

IN THE CIRCUIT COURT, 9th JUDICIAL  
CIRCUIT, CRIMINAL JUSTICE DIVISION  
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

PLAINTIFF,

VS.

CASE NO. CR 90-5351  
VOLUME V

SCOTTY MERSON,

DEFENDANT.

JURY TRIAL PROCEEDINGS

BEFORE

THE HONORABLE GEORGE A. SPRINKEL,

ORANGE COUNTY COURTHOUSE  
COURTROOM C, THIRD FLOOR  
ORLANDO, FLORIDA 32801  
THURSDAY, OCTOBER 18, 1990  
COMMENCING AT 10:10 A.M.

A P P E A R A N C E S:

MARK C. BENDER, ESQUIRE  
ASSISTANT STATE ATTORNEY  
250 NORTH ORANGE AVENUE  
ORLANDO, FLORIDA 32801  
APPEARING FOR THE PLAINTIFF

ERIC R. EIDE, ESQUIRE  
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APPEARING FOR THE DEFENDANT

HEATHER L. EICH  
Official Court Reporter

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VOL. V

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\* \* \* \* \*

1 OCTOBER 18, 1990

2 10:10 O'CLOCK A.M.

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

4 THE COURT: ALL RIGHT. I'M GOING TO GIVE --

5 MR. BENDER: PARDON MY TARDINESS, YOUR HONOR.

6 THE COURT: THE DEFENDANT IS GETTING A NEW SHAVE  
7 AND HAIRCUT AGAIN.

8 (THEREUPON, OUTSIDE THE PRESENCE OF THE DEFENDANT  
9 AND THE JURY, THE JURY CHARGE CONFERENCE TRANSPIRED AS  
10 FOLLOWS:)

11 THE COURT: ALL RIGHT. WE'LL GIVE 2.01; 2.02,  
12 HAVE YOU ALL LOOKED AT IT AS TO THE MANDATORY LESSER  
13 INCLUDED?

14 MR. EIDE: YES, JUDGE.

15 THE COURT: WELL, LET'S START WITH THE ORIGINAL  
16 SEXUAL BATTERY. DOES ANYBODY KNOW WHAT PAGE IT'S ON?

17 MR. EIDE: IT'S 115, YOUR HONOR.

18 THE COURT: ALL RIGHT. WE WOULD READ 1.; 2.,  
19 WITH THE APPROPRIATE DESCRIPTION.

20 MR. EIDE: THE ENTIRE PORTION OF 2., YOUR HONOR?

21 THE COURT: NO. NO, I'M SORRY. 2.(A), WITH THE  
22 APPROPRIATE BODY PARTS THAT'S COME OUT IN THE FACTS.

23 MR. BENDER: AND THAT WOULD BE THAT THE DEFENDANT'S  
24 MOUTH HAD UNION WITH THE VAGINA OF ANGELA [REDACTED].

25 THE COURT: WELL, THAT WOULD BE PARAPHRASING IT.

1 BECAUSE THEY TALK ABOUT IT BEING -- THAT THE DEFENDANT  
2 COMMITTED AN ACT IN WHICH THE SEXUAL ORGAN OF THE VICTIM  
3 HAD UNION WITH THE MOUTH OF THE DEFENDANT.

4 THAT'S FINE. IT WOULD BE 2. (A) AND NOT  
5 (B), (C) OR (D). WE DON'T NEED THE MEDICAL PURPOSES  
6 INSTRUCTION.

7 MR. BENDER: YOUR HONOR, I WOULD ASK THAT THE  
8 "UNION" DEFINITION BE READ TO THE JURY.

9 THE COURT: OH, "UNION AS AN ALTERNATIVE TO  
10 PENETRATION," ALL RIGHT. YEAH, YOU'RE CORRECT.

11 ALL RIGHT. AS FAR AS THE VERDICT FORM,  
12 YOU'RE GOING TO NEED SEXUAL BATTERY WITH A VICTIM  
13 LESS THAN TWELVE, PERSON OVER 18.

14 MR. BENDER: GENERALLY, WHAT WE DO ON THE VERDICT  
15 FORM IS TO HAVE A SEPARATE PLACE WHERE THEY MARK IT:  
16 WE, THE JURY, FIND THE DEFENDANT OVER THE AGE OF 18  
17 OR UNDER THE AGE OF 18.

18 MR. EIDE: AND WE FIND THE VICTIM --

19 MR. BENDER: AND WE FIND THE VICTIM OVER 12 OR  
20 UNDER 12.

21 THE COURT: ALL RIGHT. HAVE YOU SEEN IT, ERIC?

22 MR. EIDE: NO, I HAVE NOT.

23 THE COURT: WHERE ARE THE VERDICT FORMS.

24 MR. BENDER: I HAVEN'T PREPARED THEM YET, YOUR  
25 HONOR.



1 THE COURT: HOPEFULLY -- WE'RE NOT GOING TO BE  
2 DONE THIS MORNING; I DON'T THINK.

3 MR. BENDER: I WAS THINKING WE COULD GET THEM  
4 PREPARED OVER LUNCH, YOUR HONOR. IT JUST TAKES A  
5 PHONE CALL.

6 THE COURT: I JUST WANT TO MAKE SURE. WE'VE GOT  
7 TO DO OUR LESSER INCLUDED, ANYWAY.

8 MR. BENDER: RIGHT. I DIDN'T WANT TO PREPARE  
9 THEM AND HAVE TO CHANGE THEM.

10 THE COURT: THAT'S FINE.

11 ALL RIGHT. HAVE WE GOT ANYTHING ELSE ON  
12 SEXUAL BATTERY?

13 MR. EIDE: LESSER INCLUDED.

14 THE COURT: WHICH WOULD BE WHAT?

15 MR. BENDER: I THINK, REALLY, ONLY BATTERY WOULD  
16 BE APPLICABLE, YOUR HONOR. THAT'S REQUIRED TO BE GIVEN  
17 FOR SOME REASON.

