

IN THE CIRCUIT COURT IN AND FOR PASCO COUNTY, FLORIDA  
CASE NO. CRC89-11425CFANO-B

STATE OF FLORIDA,

Plaintiff,

vs.

KEVIN RICHARD HERRICK,

Defendant.

FILED  
CRIMINAL COURT  
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KARLEEN F. DEPLAKER  
CLERK OF CIRCUIT COURT  
APPEAL

BEFORE: THE HONORABLE BRANDT C. DOWNEY III  
Circuit Judge

REPORTED BY: CARLA JESSAL, NOTARY PUBLIC  
State of Florida at Large  
Deputy Official Court Reporter  
Sixth Judicial Circuit

PLACE: Courtroom B  
Criminal Courts Complex  
Clearwater, FL 34620

DATE: October 2, 1990  
October 3, 1990

TIME: Commencing at 9:00 A.M.

JURY TRIAL  
(Volume Two)

Volume 1 Pages (1 - 158)  
Volume 2 Pages (159 - 243)

ROBERT A. DEMPSTER & ASSOCIATES  
Pinellas County Courthouse  
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Clearwater, Florida 34616  
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**COPY**

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## P R O C E E D I N G S

1  
2 (THEREUPON, PROCEEDINGS CONTINUED OUTSIDE THE PRESENCE OF  
3 THE JURY AS FOLLOWS: )

4 THE COURT: Special instructions from anybody?

5 MR. BULONE: No, Your Honor.

6 THE COURT: Defense?

7 MR. LEINSTER: No, sir.

8 THE COURT: Okay. In looking at the lesser  
9 included chart, it would appear that we have several  
10 category ones. I think we're going to have to go into  
11 this.

12 On the aggravated battery, lesser included of  
13 simple battery as a category one, so I don't think I  
14 have any option on that. An attempt, I guess they're  
15 talking about an attempted aggravated battery is also  
16 a category two.

17 MR. BULONE: I don't think that's really  
18 necessary, Judge.

19 THE COURT: Would you agree that attempt doesn't  
20 need to be given?

21 MR. LEINSTER: Honestly, Judge, I have not looked  
22 at the lessers as scheduled in this case. An attempt  
23 is necessarily a one step reduction but, then again, I  
24 guess we go to the evidence and see if there is  
25 anything to sustain an attempt. Either it was done or

1           it wasn't.

2           THE COURT: That's the way I would look at it.  
3           He was either battered or he wasn't battered.

4           MR. LEINSTER: I agree with that.

5           THE COURT: I don't think an attempt on agg  
6           battery is an appropriate charge to give, but I will  
7           give aggravated battery and the lesser included of  
8           simple battery.

9           MR. LEINSTER: That's fine.

10          THE COURT: Looking at the sexual battery count,  
11          they give as a lesser included category one a simple  
12          battery. Again does the -- I don't think I have any  
13          control over that. The State has charged 794.011(3)  
14          which is the victim 12 years or older and great force.

15          MR. BULONE: Well, Judge, it's actually used or  
16          threatened to use a deadly weapon 3(a).

17          THE COURT: I mean, at the top of the jury  
18          instruction it says great force and then alleging that  
19          a weapon was used. Looking at that particular charge,  
20          as I said, there are several category two lesser  
21          includes. One would be an attempt, one would be an  
22          agg battery, one would be an agg assault, one would be  
23          a simple assault, and then the sexual battery as it  
24          relates to the forth subparagraph of the statute,  
25          which is the situation where great force wasn't used,

1 but certain other coercion, et cetera, was used.

2 It also relates to subparagraph five of the  
3 sexual battery statute where slight force was used.

4 What says the state with regard to the category  
5 two lesser included?

6 MR. BULONE: I don't think they're really  
7 appropriate. I think the defense in this case is ID,  
8 and I think the defense is more or less stipulating to  
9 the fact if that victim was stabbed, that a deadly  
10 weapon was used. So I would just ask for the sexual  
11 battery charge as charged. I don't know that you have  
12 to go through all the lesser includes. I wouldn't ask  
13 for them.

14 THE COURT: Defense?

15 MR. LEINSTER: Your Honor, to be perfectly  
16 candid, I think this is a win big or lose big  
17 situation. However, I would be legally replete in not  
18 requesting the lesser included instructions, at the  
19 risk of complicating things, elongating things, and  
20 all the rest. I'm not crazy about having to give  
21 them, but I am requesting them as a matter of law.

22 THE COURT: All of the category two?

23 MR. LEINSTER: Yes, sir.

24 THE COURT: I would think that based on the  
25 testimony that has been elicited during the trial, I

1 think an attempt would be appropriate here. I don't  
2 think the agg battery lesser included, I don't think  
3 the agg assault -- well, let me take that back. I  
4 think the agg assault would apply and I don't think  
5 the assault simple would apply.

6 With regard to the two sexual battery lessers, I  
7 believe that the lesser included with paragraph --  
8 subparagraph four, wherein, one of the elements was  
9 that the Defendant coerced the victim to submit by  
10 threat of retaliation against the victim or any other  
11 person. The victim reasonably believed that the  
12 Defendant had the ability to execute the threat in the  
13 future, I believe that that one would apply.

14 I don't believe the slight force would be used  
15 because of the weapon she indicated that was there.  
16 I'll give the lesser included on sexual battery from  
17 subparagraph four, but not five, as well as an attempt  
18 and the aggravated assault and the mandatory one with  
19 regard to the battery.

20 Concerning the burglary, there is a mandatory  
21 lesser included of burglary.

22 MR. BULONE: Judge, I think that the way the jury  
23 instructions work that there is burglary and then it's  
24 aggravated if there are certain things that apply.  
25 The only thing we've alleged is the deadly weapon.



1 THE COURT: The lesser included of burglary where  
2 there wasn't a dwelling or whether there was or was  
3 not a danger weapon and all that, we'll go through  
4 that when we go through the instructions.

5 There are category two lesser includeds of an  
6 attempt and then burglary of a dwelling or without  
7 humans present. I don't believe that would apply, but  
8 it will be part of the instruction, but I don't think  
9 we need to give it again.

10 Then trespass. How do you feel about trespass,  
11 Mr. Leinster?

12 MR. LEINSTER: I'll waive it.

13 THE COURT: So on the burglary we'll just go  
14 through with the regular burglary part of the statutes  
15 or instructions. There was one other I need to pull  
16 out. Okay. Under section 2.02, statement of the  
17 charge, using the format as outlined in the  
18 information, the first one I'll give will be the  
19 burglary charge. I'm looking at pages 135 136 and 137  
20 from the book.

21 I'll delete any reference to any type of  
22 conveyance. I'll go through the three elements, that  
23 the Defendant entered or remained in a structure owned  
24 or in the possession of the Defendant -- or the victim  
25 and I'll read in that instance Cheryl Hagan or Darren

1 Barfield. He didn't have permission of anyone to  
2 enter or remain and at the time of entering he did so  
3 with the intent to committ the crime in that  
4 structure.

5 The first note deals with being open to the  
6 public. I don't think that applies. Proof of  
7 entering stealthily without consent of the owner.  
8 Joe, how would you feel about that one?

9 MR. BULONE: I would ask for that one, Judge.

10 THE COURT: Since this was a flight I would think  
11 that that one would apply. The next one, with regard  
12 to the whole body, I don't think that one applies. I  
13 believe the bottom paragraph, the intent with which an  
14 act is done, would also apply.

15 MR. LEINSTER: I'm sorry, I don't have the jury  
16 instructions in front of me.

17 THE COURT: The intent with which an act is done  
18 is an operation of the mind and, therefore, is not  
19 always capable of direct or positive proof. It may be  
20 established by circumstantial evidence like any other  
21 fact in the case.

22 MR. LEINSTER: That's fine.

23 THE COURT: Okay. The next one I believe  
24 applies. Even though an unlawful entering or  
25 remaining in a structure is proved, if the evidence

1 does not establish that it was done with the intent to  
2 committ a crime, the Defendant must be found not  
3 guilty. I believe that does apply.

4 The next paragraph has to do with proof of  
5 possession of stolen property, that does not apply to  
6 this. Definition of structure applies, then the  
7 enhancement. The first paragraph with an assault or a  
8 battery I believe would apply. If you find in the  
9 course of committing the burglary the Defendant made  
10 an assault or a battery upon any person, you should  
11 find him guilty of burglary during which an assault or  
12 a battery had been committed. Then I'll give the  
13 definition of a battery at that time.

14 I think the next one also applies with regard to  
15 being armed.

16 MR. BULONE: Uh-huh.

17 THE COURT: I believe the next one applies with  
18 regard to the structure being a dwelling. I believe  
19 the next one applies with regard to a human being  
20 being in the structure. And then, if there are no  
21 aggravating circumstances, you should find him guilty  
22 only of burglary and we'll go through on the verdict  
23 form what they all mean.

24 MR. BULONE: Okay. On the verdict form, I'm not  
25 sure how it's normally done, but the way I think it

1 probably should be done is to say guilty of burglary  
2 and then have a bunch of other boxes for the  
3 aggravating ones.

4 THE COURT: That's right, all of the aggravating  
5 factors and then one with no aggravating factors and  
6 then a not guilty will be included on the verdict  
7 form.

8 MR. BULONE: Got that.

9 THE CLERK: No, you lost me there.

10 THE COURT: We'll go through the verdict form in  
11 a minute. I don't believe the next one applies. I  
12 don't believe explosive applies. Dangerous weapon  
13 will be given. We've already given the definition of  
14 a dwelling. I don't think we have to do it again.

15 MR. BULONE: Did we?

16 THE COURT: No, we did structure. I'll give  
17 dwelling. Then I won't give the bottom one.  
18 Therefore, if you find the Defendant of burglary  
19 it is necessary to state in your verdict whether the  
20 Defendant then insert the aggravating circumstance.  
21 We'll have all of those listed out for them and then  
22 on the -- and that was the only -- we weren't going to  
23 give any category two other than what was in the  
24 standard instruction with regard to the burglary.  
25 Again, we'll go through the verdict form on that in a

1 minute.

2 The next one would be the sexual battery, sexual  
3 battery alleging great force. The elements to be  
4 shown are that the victim was 12 years of age or  
5 older, that the Defendant committed an act upon the  
6 victim in which the sexual organ of the Defendant  
7 penetrated or had union with the mouth of the victim.  
8 2(b) would not be given since that deals with an  
9 object, and I don't think that applies here.

10 The Defendant in the process used or threatened  
11 to use a deadly weapon, 3(a), that will be given and  
12 the act was done without the consent of the victim,  
13 that will be read.

14 Consent will be defined. I don't think that any  
15 of the mental incapacities or mental defective  
16 statutes apply. The union definition I believe would  
17 apply. Deadly weapon would also apply. We don't need  
18 to worry about serious personal injury and I don't  
19 believe with regard to the medical purposes that that  
20 would apply either.

21 I'll also at this point give the lesser included  
22 of a battery, and at that point I'll also give the  
23 lesser included from the page on a sexual battery from  
24 page 119 and 119(a). And under paragraph three it  
25 would be 3(c) that I believe only has to do with

1           whether it comes to -- whether it's a second or a  
2           third or a first or second degree matter, I believe.  
3           The rest of that would be the same.

4           Definition of union, eliminating mentally  
5           defective, eliminating mentally incapacitated. Give  
6           definition of consent again, eliminate anything having  
7           to do with physically helpless or serious personal  
8           injury, and I won't give the part about the medical  
9           purposes.

10           The third would be the aggravated assault lesser  
11           included, looking at page 88. Before you can find him  
12           guilty, there are four elements, that the Defendant  
13           intentionally and unlawfully threatened either by word  
14           or act to do violence to the victim, at the time  
15           appeared to have the ability to carry it out, that the  
16           act of the Defendant created in the mind of a victim a  
17           well-founded fear that violence was about to take  
18           place and that the assault was made with a deadly  
19           weapon. Give definition of deadly weapon and also the  
20           last paragraph would be state doesn't have to prove  
21           defendant intended to kill anybody.

