testified. The
23 Court finds that despite that express concern on
24 the part of the defense, doesn't change the law
25 in this area, that the State is simply not

1 required to permit an observer at the Crime Lab.

2 The defense also argues that the
3 defendant himself personally expressed concern
4 about being framed earlier in this case. The
5 Court understands that that in fact was the case
6 here, but the Court also understands that the
7 defendant's claim is that he was being framed by
8 members of the County Sheriff's Department and
9 not by members of the Crime Lab.

10 I think it's worth noting in this case
11 that it was Ms Culhane's testing of the DNA in
12 the 1985 case that, in fact, led to the
13 defendant's exoneration. The Court is not aware
14 of any allegations that the Crime Lab was a party
15 to any frame up here and the Court finds no
16 reason to believe that was the case.

17 The last argument was there's no clean
18 sample left to test, as while there is an
19 abstract of the blood evidence, that abstract may
20 have been already contaminated. There's no
21 indication here that the operator, Ms Culhane,
22 used more of the sample than was necessary. She
23 used her best judgment in testing the bullet as
24 she did.

25 She testified that there was nothing

1 visible on the bullet and she felt she had to
2 take an extract from the bullet in order to get
3 enough of a sample to test. The Court can't find
4 anything wrong with that, which would constitute,
5 in any fashion, bad faith on the part of the
6 State.

7 The bottom line is that Ms Culhane did
8 somehow contaminate the control sample in the
9 course of the testing process and she disclosed
10 that contamination. She followed protocol in
11 asking for an exception. Her mistake was
12 disclosed to the defense in a timely manner as
13 part of discovery and the defendant skillfully
14 elicited her testimony about the mistake in
15 cross-examination. The Court does not believe
16 that any bad faith has been shown or that the
17 defendant has not been -- has been unfairly
18 prejudiced in any manner and for that reason that
19 motion is denied.

20 The next motion renewed by the defense
21 is the -- is motion to suppress evidence from
22 multiple searches. This motion was renewed
23 outside of the presence of the jury during the
24 trial, on February 23rd. At that time the
25 defense renewed its motion to suppress evidence

1 based on illegal searches, which was initially
2 denied by this Court in a 21 page written
3 decision on December 12 of last year.

4 Defense counsel cited three separate
5 bases for renewal of the motion at this time,
6 based on evidence that was introduced up to
7 February 23rd. First, the defendant claims that
8 the testimony of Special Agent Fassbender and the
9 other officers who participated in the execution
10 of the multiple day search is not consistent with
11 the facts which formed the basis of the Court's
12 original ruling. Specifically, the defendant
13 characterized the initial entries as prohibited
14 warm-up searches, which are not constitutionally
15 permitted.

16 In the Court's view, the evidence
17 introduced at trial was consistent with the
18 Court's earlier understanding of the bases for
19 the various entries into the trailer and garage
20 that were occupied by the defendant. The Court
21 is not going to repeat here its earlier findings
22 or conclusions, other than to note that the
23 evidence supports the Court's prior understanding
24 of the circumstances under which the entries to
25 the defendant's trailer and garage were made.

1 The fact that there were admittedly
2 multiple entries, raises a number of interesting
3 legal issues of apparent first impression in the
4 State of Wisconsin, but the Court believes it
5 addressed those issues in its written decision
6 and the evidence introduced does not change the
7 factual assumptions which were part of that
8 decision.

9 The defendant's second argument is that
10 the facts introduced give new life to the
11 defendant's **Franks** motion. Specifically, the
12 emphasis by law enforcement in the early stages
13 of the search, treating the case as a missing
14 persons case, the defense alleges undercut the
15 representation made in the affidavit for the
16 initial search warrant by Mr. Wiegert.

17 Mr. Wiegert's specific representations
18 in the affidavit for the warrant were the
19 following: Your affiant believes, that based on
20 Teresa's lack of contact with her employer and
21 family members, and her vehicle being abandoned
22 at the Avery Auto Salvage Yard, that Teresa
23 Halbach is the victim of a crime, including but
24 not limited to, homicide, sexual assault,
25 kidnapping, false imprisonment, and theft.

1 Essentially the Court understands the
2 defense argument to be that the State is not
3 permitted to suspect the worst, but hope for the
4 best. The Court does not agree, given the facts
5 available to law enforcement authorities at the
6 time, primarily the lack of conduct -- or contact
7 with Teresa Halbach for a number of days, and the
8 circumstances surrounding the discovery of her
9 vehicle, even before anyone's blood was found
10 inside the vehicle, there was more than probable
11 cause to suspect serious foul play, in the form
12 of the crimes listed in the affidavit.

13 It is not inconsistent, in those
14 circumstances, for law enforcement personnel to
15 hope that their legitimate suspicions are wrong
16 and that there might be some explanation which
17 would be consistent with Teresa Halbach still
18 being alive. There is nothing unreasonable about
19 what the State did, or what the State gave as
20 bases in the affidavit for the search warrant.
21 The information known to the State at the time,
22 which was reflected in the search warrant,
23 provides adequate probable cause for its
24 issuance.

25 The defendant's third separate argument

1 is that the State waited too long to commence its
2 search of the burn pit area behind the
3 defendant's garage, where the victim's bone
4 fragments were found. As the Court understands
5 the argument, it's different from the challenges
6 to the searches of the trailer and the garage
7 because the claim is not based on improper
8 multiple searches, but rather on an improper
9 delay in conducting the search at a time after
10 the possession of the defendant's living quarters
11 should have been turned back to him.

12 The Court finds nothing improper about
13 the timing of the search in this case. Section
14 968.15 requires that a search warrant be executed
15 and returned within five days. The search of the
16 burn pit commenced before that time period
17 expired.

18 The defense makes much out of the fact
19 that the searchers initially refrained from
20 starting the search because of the presence of
21 the defendant's dog and that's not a valid reason
22 for not starting the search earlier, even if the
23 dog appeared to be dangerous. The Court agrees
24 that the presence of the dog alone would not
25 excuse the timing of the search in this case.

1 However what does excuse it are a number
2 of factors. First, as the Court noted, the
3 search was commenced within the five day time
4 limit.

5 Second, law enforcement personnel had a
6 very large area to search under the warrant, that
7 is, the entire Avery Auto Salvage Yard, and they
8 did not artificially delay, in any way, their
9 search of the burn pit.

10 Third, and most significant, the
11 significance of the burn pit site was not
12 apparent until what appeared to be human remains
13 were discovered there. Once that discovery was
14 made the authorities worked promptly to collect
15 the evidence.

16 There was nothing unreasonable about the
17 search of the burn pit. For these reasons, the
18 defense renewed motion to suppress evidence based
19 on unlawful searches is likewise denied.

20 Third motion that the Court addresses
21 this morning is the defense motion to dismiss all
22 charges against the defendant at the close of the
23 State's case. The standard that the Court is to
24 apply in this situation has been stated as
25 follows:

1 The test is whether, considering the
2 State's evidence in the most favorable light, and
3 the evidence adduced, believed, and rationally
4 considered, is sufficient to prove the
5 defendant's guilt, beyond a reasonable doubt.
6 That is, the Court has to look at the evidence in
7 a light most favorable to the State and ask
8 itself whether a reasonable jury could find that
9 the defendant is guilty beyond a reasonable
10 doubt.

11 In this case, the defendant moved to
12 dismiss all charges, but did not present specific
13 argument on the homicide, mutilation of a corpse,
14 and possession of a firearm charges. The Court
15 is not going to summarize all the evidence here,
16 but it concludes that the State has introduced
17 evidence which, if believed by the jury, would be
18 sufficient to prove the defendant's guilt, beyond
19 a reasonable doubt, on these three particular
20 charges.

21 The argument advanced most strenuously
22 by the defendant is that the evidence introduced
23 by the State, even if believed by the jury, would
24 not be sufficient to sustain a guilty verdict on
25 the false imprisonment charge. The elements the

1 State must prove on the false imprisonment charge
2 are the following:

3 One, the defendant confined or
4 restrained Teresa Halbach during her lifetime.

5 Two, the defendant confined or
6 restrained Teresa Halbach intentionally.

7 Three, Teresa Halbach was confined or
8 restrained without her consent.

9 Four, the defendant had no lawful
10 authority to confine or restrain Teresa Halbach.

11 Five, the defendant knew that Teresa
12 Halbach did not consent and knew that he did not
13 have lawful authority to confine or restrain her.

14 The Court understands the defense
15 argument primarily to be that there's no evidence
16 the defendant confined or restrained the victim
17 in this case. The State introduced no direct
18 proof of that particular element, but asserts
19 that it has a circumstantial evidence case. The
20 State points to evidence that the defendant used
21 his sister's name in requesting the victim to
22 come to the property.

23 Bobby Dassey testified he saw Teresa
24 Halbach heading toward the defendant's trailer
25 after he observed her taking pictures of his

1 mother's van and did not see her three to four
2 minutes later when he looked again after taking a
3 shower.

4 The bullet fragment with the defendant's
5 DNA was found on the floor of the garage. The
6 State submits this evidence demonstrates that the
7 victim was killed in the garage by two bullet
8 wounds to the head. The State also argues the
9 evidence demonstrates that the victim was forced,
10 involuntarily, from the trailer to the garage,
11 and that's the basis for the false imprisonment
12 charge.

13 The State does offer a plausible
14 scenario for what happened; however, that's not
15 the standard that the Court must apply. The
16 evidence has to be sufficient to support a jury
17 verdict of guilt, beyond a reasonable doubt. The
18 circumstantial evidence introduced by the State
19 is, if believed by the jury, sufficient to
20 sustain a guilty verdict on the other charges,
21 but the Court believes there's minimal evidence
22 supporting the false imprisonment charged.