18 THE COURT: SO WE'VE GOT 115, "SEXUAL BATTERY".

19 MR. EIDE: AND WE WOULD ASK THAT ATTEMPT BE GIVEN,  
20 YOUR HONOR.

21 MR. BENDER: YOUR HONOR, WE'VE TALKED ABOUT THIS  
22 BEFORE. YOUR HONOR, THE RULES OF CRIMINAL PROCEDURE  
23 STATE THAT THE ATTEMPT INSTRUCTION SHALL NOT BE GIVEN  
24 IF THERE IS EVIDENCE THAT AN ACT WAS COMPLETED.

25 AND THIS CASE, CLEARLY, THE DEFENDANT'S

1 MOUTH AND TONGUE HAD UNION WITH THE VAGINA. THERE  
2 IS NO ATTEMPT HERE.

3 MR. EIDE: THERE'S A QUESTION FROM ONE OF THE  
4 WITNESSES SAYING, "I DIDN'T SEE ANYTHING."

5 MICHELLE SAID SHE DIDN'T SEE IT HAPPEN.  
6 SHE DIDN'T SEE THE CONTACT WITH HER SISTER. SO I  
7 THINK THAT THAT --

8 THE COURT: WELL, IF I'M NOT REQUIRED TO, I  
9 WILL NOT GIVE THE INSTRUCTION ON ATTEMPT. I SAY,  
10 "NOT REQUIRED". I THINK THE EVIDENCE DOESN'T SHOW  
11 ANY ATTEMPT HERE.

12 BUT IF THE LAW REQUIRES IT AS A LESSER  
13 INCLUDED, THEN I WOULD GIVE IT. BUT I DON'T THINK  
14 IT DOES. IT JUST REQUIRES "BATTERY".

15 MR. BENDER: YOUR HONOR, RULE 3.510, RULES OF  
16 CRIMINAL PROCEDURE --

17 THE COURT: YEAH, WHAT ABOUT IT.

18 MR. BENDER: THAT AUTHORIZES YOU. THE SUPREME  
19 COURT PROMULGATED THAT RULE, THE SUPREME COURT OF  
20 FLORIDA:

21 THE JUDGE SHALL NOT INSTRUCT ON ANY  
22 LESSER INCLUDED OFFENSES TO WHICH THERE IS NO  
23 EVIDENCE, IF THERE IS NO EVIDENCE TO SUPPORT SUCH  
24 ATTEMPT, AND IF THE EVIDENCE PROVES A COMPLETED  
25 OFFENSE.

1 THE COURT: ALL RIGHT. WELL, ARE YOU ALL IN  
2 AGREEMENT THAT THE BATTERY INSTRUCTION IS THE OTHER  
3 CRIME?

4 MR. BENDER: THAT IS REQUIRED TO BE GIVEN, YOUR  
5 HONOR, AS A LESSER.

6 THE COURT: WELL, I MEAN, IS THE DEFENSE IN  
7 AGREEMENT WITH THAT?

8 MR. EIDE: THAT HAS TO BE GIVEN, CORRECT.

9 WE'D ALSO BE ASKING FOR THE ATTEMPT AND A  
10 PLAIN MISDEMEANOR ASSAULT. AND WE WOULD ASK FOR THAT  
11 IN CASE THE JURY DID NOT BELIEVE ANGELA BUT BELIEVED  
12 THAT MAYBE HE WAS IN THE ROOM BUT, LIKE MICHELLE SAID,  
13 SHE DIDN'T SEE ANY CONTACT.

14 THE COURT: I DON'T THINK THAT'S REQUIRED.

15 IS "ASSAULT" REQUIRED? IT'S A CATEGORY TWO.

16 MR. BENDER: IT'S NOT REQUIRED, YOUR HONOR.

17 THE COURT: I DON'T THINK THAT'S APPROPRIATE UNDER  
18 THE TESTIMONY WE'VE HAD.

19 SO OTHER THAN THAT, OTHER THAN THE  
20 REQUESTED ATTEMPTS AND ASSAULT, BATTERY IS THE ONLY  
21 LESSER INCLUDED; IS THAT CORRECT?

22 MR. BENDER: THAT'S CORRECT.

23 THE COURT: WHAT PAGE IS BATTERY ON? IT'S PAGE  
24 89. I HAPPENED TO FLIP TO IT BY LUCK. BUT THE INDEX  
25 IS PITIFUL IN HERE. THEY DON'T LIST --

1 MR. EIDE: IT'S PUT TOGETHER BY THE HARVARD BLUE  
2 BOOK.

3 THE COURT: WELL, THE INSTRUCTIONS AREN'T VERY  
4 CLEAR.

5 MR. EIDE: WHAT PAGE WAS THAT, YOUR HONOR, 84?

6 THE COURT: PAGE 89 IN MY BOOK.

7 "BEFORE YOU CAN FIND THE DEFENDANT GUILTY  
8 OF BATTERY, THE STATE MUST PROVE THE DEFENDANT  
9 INTENTIONALLY TOUCHED OR STRUCK THE VICTIM AGAINST  
10 HER WILL OR THE DEFENDANT INTENTIONALLY CAUSED BODILY  
11 HARM."