22           Third charge is aggravated battery from page 90.  
23           Before you can find the Defendant guilty of agg  
24           battery the State has to prove two elements. The  
25           first is a definition of a simple battery that the

1 Defendant intentionally touched or struck the victim,  
2 and in this case the victim would be Barfield, against  
3 his will or intentionally caused bodily harm to  
4 Mr. Barfield. And second, that the Defendant in  
5 committing the battery intentionally and/or knowingly  
6 caused great bodily harm to the victim or used a  
7 deadly weapon. I think both of those would apply. I  
8 don't think C would apply and the deadly weapon is a  
9 weapon if it's used or threatened to be used likely to  
10 produce death or great bodily harm. Come back and  
11 give an included of simple battery. Anything else as  
12 it relates to the charges that we need to go through  
13 at this time, Mr. Bulone?

14 MR. BULONE: No, sir.

15 MR. LEINSTER: No, sir.

16 THE COURT: All right. Then the other standard  
17 instructions that will be given would be 2.01 the  
18 introduction, 2.02 Statement of the Charges, 2.02(a)  
19 Will necessarily have to be given because of the  
20 lesser included, 2.03 Burden of Proof, 2.04 Weighing  
21 the Evidence. I think the first five questions apply.  
22 I believe that eight also applies with regard to prior  
23 inconsistent statements. I think that would be  
24 appropriate. I don't think that six with regard to  
25 receiving any preferential treatment or money applies.

1 I don't think seven with regard to any pressure or  
2 threats apply. I don't think nine with regard to  
3 witness being convicted of a crime applies and I don't  
4 think ten with regard to general representation  
5 applies. So I won't give those four, but I will give  
6 one through five, eight. No expert witnesses, no  
7 accomplice.

8 Defendant not testifying. Mr. Leinster, do you  
9 want both or either or none read.

10 MR. LEINSTER: As far as the Defendant not  
11 testifying?

12 THE COURT: Yes, 2.04(d).

13 MR. LEINSTER: I would like that.

14 THE COURT: Both of them read? Fine, I'll read  
15 both. Defendant's Statements, I don't believe that  
16 applies. I don't think there was anything major with  
17 regard to any incriminating statements.

18 Rules For Deliberation, all eight would apply.  
19 Cautionary, 2.07, would apply. We'll come back to  
20 2.08 in a minute. 2.08(a) Single Defendant Multiple  
21 Counts, that would certainly apply to this case. And  
22 Submitting the Case to the Jury, 2.09, that would  
23 apply and I'll read that also.

24 With regard to the verdict form, we'll need three  
25 separate forms. The first one -- and we'll go through



1 the easy one fist -- aggravated battery, the Defendant  
2 is guilty of aggravated battery as charged. The  
3 second box that they can check would be the Defendant  
4 is guilty of simple battery as included. The  
5 Defendant is not guilty.

6 On the sexual battery, the Defendant is guilty of  
7 sexual battery using great force as charged.

8 MR. BULONE: Well, that's the title, but what we  
9 really charged him with was --

10 THE COURT: A weapon.

11 MR. BULONE: Yeah. So that's what we actually  
12 need, that's what we charged him with.

13 THE COURT: The Defendant is guilty of sexual  
14 battery -- why don't we say involving a deadly weapon  
15 as charged.

16 MR. BULONE: That's fine.

17 THE COURT: The second box would be the Defendant  
18 is guilty of simple battery as included, next would  
19 be Defendant is guilty of attempted sexual battery as  
20 included, guilty of aggravated assault as included and  
21 the fourth sexual battery -- I don't know what to call  
22 that.

23 MR. BULONE: The one with slight force?

24 THE COURT: No the other one where it says  
25 special circumstances. I guess we'll just say sexual

1 battery involving verbal circumstances as included and  
2 the Defendant is not guilty.

3 MR. BULONE: Judge, I think the way things are  
4 supposed to work on the lesser included, when you list  
5 them it's supposed to go from the most serious to the  
6 least.

7 THE COURT: I was just listing them in the order  
8 that they had them in the columns over in there.  
9 Obviously, sexual battery with special circumstances  
10 is worse than simple battery, except that was a  
11 category one, that's why I listed that first.

12 MR. BULONE: I think that's the order it's  
13 supposed to go in.

14 THE COURT: So the first one would be after  
15 sexual battery involving a deadly weapon as charged  
16 then the next one would be sexual battery special  
17 circumstances.

18 MR. BULONE: Then attempted sexual battery.

19 THE COURT: Then aggravated assault and then  
20 battery, all as included, and then of course the  
21 Defendant is not guilty.

22 MR. BULONE: Right.

23 THE COURT: On the burglary -- these really get  
24 confusing. Defendant is guilty of burglary of a  
25 structure.

1 MR. BULONE: I think we have to do it burglary of  
2 a structure and then you have the boxes for all the  
3 aggravating ones assault, deadly weapon.

4 THE COURT: The way I like to do it instead of  
5 saying guilty of burglary of a structure and then list  
6 them like that is repeated. Let's say guilty of  
7 burglary of a structure while armed with a deadly  
8 weapon as charged because that's what the information  
9 charges him with. The Defendant is guilty of burglary  
10 of a structure with an assault or a battery as  
11 included.

12 MR. BULONE: Okay.

13 THE COURT: Defendant is guilty of burglary of a  
14 structure which was a dwelling without an assault or a  
15 battery. Defendant is guilty of burglary of a  
16 structure with a human being in the structure, but  
17 with no assault or battery and was not armed.

18 MR. BULONE: And was not a dwelling, too. I  
19 think it's --

20 THE COURT: It just says structure, but not a  
21 dwelling.

22 MR. BULONE: That's fine.

23 THE COURT: It just says structure. The  
24 Defendant is guilty of burglary with no aggravating  
25 circumstances and I'll explain to them what that

1 means. He wasn't armed, he didn't committ an assault,  
2 that he didn't committ a battery, that there wasn't a  
3 human being and the dwelling wasn't a -- the structure  
4 wasn't a dwelling. Then the Defendant is not guilty.

5 Before we start closing argument I'll show each  
6 of you the three verdict forms so we can talk about it  
7 if we need to. State goes first and last. How much  
8 time gentlemen?

9 MR. BULONE: I'd say about 40 minutes, maybe 45  
10 minutes.

11 THE COURT: Ed, how long do you think?

12 MR. LEINSTER: I think that's a rough  
13 approximation. I don't like to be held to a specific.

14 THE COURT: You're the one going straight through  
15 so --

16 MR. LEINSTER: I think 45 is pretty good.

17 THE COURT: I would say 45.

18 MR. LEINSTER: I don't know if you're the type of  
19 judge that taps on the podium or rings a bell.

20 THE COURT: I'll tell you when you have five to  
21 go. Joe, when you get up for your rebuttal, I'll tell  
22 you how much time you have left out of 45, okay?

23 MR. BULONE: All right. Anything else to talk  
24 about as it relates to instruction? All right. We'll  
25 be back in here without the jury at 12:30 and go over

1 the forms, the verdict forms, at that point and if we  
2 don't have a problem then we'll proceed directly into  
3 closing argument.

4 (THEREUPON, A RECESS WAS TAKEN AT 11:45 A.M. AND  
5 PROCEEDINGS RESUMED AT 12:45 P.M. OUTSIDE THE PRESENCE  
6 OF THE JURY AS FOLLOWS: )

7 THE COURT: Have we had a chance to go over the  
8 verdict forms?

9 MR. LEINSTER: Yes, sir, I have. What is the  
10 crime of sexual battery with special circumstances.

11 THE COURT: That is the lesser included. That's  
12 a category two where the three of the four elements  
13 are the same and refers to that part of the statute  
14 where the victim was either physically unable to  
15 resist or the Defendant coerced the victim to submit  
16 by threatening to use force or coerced the victim to  
17 submit to the threat of retaliation against the victim  
18 or against someone else or the Defendant without prior  
19 knowledge or consent administered or had knowledge  
20 that someone gave a narcotic or an anaesthetic or  
21 intoxicating substance to the victim or the victim was  
22 mentally defective.

23 MR. BULONE: I don't think any of that really  
24 applies, Judge.

25 THE COURT: I was just thinking from the

1 testimony of retaliation against the child.

2 MR. BULONE: That's true.

3 MR. LEINSTER: But of course --

4 THE COURT: And it lowers the degrees, I think.

5 MR. LEINSTER: One of those categories is exactly  
6 the same as the charge itself, at least as you recited  
7 it with the threat of force.

8 MR. BULONE: The actual charge is with a deadly  
9 weapon.

10 THE COURT: Yeah. One alleges great force or  
11 with a deadly weapon and that's the main one I'm  
12 reading with the deadly weapon.

13 MR. LEINSTER: Okay. I was just curious. I  
14 never heard that particular crime before.

15 THE COURT: Anything else with regard to the  
16 verdict form.

17 THE CLERK: I have count one coming up, I left  
18 that out of it, and they're going to put that in and  
19 bring it up.

20 THE COURT: All right. Bring the jury in.

21 THE BAILIFF: The jury is seat in the jury box,  
22 Your Honor.

23 THE COURT: Fine, thank you. Ladies and  
24 gentlemen of the jury, both the State and the Defense  
25 have rested their respective cases and the attorneys

1 will make their final argument to you. As before,  
2 keep in mind that what the lawyers say during their  
3 final arguments is not evidence. However, do listen  
4 closely to their argument as they are intended to aid  
5 you in understanding the case.

6 Each side will have an equal time to address you  
7 during their final argument, however, the State is  
8 entitled to divide its time between an opening  
9 argument and a rebuttal argument after the Defendant  
10 has spoken to you.

11 Mr. Bulone, your final argument to the jury.

12 MR. BULONE: Thank you, Your Honor. The way that  
13 this will work is that when you go back into the jury  
14 room you will be given what is called a verdict form  
15 and there will be a verdict form for each charge in  
16 this particular case. The Defendant in this case has  
17 been charged with three charges. One is burglary, one  
18 is sexual battery, and the other one is aggravated  
19 battery.

20 The way there works is, see that under A there is  
21 a box there for the burglary. It goes all the way to  
22 F. A is what the Defendant is charged with and each  
23 of those are called lesser included offenses, and the  
24 bottom one is not guilty. The judge will instruct you  
25 that the way you handle this is that you look at the

1 offense that is charged to see if the State has proved  
2 that beyond a reasonable doubt. If the State has  
3 proved that beyond a reasonable doubt then you check  
4 A and you don't have to move on.

5 The only time you move on into the lesser  
6 included offenses is if the State has not proved A  
7 beyond a reasonable doubt. Then you go to B and see  
8 if the State proved that, if not you go to C, D and so  
9 on. So if the State has proved what has been alleged  
10 as charged in A, you just look at that, and if we  
11 have, you check that and you don't have to go any  
12 further.

13 Now, the State does have the burden of proof and  
14 we accept that burden of proof, of course, and that  
15 burden of proof is what's called beyond a reasonable  
16 doubt. And remember, it's not beyond all doubt or any  
17 doubt or beyond the shadow of a doubt, but it's beyond  
18 a reasonable doubt. And that is a doubt that you  
19 can subscribe a reason to, an actual reason to. It's  
20 not a forced doubt, an imaginary doubt, a speculative  
21 doubt or a possible doubt, and the Judge will tell you  
22 that.

23 And you have to remember that in a trial if some  
24 witnesses say one thing and then another witness might  
25 say something a little bit different, that is not



1 automatically a reasonable doubt. If it was an  
2 automatically reasonable doubt, things would be pretty  
3 easy. If you assume it's a reasonable doubt off the  
4 bat, it's a cop out because what the duty of the jury  
5 is to do is look at the evidence and look at the  
6 testimony.

7 The Judge will tell you that the jury can accept  
8 any evidence that you want or disregard any evidence.  
9 You can believe any evidence that you want or not  
10 believe any evidence that you want. You have to look  
11 at the evidence and decide what's credible, what's  
12 right and what really happened. That's your job and  
13 that's why we have jurors to figure out what really  
14 happened, to cut through it all.

15 Now, as I stated, the Defendant is charged with  
16 three charges and the first one that the Judge will  
17 instruct you on is burglary, and I think it's rather  
18 clear. The State has prove this one, as all of them,  
19 beyond a reasonable doubt. Let's talk about burglary  
20 first. The Judge will instruct you before you can  
21 find the Defendant guilty of burglary the State must  
22 prove the following three elements beyond a reasonable  
23 doubt. There are three things we have to prove for  
24 burglary: Number one, the Defendant entered a  
25 structure owned or in the possession of the victims

1 Cheryl and Scott. The Defendant did enter that  
2 structure back on July 15th, 1989. Number two, that  
3 the Defendant did not have the permission or consent  
4 of the victims or anyone authorized to act for him or  
5 her to enter into that structure at that time. That  
6 is true, the victims stated that the Defendant did not  
7 have permission to be in that structure at that time.  
8 Number three, at the time of entering the structure,  
9 the Defendant had a fully formed conscience intent to  
10 committ the offense of assault in that structure.