23 Viewed most favorable to the State,
24 there is a logical inference that the victim
25 entered the defendant's trailer for some

1 unspecified period of time and that she was
2 killed by the defendant in his garage. There is
3 no evidence from which a jury can determine the
4 circumstances of how she went from the trailer to
5 the garage.

6 To conclude, on the evidence presented,
7 that she was forced there against her will would
8 require speculation on the part of the jury. The
9 Court believes it is not coincidental that the
10 defendant was not charged with false imprisonment
11 until after the State received statements from
12 Brendan Dassey. That fact alone would not
13 prevent the State from pursuing the false
14 imprisonment charge if there was other evidence
15 to support the charge. But the record does not
16 contain such other evidence.

17 During voir dire, a number of jurors
18 indicated they were at least somewhat familiar
19 with the case against Brendan Dassey. To submit
20 this charge to the jury would, the Court
21 believes, invite the jury to fill in the blanks,
22 if you will, by what they might otherwise
23 remember about allegations that have not been
24 supported by evidence in this case.

25 The Court concludes there is not

1 sufficient evidence in the record to support a
2 jury finding of guilt, beyond a reasonable doubt,
3 on the false imprisonment charge. And the Court,
4 therefore, grants the defendant's motion to
5 dismiss that charge.

6 Counsel, is there anything further
7 before we bring in the jury?

8 ATTORNEY STRANG: I don't know that I need,
9 given the Court's ruling, but if I do, I would move
10 for entry of judgment of dismissal or acquittal on
11 Count 4 of the second Amended Information.

12 THE COURT: Anything else from State?

13 ATTORNEY KRATZ: No.

14 THE COURT: All right. The Court will
15 enter, then, a judgment of dismissal of that charge.

16 I will indicate for the record that the
17 Court met with counsel before beginning today.
18 And after discussion, I believe both parties and
19 the Court is in agreement that the Court is going
20 to individually voir dire the jurors, because of
21 the length of the trial, the extensive publicity
22 that it received, in order to make sure that the
23 Court's order has been adhered to in this case.
24 And before doing that, I think it's beneficial to
25 bring in the jurors briefly and let them know

1 what's going on.

2 I will also indicate, before we bring
3 the jury in, that the Court has spent a good deal
4 of time examining the circumstances under which
5 that individual voir dire should take place.
6 Because the subject of the voir dire could
7 include information about whether or not the
8 jurors violated the Court's order, the Court does
9 not believe that the voir dire should take place
10 in the confines of this courtroom, which could
11 easily be found to be somewhat intimidating to
12 the jurors.

13 It's very important in this case to make
14 sure that the jurors express candor in giving
15 their answers. In many cases voir dire is
16 conducted in chambers, without anyone else being
17 present. But this case is different from many
18 other cases because of the intense media coverage
19 that it's received.

20 The media is very interested in this
21 case and while the Court believes there may be
22 grounds to completely close individual voir dire,
23 the Court also believes that consideration must
24 be given to the interests of the media. And,
25 therefore, I have decided that, although the voir

1 dire will take place in a small conference room
2 that has very limited seating, the Court is going
3 to allow a media representative to be present
4 during the questioning of the jurors.

5 Earlier this morning, I instructed the
6 media coordinator to contact the media folks who
7 are here today and designate one of their members
8 to be present. It will be the obligation of that
9 member to report back to the other members of the
10 media. Obviously, they still will be prohibited
11 from disclosing the identity of any juror.

12 If any action is required as a result of
13 the answers given by the jurors, the Court
14 anticipates that that would take place in open
15 court and not in the voir dire investigation in
16 chambers.

17 Anything further that either party would
18 like to add to that before we bring in the jury?

19 ATTORNEY STRANG: Nothing -- Nothing from
20 the defense.

21 ATTORNEY KRATZ: No, Judge.

22 THE COURT: All right. Let's call in the
23 jurors at this time.

24 (Jury present.)

25 THE COURT: You may be seated. Good

1 morning, members of the jury. I can tell you that
2 your first sitting in the jury box this morning will
3 be probably the shortest sitting that you have
4 during the course of this trial.

5 I indicated last Friday, that because of
6 the length of the trial and the concerns about
7 exposure to media coverage and other items, that
8 it was entirely possible that the Court would
9 conduct some questioning of the jurors on an
10 individual basis before the end of the trial in
11 order to make sure that no improper information
12 had found its way to the jury. Before we proceed
13 further with the defense case this morning, that
14 is what we're going to do.

15 We're not going to conduct the voir dire
16 in this courtroom; it's going to be done in a
17 small conference room and you will be escorted by
18 a sheriff's deputy, one by one, to the conference
19 room, so that the questioning may take place. I
20 only called you out here this morning so I would
21 have a chance to tell you that.

22 So at this time, I'm going to allow you
23 to go back to the jury room and in a few minutes
24 we'll begin the individual questioning. Although
25 you will be questioned individually, the Court

1 does not anticipate that the process will be very
2 long, with respect to any individual juror. So
3 you are excused at this time.

4 (Jury not present.)

5 THE COURT: You may be seated. Counsel,
6 then, I will see you in the conference room near the
7 judge's chambers in 10 minutes.

8 (Individual voir dire in conference room.)

9 THE COURT: I'm not going to take them all
10 in order, we'll start out with Mr. Slaby.

11 Mr. Slaby, I think I indicated on the
12 record the reason for our little session here.
13 Because of the length of this trial, which was
14 kind of unusual in the amount of media attention
15 it's received.

16 You probably have memorized by now the
17 admonition I normally give at the end of the
18 week. And we just wanted to take -- give each
19 juror an opportunity to let us know if there have
20 been any problems, if they have been exposed to
21 any information from any source whatsoever about
22 the case, that, you know, might have an effect on
23 the juror. So, is there anything that you feel
24 the Court should know?

25 MR. SLABY: I don't believe so.

1 THE COURT: You feel you have been able to
2 follow the instructions okay?

3 MR. SLABY: Yes.

4 THE COURT: All right. Can you tell me,
5 have you heard any other persons, whether they be
6 jurors or otherwise, say anything about the case?

7 MR. SLABY: No, not about the case.

8 THE COURT: Okay.

9 MR. SLABY: I mean --

10 THE COURT: I'm sure there's been talk
11 among the jurors, we have heard it sometimes as you
12 leave.

13 MR. SLABY: I don't think there's been
14 anything improper.

15 THE COURT: All right. Very well, I'm
16 going to excuse you then. The sheriff will escort
17 you back to the jury room.

18 *****

19 ATTORNEY STRANG: If we're going to
20 continue this, we should see if Mr. Avery is willing
21 to waive his presence. We have got the sheriff
22 walking these people in. We've got two armed law
23 enforcement officers right outside the door, and
24 we've got a fourth one right in here. It just has a
25 feeling of, you know, an encampment. I don't think

1 anybody would assume that they are worried about
2 Norm Gahn.

3 ATTORNEY FALLON: I'm worried, he is right
4 behind me.

5 THE COURT: Well, we'll -- There's only one
6 sheriff's person in the room. And I think at
7 defense counsel request, I deliberately kept them
8 stationed behind the juror.

9 ATTORNEY STRANG: If he was going to be
10 here at all, that's right. But the sheriff is
11 walking them in and there are two armed, in uniform,
12 officers right outside the door.

13 ATTORNEY BUTING: Could they be out that
14 door?

15 ATTORNEY STRANG: There's another one out
16 there. That's five.

17 THE COURT: Let's do this, after this next
18 juror, we'll take it up and we'll ask the sheriff to
19 return.

20 ATTORNEY BUTING: Okay. Sure.

21 THE COURT: Hi.

22 MS DORN: Hi.

23 THE COURT: Have seat.

24 MS DORN: Is this the hot seat?

25 THE COURT: That's the hot seat. I told

1 you the room wouldn't be very big.

2 MS DORN: Yup.

3 THE COURT: As I explained late Friday and
4 this morning, because of the length of this trial
5 and the publicity that's it's received, now, as
6 we're getting toward the final stages, we just want
7 to make sure that there haven't been any problems
8 with jurors being exposed to information they
9 shouldn't be.

10 MS DORN: Mm-hmm.

11 THE COURT: So what I'm primarily looking
12 for is, do you feel that you have been exposed to
13 anything that you shouldn't have been?

14 MS DORN: My night ends at 8:30 at
15 night. I'm running -- too much running with the
16 kids, tournaments, everything.

17 THE COURT: So you have been busy and you
18 don't feel there's anything you have been exposed
19 to?

20 MS DORN: No.

21 THE COURT: Have you -- Let me ask you
22 this, has there been -- I know that the jurors talk
23 to each other, but has there been any discussion
24 about anything involving the case, that you are
25 aware of?

1 MS DORN: No.

2 THE COURT: There's not been.

3 MS DORN: No.

4 THE COURT: Okay. Very well, thank you.

5 *****

6 THE COURT: At this time we're back on the
7 record. The sheriff is in the conference room, the
8 juror is outside the conference room. The defense
9 counsel, I think, expressed concern about the jurors
10 seeing the sheriff's deputies as they came into the
11 room. It's not a problem with the deputy in the
12 room, as I understand it, but the defense was asking
13 if the deputies outside could, what?

14 ATTORNEY STRANG: Not be there. I mean
15 that's, you know, I'm just concerned about doing
16 this in a way that --

17 THE COURT: Okay.

18 ATTORNEY STRANG: -- has as heavy a law
19 enforcement presence as we have got here.

20 THE COURT: What about if they sat in the
21 outer conference room, behind the wall that's
22 behind?

23 OFFICER: That was a jailer and State
24 Patrol. We could dismiss the State Patrol
25 officer.

1 ATTORNEY BUTING: If they are sitting out
2 there no one is going to see them.

3 ATTORNEY STRANG: I think Brett Bowe is
4 already out there.

5 ATTORNEY KRATZ: Can I ask, in this room,
6 why we're not using a stun belt?

7 THE COURT: That's been ruled on already.

8 ATTORNEY KRATZ: That's been ruled on in a
9 court proceeding, not in a conference room, Judge.

10 THE COURT: I think the concern about what
11 could happen with the stun belt remains the same.
12 I'm not going to revisit that. There has not been
13 any problems with the defendant throughout this
14 trial; I see no reason to revisit it.