12 WE'RE NOT ALLEGING "BODILY HARM" OR  
13 "STRUCK". SO "THE DEFENDANT INTENTIONALLY TOUCHED  
14 THE VICTIM AGAINST HER WILL" IS THE ONLY INSTRUCTION  
15 THAT'S NECESSARY.

16 MR. BENDER: THAT IS FINE WITH THE STATE.

17 MR. EIDE: YOUR HONOR, I WOULD ASK THAT THE WHOLE  
18 THING BE GIVEN, THE (A) PORTION. IT SAYS: GIVE (A)  
19 OR (B) AS APPLICABLE.

20 WE KNOW THERE'S NO HARM. AND I WOULD  
21 ASK THAT IT BE GIVEN AS WRITTEN: "THE DEFENDANT  
22 INTENTIONALLY TOUCHED OR STRUCK VICTIM AGAINST HER  
23 WILL."

24 THE COURT: WELL, THE REQUEST IS DENIED. THE  
25 INSTRUCTION WILL BE: THAT THE DEFENDANT INTENTIONALLY

1 TOUCHED THE VICTIM AGAINST HER WILL.

2 THEN WE HAVE BURGLARY TO A DWELLING WITH  
3 A BATTERY THEREIN.

4 MR. EIDE: THAT'S ON PAGE 135, YOUR HONOR.

5 THE COURT: ALL RIGHT. WELL, LET'S LOOK AT THIS  
6 BURGLARY INSTRUCTION, ERIC.

7 MR. EIDE: YES, YOUR HONOR.

8 THE COURT: YOU NEED TO LOOK AT THE BURGLARY  
9 INSTRUCTION.

10 MR. EIDE: PAGE 135, YOUR HONOR. I'VE GOT IT.

11 THE COURT: YEAH. IT SAYS: "WITH AN ASSAULT."  
12 SO I GUESS IT GOES ON TO "BATTERY". ALL RIGHT.

13 MR. BENDER: YOUR HONOR, IT DOESN'T. WE CAN  
14 BRING THAT UP IN A MINUTE.

15 THE COURT: DO YOU SAY IT DOES OR DOESN'T?

16 MR. BENDER: IT DOES NOT. THEY SPEAK ONLY OF  
17 "ASSAULT". BUT I THOUGHT WE COULD INSERT "BATTERY"  
18 IN PLACE OF "ASSAULT".

19 THE COURT: THE DEFENDANT ENTERED A STRUCTURE  
20 OWNED BY OR IN THE POSSESSION OF -- WHAT'S HIS NAME?

21 MR. BENDER: WE HAVE CATHY [REDACTED] LISTED IN THE  
22 INFORMATION, YOUR HONOR, AS CUSTODIAN, YOUR HONOR.

23 THE COURT: ALL RIGHT. CATHY [REDACTED].

24 MR. BENDER: WELL, AT THAT TIME, YOUR HONOR, WE  
25 JUST PUT HER DOWN.

1 THE COURT: THAT THE DEFENDANT DID NOT HAVE --  
2 SO IT'S POSSESSION OF CATHY [REDACTED]. "THE DEFENDANT DOES  
3 NOT HAVE THE PERMISSION OR CONSENT OF CATHY [REDACTED], OR  
4 ANYONE."

5 MR. BENDER: YOUR HONOR, THE DEFENSE WILL STIPULATE;  
6 WE DON'T HAVE A PROBLEM WITH MR. STOCKWELL'S NAME BEING  
7 ENTERED. BUT --

8 MR. EIDE: I CAN'T.

9 MR. BENDER: OKAY.

10 MR. EIDE: THE INFORMATION ALLEGES THAT IT WAS  
11 IN THE CUSTODY OF OR CONTROL OF, I BELIEVE WAS HOW YOU  
12 PUT IT, "CUSTODY OR CONTROL; CATHY [REDACTED] AS CUSTODIAN,"  
13 I BELIEVE.

14 THE COURT: "THE DEFENDANT DID NOT HAVE THE  
15 PERMISSION OF CATHY [REDACTED] OR ANYONE AUTHORIZED TO ACT  
16 FOR HER TO ENTER OR REMAIN IN THE STRUCTURE AT THE  
17 TIME.

18 "AT THE TIME OF ENTERING OR REMAINING IN  
19 THE STRUCTURE THE DEFENDANT HAD A FULLY-FORMED,  
20 CONSCIOUS INTENT TO COMMIT THE OFFENSE OF BATTERY  
21 OR SEXUAL BATTERY."

22 MR. BENDER: SEXUAL BATTERY.

23 THE COURT: SEXUAL BATTERY?

24 MR. BENDER: SEXUAL BATTERY.

25 THE COURT: IS THAT WHAT YOU'VE ALLEGED IN THE

1 INFORMATION?

2 MR. BENDER: I BELIEVE SO , YOUR HONOR.

3 THE COURT: IT SAYS, "BATTERY".

4 MR. BENDER: IT JUST SAYS, "BATTERY"?

5 THE COURT: YOUR ALLEGING THE BATTERY TO MICHELLE  
6 IN COUNT TWO. BURGLARY OF A DWELLING WITH A BATTERY  
7 THEREIN.

8 MR. BENDER: YOU'RE RIGHT, YOUR HONOR. I'M SORRY.  
9 THAT'S FINE.

10 THE COURT: SO LET'S JUST CALL IT "BATTERY".

11 THEN INTENT TO COMMIT THE OFFENSE OF  
12 BATTERY IN THAT STRUCTURE. AGAIN, THE OFFENSE THAT  
13 WAS THE OBJECT OF THE BURGLARY. THEN WE GO BACK TO  
14 THE DEFINITION OF "BATTERY" AT PAGE 89.