11 Now, the Court will further instruct you that the  
12 intent with which an act is done is an operation of  
13 the mind and therefore is not always capable of direct  
14 and positive proof. It may be established by  
15 circumstantial evidence, like any other fact in the  
16 case. Well, the way we prove the Defendant's intent  
17 to commit a crime therein, and that's all a burglary  
18 is, it's a trespass, an entering with the intent to  
19 committ a crime therein. And the way we prove what  
20 his intent was is what he did. That's the easiest way  
21 to prove that.

22 The tough cases is when a person enters a  
23 structure and he gets caught before he can do  
24 anything, then you really don't know what his intent  
25 was. But in this case we know what his intent was

1 because we know what he did. We know he went in, we  
2 know he turned off the lights, we know he got on top  
3 of Cheryl, we know he put each knee to each side so as  
4 to straddle her, we know that he had his pants and his  
5 underwear off, we know that he had his penis in her  
6 face, we know that he put his penis into her mouth  
7 against her will, we know that Scott heard her crying,  
8 that Scott came in, that Scott saw this and caught the  
9 Defendant, that the Defendant had a knife which he had  
10 up against the victim's throat, that he threatened to  
11 kill the baby, that he threatened to kill Cheryl, that  
12 he threatened to kill Scott, that when Scott came in  
13 he got off of Cheryl, that he got into a struggle with  
14 Scott, that he stabbed Scott, that he then went out of  
15 the bedroom and went toward the sliding glass doors  
16 where Scott was able to see who he was. We then know  
17 that he ran out with Scott chasing him and Scott was  
18 again able to see who he was outside.

19 So we know what his intent was because we know  
20 what he did. He committed a brutal and a violent act  
21 and the defense likes to dehumanize things, but let's  
22 not lose site of the facts. If the witness states he  
23 had his penis in my face and he was shoving it in my  
24 face, the defense likes to dehumanize that. Let's not  
25 talk about that, let's talk about how many times he

1           went over there for a barbecue and let's try to make  
2           things as confusing as we can by asking the same  
3           questions over and over again when it's really pretty  
4           simple. Let's just keep going over the same thing.  
5           So let's not lose site of what happened, this was not  
6           a pretty thing that he did.

7                     Now, that's what a burglary is. Now there are  
8           certain aggravating circumstances with a burglary  
9           under A which is what he's charged with. If he had a  
10          deadly weapon, then you find the Defendant guilty as  
11          charged -- excuse me, a dangerous weapon is the  
12          correct phrase. A dangerous weapon is any weapon  
13          that, taking into account the manner in which it is  
14          used, is likely to cause death or great bodily harm.  
15          That certainly fits a knife or a scalpel. Certainly a  
16          knife or scalpel at your throat, that is at your  
17          underwear, that is shoved into your chest, that's a  
18          dangerous weapon.

19                    And how do we know that the Defendant had a  
20          scalpel or a knife? Well, there's Scott's shirt right  
21          there. The police saw Scott after the incident.  
22          There was blood all over, they saw his wounds, that's  
23          what Officer Crosby stated, he was stabbed. So,  
24          obviously, there was a knife or scalpel. Plus, Scott  
25          and Cheryl saw a knife or scalpel and Cheryl felt that

1 knife or scalpel on her throat. And we also have  
2 blood on the walls and on the sliding glass door where  
3 the Defendant was trying to escape from. So we know  
4 that we have a dangerous weapon involved. And as I  
5 stated, the only time that we go beyond A, which is as  
6 charged, is if we don't prove that beyond a reasonable  
7 doubt.

8 Then we go to B which is a burglary and an  
9 assault therein which, obviously, there was. And then  
10 if you don't think we did that, then you go down to is  
11 it a dwelling or not, et cetera. But we proved A  
12 beyond a reasonable doubt. There was an entering, it  
13 was not with the permission of the owners and the  
14 Defendant did intend to do an assault therein and he  
15 did have a deadly weapon. That takes care of  
16 burglary.

17 Next up is the sexual battery charge. Now, I  
18 explained to you during voir dire and I asked you if  
19 you could follow the law on this and not follow what  
20 you think the law should be or what you think the law  
21 was when you came in. That goes for burglary and for  
22 sexual battery and for all of the charges. The Judge  
23 will instruct you that the State has to prove these  
24 following four elements: Number one, that the victim  
25 was twelve-years-old or older, obviously, that's true.

1           Number two, the Defendant committed an act upon Cheryl  
2           Hagan in which the sexual organ of the Defendant, his  
3           penis, obviously, penetrated or had union --  
4           penetrated or had union with the mouth of the victim.  
5           So we have that in this case. We have the sexual  
6           organ of Kevin Herrick being involved into the mouth  
7           of Cheryl Hagan against her will. Number three, the  
8           Defendant in the process used or threatened to use a  
9           deadly weapon and, again, did he have a deadly weapon?  
10          Did he use it or threaten to use it? He sure did. He  
11          had a knife to her throat, a knife to her underwear.  
12          He threatened to kill her, he threatened to kill the  
13          baby. He threatened to kill Scott and the baby and he  
14          stabbed Scott. The act was done without the consent  
15          of the victim. So if we've proved there is a sexual  
16          battery with a weapon then you check A, and only if we  
17          haven't proved that do you go to B and C and D.

18                 The third charge is aggravated battery against  
19          the victim Darren Scott Barfield who was stabbed.  
20          Again, some of the same elements -- the State must  
21          prove the following two elements beyond a reasonable  
22          doubt: Number one, the Defendant intentionally  
23          touched or struck the victim against his will or  
24          intentionally caused bodily harm. Did he touch or  
25          strike Darren Scott Barfield against his will? Of

1 course, when he stabbed him. Number two, the  
2 Defendant in committing the battery intentionally or  
3 knowingly caused great bodily harm or used a deadly  
4 weapon. Again, deadly weapon is, of course, a knife  
5 or scalpel, and that's under A.

6 Aggravated battery, you only go to battery which  
7 is no deadly weapon or dangerous weapon and D. Of  
8 course from all the evidence and being stabbed, the  
9 blood, the testimony, there was a deadly weapon  
10 involved. And the defense doesn't really contest the  
11 charges, I don't think. Their point, I believe, is  
12 not that this Defendant did something else other than  
13 what was charged, but that it wasn't him. It was  
14 somebody else, it was some other guy.

15 You know, though, it wasn't some other guy  
16 because we have the best evidence we can have that it  
17 was Kevin Herrick. We have eye witnesses, eye witness  
18 testimony. First we have Cheryl. Cheryl stated to  
19 you and she has stated all along, first to the police,  
20 from the very beginning when the police asked her, she  
21 stated I think it was Kevin Herrick, but I can't  
22 really be a hundred percent sure. She stated it from  
23 the very beginning and all the way through. She  
24 stated I thought it was him because of his body build,  
25 his shape, his hair, the fact that he left by the

1 sliding glass door was an additional thing, and by the  
2 belt buckle. It was dark in there when she was  
3 assaulted, but after she woke up for a while she was  
4 able to focus better. Of course, it's not going to be  
5 a hundred percent darkness, and she was able to see  
6 his outline, see his features, see the shape of his  
7 body and see that big old belt buckle that she  
8 recognized so well when he came out of the apartment,  
9 eventually, the last person out, wearing the same belt  
10 buckle.

11 We have the eye witness testimony of Scott.  
12 Scott testified, the first one into the bedroom, he  
13 saw an outline of the Defendant. A struggle ensued  
14 and the stabbing occurred. The Defendant then went  
15 towards the sliding glass doors and Scott went into  
16 the baby's room for a very short period of time then  
17 went after the Defendant.

18 The Defendant ran into the kitchen and in the  
19 kitchen the venetian blinds were open. There was a  
20 big light right across the way. This is a very small  
21 complex. With a light shining through the kitchen, he  
22 was able to see who it was. In the bedroom he saw the  
23 outline and in the kitchen with the light shining  
24 through saw the face, and it was that face right  
25 there. That face was the face of Kevin Herrick.



1           Herrick then ran eastbound and then southbound.  
2           Scott went after him for a while. Scott then thought  
3           perhaps he went into a car and he was in the bushes  
4           for a while trying to check out the car and he got the  
5           license plate number and he came back. The Defense  
6           attorney would like to make this all confusing by  
7           asking the same questions over and over again, but  
8           it's not very confusing. Scott thought that the  
9           Defendant may have been in the car so he got the  
10          license plate number.

11           He came back, he knew that the Defendant was not  
12          in the car because he knew it was the Defendant that  
13          did this because the Defendant then emerged from the  
14          apartment. He then continued the story about the  
15          license plate, and he told you this straight forward,  
16          that the reason he didn't tell the police that it was  
17          Kevin Herrick right then was because he was going to  
18          get some guys together and he was going to kill him.

19           Now that may not be the best reaction in the  
20          world by Scott, but it certainly is an understandable  
21          reaction. The first reaction of a victim when a  
22          Defendant breaks into your house, rapes your fiancée,  
23          threatens her with a knife, has a knife to her throat,  
24          threatens to kill your baby and stabs you probably is  
25          not we'll just let the criminal justice system handle

1 this. It's probably not the first reaction of a  
2 victim like this that I'm going to get this guy. I'm  
3 going to get him. And sometimes, for good reason, our  
4 system does not have a great representation and people  
5 sometimes don't have a whole lot of confidence in it,  
6 and I guess you could see why. It takes a year and a  
7 half for things to happen before we finally have the  
8 trial, and we have to live with it for a year and a  
9 half.

10 The victims come in here and they're treated as  
11 if they're on trial being victimized again, plus he  
12 was just darn right angry. That's may not be the best  
13 reaction, but understandable reaction. He was going  
14 to get some guys together and he was going to kill  
15 him.

16 He went to the hospital, he was treated and he  
17 had time to cool down and calm down, and cooler heads  
18 prevailed and he called the police and he told them  
19 that he knew who it was and that it was Kevin Herrick.  
20 He stated that there is no doubt in his mind that it  
21 was Kevin Herrick. And I said that a reasonable doubt  
22 is a doubt that you can ascribe a reason.

23 Well, the Defense would have you believe that  
24 Cheryl and Scott are making this up now, that they  
25 don't really know who it was or that it may have been

1 a different person, it wasn't Kevin. They're just  
2 making it up now. They're fibbing and they've been  
3 fibbing the whole time. They'e not telling the truth.  
4 But why in the world would they just make that up and  
5 say that it was Kevin Herrick? Why in the world would  
6 they do that? She had just been raped and threatened  
7 and had a knife or scalpel at her throat, the baby was  
8 threatened with death, Scott was stabbed, why would  
9 they make up Kevin Herrick if it wasn't him? Do we  
10 have a good reason for that? No way. It was Kevin  
11 Herrick and I hope you will so find. Thank you.

12 THE COURT: Mr. Leinster.

13 MR. LEINSTER: Well, I agree with the State on  
14 one thing, something happened out there in July of  
15 1989, that's about where we part company. There is  
16 absolutely nothing up anyone's sleeves. There is  
17 nothing in the wings. You have heard everything that  
18 the police know or don't know about this case. And  
19 for a lay person, as the State points out it, takes a  
20 year, year and a half, that may be true. But how does  
21 a man spend a year and three months behind bars?

22 MR. BULONE: Judge, I object, that's not  
23 relevant.

24 THE COURT: Sustained.

25 MR. LEINSTER: This case has been going on for a

1 year and three months. You see, at the stage in which  
2 a person is arrested there is no cross-examination.  
3 The State says that I have victimized these witnesses  
4 all over again. All I did was cross-examine them. It  
5 may be that Cheryl was put through a traumatic  
6 situation, that doesn't mean that I can allow a man  
7 who may be innocent to be victimized as well.