15 But security wise sheriff I guess the
16 question is, does that work for you?

17 OFFICER: Sure, if I could just be
18 standing out here after I bring the juror in?

19 THE COURT: Right.

20 OFFICER: Okay.

21 THE COURT: You can stay out there, I think
22 they're asking -- and the deputies, if you like them
23 nearby for security, that's fine.

24 OFFICER: Okay.

25 THE COURT: Have them sit in the outer

1 office rather than standing by the door. Am I
2 correct?

3 ATTORNEY STRANG: Yeah, and if that doesn't
4 work, we will talk about waiving his presence, so to
5 speak.

6 THE COURT: Okay. For what it's worth, I
7 should note that when I saw the first juror come in,
8 and the kind of surprised look on his face on the
9 way out of this room, I didn't get the impression it
10 was due to a couple deputies outside so much as all
11 of us sitting in this room, with one -- just one
12 chair left for him. That was my impression.

13 But at any rate, Sheriff, if that works
14 for you, you can have your deputies sit down in
15 the other outer office. Take Ms Dorn back.
16 Let's bring in Mr. Mahler, Richard Mahler.

17 OFFICER: Okay.

18 ATTORNEY STRANG: Do you have a particular
19 order in your head?

20 THE COURT: No, I'm trying to go as random
21 as I can.

22 ATTORNEY STRANG: There was much less
23 physical fidgeting with this juror.

24 ATTORNEY GAHN: She saw the other one come
25 back so.

1 ATTORNEY STRANG: Right. Some Stranger
2 wasn't sent in to pick up his coat.

3 ATTORNEY BUTING: She was always a little
4 more effervescent in court. The other guy wasn't
5 quite as talkative.

6 THE COURT: Good morning, Mr. Mahler.

7 MR. MAHLER: Good morning.

8 THE COURT: Well, there's no secret why you
9 are here, I indicated in the courtroom.

10 MR. MAHLER: Right.

11 THE COURT: Because of the fact that the
12 trial has gone on for six weeks and that there's
13 been a fair amount of publicity about the trial, I
14 have given the jurors warnings at the end of every
15 day and admonishments not to watch the news media.
16 We just want to make sure that none of the jurors
17 have been exposed to information that they shouldn't
18 have been seeing.

19 MR. MAHLER: Okay.

20 THE COURT: And so at this time, I'm just
21 asking, is there anything that you feel you have
22 been exposed to that could impact your service as a
23 juror.

24 OFFICER: No. In the beginning, my wife
25 said that Channel 12 humiliated me and my family

1 on TV, but that was about it. That has no affect
2 on what I'm doing here.

3 THE COURT: I don't think they would have
4 been permitted to identify a juror.

5 MR. MAHLER: Well, they didn't say my
6 name, but my wife said she knew who I was because
7 they said a musician living on the wife's trust
8 fund, which kind of pissed her off. So she wants
9 nothing to do with it.

10 THE COURT: Channel 12 is in Milwaukee?

11 MR. MAHLER: Yes.

12 THE COURT: Hopefully people in Milwaukee
13 didn't know, but do you feel that that would have
14 any impact on your ability to be fair in this case?

15 MR. MAHLER: No, I'm here to take in the
16 evidence and weigh it out.

17 THE COURT: Okay. Have you heard any
18 discussion of the case by any of the jurors, or
19 anything about the case?

20 MR. MAHLER: Nobody has said anything.

21 THE COURT: Okay. All right. Good. Thank
22 you. You may step outside, the sheriff will take
23 you back.

24 *****

25 THE COURT: All right. How about

1 Mr. Wardman? Good morning, Mr. Wardman. As I
2 indicated on the record, we're having this session
3 just because this is a trial that's gone on for six
4 weeks. There's been a lot of publicity about it.
5 And for the benefit of the Court and the parties and
6 to make sure there is a fair trial, we're just
7 double checking to see if any of the jurors may have
8 been exposed to any information about the case that
9 would affect their ability to serve as a juror. Can
10 you tell us if you feel you have been.

11 MR. WARDMAN: No, last night is the only
12 night I seen it on TV and I had clicked it real
13 quick.

14 THE COURT: You turned it off right away?

15 MR. WARDMAN: Yeah, after I was watching
16 ***Deal or No Deal***, I was surprised they put you on
17 there in commercial time.

18 THE COURT: They tell me I have been on
19 there more than I should be. Okay. So -- But that
20 was it and you turned it off right away.

21 MR. WARDMAN: Yeah. And I don't get the
22 paper so.

23 THE COURT: And the second question, to the
24 best of your knowledge has there been any discussion
25 about the case by any of the jurors?

1 MR. WARDMAN: No.

2 THE COURT: No. Okay. Thank you. You can
3 step outside, the sheriff will take you back.

4 *****

5 And let's try, if the sheriff can duck
6 in here for a minute. Sheriff, Diane Free,
7 number two.

8 THE COURT: Good morning, Ms Free.

9 MS FREE: Good morning.

10 THE COURT: As I indicated in the
11 courtroom, the reason we're doing this is because
12 the trial has gone on for, you know, five weeks now.
13 And there's been a good deal of publicity about the
14 case, so just to make sure that both sides get a --
15 a fair trial, we're double checking to see if any of
16 the jurors may have been exposed to any information
17 about the case that you feel could impact your
18 ability to serve as a juror. Have you been exposed
19 to any information about the case?

20 MS FREE: No, I'm -- I miss the news,
21 though.

22 THE COURT: You are not that many days
23 away. And the second question I have is, are you
24 aware of any conversations that have taken place
25 among any of the jurors involving the case.

1 MS FREE: No, we have done really good
2 policing ourselves.

3 THE COURT: Okay. I'm glad to hear that.
4 All right. Thank you, that's all I have. You are
5 excused.

6 MS FREE: Thanks.

7 *****

8 THE COURT: Number seven, Paul Nelesen.
9 Good morning, Mr. Nelesen.

10 MR. NELESEN: Good morning.

11 THE COURT: First of all, how are you
12 feeling today?

13 MR. NELESEN: Oh, fair to partly cloudy,
14 I guess.

15 THE COURT: Better than last week?

16 MR. NELESEN: Yeah, a little bit better.

17 THE COURT: As I indicated on the record,
18 because of the fact that the trial has gone on for
19 six weeks and has been the subject of a lot of
20 publicity, as we get toward the end stages of the
21 trial here, I'm just trying to make sure that there
22 haven't been any problems of the nature --

23 MR. NELESEN: Sure.

24 THE COURT: -- I addressed. So my question
25 is, whether you have been exposed to any

1 information, whether anybody tried to talk to you or
2 anything, anything that -- information about the
3 case that could affect your ability as a juror?

4 MR. NELESEN: No, I have had people ask
5 me, but I just pretty much tell them what you
6 told me, no, I can't talk about it. Everyone
7 pretty much just drops it.

8 THE COURT: Okay. That's good to hear.
9 And the second and the final question is, are you
10 aware of any discussion that's taken place among any
11 of the other jurors about the case?

12 MR. NELESEN: No, we usually keep pretty
13 quiet.

14 THE COURT: Okay. All right. That's good.
15 You are excused.

16 MR. NELESEN: That's it? Okay.

17 THE COURT: That wasn't so bad.

18 MR. NELESEN: No.

19 *****

20 THE COURT: Let's do number eight, Nathan
21 Klein. Good morning, Mr. Klein.

22 MR. KLEIN: Good morning.

23 THE COURT: As I indicated on the record,
24 because of the fact the trial has gone on for six
25 weeks and has been the subject of a lot of publicity

1 and the trial is starting to wind down and we're
2 getting near the end, we're taking the opportunity
3 to make sure that the -- that the jurors haven't
4 been exposed to anything they shouldn't be. So my
5 first question would be, have you inadvertently, or
6 otherwise, heard anything on the news, or had
7 persons talk to you, or anything else --

8 MR. KLEIN: No.

9 THE COURT: -- about the case?

10 MR. KLEIN: No, I have been very good
11 about it. Immediate family, nor anybody else in
12 the group.

13 THE COURT: And I did get your note about
14 the propane delivery driver, as I understand it that
15 was one of the witnesses from a few days ago.

16 MR. KLEIN: Correct.

17 THE COURT: You indicated you spoke to him
18 two or three years ago when your propane tank --

19 MR. KLEIN: Yeah.

20 THE COURT: Did you just talk about the
21 propane?

22 MR. KLEIN: Yes. There was nothing
23 more, but I felt that I should let you guys know.

24 THE COURT: Is that the extent of your
25 acquaintance with him?

1 MR. KLEIN: Yes.

2 THE COURT: You don't think that would
3 impair --

4 MR. KLEIN: I don't know the guy. He
5 doesn't hardly know me.

6 THE COURT: Last question is, are you aware
7 of any discussion that's taken place about the case
8 by any other members of the jury?

9 MR. KLEIN: No. No, I feel we have a
10 really good group in this. Everybody is very
11 diligent about not speaking of anything.

12 THE COURT: Okay. Very good. Thank you.

13 MR. KLEIN: Yeah, thanks.

14 *****

15 THE COURT: How about number 12, William
16 Mohr? Good morning. Mr. Mohr.

17 MR. MOHR: Good morning.

18 THE COURT: As I indicated on the record,
19 because of the fact that a trial has gone on for six
20 weeks and it's been the subject of a good deal of
21 publicity, we're just questioning the jurors to make
22 sure that they haven't been exposed to anything that
23 could jeopardize the right of either side to a fair
24 trial.