15 WE DON'T NEED THE NEXT ONE ABOUT ENTERING,  
16 WHEN IT WAS OPEN. AND THEN STATING:

17 "PROOF OF THE ENTERING STEALTHILY AND  
18 WITHOUT THE CONSENT OF THE OWNER AND OCCUPANT MAY  
19 JUSTIFY THE FINDING THAT HE INTENDED TO COMMIT A CRIME."

20 WELL, I ASSUME THE NEXT ONE SHOULD BE READ,  
21 810.07.

22 MR. BENDER: YES, YOUR HONOR.

23 THE COURT: "PROOF OF INTENT," WE DON'T NEED  
24 "THE ARM INTO THE STRUCTURE". WHY COULDN'T YOU INTEND  
25 TO JUST COMMIT THE CRIME OF TRESPASS?

1           MR. EIDE: TRESPASS IS GENERAL INTENT; BURGLARY,  
2           A SPECIFIC.

3           THE COURT: I GUESS WE CAN'T READ "STRUCTURE".  
4           "PROOF OF POSSESSION OF STOLEN PROPERTY" DOESN'T APPLY.  
5           "CONVENIENCE" DOESN'T APPLY.

6           MR. BENDER: ARE YOU GOING TO READ THE "PROOF OF  
7           INTENT," BOTH OF THOSE PARAGRAPHS?

8           THE COURT: WHAT'S THAT?

9           MR. BENDER: "EVEN THOUGH AN LAWFUL ENTERING  
10          INTO A STRUCTURE IS PROVEN, IF THE EVIDENCE DOES NOT  
11          ESTABLISH THAT IT WAS DONE WITH THE INTENT TO COMMIT  
12          A BATTERY, THE DEFENDANT MUST BE FOUND NOT GUILTY."

13          THE COURT: YES, I'M GOING TO READ THAT. I THINK  
14          I HAVE TO READ THAT.

15          MR. BENDER: YES.

16          THE COURT: BUT "POSSESSION OF STOLEN PROPERTY"  
17          I'M NOT GOING TO READ.

18                 THEN I'M GOING TO READ THE DEFINITION OF  
19          "STRUCTURE". THEN WE'LL READ THE ENHANCED PUNISHMENT,  
20          AS FAR AS THE BURGLARY IS CONCERNED.

21                 (THEREUPON, THE DEFENDANT ENTERED THE COURTROOM.)

22          THE COURT: WELL, THE ENHANCED PENALTY PART SHOULD  
23          BE READ. BUT IT LOOKS LIKE THE NEXT ONE         SAYS,  
24          "WITH AN ASSAULT," IT WOULD HAVE TO BE READ.

25                 "IF YOU FIND IN THE COURSE OF COMMITTING



1 THE BURGLARY THE DEFENDANT MADE AN ASSAULT UPON ANY  
2 PERSON, YOU SHOULD FIND HIM GUILTY OF BURGLARY DURING  
3 WHICH AN ASSAULT HAS BEEN COMMITTED."

4 MR. BENDER: THAT'S WHAT WE WOULD BE REQUESTING,  
5 YOUR HONOR. AND FOR SOME REASON --

6 THE COURT: WELL, WE'VE READ THE BATTERY INSTRUCTION  
7 EARLIER IN THIS INSTRUCTION, THOUGH.

8 MR. BENDER: WE HAVE. BUT THAT'S JUST DEFINING  
9 THE ELEMENTS OF THE OFFENSE. THE JURY HAS NOT BEEN  
10 INSTRUCTED UNTIL THIS TIME THAT THIS IS AN AGGRAVATING  
11 FACTOR, WHICH SHOULD BE CONSIDERED, AS WELL.

12 SO I THINK IT NEEDS TO BE READ AGAIN. BUT  
13 FOR SOME REASON ALL THEY HAVE IS "AN ASSAULT".

14 THE COURT: "IF YOU FIND IN THE COURSE OF  
15 COMMITTING THE BATTERY THE DEFENDANT MADE A BATTERY  
16 UPON ANY PERSON, YOU SHOULD FIND HIM GUILTY."

17 "A BATTERY IS," AND THEY GO BACK TO THE  
18 DEFINITION FOR "BATTERY," I GUESS. "BATTERY" IS  
19 DEFINED AS: IN ORDER TO FIND THAT THE DEFENDANT  
20 COMMITTED A BATTERY, THE STATE MUST PROVE THE FOLLOWING  
21 ELEMENT BEYOND A REASONABLE DOUBT: THAT THE DEFENDANT  
22 INTENTIONALLY TOUCHED THE VICTIM AGAINST HER WILL.

23 MR. BENDER: THAT'S FINE.

24 THE COURT: ANY OBJECTION TO THAT BY THE DEFENSE?

25 MR. EIDE: YOU WOULD BE READING (A) AS IT STANDS,

1           EXCEPT EXCLUDING THE WORDS "OR STRUCK"?

2           THE COURT:   YEAH.

3           MR. EIDE:   I WOULD STILL PREFER TO HAVE THOSE  
4           WORDS IN, LIKE WE ASKED FOR THE FIRST TIME.

5           THE COURT:   WELL, I UNDERSTAND THAT, AND I  
6           OVERRULED THE OBJECTION AS FAR AS THAT'S CONCERNED.