8 There was no cross-examination a year and three  
9 months ago. How did this start? How is it possible  
10 that this happened? Because Darren Barfield comes  
11 running back to the complex and he tells his fiancée  
12 -- it's one of those subtle cleansing kind of words.  
13 I don't care that they're not married. But "fiancée"  
14 of three years, just a good family guy, he tells her  
15 that it was Kevin that did this. He takes her aside  
16 to console her and plants in her mind it was Kevin  
17 that did this. That's where it started. She doesn't  
18 have a clue as to who it was at that point. It was  
19 pitch black, her words not mine.

20 But what does she tell the police? Does she tell  
21 the police my boyfriend saw him? He just told me he  
22 saw him; he got a got look at him. No, what she says  
23 is it might have been the next door neighbor, but I  
24 don't think so because he's too nice. This is after  
25 her fiancée of three years says it was him, I saw him,

1 and she's still not saying it's him, I don't think so,  
2 he's too nice.

3 But then she says it must be him because he's  
4 always coming through the sliding glass door. Always  
5 coming through the sliding glass door. Well, of  
6 course, that's not true because, according to her, he  
7 only came over two or three times and didn't always  
8 come through the sliding glass door. But her mind has  
9 been set in motion that this guy tried to get out the  
10 sliding glass doors, it's probably Kevin Herrick for  
11 crying out loud.

12 What description does she give the police of her  
13 assailant in the pitch black, venetian blinds closed,  
14 she sees nothing. What is it about her assailant that  
15 catches her attention? It's his dark, curly hair,  
16 longer in July of 1989 than it is now. That was the  
17 one thing that was similar in her mind to Kevin  
18 Herrick, his dark, pouffy, curly hair. She is now  
19 convinced, having seen nothing of Mr. Herrick or  
20 anyone else at the time other than that pouffy, dark,  
21 curly hair she is now convinced it is him. Why,  
22 Aside from the fact that Mr. Barfield tells her it is?

23 The police have told her they found the weapon  
24 with Scott's blood on it. Not true. Why did the  
25 police tell her that? Did Mr. Barfield tell her not

1 to say to the police that it was Kevin? They didn't  
2 say that, but for crying out loud why wouldn't she?  
3 Say my boyfriend just went to the hospital, he got  
4 stabbed, and he told me. Go talk to him. It was  
5 Kevin. No, she doesn't think it's him, he's too nice.

6 She had known Kevin Herrick for weeks. She knew  
7 his height, weight, voice. It is pitch black and she  
8 says that she saw his jeans in the dark. I said how  
9 do you know they were jeans, it's pitch black? How do  
10 you know they were jeans? She didn't. She said they  
11 were jeans to the police, that was gospel, but she  
12 really didn't know, she just said so. He had on a  
13 navy blue shirt or black, that's what she told the  
14 police. He had on a shirt and described the color. I  
15 said how do you know it was that color it was pitch  
16 black? You see colors because of light. Well, she  
17 didn't know. She said that. But that's not what she  
18 said to the police. And when it comes out to the  
19 police, it's gospel. She didn't say I think, maybe,  
20 it was dark. She said it's a navy blue or black  
21 shirt. She didn't have a clue.

22 Another thing, her assailant at the same time had  
23 one hand over her mouth and with his other hand,  
24 unless he was uniquely ambidextrous, had a knife to  
25 the right side of her neck which would suggest that

1 the assailant was left-handed, unless you crossed your  
2 hands over like this, which wouldn't make much sense.  
3 I had Mr. Herrick sign his name in front of you. I  
4 hope you noticed he signed with his right hand. He is  
5 not left-handed.

6 What was she told? What was Cheryl told by  
7 Scott? That he chased the suspect, that he saw the  
8 car moving, that he got the tag, that Kevin is getting  
9 away, that's what Cheryl was told in the presence of  
10 Dave, a friend. These are all lies. These are not  
11 people from whom you hide something. And why did he  
12 tell that to those folks? Is he really confused? I  
13 asked him and I read to him specifically from his  
14 deposition, which is no less under oath than the  
15 testimony in court. I said what did you mean when you  
16 gave that tag number to David and asked him to report  
17 it to the police? You knew that that was not the  
18 rapist that was in that car. That was to deflect the  
19 police. Answer: Yes. Well now what he says --  
20 because what is he gonna say? I was confused? That's  
21 not a confusing question, but he certainly is not  
22 going to tell you, yes, I came back and I not only  
23 lied to the police, but I lied to Cheryl and I lied to  
24 Dave as well about this.

25 Well, we know he's a liar. When and where he

1 lies is difficult to tell. His nose doesn't grow, his  
2 eyes don't light up, but we know he's a liar. For  
3 some strange reason Cheryl doesn't tell that to the  
4 police either. She doesn't say anything about any of  
5 the conversations. She just says I can't be certain.  
6 Her own fiancée has told her apparently, psst, it was  
7 Kevin. Doesn't she believe him?

8 This is a real tag number, according to Scott,  
9 this wasn't something that he made up. Somewhere that  
10 evening over the course of about four hours, although  
11 nobody came in to say this, I'm assuming that the  
12 police were out actually looking for a car with a tag  
13 on it, and some poor guy is going to get pulled over  
14 for rape because his tag number has been broadcast by  
15 Dave at the request of Scott. So some innocent person  
16 is going to be victimized by Scott. Does he care?  
17 No. The police have a canine outgoing all through the  
18 neighborhood trying to track down this physical  
19 course, hopping fences, a lot of manpower, police  
20 work, why? It's a lie. Does Scott care? Nope.

21 Why doesn't he care? Because he wants to kill  
22 Kevin Herrick. He is so worried about his family --  
23 this is the picture we're now going to get -- that he  
24 goes off to the hospital and leaves his fiancée and  
25 child behind never mentioning to the police that the



1 rapist is right there back at the complex. That's how  
2 concerned he is. Well, it is certainly understandable  
3 that a man would want to, at the very least, do some  
4 serious damage to somebody who had just tried to rape  
5 his fiancée and threatened his child. I don't have  
6 any quarrel with that whatsoever. I would too. But  
7 why not do it? He sees Mr. Herrick only moments, his  
8 words, after arriving home. The police aren't there.  
9 Mr. Herrick's outside. He doesn't say boo to  
10 Mr. Herrick.

11 His friend Dave, not Kevin's, is out there. His  
12 friend that's willing to take a sick fish and go off  
13 at midnight they're that good friends, and here's this  
14 guy that's absolutely outraged. He's chased an armed  
15 man with a knife and said if I caught him I'd probably  
16 attack him on the spot, and yet there he is unarmed.  
17 Does he say anything to him? No. Come on, he'd have  
18 gone for the jugular right then and there. You rotten  
19 bastard, you did this to my fiancée. Nothing,  
20 absolutely nothing.

21 We know, according to him, that that was the real  
22 reason that he didn't tell the police initially that  
23 it was Kevin Herrick because he was so mad he just  
24 wanted to take justice in his own hands. Then he  
25 thought more about it and four hours later decided to

1           come clean. You know, he gives them a written  
2           statement under oath and this time what does he do?  
3           He cleans it up, as we read in court. The reason I  
4           waited before I told the police who it was was because  
5           I was in shock and very traumatized. My only concern  
6           was to see my family safe and get myself to the  
7           hospital as quickly as possible. What a great guy.  
8           What a good family guy. Complete whitewash,  
9           sanitized, as I said during the trial, and at whose  
10          request? The police. Can you believe that one?  
11          Don't put in there -- don't put in your sworn report  
12          that you didn't tell us the truth because you wanted  
13          to kill this guy. We don't want the jury to hear that  
14          down the road. Let's clean it up. Say you were  
15          traumatized, that's the reason, under oath. It's a  
16          lie. And according to him the police assisted with  
17          that lie. They assisted a guy that led them on a  
18          complete wild goose chase. He's jumping fences,  
19          there's a car that was or wasn't moving depending on  
20          who you listen to, a real tag number, a canine search,  
21          but his word is gospel. They know this guy has just  
22          dragged them all over the planet on a wild goose  
23          chase, but they're gonna clean him up.

24                 This is the same kind of arrogance, the same kind  
25                 of unmitigated arrogant law enforcement that allows

1           somebody to come in here and suggest to you that  
2           Mr. Herrick is guilty because he was nervous. On the  
3           scene of a crime, where everyone else is hysterical  
4           and because he's nervous there is some sinister  
5           implication that he must somehow be guilty of all of  
6           this.

7                        This is also the same general law enforcement  
8           team that for eleven months sat on the forensic  
9           evidence. My client was asked shortly after the crime  
10          will you give us hair and pubic samples? You don't  
11          have to but would you? And he did voluntarily. It  
12          was eleven months later that the police get around to  
13          wondering whether or not they've got a match.

14                      This is pretty common stuff for these kind of  
15          investigations, hair samples, blood samples  
16          fingerprints, all of those things. Those are  
17          important. The police knew that the assailant left,  
18          according to Scott, bloodstained prints on the sliding  
19          glass doors. They had surfaces that they expected to  
20          get good latent prints off of but for eleven months,  
21          for whatever reason, law enforcement really doesn't  
22          care.

23                      Had they talked to Theresa Porrey? Have they  
24          found out from her that says this guy is asleep he,  
25          couldn't have done this. Eleven months, when it takes

1 less than an hour to get the answer. Don't they care?  
2 I mean, isn't proving a man's innocence as important  
3 to the police as trying to prove his guilt? Why are  
4 there no comparisons? Why no forensic comparisons?  
5 Because he didn't do it. He's not the guy. Those  
6 surfaces, the police expert says you would expect to  
7 find prints off of there. They took the hair samples,  
8 they took the blood, they did it all. It's not Kevin  
9 Herrick, pure and simple.

10 Why did Scott chase him at all? If he saw him in  
11 the kitchen, as he now said he did, why bother? Call  
12 911. Stay at home with the family that you're so  
13 concerned about. Don't chase him around. You know  
14 who it is, just call them up. The man is armed with a  
15 knife. If, in fact, he saw him in the kitchen, why  
16 tell the police on the phone that he didn't see him in  
17 the house, only outside? And then comes down to his  
18 deposition where, once again, he says I was confused.

19 In his deposition he says in the kitchen he  
20 speculated because of the rolls of fat. He didn't  
21 really mean speculated, that was a poor choice of  
22 words or perhaps the court reporter took it down wrong  
23 but, by golly, that's what he said under oath, he  
24 speculated because of the rolls of fat. Now, of  
25 course, this is a guy that supposedly had on a dark

1 navy blue shirt, according to Cheryl. But it's the  
2 rolls of fat that give him away in the kitchen. But  
3 that's not what he told the police. He said I didn't  
4 see him in the house, I saw him under the moon in the  
5 street lights and his silhouette looked just like  
6 Kevin Herrick. That silhouette in the pitch black  
7 bedroom with the closed venetian blinds, you cannot  
8 have a silhouette without a light source and what was  
9 the silhouette that he saw? It was just like Kevin  
10 Herrick.

11 Question: Well, what was just like Kevin  
12 Herrick; was it that pouffy curly hair trademark of  
13 Kevin Herrick in July of 1989 as described by Cheryl?  
14 No, it was a hair style he had never seen on Kevin  
15 Herrick. It was greased and slicked back with mousse  
16 or oil, that's the silhouette that he claims he saw.  
17 You can't have it both ways. Cheryl doesn't have a  
18 clue who her assailant was except for his dark,  
19 pouffy, curly hair. Scott says his hair is slicked  
20 back with oil right down to the scalp line. It can't  
21 be both ways. Somebody is wrong or somebody is lying.

22 What kind of a disguise is that by the way? A  
23 guy that has been living a stone's throw away right in  
24 the next apartment is going to confuse everyone by  
25 slicking his hair back? I mean, obviously, Kevin

1 Herrick knows these people live together. There is no  
2 reason for him to think that Scott's not going to be  
3 home at midnight. He's taking a chance on  
4 encountering not just Cheryl but Scott, too.

5 So what does he do? He decides to go in to  
6 molest her after midnight when you would expect Scott  
7 to be home. But to confuse them he doesn't use a Lone  
8 Ranger mask, he doesn't put on glasses and a fake  
9 nose, he slicks his hair back. It's kind of like  
10 Clark Kent, he puts on the glasses and nobody can  
11 figure out it's Superman. It sure looks like the guy,  
12 but if he puts those glasses on you wouldn't know him.  
13 What's the point?