25 So my first question is whether,

1 inadvertently or otherwise, you have heard
2 anything on the news, or other persons have
3 talked to you or tried to talk to you about the
4 case?

5 MR. MOHR: No.

6 THE COURT: Anything?

7 MR. MOHR: No.

8 THE COURT: Thanks. And the second
9 question I have is, are you aware of any
10 conversations that have taken place among any
11 members of the jury that were related to the case or
12 about the case?

13 MR. MOHR: No.

14 THE COURT: Okay. Very good. You may
15 stand up and you will be escorted back.

16 MR. MOHR: All righty.

17 *****

18 THE COURT: Number three, Terri Temme.
19 Good morning.

20 MS TEMME: Good morning.

21 THE COURT: Have a seat.

22 MS TEMME: Okay.

23 THE COURT: As I indicated on the record,
24 because of the fact that a trial has gone on for
25 five weeks now and it's been the subject of a good

1 deal of publicity, we're just taking this
2 opportunity as we near the end of the trial to make
3 sure that, inadvertently or otherwise, none of the
4 jurors have been exposed to any information about
5 the case that they shouldn't be. So, my first
6 question is, has there been anything on the news, or
7 any person who has tried to talk to you, or anything
8 else, with information about the trial?

9 MS TEMME: No.

10 THE COURT: Okay. And my second question
11 is, are you aware, have you heard of any discussions
12 by any other members of the jury about the case?

13 MS TEMME: No.

14 THE COURT: Okay. Thank you. That's it.

15 *****

16 THE COURT: Let's try Barbara Schmidt,
17 number four. Good morning. Good morning, Ms
18 Schmidt. As you know, the trial has been going on,
19 we're in our fifth week now. And because of the
20 fact of the length of the trial and the amount of
21 publicity that it's received, it's very important to
22 both sides that the trial is heard by a fair and
23 impartial jury. And we want to make sure, that
24 whether through inadvertence or otherwise, or for
25 any other reason, that none of the jurors has been

1 exposed to any information that could affect their
2 ability to serve as a juror.

3 So I have a few questions for you. Have
4 you heard anything about the case from any of the
5 media during the trial?

6 MS SCHMIDT: No, sir.

7 THE COURT: The other thing that we asked
8 about and I know that sometimes through inadvertence
9 or through no fault of the jurors, it can happen,
10 but have any other persons attempted to talk to you
11 about the trial, whether other jurors, or family
12 members, or anything else?

13 MS SCHMIDT: No.

14 THE COURT: Okay. Have -- Is there anybody
15 else that lives in your household with you?

16 MS SCHMIDT: Well, my husband, my three
17 sons.

18 THE COURT: Okay. Are your three sons home
19 during the day?

20 MS SCHMIDT: Mostly the older one is a
21 foreman at EVM and the other two go to school.

22 Q. Okay. Have either -- Any of your children or
23 your husband said anything to you about the trial
24 during the course of the trial?

25 MS SCHMIDT: They mention things, but I

1 just kind of ignore them.

2 THE COURT: Okay. Who would mention
3 things?

4 MS SCHMIDT: Mostly my husband. I think
5 he knows more about what's going on than I do.

6 THE COURT: Can you tell me some of the
7 types of things he might mention?

8 MS SCHMIDT: Well, Saturday he said
9 something to the affect that it didn't make any
10 difference what the jurors would decide because
11 everybody would go to appeals and all that kind
12 of stuff. So that's basically it.

13 THE COURT: Has he -- do you know where
14 he's gotten whatever information he has about the
15 trial?

16 MS SCHMIDT: I don't know. He has -- he
17 goes out to the greenhouse, which is our part
18 business. And I imagine he has got a radio out
19 there.

20 THE COURT: Has he said anything to you
21 that in any way is for or against one of the parties
22 to the trial?

23 MS SCHMIDT: No, sir.

24 THE COURT: Okay. So he's mentioned things
25 to you about the trial, but he hasn't said anything

1 about, for example, how he feels?

2 MS SCHMIDT: No, sir.

3 THE COURT: Okay. And what have you done
4 when he's talked to you about the trial?

5 MS SCHMIDT: Well, on Saturday, I went
6 down to carry in wood. See, we have a wood
7 burner in our basement so that's what I do in my
8 spare time. Carry in, putting in, carry in,
9 putting in, that kind of stuff.

10 THE COURT: So you have walked away when
11 he's talked about it?

12 MS SCHMIDT: Yeah, it kind of perturbed
13 him, but I did walk away, yes.

14 THE COURT: And is he aware of the
15 restrictions the Court has placed on you, that you
16 are not supposed to talk about it.

17 MS SCHMIDT: He's aware, but he likes to
18 see if he can get my goat, so to speak.

19 THE COURT: Okay. Has he attempted to
20 provide you with any information outside of what the
21 jury has heard in court about the case.

22 MS SCHMIDT: No, sir, that he won't do.

23 THE COURT: Okay.

24 MS SCHMIDT: But I do have a problem
25 with those little -- I don't know what you call

1 them -- tickers across the bottom of the screen.
2 I usually pay attention because it means
3 something has happened, or like the kids don't
4 have to go to school that day --

5 THE COURT: Sure.

6 MS SCHMIDT: -- because of bad storms,
7 that kind of bothers once in a while, if I don't
8 catch it in time.

9 THE COURT: So you -- What do you do if you
10 see a ticker that involves the trial?

11 MS SCHMIDT: Well, I have been engrossed
12 pretty much in books and stuff. I don't pay too
13 much attention to TV, but when this little sign
14 goes off and then all of a sudden the ticker
15 flies across, well, you kind of pay attention to
16 it.

17 THE COURT: Okay.

18 MS SCHMIDT: But when it involves the
19 trial or something like that, I turn it off
20 quick.

21 THE COURT: Okay. All right. So do you
22 feel that you have been exposed to any information
23 that would affect you or your ability to be fair as
24 a juror?

25 MS SCHMIDT: Not that I know of.

1 THE COURT: Okay. Are you -- Have you
2 talked to any other jurors about what you just
3 talked to me about?

4 MS SCHMIDT: No, sir.

5 THE COURT: Do you know if any other jurors
6 have talked to you or have you heard anything about
7 similar situations where they might -- somebody in
8 their family might be talking to them?

9 MS SCHMIDT: No, sir. I kind of sit
10 back in the room and read all day. And they go
11 around talking, talking, talking.

12 THE COURT: Okay.

13 MS SCHMIDT: And I kind of absorb bits
14 and pieces here and there but.

15 THE COURT: Has any other juror said
16 anything to you on the bus about them talking to
17 their spouse or anything?

18 MS SCHMIDT: Not their talking to their
19 spouse, no.

20 THE COURT: Talking to anybody about the
21 case?

22 MS SCHMIDT: Not about the case, about
23 their measures as to not hearing it, you know,
24 like turning off the radio --

25 THE COURT: Okay.

1 MS SCHMIDT: -- or listening to the PF,
2 whatever, public service thing, you know.

3 THE COURT: Okay.

4 MS SCHMIDT: I don't know what that's
5 called, PBS.

6 THE COURT: So, based on what you know, you
7 feel that the other jurors are doing their best not
8 to hear anything about the case?

9 MS SCHMIDT: That's right.

10 THE COURT: All right. I'm going to have
11 you -- why don't you just step outside for a second
12 with the sheriff there.

13 MS SCHMIDT: Excuse me.

14 *****

15 THE COURT: Let's just hold for a second,
16 shut the door.

17 OFFICER: Okay.

18 THE COURT: We'll be right with you.

19 ATTORNEY FALLON: The only thought I had is
20 you might want to ask her what she's learned from
21 the tickers.

22 ATTORNEY KRATZ: If she learned anything
23 that wasn't in the trial.

24 ATTORNEY FALLON: Depending on what she
25 reveals, whether you go further is entirely

1 dependent on that answer.

2 ATTORNEY GAHN: The tickers, I wouldn't
3 even bring her back in for that.

4 ATTORNEY BUTING: It's kind of hard to
5 believe that as to how many times that her husband
6 has said anything and if he is trying to get her
7 goat all the time, but I'm not sure what would
8 provoke that thing, doesn't matter what the jurors
9 are going to do, everybody is going to appeal.

10 THE COURT: Yeah, well, that can be a
11 situation where a spouse, you know, if they know
12 they are not supposed to be talking about the case,
13 can tease them without saying anything that would
14 prejudice the juror.

15 ATTORNEY STRANG: Let's ask her what her
16 husband thinks about the case.

17 ATTORNEY BUTING: More open ended, what
18 does he think about the case. He knows more about
19 it, what's going on, than I do. How can that be?

20 THE COURT: Sure. Anything else before we
21 bring her back in? I will ask her both, I'll ask
22 her about the tickers.

23 Ms Schmidt, I just have a couple
24 follow-up questions. One was about the tickers
25 you mentioned. Do you know, before you were able

1 to turn the TV off, or look away, do you remember
2 anything that you saw on the tickers?

3 MS SCHMIDT: Not -- Not particularly,
4 no. It just -- it mentioned you and something
5 about Mr. Avery. And then I don't have any idea.
6 But see like the something is, you know, it goes
7 -- like I said, it goes in one ear and out the
8 other and sometimes it doesn't register in
9 between.

10 THE COURT: So whatever you saw on the
11 tickers, you can't remember?

12 MS SCHMIDT: No, sir.

13 THE COURT: The other question I have is
14 with respect to your husband, do you know what his
15 opinion is about the case? Does he think --

16 MS SCHMIDT: He has strong opinions,
17 they don't always agree with mine.

18 THE COURT: Okay. But what opinions of his
19 has he given to you?

20 MS SCHMIDT: Just what he mentioned
21 about, no matter what happens to the trial, you
22 are going to have appeals and all kinds of stuff
23 anyway, so.

24 THE COURT: Has he told you anything about
25 whether he thinks the defendant is guilty or

1 innocent?