7           MR. EIDE:   RIGHT.

8           THE COURT:   BUT DO YOU HAVE ANY OBJECTION TO  
9           READING THAT LAST PARAGRAPH AT THE BOTTOM OF 136, IN  
10          THAT MANNER?

11          MR. EIDE:   NO.   IN OTHER WORDS, USING THE "BATTERY"  
12          PORTION?   THAT'S FINE.

13          THE COURT:   RIGHT.   AND JUST SAY:   "THE STATE  
14          MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT  
15          INTENTIONALLY TOUCHED THE VICTIM AGAINST HER WILL."

16          ALL RIGHT.   LET'S SEE.   "IF YOU FIND THAT  
17          WHILE THE DEFENDANT MADE NO BATTERY AND WAS UNARMED,  
18          THE STRUCTURE ENTERED WAS A DWELLING, YOU SHOULD FIND  
19          HIM GUILTY OF BURGLARY TO A DWELLING."

20          MR. BENDER:   THAT ONE SHOULD BE READ.

21          THE COURT:   IF YOU FIND -- THE NEXT ONE IS FOR  
22          A STRUCTURE OTHER THAN A DWELLING.   I MEAN, CLEARLY,  
23          WE'RE TALKING ABOUT A DWELLING HERE.   THE FACTS AREN'T  
24          AMBIVALENT AT ALL ON THAT.

25          DO WE NEED "THE HUMAN BEING IN A STRUCTURE"

1           AND "CONVENIENCE"?

2           MR. BENDER: YOUR HONOR, WE DO. BECAUSE IF YOU  
3 GO INTO A DWELLING WITHOUT ANYONE PRESENT, EVEN IF  
4 YOU DON'T MAKE A BATTERY, IT'S STILL AN AGGRAVATOR.

5           THE COURT: YEAH. BUT THAT'S ONLY IN A STRUCTURE;  
6 THAT'S NOT A DWELLING, RIGHT?

7           MR. BENDER: WELL, UNFORTUNATELY, THE INSTRUCTION  
8 IS CONFUSING BECAUSE THEY INTERCHANGE "STRUCTURE" AND  
9 "DWELLING" AND THEN DON'T USE "DWELLING" BUT "STRUCTURE".  
10 IN THIS INSTANCE IT'S THE SAME AS A DWELLING HOUSE.

11          THE COURT: ARE YOU SURE?

12          MR. BENDER: ABSOLUTELY.

13          MR. EIDE: "A 'DWELLING' IS A HOUSE OF ANY KIND  
14 SET IN A FOUNDATION OR ANY APARTMENT ACTUALLY USED AS  
15 A DWELLING, HOME OR PLACE OF ABODE, PERMANENTLY OR  
16 TEMPORARILY."

17          THE COURT: I KNOW, OBVIOUSLY, THAT A DWELLING  
18 IS DIFFERENT THAN A STRUCTURE. STRUCTURE IS TALKING  
19 ABOUT A WAREHOUSE OR OFFICE BUILDING OR SOMETHING.  
20 A DWELLING IS WHERE SOMEONE LIVES.

21          MR. EIDE: RIGHT.

22          THE COURT: BUT THERE'S NO CRIME OF BURGLARY TO  
23 AN OCCUPIED STRUCTURE. BUT IS THERE A BURGLARY TO  
24 AN OCCUPIED DWELLING, AS OPPOSED TO A DWELLING.

25          MR. BENDER: YOUR HONOR, "A DWELLING" IS A

1 "STRUCTURE" UNDER THE DEFINITION. A DWELLING IS ALWAYS  
2 A STRUCTURE. A STRUCTURE IS NOT NECESSARILY A DWELLING.

3 MR. EIDE: THE DIFFERENCE, TO MY UNDERSTANDING, IS  
4 NOT WHETHER THERE'S SOMEONE PRESENT OR WHETHER THEY'RE  
5 NOT PRESENT THERE, BUT WHETHER OR NOT PEOPLE LIVE THERE  
6 OR IF IT'S JUST FOUR WALLS AND A ROOF.

7 THE COURT: THAT'S THE STRUCTURE.

8 MR. EIDE: RIGHT. IF YOU HAVE A HOUSE, IT'S A  
9 DWELLING.

10 THE COURT: WELL, I UNDERSTAND THAT. ALL THE  
11 FACTS ON THIS ARE AS TO "DWELLING". AND IF WE START  
12 READING ABOUT A HUMAN BEING IN A STRUCTURE, IT'S JUST  
13 CONFUSING. BECAUSE NONE OF THOSE FACTS APPLY TO OUR  
14 CASE.

15 MR. BENDER: WELL, ARE YOU GOING TO READ THE  
16 "STRUCTURE" DEFINITION?

17 THE COURT: SURE.

18 MR. BENDER: WELL, IF YOU'RE GOING TO READ THE  
19 STRUCTURE DEFINITE, THEN I THINK THE "HUMAN BEING IN  
20 A STRUCTURE" IS RELEVANT AND SHOULD BE READ.