14 And you remember what Mr. Barfield said as he was  
15 being taken to the ambulance, he told the police the  
16 assailant had slicked-back hair. Did anybody else  
17 ever tell you that they ever saw anything that  
18 suggested that my client, moments after Scott got  
19 back, looked like he had anything like oil in his  
20 hair, that his hair was damp or wet or anything? If  
21 he told them that his assailant had slicked-back hair,  
22 don't you think they would have checked? And why  
23 would he tell them he had slicked-back hair anyway  
24 because at this point he's trying to throw them off  
25 track. He's trying to tell them absolutely nothing.

1 Curiously, nobody else testified he said anything to  
2 them.

3 It took moments, according to Scott, for Kevin to  
4 appear at the front door. He came out before the  
5 police arrived which, according to Scott's deposition,  
6 under oath just like on the stand, raise your right  
7 hand, tell the whole truth nothing but the truth so  
8 help you God. He said the police got there in less  
9 than a few minutes and prior to their getting there,  
10 my client comes out the front door.

11 In this extremely short span of time the theory  
12 would be, I suppose, that my client has had the time  
13 to get into his residence. Now, he couldn't have  
14 gotten in the front because everybody is out in the  
15 front and there has really been no testimony about the  
16 back of the place or how it figures into the entire  
17 scenario of where everybody ran. But the theory would  
18 have to be that he somehow got in, washed the blood  
19 off of his hands, washed the blood, I suppose, off of  
20 his shirt, got the oil out of his hair which would  
21 necessitate, I would assume, washing your hair and  
22 somehow blowing it dry enough so it's obvious you  
23 didn't step out of the shower and then emerge moments  
24 later for all the world to see.

25 Question: Did he really change shirts?

1 According to Cheryl now he's got on a red shirt, but  
2 according to Scott the man never had on a shirt. The  
3 man was nude with a possible exception of socks. The  
4 man picks up his shirt and shoes and he ran. He  
5 really didn't remember the shirt. He did say it was a  
6 dark shirt. I don't know why he said that because he  
7 said he didn't really remember the shirt, but he  
8 remembers the man didn't have a shirt on.

9 And then he remembers that the guy had his shoes  
10 in his hands as he ran hopping fences with his shoes  
11 in his hand. Which way did he go east, south?  
12 Depends on which of his stories you listen to. How  
13 did Mr. Herrick get back so fast and why would he come  
14 back at all? I mean, he's just raped his next door  
15 neighbor for crying out loud. Why not just keep  
16 going? Crime of the century.

17 The police went through Mr. Herrick's room.  
18 We've got pictures of everything else and you heard  
19 Mrs. Porrey testify that the back doors to that room  
20 were blocked with construction materials. The  
21 police went in there that night. Now don't you think  
22 if those doors had been open that they'd have taken  
23 pictures of that? Don't you think they would have  
24 shown you those doors were readily accessible to get  
25 in and out?



1           They went through the victims' room with a fine  
2           tooth comb. They got the hair samples and bed sheets  
3           and everything else that they needed. Do you think  
4           they didn't do the same thing in Mr. Herrick's room?  
5           What about the sink where he would have washed his  
6           hands to get that blood off and the shirt and the  
7           knife and those wet shoes? Why would they be wet, he  
8           was carrying them, according to Scott, his shoes  
9           wouldn't be wet. What do you think the police did,  
10          overlook all that? Of course not. They went through  
11          his room and there wasn't anything there. There's no  
12          knife. Somebody's told these people they found the  
13          knife with the blood on it. Somebody's told these  
14          people they found the shirt with the blood on it. Not  
15          true. It's not that anybody is hiding the stuff from  
16          you, it didn't happen. They didn't find anything in  
17          Kevin Herrick's room and you can bet if there was a  
18          viable way for him to have gotten into that place in  
19          that amount of time and done these kinds of things,  
20          they'd had told you. Absolutely nothing, no photos of  
21          anything concerning Kevin's room or his belongings  
22          because they didn't find anything.

23                 Now we have the story of a baby intercom. I  
24                 don't know when this one came up, but now they've got  
25                 the unique ability to tune into the frequency of the

1 next door telephone. They can't hear both sides of  
2 that conversation for unknown reasons, but I guess  
3 that could happen. I don't know. I don't know much  
4 about electronics. Nobody had ever heard that story  
5 before.

6 Now we have Mrs. Porrey stating that the shoes  
7 and the socks were wet, the same shoes and socks the  
8 police ignored, the same shoes that the guy wasn't  
9 wearing because he was carrying them in his hands.  
10 And they say that's the conversation that they  
11 overheard. Why not tell the police? More  
12 importantly, why why turn it off? Well, Cheryl was  
13 upset. Then it came up that something was being said  
14 about a relationship between Mr. Herrick and Cheryl  
15 and that she was upset, Scott wasn't upset she was  
16 upset. I don't know, I haven't the vaguest idea, but  
17 you know you don't turn off a conversation where  
18 you're listening to somebody discuss the rape of your  
19 fiancée illuminating, for your benefit, some of her  
20 thought processes and her findings. You don't turn it  
21 off, you listen to it and you go next door and say,  
22 you know, I just heard what you said and you call the  
23 police and say I just overheard this conversation, ask  
24 her about it. Baloney.

25 What is the motive the State says? I don't know,

1 I don't know. I don't know why Scott decided it was  
2 Kevin Herrick. I don't know if Kevin was doing  
3 anything with Cheryl as was suggested by Scott. I  
4 don't know if Scott was mad because they were playing  
5 chess. I don't have a clue as to why, but that's not  
6 my job. The the Defense doesn't have to prove a  
7 single thing. The State has to prove everything  
8 beyond a reasonable doubt. There are very, very  
9 strange things that take place in our world. I can't  
10 begin to account for all of them. It's not my  
11 responsibility. They've got to prove to you that my  
12 client did this beyond every reasonable doubt, not  
13 prove to you why it would be that the likes of Cheryl  
14 and Scott might create a story.

15 We know Cheryl doesn't know anything because she  
16 didn't see anybody. And we know that Scott is a liar.  
17 We know that, there is no question about that. My  
18 client did not testify, we talked about that earlier.  
19 There was nothing he could add to the story  
20 Mrs. Porrey told it for him. What's her reason for  
21 lying? Is she daft? She's ill, she's not mentally  
22 ill, and she told you what happened. She got no  
23 reason to tell you this. As a matter of fact, she was  
24 rather outspoken. She said do you know what it's like  
25 for a woman to go through this? I'd tell you if he

1 did it.

2 Reasonable doubt, shadow of a doubt, you'll hear  
3 what a reasonable doubt is. A reasonable doubt in any  
4 vernacular is a gut level certainty because your  
5 decision is going to have a profound impact,  
6 obviously, on a young man's life. And tomorrow and  
7 the next day and the next day you will have to  
8 evaluate and reevaluate your decision. You will  
9 have to be so comfortable with that decision, if you  
10 find him guilty, that you say, you know, I know I was  
11 right. I am comfortable with that. I know in my  
12 heart that I'm right, and I know that because, let's  
13 see, because Scott said it was true? Scott's a liar.  
14 We know he's a liar. I know he's a liar. Can I be  
15 sure that Scott is telling the truth? Cheryl didn't  
16 know so, gee, what is there? What is there? There is  
17 nothing but the word of a liar.

18 Now, I wasn't there, I told you that earlier.  
19 Mr. Bulone wasn't there. We can both stand up here  
20 and beat our drums. He doesn't know. I don't know.  
21 I don't know with any certainty what happened, but I  
22 know what the evidence shows and I know what the  
23 State's responsibility is to prove a man's guilty  
24 beyond every reasonable doubt. That's their job, they  
25 accept that, that's the way our system works. Does it

1 mean that Mr. Herrick is a wonderful human? He may  
2 be, I don't know. He's a client of mine, we don't  
3 socialize. He may or may not be a lot of things, but  
4 what he is not is proven guilty of this crime beyond  
5 every reasonable doubt. And only if you can find it  
6 in your heart, when you go back there, to say I am  
7 absolutely convinced that this man is guilty, can you  
8 find him guilty of this crime? Anything short of  
9 that, anything short of a firm, unwaivering conviction  
10 that he did this translates into a verdict of not  
11 guilty, and I ask that that is the verdict you return.

12 THE COURT: You have about twenty minutes left,  
13 Mr. Bulone.

14 MR. BULONE: Thank you. First of all, what the  
15 standard is as far as burden of proof will be  
16 explained by the Judge, and the Judge is not going to  
17 tell you it's anything like absolutely convinced or  
18 anything like that. He will explain what a reasonable  
19 doubt is and that's the law that you should follow is  
20 what the Judge tells you.

21 Now, let's get this straight here. Cheryl  
22 testified that she saw the outline of the Defendant in  
23 the bedroom when she was being attacked and when the  
24 Defendant was attacking Scott. And she told you she  
25 thought it was him but she wasn't a hundred percent

1           sure. After Scott came back she told Scott, I think  
2           it was the neighbor. And the only thing that he said  
3           was I know it was the neighbor.

4           Then once the police got there Cheryl told the  
5           police the exact same thing that from the shape of the  
6           body and the hair and the whole outline and the belt  
7           buckle and the whole thing that she thought it was  
8           Kevin Herrick, but she wasn't a hundred percent sure.  
9           And Scott, after he calmed down and cooled down, told  
10          the police right after he got back from the hospital  
11          that he was sure it was Kevin Herrick, and it was  
12          Kevin Herrick.

13          One of the things that's very important is the  
14          Defense attorney brings up the fact that they were  
15          told that the police found the weapon that was used.  
16          Well, that's true, but they were told that after  
17          Cheryl told the police that I believe it's Kevin  
18          Herrick, but I'm not a hundred percent sure and it was  
19          after that that Scott told the police, yeah, I know  
20          who it was. I'm a hundred percent sure, I know  
21          exactly who it was, and it was Kevin Herrick.

22          How else, besides eye witness testimony -- and  
23          by far that's the best, obviously -- how else do we  
24          know it's this Defendant? Well, we know from the  
25          victims that the Defendant would often hang around the

1           apartments and we know that Scott left and at that  
2           moment the attacker, the Defendant, came in after  
3           Scott left. So he would have to be someone who was in  
4           the area who would see Scott leave to know that it's  
5           time to go in to do the dastardly deed. Who would  
6           that be, a neighbor? No one was as close as Kevin  
7           Herrick, the neighbor adjacent. He would know if  
8           Scott left or not. He would know that.

9           And what did the Defendant say to Cheryl when he  
10          had the knife to her neck? And, by the way, if you're  
11          left-handed or right-handed you can have the knife on  
12          the right side of someone's face. You can use your  
13          right hand and then use your strong hand to put the  
14          hand over the victim's mouth or do whatever it is you  
15          want. So it doesn't make any difference if you're  
16          left-handed or right-handed. That doesn't prove or  
17          show anything.

18          What does he say to Cheryl while he's on top of  
19          her with a knife to her throat? "Suck it or I'll kill  
20          your baby." So it was someone who knew that Scott  
21          left, someone close to the area and someone who knew  
22          they had a baby. Who would know that? Well, a  
23          neighbor, I guess. How about Kevin Herrick?

24          Scott comes in. The Defendant gets off of  
25          Cheryl. He states, I'm going to kill you and your

1 baby. Back off, get out of here, I'm going to kill  
2 you and your baby. Get out of here. How does the  
3 perpetrator, the attacker, the rapist, the stabber,  
4 know that it's Scott's baby, too? Because he knows  
5 them. He's a neighbor, an acquaintance. He knows  
6 Scott left and he knows they have a baby. He knows  
7 it's Cheryl's baby and he knows it's Scott's baby.  
8 That's not a stranger who snuck up from south St.  
9 Petersburg to rape somebody at random, that is Kevin  
10 Herrick, that's who that is.

11 And what about this thing with the hair? He  
12 never greased back his hair before and at six o'clock  
13 when they saw him his hair wasn't like that. Why  
14 would he grease it back from six o'clock until  
15 midnight when this thing happens? What a weird  
16 coincidence. Scott states his hair was glistening.  
17 Why would he do that? A weird coincidence he decided  
18 to grease his hair back. It's because he's the person  
19 who did it, because he was thinking about it and  
20 planned it and he did it.