2 MS SCHMIDT: No. No.

3 THE COURT: He has not.

4 MS SCHMIDT: No.

5 THE COURT: When you say he has strong
6 feelings, what -- what are those strong feelings
7 that he passed on to you?

8 MS SCHMIDT: Not anything regarding the
9 trial, but -- but like home things. Like if the
10 boys have trouble with this or that, they know
11 better, they are supposed to do this and they are
12 supposed to do that. He doesn't holler at them
13 or scold them, it's always up to me to do the
14 punishing.

15 THE COURT: How often has your husband
16 attempted to talk to you about the case?

17 MS SCHMIDT: Well, twice for sure. As
18 long as this has been going on, maybe twice.

19 THE COURT: Over the five weeks.

20 MS SCHMIDT: Yes, sir.

21 THE COURT: Do you remember which -- about
22 when they were?

23 MS SCHMIDT: No, I couldn't tell you on
24 it.

25 THE COURT: Do you remember the most recent

1 one?

2 MS SCHMIDT: Just that Saturday, this
3 past Saturday.

4 THE COURT: This past Saturday?

5 MS SCHMIDT: Yeah.

6 THE COURT: And the other one would have
7 been about how long before that?

8 MS SCHMIDT: Probably when it just
9 started.

10 THE COURT: Nothing other than that?

11 MS SCHMIDT: No, sir.

12 THE COURT: All right. Thank you. You may
13 step outside.

14 *****

15 THE COURT: Just hold it for a second and
16 shut the door.

17 ATTORNEY BUTING: I think we need to hear
18 from the reporter next, we're kind of shooting in a
19 vacuum.

20 THE COURT: Do you have any questions for
21 this juror at this time?

22 ATTORNEY FALLON: On the thing as a result
23 of that family dynamic, do you think that's going to
24 have any problem for you?

25 COURT REPORTER: I'm sorry, you're going

1 to have to talk a little louder.

2 ATTORNEY FALLON: Okay. I'm sorry. The
3 only thought I had and I'm not saying you definitely
4 need to ask it, but the only question I had is, do
5 you think as a result of the family dynamics here
6 that you would still be able to fulfill your role or
7 duty as a juror in this case, or something to that
8 affect. But other than that, I don't really see
9 anything else.

10 THE COURT: I think I asked her something
11 like that earlier, but it's a good idea to ask her
12 again, now that we have heard everything. Let's
13 bring her back for that one question.

14 One more question.

15 MS SCHMIDT: All right.

16 THE COURT: Ms Schmidt, you will be
17 relieved to know I only have one more question. As
18 a result of whatever discussion you had with your
19 husband on those two occasions when he's tried to
20 talk to you about it; do you feel that anything he
21 said would affect your ability to be fair and just
22 base your decision on the evidence in this case?

23 MS SCHMIDT: No, sir.

24 THE COURT: Okay. Thank you.

25 MS SCHMIDT: This is it, this time,

1 right?

2 THE COURT: I promise, you are not coming
3 back.

4 *****

5 THE COURT: Nancy Stienmetz.

6 ATTORNEY STRANG: As a matter of demeanor
7 and watching her, listening to the answers, I don't
8 believe her. I don't think this is a candid juror.

9 *****

10 THE COURT: Good morning.

11 MS STIENMETZ: Good morning.

12 THE COURT: Have a seat. Ms Stienmetz,
13 we're bringing all of the jurors in this morning to
14 ask some questions, because of the length of the
15 trial and the amount of publicity that it's had,
16 just to make sure that all the jurors can be fair
17 and impartial.

18 You should know that, although there's a
19 reporter sitting behind you, they are prohibited
20 from identifying any juror by name. And I told
21 him also by sex. So any reporting as a result of
22 what happens here cannot in any way identify
23 anything that is said by any particular juror.

24 MS STIENMETZ: Okay.

25 THE COURT: The first thing I want to ask

1 is that the trial has gone on for five weeks now and
2 it's received a great deal of publicity, so we're
3 calling in each of the jurors in order to find out
4 whether any juror may have, through inadvertence or
5 anything else, been exposed to any information about
6 the case from the news media, another person, or any
7 other source, that you can remember? Have you been
8 exposed to any such information?

9 MS STIENMETZ: I have been exposed to --
10 I have not seen a thing on TV, absolutely nothing
11 media wise. I have just been exposed to some
12 chit chat that I have heard, but that's --

13 THE COURT: Chit chat from who?

14 MS STIENMETZ: Some of the other jurors.

15 THE COURT: Okay. Are you referring to the
16 information you provided the Court earlier?

17 MS STIENMETZ: Yeah.

18 THE COURT: Okay. And we have heard
19 something about that as well from one of the
20 participants. I'm going to ask you, if you will, at
21 this time, to tell me as best you can remember, the
22 circumstances and what happened.

23 MS STIENMETZ: For -- From the whole
24 perspective of what I have heard --

25 THE COURT: Yes.

1 MS STIENMETZ: -- since the beginning of
2 everything?

3 THE COURT: Yes. My understanding, it
4 involves two other jurors.

5 MS STIENMETZ: Correct. From what I had
6 heard. The first week, first couple of days
7 Auggie, he sits right next to me, made the
8 comment that when he got --

9 THE COURT: Sits next to you on the bus?

10 MS STIENMETZ: No, he sits next to me at
11 our long table in the room.

12 THE COURT: Oh, not in the courtroom,
13 though?

14 MS STIENMETZ: No.

15 THE COURT: Okay.

16 MS STIENMETZ: No, in that sitting room.

17 THE COURT: Okay.

18 MS STIENMETZ: So, you know, there's
19 always conversation, everyone is laughing and
20 having a pretty good time, generally speaking,
21 but the first week he made a couple comments that
22 when he would get home that his wife watches the
23 trial while he is in there and that she would
24 tell him what transpired when we would be sent
25 out of the courtroom.

1 And one of the other jurors went, shh,
2 shh, you are not supposed to be talking about
3 that. You are not supposed to do that, you know.
4 And then he was quiet. And then a couple of days
5 later, again, he started saying that. And he got
6 shooed by several people and -- Oh, man, I don't
7 like having to do this. And, um, then that was
8 like the first week. Then you had said that you
9 were going to be giving a CD to keep everyone's
10 temptation.

11 THE COURT: Mm-hmm.

12 MS STIENMETZ: So, I think that was like
13 on a Friday and about a few days after that,
14 beginning of the next week, it was conversation
15 about how nice it was and that, you know, no one
16 should be tempted now and whatever. And then
17 there was conversation, just everybody generally
18 here and there popping in something. And they
19 were saying how you could -- you were not
20 supposed to -- because you were doing this, were
21 not supposed to be watching TV, reading
22 newspapers, the computer and stuff like that.
23 And then computer talk started and Auggie, he
24 tends to want to, I know we're not supposed to
25 talk about it but, and he wants to try to start a

1 conversation and he gets shooed.

2 But then when we were on the computer
3 stuff, saying well, you can pull stuff up. And I
4 had said, I think what started that was I had
5 said, well, I had a girlfriend who said that we
6 were all in the computer with our occupations,
7 our family, and I was kind of worried about it
8 because I didn't want anybody to know who I was.
9 I think that's how the computer started.

10 And then Auggie, he was saying, well,
11 how can you erase something on the computer, to
12 have it off of the C drive, I believe. And they
13 were telling him, but then they said, well, once
14 you delete it, it's still in the memory, etched
15 in the computer and anyone can still pull that
16 information out if they want to.

17 It was just speculation on my part. It
18 just was all very coincidental. And he got like
19 whiter than a ghost and didn't say a word the
20 rest of the day. So that was just
21 circumstantial, but I mean it was -- it put a
22 flag in my mind and I'm thinking, well, should I
23 say something, not, no. So I didn't, thinking
24 that was the end of it. Then, I guess what made
25 me think, well, I better say something was then

1 Wednesday on the bus, him and Barb were sitting
2 together and Barb is very quiet.

3 THE COURT: Mm-hmm.

4 MS STIENMETZ: And she was talking about
5 all her things going on at home on the farm and
6 stuff. And I heard Auggie mention, again, about
7 his wife watching it and wanting to tell him what
8 happens.

9 And Barb said that her husband watches
10 it, too, during the day, but he tries to pressure
11 her, influence her with his opinions. She
12 wouldn't mind if he -- She doesn't mind him
13 watching it, but he pressures her with his
14 opinions.

15 And then they were talking -- I don't
16 know, I heard bits and pieces about when news
17 flashes pop up on the screen with film flashes,
18 Auggie was saying that it's hard to get up and
19 leave. I don't know if he said he does or
20 doesn't, but that when they pop up, because they
21 pop up frequently, it's difficult.

22 And that's when I heard Barb,
23 specifically say, that she sees when the ticker
24 tape goes across the bottom of the screen, even
25 though there is a program on, that she does read

1 that ticker tape, that she doesn't leave the
2 room. And that's when I sat on it for a couple
3 days and I thought, well, I better say something.

4 THE COURT: Sure. Let me ask you just a
5 few follow-up questions. First of all, that
6 represents the extent of exposure you have had,
7 right?

8 MS STIENMETZ: Yes.

9 THE COURT: As I understand what you are
10 saying --

11 MS STIENMETZ: Yeah.

12 THE COURT: -- from what you reported that
13 Auggie said, did you get the impression that besides
14 his wife watching what happens when the jurors leave
15 the room, that -- that she's passing that
16 information on to him?