21 THE COURT: YOU SAY IT IS RELEVANT?

22 MR. BENDER: BECAUSE I DON'T KNOW WHAT LESSER  
23 INCLUDED MR. EIDE IS GOING TO BE REQUESTING. BUT IF  
24 YOU LOOK BACK AT THE SCHEDULE OF LESSER INCLUDED ON  
25 BURGLARY, THEY HAVE BURGLARY WITH A BATTERY. THEN

1 CATEGORY ONE IS BURGLARY. THEN THE CATEGORY TWO ARE  
2 ATTEMPT, BURGLARY OF A DWELLING WITH A HUMAN BEING  
3 INSIDE.

4 SO IF HE'S ASKING FOR THAT AS A LESSER  
5 INCLUDED, THEN I THINK THE INSTRUCTION SHOULD BE READ.  
6 IF HE'S NOT GOING TO ASK FOR IT, THEN I HAVE NO PROBLEM  
7 WITH IT NOT BEING READ.

8 THE COURT: WELL, IT'S NOT A STRUCTURE OR A  
9 CONVENIENCE. WELL, THEY SAY THAT A STRUCTURE IS A  
10 DWELLING. BUT "A DWELLING," WE DON'T NEED TO GIVE  
11 THAT INSTRUCTION.

12 MR. BENDER: ALL RIGHT.

13 MR. EIDE: THE WHOLE SITUATION IS CATEGORY ONE  
14 IS BURGLARY. 810.023 IS WHAT THEY LIST. YOU CAN HAVE  
15 IT PROVEN IN THE ALTERNATIVE; EITHER A BURGLARY OF A  
16 DWELLING, OR WITH A HUMAN BEING INSIDE. SO I THINK  
17 BURGLARY OF A DWELLING IS ENOUGH.

18 MR. BENDER: ALL RIGHT. THAT'S FINE.

19 THE COURT: SO WE'RE NOT GOING TO READ "THE HUMAN  
20 BEING IN A STRUCTURE". THAT WAS MY POINT IN THE FIRST  
21 PLACE.

22 "WITH NO AGGRAVATING CIRCUMSTANCES," ALL  
23 RIGHT; WE NEED TO READ THAT. SO WE'LL READ THAT.

24 WE'LL READ THE DWELLING INSTRUCTION:

25 "THEREFORE, IF YOU FIND THE DEFENDANT GUILTY OF A

1 BURGLARY, IT WILL BE NECESSARY FOR YOU TO STATE IN  
2 YOUR VERDICT WHETHER THE DEFENDANT --

3 MR. EIDE: COMMITTED A BATTERY."

4 THE COURT: -- "COMMITTED THE CRIME OF BURGLARY  
5 TO A DWELLING WITH BATTERY THEREIN."

6 WHAT'S THE LESSER INCLUDED OF BURGLARY TO  
7 A DWELLING WITH BATTERY THEREIN?

8 MR. EIDE: BURGLARY.

9 MR. BENDER: STRAIGHT BURGLARY.

10 THE COURT: SO I'M GOING TO HAVE TO READ THE  
11 BURGLARY INSTRUCTION THAT IT WAS A DWELLING.

12 MR. BENDER: ALL RIGHT.

13 THE COURT: "THEREFORE, IF YOU FIND THE DEFENDANT  
14 GUILTY OF BURGLARY, IT WILL BE NECESSARY FOR YOU TO  
15 STATE IN YOUR VERDICT WHETHER THE DEFENDANT COMMITTED  
16 THE CRIME OF BURGLARY TO A DWELLING WITH BATTERY  
17 THEREIN."

18 MR. BENDER: OKAY. YOU'RE GOING TO READ THE  
19 DEFINITION OF "DWELLING," ALSO?

20 THE COURT: HMM-HMM.

21 MR. EIDE: YOUR HONOR, I THINK WHAT THEY MEANT  
22 BY "INSERT AGGRAVATING CIRCUMSTANCE" IS THAT IT WOULD  
23 SAY: IF YOU FIND THE DEFENDANT GUILTY OF BURGLARY,  
24 IT WOULD BE NECESSARY TO STATE IN YOUR VERDICT WHETHER  
25 THE DEFENDANT ALSO COMMITTED THE CRIME OF BATTERY WHILE

1 IN THE DWELLING. INSTEAD OF JUST SAYING: "GUILTY OF  
2 BURGLARY".

3 THE COURT: NO. BECAUSE YOU CAN FIND HIM GUILTY  
4 OF BURGLARY WITHOUT FINDING HIM GUILTY OF BURGLARY TO  
5 A DWELLING. SO YOU HAVE TO INCLUDE NOT ONLY "BURGLARY"  
6 BUT "BATTERY".

7 MR. EIDE: BUT THE AGGRAVATED CIRCUMSTANCE HERE  
8 IS THE BATTERY.

9 THE COURT: BUT THERE'S A DIFFERENCE BETWEEN  
10 "BURGLARY" AND "BURGLARY TO A DWELLING".

11 MR. EIDE: WELL, IT WOULD EITHER BE BURGLARY TO  
12 A DWELLING, BURGLARY TO A STRUCTURE, OR BURGLARY TO A  
13 CONVENIENCE. SO IF THEY FIND HIM GUILTY OF BURGLARY,  
14 THEY HAVE TO DECIDE WHETHER IT'S A --

15 THE COURT: NO, THERE'S A DISTINCTION. IF YOU  
16 WANT ME TO READ IT -- "THEREFORE, IF YOU FIND THE  
17 DEFENDANT GUILTY OF BURGLARY TO A DWELLING, IT WILL  
18 BE NECESSARY FOR YOU TO STATE IN YOUR VERDICT WHETHER  
19 THE DEFENDANT COMMITTED THE CRIME OF BATTERY THEREIN."