21 The Defendant went back to the apartment because  
22 that was the smartest thing to do and he had the time  
23 to do it. What really is the testimony? The  
24 testimony is that Scott tried to chase the Defendant,  
25 that the Defendant went eastbound and then went



1 southbound toward the back of his house where, as  
2 Theresa Porrey stated, there's a sliding glass door  
3 where his bedroom is and also a sliding glass door in  
4 the living room. Scott stayed he was gone for a good  
5 five minutes, a good five minutes and Cheryl said  
6 five to ten.

7 Scott was hiding in some bushes. He was trying  
8 to see if Kevin Herrick went into the car. He tries  
9 to get the license plate and it takes him a while in  
10 order to get back. In the meantime, the Defendant  
11 knows exactly where he's going. He runs back to his  
12 house in the back of his bedroom or living room where  
13 the sliding glass doors are and he can get right back  
14 in there.

15 And the testimony is that Cheryl is screaming,  
16 she's hysterical. Everyone is coming out of the  
17 triplex, David comes out, Barbara comes out, Theresa  
18 Porrey comes out, everybody is out. Isn't it amazing  
19 this Defendant is asleep since 9:00. What a sleeper.  
20 What a great sleeper. He's in his room sleeping away  
21 while everyone's doors are open and Cheryl is out in  
22 the courtyard screaming hysterically and Theresa  
23 Porrey is hysterical in this tiny triplex. And isn't  
24 it amazing that he's in there sleeping and he doesn't  
25 emerge until several minutes after Scott gets back?

1           So, Scott leaves. He's gone five to ten minutes  
2           and then he gets back and then a few minutes later the  
3           Defendant emerges. That is plenty of time. Then, of  
4           course, he's in bed while everyone else is awake and  
5           he's sleeping, just really knocked out. Nothing is  
6           going to wake him up. As a matter of fact,  
7           Mrs. Porrey has to shake him in order to wake him up.  
8           What's the big sleeper got to be so worried about?

9           Well, the police go to crime scenes all the time,  
10          that's their job, and by nature they're a little  
11          snoopy and they're a little suspicious. They look  
12          around to see who is a little suspicious and Officer  
13          Crosby was struck right away by Kevin Herrick. He was  
14          sweating, that's kind of unusual, he was breathing  
15          hard and his heart was beating so hard that he could  
16          actually see it through the shirt. Officer Crosby was  
17          so suspicious of him that he did what's called an FIR  
18          which is to get information on him. Well, if he's not  
19          the person who did it what does he have to be so  
20          nervous about? He was sleeping like a rock. Why is  
21          he so nervous? Because he did it that's why. He's  
22          afraid of being caught that's why. Because he knows  
23          that he's the man.

24          Let's talk about the fingerprints for a minute.  
25          What happened some time later was not that the

1 fingerprints were lifted or compared or anything else.  
2 What happened later is that the fingerprints were  
3 compared with the fingerprints of the victim. There  
4 were fingerprints that were taken from the sliding  
5 glass door. The blood smudge marks were smudged so  
6 that they were unable to get fingerprints from that  
7 area. So they dusted for fingerprints from the  
8 sliding glass doors and later they compared those  
9 fingerprints, which were taken right away, from the  
10 sliding glass doors to that of the victim. As we all  
11 stipulated to -- we didn't have to put someone on --  
12 and all of those fingerprints belonged to the victim.  
13 So, it's not like there were fingerprints here and we  
14 don't know who they belong to so they probably belong  
15 to the bad guy. There were fingerprints there and it  
16 so happened they belonged to the victim, which is not  
17 unusual for him to touch his own sliding glass door.  
18 Of course, as far as things being sent off to the lab,  
19 obviously no help there for either side unless we  
20 would have heard from them. So all we have to go with  
21 is the evidence in the case.

22 Let's talk about Theresa Porrey for a minute.  
23 The Judge will instruct you that it's your duty to  
24 weigh the evidence to try to figure out what testimony  
25 you should believe and not believe. Well, here's a

1 lady that does have a bit of an interest, at least in  
2 her own mind, and that's all that counts. Kevin  
3 Herrick was a friend of the family, his family was a  
4 friend of their family. He was a friend of her son  
5 Patrick Porrey. She wants to protect him, that may or  
6 may not be rational, but she's also afraid of being  
7 sued because the attacker came out of her apartment.  
8 So whether that's rational or not doesn't matter, but  
9 she's afraid of being sued and on the tape she stated  
10 she spoke to Cheryl about that, that Cheryl and Scott  
11 did not threaten her with that, that she had talked to  
12 her sister about that and to Cheryl about that. So  
13 she has an interest in that, too. She wants to  
14 protect him and she wants to protect herself.

15 And we saw how she embellished things, didn't we?  
16 She said that she went back there right away. She ran  
17 back there to tell Kevin in the room about this and  
18 she tried to wake him up and shake him. We know  
19 that's not true because she was out in the courtyard  
20 with everyone else and the victim Cheryl when this  
21 happened. So she tries to embellish, she tries to  
22 protect, that's exactly what she's trying to do.

23 Now we have the thing with the intercom. Ladies  
24 and gentlemen, we know that that's true. You say how  
25 do we know that that's true? We know that that's true

1           because who in the world would make that up? Who in  
2           the world would make that up without hearing a  
3           cordless phone conversation on the intercom? More  
4           importantly, who would make up the statements? Who  
5           would say that she said that, oh, I can't believe it's  
6           him, but the sliding glass door was open and his shoes  
7           and socks were wet. But the sliding glass door was  
8           open but the shoes and socks were wet. If they were  
9           out to get this guy aren't they going to say, well, I  
10          overheard a conversation and she knew that Kevin did  
11          it because she told me. Who in the world is going to  
12          make up that the sliding glass door was open and that  
13          the shoes and socks were wet?

14                 The Defense attorney wants you to believe that  
15          they didn't tell the police this. Well in a way  
16          that's true because what happened on July 15th? The  
17          police show up, they get statements from everybody.  
18          The next day, after the police get all the statements,  
19          that's when this thing with the intercom happened. So  
20          obviously they're not going to tell them then because  
21          it didn't happen then. They told you they told the  
22          state attorney about it and then also they told you  
23          that they told the Defense attorney about it in the  
24          depositions, so this is nothing new. This is nothing  
25          new. As a matter of fact, you know it's nothing new

1 because on the tape I ask Mrs. Porrey about it.

2 Reasonable doubt. Reason, reason. Did Scott  
3 have a reason not to tell the police right away that  
4 it was Kevin Herrick? Yeah, he had a reason, and we  
5 might not agree with it a hundred percent, but we  
6 understand it. It's a reason why because he wanted to  
7 get him and he wanted to kill him. Then he calms  
8 down, he cools off and he tells the police shortly  
9 thereafter, after being released from the hospital.

10 But is there a reason for him to make up the fact  
11 that it's Kevin Herrick if it's not? There is no  
12 reason. There is no reasonable doubt. He said he saw  
13 him and he did see him. There is no reasonable for  
14 him to make that up. Let's not forget his wife was  
15 raped, his baby was threatened and he was stabbed.  
16 What he wants out of this is what we all want out of  
17 this, justice. He's not after anything else. He and  
18 his family were brutalized, were victimized and that's  
19 what he wants out of it. So there is no reason for  
20 him to make this up if it's not Kevin Herrick.

21 Now, it's true it's a travesty of justice if an  
22 innocent man is found guilty, but equally so it's a  
23 **travesty of justice if a guilty man is found not**  
24 **guilty. This case calls out for justice.** We're  
25 asking for justice. The criminal justice system does

1 work and I ask for you to make it work. The reason  
2 that Cheryl said that she was pretty sure it was Kevin  
3 Herrick but couldn't be a hundred percent sure and the  
4 reason that Darren Scott Barfield said it was Kevin  
5 Herrick was for one reason, because he saw him and  
6 because it was Kevin Herrick. That's the man who did  
7 it and I know that you'll do the right thing. Thank  
8 you.

9 THE COURT: Bailiff, please secure the courtroom.  
10 Would counsel approach.

11 (THEREUPON, A SIDEBAR CONFERENCE WAS HELD OUTSIDE THE  
12 HEARING OF THE JURY AS FOLLOWS: )

13 THE COURT: My instructions are going to take  
14 twenty or twenty-five minutes. Does anybody have a  
15 problem if we take a break?

16 MR. BULONE: No.

17 MR. LEINSTER: No.

18 (IN OPEN COURT)

19 THE COURT: Ladies and gentlemen of the jury,  
20 before I give you my instructions, the court will be  
21 in recess for five minutes.

22 (THEREUPON, A BRIEF RECESS WAS TAKEN AT 2:10 P.M. AND  
23 PROCEEDINGS RESUMED AT 2:15 P.M. AS FOLLOWS: )

24 THE COURT: Bring the jury in.

25 THE BAILIFF: The jury is in the jury box, Your

1 Honor.

2 THE COURT: Fine thank you. Is the courtroom  
3 secure?

4 THE BAILIFF: Yes, sir.

5 THE COURT: Good. Members of the jury, I would  
6 like to at this time thank you for the attention  
7 you've given this trial and I request you pay  
8 attention to the instructions on the law that I'm  
9 about to give you.

10 Kevin Richard Herrick, the Defendant, in this  
11 case has been accused of the crimes of Burglary,  
12 Sexual Battery and Aggravated Battery. Before you can  
13 find the Defendant guilty of Burglary the State must  
14 prove the following three elements beyond a reasonable  
15 doubt:

16 That the Defendant entered or remained in a  
17 structure owned by or in the possession of another, in  
18 this case Cheryl Hagan or Scott Barfield.

19 The second element is that the Defendant did not  
20 have the permission of or the consent of either of  
21 them, or anyone else authorized to act for them, to  
22 enter or remain in that structure at the time.

23 The third element is that at the time of entering  
24 or remaining in the structure the Defendant had an a  
25 fully-formed, conscious intent to commit a crime in



1           that structure.

2           Proof of entering a structure stealthily and  
3 without the consent of the owner or occupant may  
4 justify a finding that the entering was with the  
5 intent to commit a crime if, from all of the  
6 surrounding facts and circumstances, you are convinced  
7 beyond a reasonable doubt that the intent existed.

8           The intent with which an act is done is an  
9 operation of the mind and, therefore, not always  
10 capable of direct and positive proof. It may be  
11 established by circumstantial evidence like any other  
12 fact in a case.

13           Even though an unlawful entering or remaining in  
14 a structure is proved, if the evidence does not  
15 establish that it was done with the intent to commit a  
16 crime, the Defendant must be found not guilty of  
17 Burglary.

18           In explaining the elements, the word "structure"  
19 is defined to mean any building of any kind, either  
20 temporary or permanent, that has a roof over it, and  
21 the enclosed space of ground and outbuildings  
22 immediately surrounding that structure.

23           The punishment provided by law for the crime of  
24 burglary is greater if the burglary was committed  
25 under certain aggravating circumstances. Therefore,

1 if you find the Defendant guilty of burglary, you must  
2 then consider whether the State has further proved  
3 those aggravating circumstances.

4 If you find that in the course of committing the  
5 burglary the Defendant made an assault or a battery  
6 upon any person, you should find him guilty of  
7 burglary during which an assault or a battery was  
8 committed. An assault is defined to mean an  
9 intentional and unlawful threat either by word or act  
10 to do violence to another at the time when the  
11 Defendant appeared to have the ability to carry out  
12 the threat and his act created a well-founded fear in  
13 the mind of the other person that the violence was  
14 about to take place.

15 A battery is defined to be an unlawful touching  
16 or striking of another without their permission.

17 If you find that in the course of committing the  
18 burglary the Defendant was armed or armed himself  
19 within the structure with either explosives or a  
20 dangerous weapon, you should find him guilty of  
21 burglary while armed.

22 If you find that while the Defendant made no  
23 battery or made no assault and was unarmed, that the  
24 structure entered was a dwelling, you should find him  
25 guilty of burglary of a dwelling.

1           If you find that while the Defendant made no  
2 assault or battery and was unarmed, that there was a  
3 human being in the structure at the time he entered or  
4 remained in that structure, you should find him guilty  
5 of burglary of a structure with a human being in that  
6 structure.

7           If you find that the Defendant committed the  
8 burglary and none of these aggravating circumstances  
9 were there, you should find him guilty only of a  
10 burglary.