17 MS STIENMETZ: Yeah.

18 THE COURT: Do you have any reason to
19 believe anybody else on the jury is getting that
20 information?

21 MS STIENMETZ: From someone else?

22 THE COURT: Well, but if Auggie passing on
23 what he knows to anybody else.

24 MS STIENMETZ: I don't think so, I mean
25 Auggie, he -- he didn't say, oh, this is what

1 happened and this is what happened, but he just
2 said my wife tells me --

3 THE COURT: Okay.

4 MS STIENMETZ -- when I had come home. A
5 few times I have heard him say that.

6 THE COURT: Did he say if he makes any
7 effort to stop her?

8 MS STIENMETZ: I did not hear that.

9 THE COURT: And with Barb, did you learn
10 anything about what her husband's opinions are?

11 MS STIENMETZ: No.

12 THE COURT: So you don't know what they
13 are?

14 MS STIENMETZ: No. All I heard was, she
15 said that her husband watches the court
16 proceedings on TV, too, while she's in -- in here
17 and that she doesn't mind except that he
18 pressures her with his opinions about what goes
19 on in the courtroom.

20 THE COURT: When she -- When you heard her
21 say, pressures her with his opinions --

22 MS STIENMETZ: Mm-hmm.

23 THE COURT: -- were you sure that it was
24 pressures her with his opinions about this case, as
25 opposed to pressures her with his opinions about

1 other things.

2 MS STIENMETZ: I got the impression it
3 was with the case, because that's what they were
4 talking about.

5 THE COURT: Okay. But she didn't say what
6 those opinions were?

7 MS STIENMETZ: No, no, they did not. I
8 have not heard any of them say what someone had
9 told them, other than that they had been told.

10 THE COURT: Okay.

11 MS STIENMETZ: Influenced, or whatever,
12 I don't know. So, I'm sorry this has turned into
13 a mess.

14 THE COURT: No reason to be sorry for being
15 conscientious.

16 MS STIENMETZ: It's probably nothing,
17 but if it is something and if I didn't say
18 anything, it would be very difficult.

19 THE COURT: Believe me, everybody has to
20 live with themselves and it's good to be
21 conscientious.

22 MS STIENMETZ: So.

23 THE COURT: All right. I think that's all
24 I have for you. I'm going to let the sheriff take
25 you back.

1 MS STIENMETZ: Give me a minute to -- I
2 blush very easily.

3 THE COURT: Ms Stienmetz.

4 MS STIENMETZ: Yes.

5 THE COURT: When you leave with the
6 sheriff, you can tell them, if you want to sit down
7 outside for a little while, you can go in my office
8 if you want.

9 MS STIENMETZ: They have already made a
10 comment that Barb was out so long and I'm out as
11 long as she. And I don't want them to get any
12 ideas.

13 THE COURT: At any rate, you take whatever
14 time you need and we'll have the sheriff take you
15 back.

16 MS STIENMETZ: Okay.

17 THE COURT: Thank you.

18 *****

19 THE COURT: Let's try 16, Laura Barber.

20 ATTORNEY BUTING: We may want to ask this
21 next juror a little more pointed questions about,
22 you know, how you police yourselves. If she says
23 that nobody is talking about it, does it come up at
24 all, you know, what do you say, or how far does it
25 get, or sounds like something that's happened more

1 than once.

2 ATTORNEY KRATZ: Might want to keep her a
3 longer time.

4 ATTORNEY BUTING: Right. I knew they were
5 going to wonder because Barb was back here longer.

6 ATTORNEY GAHN: I was wondering that too.

7 THE COURT: Good morning, again.

8 MS BARBER: Good morning.

9 THE COURT: As I indicated on the record,
10 because of the fact that the trial has gone on for a
11 number of weeks and because it's gotten a lot of
12 publicity and, now, as we're getting toward the end
13 of the trial, we're taking time to make sure that
14 none of the jurors has been exposed to anything they
15 shouldn't be. So, my first question for you would
16 be, can you think of any information from the news
17 media, or any persons who said or tried to say
18 anything to you, has anything about the case been
19 presented to you.

20 MS BARBER: Not at all. Not at all. In
21 fact, if I can just speak, my family, once they
22 knew I was going to be on this jury, as soon as
23 anything comes on, you know, they mute it.

24 It's --

25 THE COURT: Okay.

1 MS BARBER: And I, then, avoid all
2 visual contact with the television. When it's
3 over, they will say it's over and put it back on.
4 People I work with, even, avoid saying. They
5 will come up and say glad to see you're still
6 working here. I work one day a week, you know,
7 and that's the extent, they don't care anything
8 else. And I appreciate that. I haven't picked
9 up a newspaper, I don't even go through the sale
10 papers on Sunday any more.

11 THE COURT: Okay.

12 MS BARBER: Just in case.

13 THE COURT: That's good to know. Next, I'm
14 wondering, and we're asking all the jurors about
15 this, have you heard any discussion about the case
16 during the course of the trial from any of the other
17 jurors?

18 MS BARBER: No, we make it specific that
19 we do not talk about the case. We may talk about
20 some of the people --

21 THE COURT: Okay.

22 MS BARBER: But that's -- usually it's
23 in a humorous -- in fact, I have never been with
24 a group, this long, this close, that everyone
25 gets along so well.

1 THE COURT: Okay.

2 MS BARBER: It's sometimes rather
3 humorous.

4 THE COURT: Sure.

5 MS BARBER: And I appreciate that,
6 because the time goes a lot nicer.

7 THE COURT: Okay. Have any members of the
8 jury had to kind of hush up any other ones before
9 they started talking about the case or --

10 MS BARBER: Someone might have started
11 to say something and it's like, whoa, hold it,
12 that's it, and it's quiet.

13 THE COURT: Okay. So there's pretty good
14 policing?

15 MS BARBER: Very much, very much.
16 Everybody keeps track of everybody else. Unless
17 they are talking to themselves in the bathroom, but
18 to me that's --

19 THE COURT: And you haven't heard --

20 MS BARBER: I'm sorry.

21 THE COURT: And you haven't heard anything
22 come from any of the jurors in this case?

23 MS BARBER: No. Not at all.

24 THE COURT: All right. Thank you.

25 MS BARBER: Oh, darn, I was kind of

1 enjoying this.

2 THE COURT: Well, it's a break from the
3 norm.

4 MS BARBER: Definitely, actually, we
5 were just discussing, we missed our morning
6 break, is it okay if we have one.

7 THE COURT: It's going to be running
8 altogether.

9 MS BARBER: I'm telling you, that's why
10 it's such an enjoyable group. Because this is
11 one of the things, we're worried about our break.

12 THE COURT: Well, that is good.

13 MS BARBER: Thanks.

14 *****

15 THE COURT: Let's try Marion Flint.

16 ATTORNEY FALLON: We don't talk about the
17 trial, but we talk about the people.

18 THE COURT: Talking to themselves in the
19 bathroom. I didn't know that any of you guys wanted
20 me to pursue that. I didn't know if they meant
21 other jurors or the participants in the trial.
22 Marion Flint is the next one.

23 Good morning, have a seat.

24 MS FLINT: Good morning. Okay.

25 THE COURT: We saved you the only chair

1 that's left. This is, as I explained on the record,
2 because of the fact the trial has gone on for a
3 number of weeks, it's gotten a lot of publicity.
4 We're near -- getting near the final stages of the
5 trial. And because of the length of the trial and
6 the publicity, we're taking this opportunity to talk
7 to each of the jurors, just to make sure that the
8 jurors haven't heard anything inadvertently or
9 otherwise, that could impact their ability to serve.

10 So, my first question is, are you aware
11 of any information that you have been exposed to,
12 by accident or otherwise, on the news or from
13 other persons, or any other member of the jury,
14 anything about the case?

15 MS FLINT: No.

16 THE COURT: You have been able to --

17 MS FLINT: I live alone.

18 THE COURT: Okay.

19 MS FLINT: And so I can monitor myself.

20 THE COURT: Sounds like you are doing a
21 good job. Next question is, I know the jurors have
22 been together a lot about this case, are you aware
23 of any instances that came to your attention in
24 which any of the jurors, other jurors, said anything
25 about the case?

1 MS FLINT: None, they have been really
2 good.

3 THE COURT: Okay. All right. Well, that's
4 good to hear. I think that's all I have got for
5 you.

6 MS FLINT: Okay. Thank you.

7 *****

8 THE COURT: Mr. Schuette. Good morning.

9 MR. SCHUETTE: Good morning.

10 THE COURT: We're, as I indicated on the
11 record, in recognition of the fact that the trial
12 has gone on for five weeks now and it's been the
13 subject of a good deal of publicity, and now that
14 we're starting to get near the end of the trial, we
15 wanted to make sure that -- that all the jurors
16 haven't been exposed -- or that none of the jurors
17 have been exposed to any information through
18 inadvertence, or otherwise, about the trial, because
19 of the importance to both parties to get a
20 absolutely fair trial.

21 And we're especially doing it because we
22 understand, even if the parties try to avoid
23 information, it's not always easy to do that.
24 So, in that light, I would like to ask you a
25 couple questions. First of all, whether or not

1 you have been exposed directly to any media
2 reporting about the case during the course of the
3 trial?

4 MR. SCHUETTE: No, I have not.

5 THE COURT: The next question I have
6 relates to information gained from other parties, or
7 other persons, whether there's been any personal
8 acquaintances, other jurors or, I know in special
9 cases, members of the person's family, whether any
10 such information, or any persons have attempted to
11 talk to you about the case in any way?

12 MR. SCHUETTE: No, nobody has. No there
13 have not.

14 THE COURT: Have there been any other
15 conversations with -- involving other members of the
16 jury about the case?

17 MS SCHUETTE: None at all, no.

18 THE COURT: Okay. There -- In cases with
19 people that have spouses, especially, we're asking
20 the question, do you have a spouse at home?

21 MS SCHUETTE: Yes, I do.

22 THE COURT: Has there been any discussion
23 whatsoever between you and your wife about the case;
24 is she following the case in any way?

25 MS SCHUETTE: She's limitedly following

1 it. We have had no discussion that would be
2 involved. I think the only thing about the whole
3 procedure, is what we have for lunch.