20 OR, IF YOU WANT ME TO SAY: "THEREFORE, IF  
21 YOU FIND THE DEFENDANT GUILTY OF BURGLARY, IT WILL BE  
22 NECESSARY FOR YOU TO STATE IN YOUR VERDICT WHETHER THE  
23 DEFENDANT COMMITTED THE CRIME OF BURGLARY TO A DWELLING  
24 WITH A BATTERY THEREIN."

25 MR. EIDE: I PREFER THE FORMER.

1 THE COURT: SO YOU WANT: "THEREFORE, IF YOU FIND  
2 THE DEFENDANT GUILTY OF BURGLARY TO A DWELLING, IT WILL  
3 BE NECESSARY FOR YOU TO STATE IN YOUR VERDICT WHETHER  
4 THE DEFENDANT COMMITTED THE CRIME OF BATTERY THEREIN"?

5 MR. EIDE: CORRECT.

6 MR. BENDER: AND "COMMITTED THE CRIME OF BATTERY  
7 IN THE COURSE OF BURGLARY".

8 MR. EIDE: NO.

9 THE COURT: NO. I'LL JUST READ IT JUST "COMMITTED  
10 THE CRIME OF BATTERY THEREIN."

11 SO WE'RE GOING TO SAY: "IF YOU FIND THE  
12 DEFENDANT GUILTY OF AGG. -- NOT AGGRAVATED BATTERY.  
13 I'M GETTING PUNCHY -- BURGLARY TO A DWELLING, IT WILL  
14 BE NECESSARY FOR YOU TO STATE IN YOUR VERDICT WHETHER  
15 THE DEFENDANT COMMITTED THE CRIME OF BATTERY THEREIN."

16 THIS IS GOING TO BE FUN DOING THESE  
17 INSTRUCTIONS.

18 ALL RIGHT NOW, WHAT'S THE LESSER OF THIS?

19 MR. EIDE: BURGLARY, YOUR HONOR.

20 MR. BENDER: 810.02(3).

21 THE COURT: IT'S WHAT?

22 MR. BENDER: 810.02(3) IS THE LESSER, BURGLARY.

23 MR. EIDE: THAT'S THE NECESSARY LESSER.

24 THE COURT: ALL RIGHT. SO THEN WE'LL READ THE  
25 LESSER INCLUDED OF -- IF I GET INTO THESE INSTRUCTIONS



1       AND FLUB UP ON SOMETHING, DON'T HESITATE TO APPROACH  
2       THE BENCH BEFORE WE GO ALL THE WAY THROUGH IT AND THEN  
3       AT THE END ASK YOU IF THERE'S ANY OBJECTIONS.

4               SO IF I GET INTO IT AND FOR SOME REASON --  
5       BECAUSE A LOT OF THIS, WE'RE NOT EXACTLY WEANING IT  
6       BUT TRYING TO INSERT PHRASES THAT DON'T NECESSARILY  
7       FIT GRAMMATICALLY.

8               ALL RIGHT. THEN THE LESSER INCLUDED OF  
9       BURGLARY TO A DWELLING WITH BATTERY THEREIN IS JUST  
10      BURGLARY; IS THAT CORRECT? OR ARE WE GOING TO CALL  
11      IT "BURGLARY"?

12              MR. EIDE: I THINK THAT'S WHY THEY PUT IN THE  
13      ITEMS OF AGGRAVATING CIRCUMSTANCE. I THINK ONCE  
14      YOU'VE READ THAT BURGLARY INSTRUCTION, YOU'VE READ  
15      THE WHOLE INSTRUCTION FOR IT.

16              THE COURT: SO WE DON'T HAVE TO WORRY ABOUT THAT.  
17      YOU'RE GOING TO HAVE THAT ON YOUR VERDICT FORM, ANYWAYS,  
18      OF BURGLARY AND BURGLARY TO A DWELLING WITH BATTERY  
19      THEREIN, RIGHT?

20              MR. BENDER: RIGHT.

21              THE COURT: IS THERE GOING TO BE A VERDICT FOR  
22      BURGLARY TO A DWELLING, WITHOUT THE BATTERY?

23              MR. BENDER: THERE WILL JUST BE TWO VERDICT FORMS.  
24      IT WOULD JUST BE A LESSER.

25              THE COURT: IT JUST SAYS "BURGLARY"?

1           MR. BENDER: THE CHARGE ITSELF WILL SAY THAT.  
2           BUT THE LESSER WILL NOT.

3           THE COURT: WHAT WILL THE LESSER BE ENTITLED ON  
4           THE VERDICT FORM?

5           MR. BENDER: "WE, THE JURY, FIND THE DEFENDANT  
6           GUILTY OF THE LESSER INCLUDED OFFENSE OF BURGLARY."

7           THE COURT: NOT BURGLARY TO A STRUCTURE OR BURGLARY  
8           TO A DWELLING, JUST BURGLARY?

9           MR. BENDER: JUST BURGLARY.

10          THE COURT: AND YOU UNDERSTAND BY FINDING HIM  
11          GUILTY OF BURGLARY -- WAS IT A THIRD DEGREE FELONY?

12          MR. BENDER: IT WOULD BE A SECOND DEGREE FELONY.

13          THE COURT: BURGLARY TO A STRUCTURE, THAT'S THE  
14          LESSER OF BURGLARY?

15          MR. EIDE: NO.

16          MR. BENDER: NO -- YES, THAT'S CORRECT.

17          THE COURT: THERE ISN'T ANY SUCH CRIME AS JUST  
18          BURGLARY, IS THERE? IT'S EITHER GOT TO BE TO A  
19          STRUCTURE OR DWELLING OR CONVENIENCE, DOESN'T IT?