11           A "dangerous weapon" is defined to mean any  
12 weapon that, taking into account the manner in which  
13 it is used, is likely to produce death or great bodily  
14 harm.

15           A "dwelling" is defined to mean a house of any  
16 kind or a house trailer set on a foundation or any  
17 apartment or room actually used as a dwelling, home or  
18 place of abode, either temporarily or permanently.

19           The second offense with which the Defendant is  
20 charged is that of sexual battery. Before you can  
21 find Mr. Herrick guilty of sexual battery upon a  
22 person twelve years of age or older with the use of a  
23 deadly weapon, the State must prove the following four  
24 elements beyond a reasonable doubt:

25           First, that the victim was twelve years of age or

1 older.

2 Second, that the Defendant committed an act upon  
3 the victim in which the sexual organ of the Defendant  
4 penetrated or had union with the mouth of the victim.

5 Third, that the Defendant in the process used or  
6 threatened to be used a deadly weapon.

7 Fourth, that the act was done without the consent  
8 of the victim. And referring to the victim in this  
9 count I'm referring to Cheryl Hagan.

10 The term or word "consent" means intelligent,  
11 knowing and voluntary consent and does not include any  
12 coerced submission.

13 The word "union" is an alternative to penetration  
14 and means coming into contact with.

15 A weapon is a deadly weapon if it is used or  
16 threatened to be used in a way likely to produce death  
17 or great bodily harm.

18 In considering the evidence, you should consider  
19 the possibility that although the evidence may not  
20 convince you that the Defendant committed this main  
21 crime of sexual battery of which he has been accused,  
22 there may be evidence that he committed other acts  
23 that would constitute lesser included crimes.

24 Therefore, if you decide that the main accusation of  
25 sexual battery has not been proved beyond a reasonable

1           doubt, you will next need to decide if the Defendant  
2           is guilty of any lesser included crime.

3           You are instructed that you are to find the  
4           Defendant guilty of the most serious crime charged  
5           that has been proved beyond and to the exclusion of  
6           every reasonable doubt.

7           For lesser included crimes indicated in the  
8           definition of sexual battery which involved a weapon  
9           are as follows:

10           A sexual battery with a victim of twelve years of  
11           age or older where special circumstances are involved,  
12           and I'll get into those in a moment. The second  
13           lesser included crime is that of an attempt to commit  
14           a sexual battery. The next is the offense of  
15           aggravated assault, and the last is the offense of a  
16           simple battery, and I'll go through the elements of  
17           each of those lesser included crimes at this time.

18           The first lesser included is a sexual battery  
19           where special circumstances are involved. Before you  
20           can find the Defendant guilty of sexual battery upon a  
21           person twelve years of age or older under special  
22           circumstances, the State must prove the following four  
23           elements beyond a reasonable doubt, and three of them  
24           are the same as with the main crime, but I'll go  
25           through them again:

1           That the victim was twelve years of age or older.

2           Second, that the Defendant committed an act upon  
3 the victim in which the sexual organ of the Defendant  
4 penetrated or had union with the mouth of the victim.

5           Third, that the Defendant coerced the victim to  
6 submit by threat or retaliation against the victim or  
7 any other person and the victim reasonably believed  
8 that the Defendant had the ability to execute the  
9 threat in the future.

10           Fourth, that the act was committed without the  
11 consent of the victim.

12           The definitions for "consent" and "union" that I  
13 read before are the same.

14           In order to prove that the Defendant attempted to  
15 commit the crime of sexual battery, the State must  
16 prove beyond a reasonable doubt:

17           That the Defendant did some act toward the  
18 committing of the crime of sexual battery that went  
19 beyond just thinking or talking about it.

20           That he would have committed the crime except  
21 that someone prevented him from committing the crime  
22 of sexual battery or that he failed.

23           It is not an attempt to commit the crime of  
24 sexual battery if the Defendant abandoned his attempt  
25 to commit the offense or was otherwise prevented its

1 commission, under circumstances indicating a complete  
2 and voluntary renunciation of his criminal purpose.

3 The next lesser included crime is the crime of  
4 aggravated assault. Before you can find the Defendant  
5 guilty of Aggravated Assault, the State must prove the  
6 following four elements beyond a reasonable doubt:

7 That the Defendant intentionally and unlawfully  
8 threatened by word or act to do the violence to the  
9 victim.

10 That the Defendant appeared to have the ability  
11 to carry out the threat.

12 That the act of the Defendant created in the mind  
13 of the victim a well-founded fear that violence was  
14 about to take place.

15 Fourth, that the assault was made with a deadly  
16 weapon.

17 Again, the word "deadly weapon" is defined if it  
18 is used or threatened to be used in a way to produce  
19 death or great bodily harm.

20 It is not necessary for the State to prove that  
21 the Defendant had an intent to kill.

22 The last of the lesser included offense is that  
23 of a simple battery. Before you can find the  
24 Defendant guilty of Battery, the State must prove that  
25 the Defendant intentionally touched or struck the

1 victim against her will or intentionally caused bodily  
2 harm to the victim.

3 The last or the third offense of with which the  
4 Defendant is charged is the offense of aggravated  
5 battery. Before you can find the Defendant guilty of  
6 Aggravated Battery, the State must prove the following  
7 two elements beyond a reasonable doubt:

8 That the Defendant intentionally touched or  
9 struck the victim, and in this case we're referring to  
10 Scott Barfield, against his will or intentionally  
11 caused great bodily harm to him.

12 And the second element is that the Defendant in  
13 committing the battery intentionally or knowingly  
14 caused great bodily harm to Scott Barfield or used a  
15 deadly weapon.

16 Again, the definition of "deadly weapon" is the  
17 same as has been givin before.

18 With the offense of aggravated battery there is  
19 also a lesser-included offense, as with the offense of  
20 the sexual battery, and the lesser-included offense  
21 indicated in the definition of aggravated battery is  
22 that of a simple battery.

23 As before, you are instructed to find the  
24 Defendant guilty of the most serious crime charged  
25 that has been proved beyond and to the exclusion of



1 every reasonable doubt.

2 Before you can find the Defendant guilty of a  
3 Simple Battery, the State must prove that the  
4 Defendant intentionally touched or struck the victim  
5 against his will or intentionally caused bodily harm  
6 to him.

7 The Defendant has previously entered a plea of  
8 not guilty, and this means you must presume or believe  
9 that the Defendant is innocent. This presumption of  
10 innocence stays with the Defendant as to each material  
11 allegation contained in that charging document called  
12 an Information through each stage of the trial until  
13 it has been overcome by the evidence to the exclusion  
14 of and beyond a reasonable doubt.

15 To overcome the Defendant's presumption of  
16 innocence, the State has the burden of proving that  
17 the crimes with which the Defendant are charged were  
18 in fact committed, and that the Defendant is the  
19 person who committed the crimes.

20 The Defendant is not required to prove anything.

21 Whenever the words "reasonable doubt" are used  
22 you must consider the following:

23 A reasonable doubt is not a possible doubt, a  
24 speculative, imaginary or forced doubt. Such a doubt  
25 must not influence you to return a verdict of not

1 guilty if you have an abiding conviction of guilt.  
2 On the other hand, if, after carefully considering,  
3 comparing and weighing all of the testimony and the  
4 evidence, there is not an abiding conviction of guilt,  
5 or, if, you have such a conviction, it is one which is  
6 not stable but one which waivers or vacillates, then  
7 the charge is not proved beyond every reasonable doubt  
8 and you should find that the Defendant is not guilty  
9 because the doubts that you have are reasonable.

10 It is to the evidence that was introduced during  
11 the trial, and to that alone, that you are to look for  
12 that proof.

13 A reasonable doubt as to the guilt of the  
14 Defendant may arise from the evidence, a conflict in  
15 the evidence or a lack of evidence.

16 If you have a reasonable doubt, then you should  
17 find that the Defendant is not guilty. However, if  
18 you have no reasonable doubt, then you should find  
19 that the Defendant is guilty.

20 It is up to you to decide what evidence is  
21 reliable. You should use your common sense in  
22 deciding which evidence is the best evidence, and  
23 which evidence should not be relied upon in  
24 considering your verdict. You may find some of the  
25 evidence not reliable or less reliable than other

1 evidence.

2 You should consider how the witnesses acted, as  
3 well as what they said. In considering the testimony  
4 you should -- some of the things you should consider  
5 are:

6 Did the witness seem to have an opportunity to  
7 see and know the things about which that witness  
8 testified?

9 Did the witness seem to have an accurate memory?  
10 Was the witness honest and straight forward in  
11 answering the lawyers' questions?

12 Did the witness have some interest in how the  
13 case should be decided?

14 Does the witness' testimony agree with the other  
15 testimony and the other evidence in the case?

16 Did the witness at some other time make a  
17 statement that was inconsistent with the testimony he  
18 or she gave in court?

19 You may rely upon your own conclusions about a  
20 witness. A juror may believe or disbelieve all or any  
21 part of the evidence or the testimony given by any  
22 witness.

23 The constitution requires the State to prove its  
24 accusation against the Defendant. It is not necessary  
25 for the Defendant to disprove anything. Nor is the

1 Defendant required to prove his innocence. It is up  
2 to the State to prove the defendant's guilt by the  
3 evidence.

4 The Defendant exercised a fundamental right by  
5 choosing not to be a witness in this case. You must  
6 not view this as an admission of guilt or be  
7 influenced in any way by his decision. No juror  
8 should ever be concerned that the Defendant did or did  
9 not take the witness stand to give testimony in the  
10 case.

11 Here are some general rules that apply to your  
12 discussions and deliberations and you must follow  
13 these rules in order to return a lawful verdict:

14 You must follow the law as it is set out in these  
15 instructions. If you fail to follow the law, your  
16 verdict will be a miscarriage of justice. There is no  
17 reason for failing to follow the law in this case, and  
18 all of us are depending upon you to make a wise and  
19 legal decision in this matter.

20 This case must be decided based only on the  
21 evidence you have heard from the answers given by the  
22 witnesses and as seen in the form of exhibits placed  
23 into evidence and these instructions.

24 This case must not be decided for or against  
25 anyone because you feel sorry for anyone or you are

1           angry at anyone.

2           Remember, the lawyers are not on trial here and  
3 your feelings about them should not influence your  
4 decision in anyway.

5           Your duty is to determine if the Defendant is  
6 guilty or not guilty in accordance with the law. It  
7 is then my job to determine what a proper sentence  
8 would be if you find he is guilty.

9           Whatever verdict you render must be unanimous,  
10 that is, each of you must agree to the same.

11          It is entirely proper for a lawyer to talk to a  
12 witness about what testimony that witness would give  
13 if called into the courtroom to testify. No witness  
14 should be discredited because of talking to a lawyer  
15 about his testimony.

16          Feelings of prejudice, bias and sympathy are not  
17 legally reasonable doubts and should not be discussed  
18 by any of you in any way. Your verdict must be based  
19 upon your views of the evidence, and the law contained  
20 in these instructions.

21          Deciding a verdict is exclusively your job. I  
22 cannot participate in that decision in any way, nor  
23 can anyone else. Disregard anything I may have said  
24 or done that made you think I preferred one verdict  
25 over another.

1           Only one verdict may be returned as to each of  
2           the crimes charged. These verdicts must be in writing  
3           and for your convenience we have prepared three forms  
4           for you to complete once you have reached your  
5           decision. The three forms, one for each of the  
6           counts, and I will go through these forms with you at  
7           this time.

8           The first form refers to count one of the  
9           Information which is the burglary charge. The form,  
10          in part, reads as follows: "We the jury finds as  
11          follows as to count one," and then there are some  
12          instructions that say "check only one as to this  
13          count", meaning that there are six boxes on the form  
14          and you are only to place a check mark in one of those  
15          boxes based on the verdict you have reached.

16          The first possible verdict is that the Defendant  
17          is guilty of Burglary of a structure while armed with  
18          a deadly weapon as charged.

19          Next, the Defendant is guilty of Burglary of a  
20          structure with an assault or a battery, a  
21          lesser-included offense.

22          Third, the Defendant is guilty of Burglary of a  
23          structure, which was a dwelling, without an assault or  
24          a battery, a lesser-included offense.

25          Next, the Defendant is guilty of burglary of a

1 structure with a human being in the structure but with  
2 no assault and battery and was not armed, a lesser  
3 included offense.