4 THE COURT: Okay.

5 MR. SCHUETTE: So there hasn't been
6 anything as far as any details, as far as the
7 trial itself.

8 THE COURT: Okay. Has she been following
9 the trial in any sense at home, on the internet?

10 MR. SCHUETTE: Well, somewhat, I think a
11 little bit in the newspapers. Not on the
12 internet, she doesn't know how to get on the
13 internet. Limitedly on the radio. I don't think
14 the radio, just limitedly.

15 THE COURT: And you said she hasn't talked
16 to you about the facts of the case; has she said
17 anything to you about the case during the course of
18 the trial?

19 MS SCHUETTE: No, not that I can
20 remember. I pretty much told her let's not talk
21 about it. She may well talk about it to some of
22 her family members, but she doesn't relay that to
23 me.

24 THE COURT: Are you aware of any
25 discussions that have been had between any members

1 of the jury about the case during the course of the
2 trial.

3 MS SCHUETTE: Not at all, no. I think
4 the jury, in my observation, I think they have
5 been very observant of your request not to talk
6 about anything.

7 THE COURT: Have any of the jurors had to
8 be told to stop talking about the case by any other
9 jurors?

10 MR. SCHUETTE: Not that I can recall.

11 THE COURT: Okay. Has anybody given -- any
12 person given any information to you about what was
13 happening during the trial while the jurors were
14 outside of the courtroom?

15 MR SCHUETTE: No.

16 THE COURT: Thank you. I think that's all
17 I have. The sheriff will take you back.

18 MR. SCHUETTE: Thank you.

19 *****

20 THE COURT: And Ms Thorne will be next.
21 Good morning.

22 MS THORNE: Good morning.

23 THE COURT: By luck of the draw, you are
24 the last person.

25 MS THORNE: Yeah, I get to wait the

1 longest and sit and wonder.

2 THE COURT: We, as I indicated on the
3 record, this trial is different than most in a
4 number of ways and one of the reasons is it's gone
5 on for five weeks now.

6 MS THORNE: Mm-hmm.

7 THE COURT: It's been the subject of a good
8 deal of publicity. And as we now get near the end
9 of the trial, because of the length of it and the
10 publicity, we're interviewing each of the jurors to
11 make sure that they haven't been exposed, through
12 inadvertence, no fault of their own, or any other
13 reason, deliberate or not, to any information about
14 the case.

15 MS THORNE: Okay.

16 THE COURT: So the first question I have
17 for you, is whether, during the course of the trial,
18 through the news media, family members, employers,
19 members of the public, anyone, have you received any
20 information about the case during the trial?

21 MS THORNE: No.

22 THE COURT: Okay. I'm trying to remember,
23 where are you employed, again?

24 MS THORNE: Waitress, but I'm off the
25 schedule until I go back.

1 THE COURT: Oh. So you have been off --
2 off the --
3 MS THORNE: Right.
4 THE COURT: -- schedule?
5 MS THORNE: Mm-hmm, ever since it
6 started.
7 THE COURT: Do you remember the last time
8 you worked there?
9 MS THORNE: The Sunday right before we
10 started.
11 THE COURT: Before the trial started?
12 MS THORNE: Uh-huh. Yeah.
13 THE COURT: So it was after the jury
14 selection, but before the trial started.
15 MS THORNE: Right. Right.
16 THE COURT: And you haven't worked since
17 then?
18 MS THORNE: No.
19 THE COURT: Okay. Has anyone -- Do any
20 family members or anyone live with you at home?
21 MS THORNE: My fiance.
22 THE COURT: Has he attempted to talk to you
23 about the case?
24 MS THORNE: No, huh-uh.
25 THE COURT: Have any fellow employees,

1 members of the public, anyone else, talked about it?

2 MS THORNE: No.

3 THE COURT: And are you aware as to whether
4 or not there's been any discussion by any of the
5 other jurors about the case?

6 MS THORNE: No, huh-uh.

7 THE COURT: No one has tried to talk to
8 you?

9 MS THORNE: No.

10 THE COURT: And you haven't heard anyone
11 else?

12 MS THORNE: No.

13 THE COURT: Okay. All right. I think
14 that's all I have.

15 MS THORNE: Okay.

16 THE COURT: You can step outside with the
17 sheriff.

18 MS THORNE: All that wondering for
19 nothing, huh.

20 THE COURT: We were trying to get you some
21 exercise this morning.

22 MS THORNE: Okay.

23 *****

24 THE COURT: All right. Counsel, what I'm
25 going to do at this time is adjourn for a break. I

1 will give you a chance to look at your notes and
2 digest things. And I have 11:22 right now, about 20
3 minutes to 12 report to chambers.

4 ATTORNEY KRATZ: This isn't something we'll
5 do on the record?

6 THE COURT: We'll determine --

7 ATTORNEY KRATZ: Oh, I see what you are
8 saying.

9 THE COURT: -- what's the next step after
10 that.

11 ATTORNEY KRATZ: Okay.

12 (Jury not present.)

13 THE COURT: At this time we are back on the
14 record, outside the presence of the jurors. All
15 counsel and the defendant are present. Mr. Strang,
16 does the defense have any additional evidence it
17 wishes to present?

18 ATTORNEY STRANG: We do not, your Honor.
19 We intend to rest, formally, before the jury next
20 joins us in the courtroom.

21 THE COURT: Very well, before we bring the
22 jurors in the courtroom to inform them of that fact,
23 the defendant in this case has a right to testify if
24 he wishes. And the Court wants to make sure that if
25 he is declining to exercise that right, that it is

1 done so knowingly and voluntarily. Mr. Strang, have
2 you raised this issue with your client?

3 ATTORNEY STRANG: I have raised it with
4 Mr. Avery; that is, Mr. Buting and I both have,
5 jointly, several times, probably beginning before
6 trial and then during the trial.

7 THE COURT: Thank you. You can move the
8 microphone over to Mr. Avery then.

9 Mr. Avery, do you understand that you
10 have a constitutional right to testify in this
11 case, if you wish?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: And do you further understand
14 that you have a constitutional right not to testify,
15 if you wish?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: Do you understand that the
18 decision whether to testify or not is yours to make?

19 THE DEFENDANT: Yes.

20 THE COURT: That means, you can listen to
21 your attorneys and listen to their advice, but,
22 ultimately, it's your call; do you understand that?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Has anyone made any threats or
25 promises to you to influence your decision?

1 THE DEFENDANT: No, they didn't.

2 THE COURT: Have you thoroughly discussed
3 your decision with your attorneys?

4 THE DEFENDANT: Yes, I did.

5 THE COURT: And have you made a decision as
6 to whether or not you wish to testify in this case?

7 THE DEFENDANT: Yes.

8 THE COURT: What is your decision?

9 THE DEFENDANT: My decision is, I'm an
10 innocent man and there's no reason for me to
11 testify. Everybody knows I'm innocent.

12 THE COURT: Okay. So you wish not to
13 testify; is that correct?

14 THE DEFENDANT: Yes.

15 THE COURT: Thank you. You may be seated.

16 THE DEFENDANT: Thank you.

17 THE COURT: Mr. Strang and Mr. Buting, have
18 each of you had sufficient opportunity to thoroughly
19 discuss this case and the decision whether or not to
20 testify with your client?

21 ATTORNEY BUTING: Yes, we both have.

22 THE COURT: And are each of you satisfied
23 that he's making his decision not to testify
24 knowingly, intelligently and voluntarily?

25 ATTORNEY BUTING: Yes.

1 THE COURT: Very well, the Court finds that
2 Mr. Avery's decision not to testify in this case is
3 knowingly and voluntarily made. I'm satisfied he's
4 aware of his constitutional right to testify, if he
5 wishes. And he is knowingly and voluntarily
6 declining the right to exercise the right to
7 testify. Is there anything else that either party
8 wishes to address before we bring the jurors in?

9 ATTORNEY STRANG: There is, from the
10 defense, your Honor. I cannot remember when, but
11 sometime earlier in this trial, we discussed the
12 issue of one of our juror's participation on an
13 earlier civil jury in which the witness here was a
14 party. I will not name the juror, but the juror is
15 known to the Court and to opposing counsel.

16 We argued at the time, that although
17 this was uncharted territory, as a matter of case
18 law, that the juror having once passed on the
19 credibility of a witness here, and that witness'
20 role as a party in a prior civil lawsuit, we
21 thought would leave a strong enough impression on
22 a juror and enough commitment to conclusions
23 about credibility that there would be at least
24 objective bias, if not also subjective bias, and
25 reason to relieve the juror from further

1 responsibilities. The Court disagreed.

2 We went back to the case file in the
3 earlier civil case and had our defense
4 investigator look at that file in the Manitowoc
5 County Circuit Court. And it appears from our
6 investigator's review that the real crux of the
7 dispute that was to be resolved by that earlier
8 civil jury was whether the man who was a witness
9 here and the plaintiff in that earlier case was
10 malingering or not.

11 So his credibility, as we understand
12 that earlier file, was not only in issue, but
13 probably the main fighting issue, the main point
14 of dispute in the earlier case. Clearly, given
15 the jury's award of something better than
16 \$170,000, to the plaintiff, that credibility
17 contest was resolved in favor of the plaintiff
18 there, witness here.

19 What we would like, and ask the Court to
20 do, is to transfer the whole of the file from the
21 earlier case to your Honor's custody now, so that
22 your honor might review both the Clerk's minutes
23 and such trial transcripts as there are. The
24 parties also should have an opportunity to review
25 those.

1 I have no reason to think that opposing
2 counsel have seen the file and I know that
3 neither Mr. Buting or I, personally, had seen the
4 file. We simply delegated this to an
5 investigator to take a first pass through that
6 earlier file.

7 So I request that the Court bring the
8 file, physically, to Chilton, from Manitowoc,
9 review the file itself, allow the parties an
10 opportunity to do that. And we anticipate
11 renewing our motion to relieve this juror from
12 further responsibilities in this case,
13 acknowledging, as we have from the beginning,
14 that the juror did the right thing by raising the
15 issue at all, with the Court.

