

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY  
BRANCH 1

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STATE OF WISCONSIN,

PLAINTIFF,

JURY TRIAL

TRIAL - DAY 22

vs.

Case No. 05 CF 381

STEVEN A. AVERY,

DEFENDANT.

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**DATE:** MARCH 13, 2007

**BEFORE:** Hon. Patrick L. Willis  
Circuit Court Judge

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

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

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

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

STEVEN A. AVERY  
Defendant  
Appeared in person.

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**TRANSCRIPT OF PROCEEDINGS**

Reported by Diane Tesheneck, RPR

Official Court Reporter

1 (Jury not present.)

2 (Jury instruction conference.)

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

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

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

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

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

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

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

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

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

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

7                     (Brief recess.)

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

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

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

5 ATTORNEY STRANG: I have the March 13,  
6 2007, red lined draft copy of jury instructions  
7 which runs onto a 14th page, in my sight.

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

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

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

25 ATTORNEY FALLON: Well, they are

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

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

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

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

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

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

10 THE COURT: Mr. Strang.

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

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

25 And there is at least some evidence

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

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

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

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



1 defense No. 9.

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

8 I recognize that I could not satisfy  
9 this court or an appellate court that the general  
10 theory of defense set forth here by the Court did  
11 not otherwise cover the matters suggested in No.  
12 1 and No. 2 as proposed by the defense. So I  
13 would withdraw those, if the Court gives the  
14 theory of defense instruction as set forth on  
15 page five of today's draft.

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

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

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

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

20 Is that correct, Mr. Fallon?

21 ATTORNEY FALLON: That would be correct.

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

25 ATTORNEY FALLON: We do not.

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

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

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

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

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

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

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

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

1 offer the suggestion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

6 THE COURT: Mr. Fallon.

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

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

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

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

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

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

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

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

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

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

20 Mr. Strang, you may continue.

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

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

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

3           ATTORNEY FALLON: Right.

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

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

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

1       presented in the context of testimony from the  
2       witnesses.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

1 or suppression of other evidence.

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

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

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

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

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

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

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

25 Although, of course, the good or bad

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

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

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

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

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

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

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

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

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

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

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

22 THE COURT: Mr. Fallon.

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

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

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

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

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



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

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

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

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

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

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

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

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

1           that they would want to preserve.

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

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

18                      ATTORNEY STRANG: The next instruction is  
19          defendant's proposed Instruction No. 8, this  
20          concerns prior inconsistent sworn statements. I  
21          think the Court ought, at a minimum, give this jury  
22          some instruction on prior inconsistent statements.  
23          It readily could be appended to Pattern Instruction  
24          300 on the credibility of witnesses, wouldn't have  
25          to stand alone.

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

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

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

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

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

5               And Lieutenant Lenk was shown to have  
6       made materially different statements, under oath,  
7       than he made on the same topic here at trial.  
8       And he was, in fact, impeached on  
9       cross-examination, with two prior sworn  
10      statements, that I think a jury could find are  
11      materially inconsistent with his testimony on  
12      direct examination on the question of, when did  
13      he arrive at the Avery property on November 5,  
14      2005. This jury should be told, specifically,  
15      that it can consider those prior inconsistent  
16      sworn statements in weighing his testimony.

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

25             There certainly were other witnesses who

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

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

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

1 THE COURT: Mr. Fallon.

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

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

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

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

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

8                   And, again, there's nothing that  
9                   precludes the defense from arguing vigorously  
10                  that because Lieutenant Lenk said, in an earlier  
11                  proceeding this past summer, that his  
12                  recollection was that he arrived at the scene at  
13                  6:00, and it turns out, in reality, after  
14                  checking all the pay logs and records and  
15                  whatnot, he arrived on the scene somewhere around  
16                  2:00; defense is certainly free to argue with  
17                  that inconsistency, whether under oath or not.  
18                  Falls within one of those parameters that the  
19                  jurors are instructed on.

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



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

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

9 THE COURT: Anything else, Mr. Strang?

10 ATTORNEY STRANG: I think I would be  
11 repeating myself.

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

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

25 What I would suggest is another bullet

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

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

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

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

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

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

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

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

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

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

1           you are talking about or what the content was.

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

5           THE COURT:   Mr. Strang.

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

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

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

19          ATTORNEY STRANG:   Right.

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

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

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

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

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

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

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

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

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

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

1           that's all I'm saying.