4 Fourth, the Defendant is guilty of a Burglary  
5 with no aggravating circumstances, a lesser-included  
6 offense.

7 Last, the Defendant is not guilty.

8 The next verdict form refers to count two of the  
9 information which is the sexual battery count. The  
10 form, in part, reads as follows: "We the jury find as  
11 follows as to count two of the charge:

12 First, the Defendant is guilty of Sexual Battery  
13 involving a deadly weapon as charged.

14 Next, the Defendant is guilty of Sexual Battery  
15 Involving Special Circumstances, a lesser included  
16 offense.

17 Next, the Defendant is guilty of Attempted Sexual  
18 Battery, a lesser included offense.

19 Next, the Defendant is guilty of Aggravated  
20 Assault, a lesser included offense.

21 Next, the Defendant is guilty of Simple Battery,  
22 a lesser included offense.

23 Last, the Defendant is not guilty.

24 The third and last verdict form refers to count  
25 three the aggravated battery count and the form, in

1 part, reads as follows: "We the jury finds as follows  
2 as to count three:

3 The Defendant is guilty of Aggravated Battery as  
4 charged.

5 Next, the Defendant is guilty of Simple Battery,  
6 a lesser included offense.

7 Last, the Defendant is not guilty.

8 All of the forms end with the words "so say we  
9 all" and a place for the foreperson of the jury to  
10 date and sign each of these forms.

11 In deciding your verdicts you must remember that  
12 a separate crime is charged as to each count of the  
13 Information and while they have been tried together  
14 each crime and the evidence applicable to it must be  
15 considered separately and a separate verdict rendered  
16 as to each. A finding of guilty or not guilty as to  
17 one crime must not affect your verdict as to the other  
18 crimes charged.

19 In just a few moments the bailiff will be taking  
20 you to the jury room for you to commence your  
21 deliberations and the first thing you should do is to  
22 elect one of your number as the foreperson of the  
23 jury. It will be his or her job to preside over your  
24 deliberation as the chairperson of the meeting and to  
25 also date and sign the verdict forms and bring the



1 forms back when you return to announce your decisions.

2 In closing let me remind you that it is important  
3 that you follow the law spelled out in these  
4 instructions in deciding your verdicts. There are no  
5 other laws that apply to this case. Even if you do  
6 not like the laws that must be applied, you must use  
7 them. For over two centuries we have agreed to a  
8 constitution and agreed to live by the law. No one of  
9 us has the right to violate the rules we all share.

10 Before I send the jury out it is my duty at this  
11 time, Mr. Christman, to thank you as your service for  
12 the alternate juror. Even if you agreed to remain  
13 silent, the law does not allow me to let you go into  
14 the jury room while they're deliberating I know that  
15 you listened as intently and have your feelings about  
16 this case but, unfortunately, I cannot let you air  
17 them in the presence of the other jury members. You  
18 are free at this time to stay or leave as you might  
19 choose. I would request for the moment that you  
20 remain seated until such time as the jury goes out.  
21 Again, you have our thanks for your service in this  
22 case.

23 That having been done, ladies and gentlemen, you  
24 may now retire to consider your verdict.

25 (THEREUPON, THE JURY LEAVES THE COURTROOM TO DELIBERATE A

1 VERDICT AND PROCEEDINGS CONTINUED AS FOLLOWS: )

2 THE BAILIFF: The jury is out of the hearing of  
3 the Court, Your Honor.

4 THE COURT: Fine. Again, Mr. Christman, thank  
5 you very much. We'll be in recess pending call of the  
6 jury.

7 (THEREUPON COURT WAS IN RECESS PENDING CALL OF THE JURY AT  
8 2:40 P.M. AND PROCEEDINGS RESUMED AS FOLLOWS: )

9 THE COURT: Bring the Defendant in please.

10 THE COURT: Let the record reflect the Defendant  
11 is in the courtroom. The jury, through the bailiff,  
12 has made a request in writing that they'd like to see  
13 the video testimony of Ms. Porrey. It is evidence.  
14 If it were transcribed testimony I guess the rules  
15 provide it could be read to them again, if they had a  
16 question about it. The mere fact it's video I don't  
17 think changes that.

18 How feels the State on this?

19 MR. BULONE: Well, I think if we explained to  
20 them that it's a substitute for testimony and that we  
21 could read back other testimony, that they could  
22 understand the reason behind it. I don't think they  
23 would have a problem.

24 THE COURT: I don't think they need an  
25 explanation. If it was -- there was explanation that

1 she was not here to testify because of health reasons.  
2 Counsel for Defense, how do you feel about it?

3 MR. LEINSTER: I agree with the Court.

4 THE COURT: Without bringing the jury back, I  
5 don't think we need to do that, let's secure the  
6 Defendant and adjourn, and wheel the video machine  
7 into the jury room with the tape and we'll show it to  
8 them at that point. We'll be in recess pending call  
9 of the jury.

10 (THEREUPON, THE COURT WAS IN RECESS PENDING THE CALL OF  
11 THE JURY AND PROCEEDINGS RESUMED AS FOLLOWS: )

12 THE COURT: On the record, the note the jury gave  
13 me I'm handing to the clerk for her to put in the  
14 court file.

15 (THEREUPON, THE COURT WAS IN RECESS PENDING THE CALL OF  
16 THE JURY AT 3:00 P.M. AND PROCEEDINGS RESUMED AT 4:50 P.M.  
17 AS FOLLOWS: )

18 THE COURT: Bring the jury back in, please.

19 THE BAILIFF: The jury is in the jury box, Your  
20 Honor, and has indicated they reached a verdict.

21 THE COURT: Mr. Burke, hand the jury forms to the  
22 bailiff and then you can be seated. Madam clerk, will  
23 you publish the verdicts, please.

24 THE CLERK: State of Florida vs. Kevin Richard  
25 Herrick. We the jury find as follows as to count one:

1 The Defendant is guilty of Burglary of a structure  
2 while armed with a deadly weapon as charged. So say  
3 we all Steven Berger, foreperson. Date, October 3rd,  
4 1990.

5 As to count two, we the jury find as follows as  
6 to count two: The Defendant is guilty of Sexual  
7 Battery as charged. So say we all, Steven W. Berger,  
8 foreperson. October 3rd, 1990.

9 We the jury find as follows as to count three of  
10 the charge: The Defendant is guilty of aggravated  
11 battery as charged. So say we all Steven Berger,  
12 foreperson of the jury. Dated October 3rd, 1990.

13 THE COURT: Do you wish the jury polled?

14 MR. LEINSTER: Yes, sir.

15 THE COURT: Ladies and gentlemen, the clerk is  
16 going to ask you individually by name if the verdicts  
17 that she just read were the verdicts that each of you  
18 reached. Madame clerk, will you poll the jury,  
19 please.

20 THE CLERK: Patricia McChesney, is this your  
21 verdict?

22 JUROR MCCHESENEY: Yes, it is.

23 THE CLERK: Joyce Sharp, is this your verdict?

24 JUROR SHARP: Yes.

25 THE CLERK: Steven Berger, is this your verdict?

1 JUROR BERGER: Yes, it is.

2 THE CLERK: Judy Eichler, is this your verdict?

3 JUROR EICHLER: Yes, it is.

4 THE CLERK: John Rogers, is this your verdict?

5 JUROR ROGERS: Yes, it is.

6 THE CLERK: Joyce Broadwell, is this your  
7 verdict?

8 JUROR BROADWELL: Yes, it is.

9 THE COURT: Ladies and gentlemen of the jury, at  
10 this time I would again thank you for the time and  
11 consideration that you've given this case. I wish to  
12 advise you of some special privileges enjoyed by  
13 jurors.

14 No juror can ever be required to talk about the  
15 discussions that occurred in the jury room, except by  
16 court order. For many centuries, our society has  
17 relied upon jurors for consideration of difficult  
18 cases. And we have recognized for hundreds of years  
19 that a jury's deliberations, discussions and votes  
20 should remain their private affair as long as they  
21 wish it to be that way. Therefore, the law gives you  
22 a unique privilege not to speak about your work as a  
23 juror.

24 Although you are at liberty to speak with anyone  
25 about your deliberations, a request may come from

1 someone curious or from someone who would seek to find  
2 fault with you. It is up to you to decide whether to  
3 preserve your privacy as a jury.

4 On behalf of the judiciary and citizens of  
5 Pinellas County, I thank you for the time you gave in  
6 this case and with our thanks at this time you are  
7 excused.

8 THE BAILIFF: Jury is out of the hearing of the  
9 Court, Your Honor.

10 THE COURT: State what do you say with regard to  
11 sentencing?

12 MR. BULONE: Judge, I don't really see any reason  
13 to put it off at this point. As you know he does  
14 score life because of his prior record and because of  
15 the seriousness of this particular crime. If I  
16 remember correctly, his priors include an escape,  
17 burglary to a dwelling, a grand theft, a criminal  
18 mischief which was a third degree felony, shooting at  
19 within or into a building and another grand theft.  
20 And if you add everything up he does score life.

21 I think this, certainly, was a brutal act, a very  
22 serious crime which even if there was no prior record  
23 at all I think that, perhaps, he would deserve life on  
24 this one, even if we're not talking about a  
25 guidelines. From the guidelines he does score life

1 and I think the Court ought to deal with that  
2 appropriately.

3 THE COURT: Mr. Leinster, with regard to  
4 sentencing?

5 MR. LEINSTER: Your Honor, I haven't had the  
6 first chance to review his prior criminal history and  
7 I would like the opportunity to be able to address the  
8 validity of prior convictions with my client.  
9 Obviously, he's not going anywhere any time soon so I  
10 think we lose very little by doing a Pre-Sentence  
11 Investigation and giving me the opportunity to confer  
12 with him about what the State alleges to be his prior  
13 record.

14 MR. BULONE: I do have the judgments and  
15 sentences here. I don't know if he wants to take a  
16 look at them or would like more time.

17 MR. LEINSTER: I would like to get more time. If  
18 you're giving the man a life sentence I would like to  
19 sit down with him for a period of time.

20 THE COURT: Under the circumstances and due to  
21 the severity, even the guideline sentence that  
22 Mr. Herrick is looking at, I certainly would give him  
23 every opportunity to review whatever needs to be done.  
24 Why don't we at this point do this, I'll at this time  
25 adjudicate Mr. Herrick guilty of the offenses that the

1 jury has found him guilty of, obviously, order that he  
2 be remanded to the and stay in custody. We'll set a  
3 sentencing for November the 2nd at 1:45 and I'll order  
4 a Pre-Sentence Investigation to be prepared.

5 You may want an opportunity to review his priors  
6 and make sure that you do have a proper score sheet.  
7 I have no reason to doubt what you were telling me,  
8 Joe but, on the other hand, before I impose a life  
9 sentence at this point I think that Mr. Herrick  
10 deserves every opportunity to show, you know, if it is  
11 true or not true.

12 MR. BULONE: If the Court would like in advance I  
13 can give you certified copies of the judgments and  
14 sentences.

15 THE COURT: Provide myself and Mr. Leinster  
16 certified copies of the prior convictions that you are  
17 relying upon and we'll set a sentencing date for that  
18 time and we'll take care of it. There are no other  
19 charges pending against Mr. Herrick are there?

20 MR. BULONE: No, sir, not that I know of.

21 THE COURT: Very good. Sentencing date having  
22 been set, we need to get fingerprints of him at this  
23 time and we will be in recess until 8:30 tomorrow

24 (THEREUPON, COURT WAS ADJOURNED AT 5:00 P.M.)

25



CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF PINELLAS )

I, CARLA JESSAL, Deputy Official in and for the Sixth Judicial Circuit, Notary Public, State of Florida at Large:

DO HEREBY CERTIFY that the foregoing proceedings were had at the time and place set forth in the caption thereof; that I was authorized to and did stenographically report the said proceedings; and that the foregoing pages, 1 through 243, inclusive, is a true and correct transcription of my said stenographic report.

IN WITNESS WHEREOF I have hereunto affixed my official signature this 23rd day of December, 1991, at Clearwater, Pinellas County, Florida.

*Carla Jessal*  
CARLA JESSAL  
Deputy Official Court Reporter

Sworn to and subscribed before the undersigned officer this 23rd day of December, 1991.

*Swendolyn P. Anthony*  
Notary Public  
State of Florida at Large.

My Commission Expires: 4-10-94