16 So this isn't a juror misconduct issue,
17 claim, not even remotely. We think it's an
18 interesting, as far as we know, unprecedented
19 factual situation that arises, that we believe
20 does require that the juror be relieved. So
21 that's the request I'm making today and the one
22 I'm forecasting later.

23 THE COURT: Let me ask one question before
24 I ask the State if they wish to comment, just to
25 enable me to prepare to reevaluate your request. Is

1 it the defense position that even if this juror is
2 not subjectively biased, that by virtue of the
3 juror's participation in this prior trial, that the
4 juror is objectively biased?

5 ATTORNEY STRANG: Yes, in a word. And I
6 won't labor again to the argument I made earlier,
7 but I spoke to the Court, at the time, about the
8 unique function of being a judge of facts. And the
9 stylized way in which judges of facts, namely
10 jurors, assess the credibility of witnesses and that
11 it's very different than the way we assess
12 credibility day-to-day, or in the grocery store, or
13 barbershop, or wherever we may have conversation
14 with people.

15 And having -- having undertaken that
16 very special and stylized credibility assessment,
17 I think it's unlikely that a juror would
18 reconsider the credibility assessment, once
19 arrived at, as a matter of judgment, as a judge
20 of the facts. And that, objectively, this looks
21 like someone who comes in with an opinion on the
22 credibility of a witness, that has been cast by a
23 very special prior intense experience, with a
24 heavy responsibility for weighing credibility in
25 that earlier role, and now being asked to do so

1 again under the same pattern instruction and with
2 the same special and stylized considerations that
3 apply, in a trial, to the judges of the facts,
4 who fill out the array of 12 people in a jury
5 box.

6 We don't think, reasonably, she could be
7 expected, entirely, to set aside that prior, not
8 just experience with the witness, but conclusions
9 about credibility that she endorsed and drew
10 after deliberations with -- with a group of 12 in
11 that case and affirmed with her verdict.

12 THE COURT: All right. I take it at this
13 point the defense is not asking to argue the merits
14 of its request, but rather simply asking the Court
15 to have the file transmitted here tomorrow.

16 ATTORNEY STRANG: Well, that is correct. I
17 argued the merits earlier. I anticipate I will
18 argue the merits again, but for today, if we can get
19 the file and all counsel can have whatever
20 opportunity they wish to avail themselves of to look
21 at the file, will be in a better position to discuss
22 the issue on the merits tomorrow, or at the Court's
23 convenience.

24 THE COURT: Anything from the State?

25 ATTORNEY FALLON: I would simply say that

1 we don't oppose that suggestion and would certainly
2 like the Court to examine the file at its leisure.
3 I will no doubt be heard tomorrow regarding any
4 renewed motion for the recusal of the juror. I will
5 save my argument until then.

6 THE COURT: Very well, the Court will make
7 sure the file is here tomorrow. I don't know how
8 much leisure time I will have to review it, but I
9 will make sure that it does get reviewed.

10 Anything else before we bring the jurors
11 back in? All right. You may bring the jury in
12 at this time.

13 (Jury present.)

14 THE COURT: You may be seated. Mr. Strang,
15 at this time the defense may call its next witness.

16 ATTORNEY STRANG: Your Honor, Mr. Buting
17 and I jointly have elected to rest at this time on
18 behalf of Steven Avery.

19 THE COURT: Thank you. Mr. Kratz, does the
20 State have any witnesses or testimony to offer in
21 rebuttal?

22 ATTORNEY KRATZ: We do not, your Honor.

23 THE COURT: All right. Members of the
24 jury, that concludes the evidence portion of this
25 trial. I have a couple of notices to read to you.

1 I can tell you that the parties informed
2 me earlier today that they expected the evidence
3 to end some time early this afternoon. They have
4 also requested that they have tomorrow to prepare
5 closing arguments and address some other matters
6 that must be addressed before we have jury
7 instructions and closing arguments of the parties
8 and I have granted that request.

9 So I'm going to, at this time, excuse
10 you for the rest of the day and also notify you
11 that you won't have to report to court tomorrow.
12 You should report at the normal time on Wednesday
13 morning. And when you get here we will then
14 proceed with final jury instructions and also
15 closing arguments of the parties.

16 I do have a few notices to read to you
17 before I excuse you for the day. As you know,
18 the Court's decision not to sequester the jury
19 during the trial is dependent on the jurors not
20 listening to, watching, or reading any news
21 accounts of the case, nor discussing it with
22 anyone including members of your family or other
23 jurors.

24 For these reasons it is vital that you
25 do not listen to any conversation about the case,

1 do not read any newspaper or internet reports, or
2 listen to any news reports on the radio or
3 television about this trial.

4 To assure that you are not exposed to
5 improper media coverage, the Court has ordered
6 that, for the duration of the trial, that you do
7 not watch the local news on television, nor
8 listen to the news on radio, nor read any
9 newspaper accounts, unless you first have someone
10 remove any articles about this case from the
11 newspaper.

12 In addition, do not visit any internet
13 websites or web logs which may include any
14 information about the case. I should add at this
15 point that although the evidence portion of the
16 trial is complete, the Court's order remains in
17 affect. It is especially important at this time
18 that you not be exposed to any information about
19 the case.

20 The Court is asking that for those of
21 you who are employed, that you not report to work
22 tomorrow. I will make sure that you get paid a
23 full day's jury pay, even though we're not asking
24 you to be here tomorrow because of the request
25 that I'm making.

1 Make sure that you do not disclose your
2 status as a juror to anyone, if anyone attempts
3 to discuss the case with you, politely but firmly
4 notify them that you are prohibited from
5 discussing the case. If you are involuntarily
6 exposed to any information about the case from
7 any source, take steps to immediately avoid any
8 further exposure.

9 Should you be exposed to any reports or
10 communications from any source concerning the
11 case during the trial, or should you become aware
12 of anything that you believe may affect your
13 ability to serve as a juror, you should not
14 discuss your concerns with any jurors, but report
15 any concerns to the jury bailiff.

16 I also have a -- prepared a memo, which
17 the jury bailiff will give to you before you
18 leave today. There is a copy for each of you.
19 As I think the parties disclosed during the jury
20 selection process, it's difficult to predict --
21 difficult to predict how long jury deliberations
22 may take, as disclosed in the memo, the Court is
23 requesting that you pack some luggage, overnight
24 belongings, in the event deliberations go on for
25 more than a day and it's required that you stay

1 over.

2 If deliberations do go on more than a
3 day, we'll put you up at a hotel, make sure you
4 get all your meals taken care of and everything
5 else. There is further information in the memo
6 that you will be receiving. With that I'm going
7 to excuse you for today.

8 (Jury not present.)

9 THE COURT: You may be seated. Counsel, is
10 there anything further either party wishes to put on
11 the record at this time?

12 ATTORNEY STRANG: The defense moves now, at
13 the close of all evidence, for a judgment
14 dismissing, with prejudice, the remaining three
15 counts of the second Amended Information. I ask the
16 Court, without further argument, to consider all of
17 the evidence now received and to conclude that, even
18 in the light most favorable to the State and drawing
19 all reasonable inferences in the State's favor, the
20 evidence is insufficient, as to each one of the
21 three counts, to justify a reasonable jury
22 concluding that the State has proven all essential
23 elements as to each of those counts.

24 And I acknowledge, again, that as to one
25 of the counts, Count 3, the felon in possession

1 of a firearm count, we did stipulate to one
2 element, so as to that element, the status as a
3 convicted felon on the relevant date, there the
4 evidence is sufficient because stipulated. But
5 as to the other charges and their essential
6 elements, I ask for judgment of dismissal for
7 want of sufficient evidence.

8 THE COURT: Anything from the State?

9 ATTORNEY KRATZ: Just that the actual legal
10 standard the Court is supposed to apply at this
11 stage, not in the light most favorable to the State,
12 but could a reasonable juror find guilt, beyond a
13 reasonable doubt. We do believe that that slightly
14 higher standard has also been met regarding the
15 three remaining counts. Would ask the Court,
16 without further argument, deny that motion.

17 THE COURT: For many of the reasons which
18 the Court gave this morning, the Court believes that
19 it has already had adequate opportunity to address
20 this motion and the Court is going to deny the
21 motion to dismiss the remaining three counts against
22 the defendant at this time. Anything else before we
23 adjourn this afternoon?

24 ATTORNEY STRANG: Yes. Mr. Buting was
25 concerned that I was unclear, and I often am, as to

1 the felon in possession count. I meant to concede
2 only that one of the essential elements of that
3 count is established, not concede that any of the
4 other essential elements of that count are
5 established. And second --

6 THE COURT: That's how I understood your
7 argument.

8 ATTORNEY STRANG: Well, then, the Court's
9 become accustomed, perhaps, unfortunately, to my
10 clumsy way of speaking. I also had, before this
11 trial started, I think on February 2, suggested that
12 a mistrial may be warranted, if, in fact, the State
13 sought to proceed on the false imprisonment count
14 and then fell short in its case-in-chief. That's
15 what happened. I am not at the moment moving for a
16 mistrial, because I want to think long and hard
17 about whether necessity for that really is manifest.
18 And there's nothing happening with the jury now so,
19 sequentially, if I wish to make that argument, I
20 know that I could do it tomorrow, out of the jury's
21 presence. So I'm not making that motion now, but I
22 want to alert the Court and counsel that the matter
23 is fresh in my mind and under consideration.

24 THE COURT: Very well. If there's nothing
25 further, we're adjourned for this afternoon.

1 STATE OF WISCONSIN)
)ss
2 COUNTY OF MANITOWOC)
3

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

15 Dated this 11th day of January, 2008.
16
17
18

19 _____
Diane Tesheneck, RPR
20 Official Court Reporter
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23
24
25