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

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

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

22                      ATTORNEY STRANG: That's fine.

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

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

3                   ATTORNEY FALLON:   That's fine.

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

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

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

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



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

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

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

25                  Answer: Yes.

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

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

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

22           We did. We complied with Section  
23      971.23 -- well, whatever the provision is that  
24      requires the defense to give notice of expert  
25      opinions. It's true that we didn't give a

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

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

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

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

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

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

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

24             THE COURT: Mr. Fallon.

25             ATTORNEY FALLON: Thank you. Much ado

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

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

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

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

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

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

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

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

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

1           about nothing.

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

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

21                   THE COURT: Read it verbatim again.

22                   ATTORNEY STRANG: Sure.

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

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

4 So the question in issue begins:

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

11 Answer: Yes.

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

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



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

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

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

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

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

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

1           you choose to point that out to the jury --

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

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

8                   ATTORNEY STRANG: Yes.

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

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

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

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

3                   ATTORNEY FALLON:   They are to the State.

4                   ATTORNEY STRANG:   Yes.

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

13                   ATTORNEY STRANG:   Yes.

14                   ATTORNEY FALLON:   Yes.

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

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

1 Office.

2 As I understand, some years ago, it's a  
3 1999 civil lawsuit, Detective Remiker sought some  
4 compensation for injuries he alleged in  
5 connection with an automobile accident. And our  
6 juror sat as a juror at the trial of that civil  
7 action. She was among those who voted for the  
8 jury verdict in that case.

9 And I don't -- I didn't look here to see  
10 whether that was a unanimous civil verdict, or a  
11 5/6ths civil verdict. But my recollection is  
12 that when she was questioned about it, she  
13 acknowledged that she voted either with all the  
14 other jurors or with the majority that determined  
15 the verdict in the case.

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

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

1           medical doctor who testified for the plaintiff,  
2           Detective Remiker.

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

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

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

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

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

13                 Answer: Yes.

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

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

24                 Question: Can everyone hear Dr. Lamps-a?  
25                 I think everyone is comfortable with your voice

1 level there.

2 Answer: Okay.

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

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

16 And evidently Dr. Dahl, was the defense  
17 medical expert in that case, and that's what I  
18 get from the context. So that, it looks to me,  
19 is like -- like a large part of the trial issue  
20 was Detective Remiker's credibility. Clearly,  
21 when the jury returned a verdict of over  
22 \$170,000, that credibility determination was  
23 resolved in Detective Remiker's favor. And this  
24 juror was part of that credibility determination.

25 So the argument, again, is that, because

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Does the State wish to be  
6 heard?

7 ATTORNEY FALLON: Yes, thank you. We would  
8 oppose the excuse -- the striking for cause or the  
9 excuse of this juror. We're going to begin with our  
10 presentation with the law. A prospective juror is  
11 objectively biased if a reasonable person in the  
12 prospective juror's position, objectively, could not  
13 judge the case in a fair and impartial manner.  
14 That's a citation from **State vs. Mendoza**, 227 Wis.  
15 2d, 838, with a citation to **State vs. Erickson**,  
16 E-r-i-c-k-s-o-n, at 227 Wis. 2d, 758.

17 In **State vs. Faucher**, at 227 Wis. 2d,  
18 700, Supreme Court noted, quote, The circuit  
19 court is particularly well-positioned to make a  
20 determination of objective bias and it has  
21 special competence in this area. It is  
22 intimately familiar with the voir dire proceeding  
23 and is best situated to reflect upon the  
24 prospective juror's subjective state of mind,  
25 which is relevant, as well as to the

1 determination of objective bias.

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

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

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

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

8                   The juror could not recall whether  
9 Detective Remiker even testified. Could not  
10 recall the amount of damages awarded to Detective  
11 Remiker. Did recall that he did prevail and that  
12 he was awarded some money and she thought perhaps  
13 \$100,000. But she could not recall any of the  
14 circumstances. She could not recall the length  
15 of the trial, or as I already said, the focus of  
16 the trial, a trial that occurred six, to possibly  
17 seven years before this trial.

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

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

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

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

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

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

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

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

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

24 THE COURT: Mr. Strang.

25 ATTORNEY STRANG: In reply, let me -- let



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

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

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

25 But let's suppose the Court was

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

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

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

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

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

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

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

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

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

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

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

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

1           and circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

25 It's one thing to pull out a transcript

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

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

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

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

1           judicial system in tough straits.

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

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

15                      I don't believe there's any evidence  
16          here to suggest this juror is objectively biased.

17          And, therefore, the Court is going to, again,  
18          find that she should not be removed from this  
19          jury, that there's no basis to remove her on the  
20          grounds of either subjective or objective bias.

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

23                      (Proceedings concluded.)

24

25

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 22nd day of January, 2008.  
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17  
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19 \_\_\_\_\_  
Diane Tesheneck, RPR  
20 Official Court Reporter  
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