20          MR. BENDER: IF YOU READ 810.02 SUB (3), WHICH  
21          IS THE LESSER REQUIRED, IT SAYS: "OR IS NOT ARMED  
22          OR DOES NOT ARM HIMSELF WITH AN EXPLOSIVE," BLAH,  
23          BLAH, "DURING THE COURSE OF COMMITTING THE OFFENSE.  
24          AND THE STRUCTURE ENTERED IS A DWELLING, AND THERE  
25          IS A HUMAN BEING IN THE STRUCTURE AT THE TIME THE

1 DEFENDANT ENTERED OR REMAINED IN THE STRUCTURE."

2 IT IS BURGLARY OF A SECOND DEGREE.

3 THE COURT: YEAH, BUT WE'VE GOT TO SET THAT AT --  
4 IS THAT ACTUALLY A LESSER INCLUDED?

5 MR. BENDER: YES. I CAN GO AHEAD AND TITLE IT.  
6 WE JUST HAVE IT "BURGLARY OF A DWELLING WITHOUT A  
7 BATTERY," WHICH I THINK IS EXACTLY WHAT THIS IS.

8 THE COURT: BUT WHAT YOU'RE SAYING IS IF HE'S  
9 NOT CONVICTED OF BURGLARY TO A DWELLING WITH A BATTERY  
10 THEREIN, THAT THE LESSER INCLUDED IS BURGLARY TO A  
11 DWELLING?

12 MR. BENDER: RIGHT.

13 THE COURT: HERE THEY ARE SAYING THAT IT'S SIMPLE  
14 BURGLARY, WHICH WOULD BE THE LESSER DEGREE OF BURGLARY,  
15 WHICH WOULD BE BURGLARY TO A STRUCTURE.

16 MR. BENDER: YOUR HONOR, THEY DO NOT CATEGORIZE  
17 WHAT THAT BURGLARY IS.

18 THE COURT: I DON'T CARE. AS LONG AS EVERYBODY  
19 IS IN AGREEMENT ON IT, I DON'T HAVE A PROBLEM.

20 MR. BENDER: BUT 810.03 IS AN F-2, NOT AN F-3.

21 THE COURT: BURGLARY TO A STRUCTURE IS A SECOND  
22 DEGREE FELONY?

23 MR. BENDER: IF THERE'S AN OCCUPANT INSIDE.

24 THE COURT: SEE, WE DIDN'T GET INTO THAT. WE  
25 DIDN'T GIVE THAT INSTRUCTION ON THE HUMAN OCCUPYING

1 THE STRUCTURE, OTHER THAN A DWELLING.

2 THE POINT WAS THAT BURGLARY TO A STRUCTURE  
3 OTHER THAN A DWELLING OCCUPIED BY A HUMAN IS THE SAME  
4 DEGREE AS BURGLARY TO A DWELLING.

5 MR. BENDER: ALL RIGHT.

6 THE COURT: RIGHT?

7 MR. BENDER: ALL RIGHT.

8 THE COURT: SO THAT'S NOT A LESSER INCLUDED.

9 THAT'S NOT A LESSER CRIME.

10 MR. BENDER: JUST THAT THERE WASN'T A BATTERY  
11 COMMITTED IS THE ONLY DIFFERENCE. IT'S GOING IN AND  
12 TAKING A STEREO WITHOUT TOUCHING OR STRIKING SOMEONE  
13 INSIDE.

14 THE COURT: BUT YOU'RE SAYING THERE'S NO REQUIRED  
15 LESSER ON THIRD DEGREE FELONY; A THIRD DEGREE FELONY,  
16 BURGLARY TO A STRUCTURE.

17 MR. EIDE: THAT'S MY UNDERSTANDING. THAT WOULD  
18 BE A PLAIN BURGLARY. 810.20(3), THIRD DEGREE, BURGLARY  
19 OF CONVENIENCE, BURGLARY OF STRUCTURE.

20 THERE'S BURGLARY OF STRUCTURE WITH A PERSON.  
21 IT'S AN F-2. IF IT'S A BURGLARY OF A DWELLING IT'S AN  
22 F-2.

23 THE COURT: SEE, BURGLARY TO AN OCCUPIED STRUCTURE  
24 IS NOT GOING TO BE A LESSER INCLUDED.

25 MR. BENDER: NO, IT'S --

1           MR. EIDE: IT'S EITHER STRUCTURE; BURGLARY OF A  
2           STRUCTURE IS NOT GOING TO BE A LESSER.

3           MR. BENDER: THE LAST SENTENCE IN 810.02(3), IT  
4           SAYS: OTHERWISE, BURGLARY IS A FELONY OF THE THIRD  
5           DEGREE. BEING, IF THERE IS NO PERSON INSIDE.

6           THE COURT: WE'VE GOT THREE LEVELS OF BURGLARY  
7           HERE. THE HIGHEST ONE IS THE ONE THAT'S CHARGED;  
8           COMMITTING THE CRIME ON A HUMAN BEING IN A DWELLING.

9           MR. BENDER: RIGHT.

10          THE COURT: THEN WE'VE GOT BURGLARY TO A DWELLING.  
11          THEN WE'VE GOT BURGLARY TO AN OCCUPIED STRUCTURE,  
12          WHICH IS THE SAME OFFENSE AS BURGLARY TO A DWELLING,  
13          PUNISHMENT-WISE. THEN WE'VE GOT SIMPLE BURGLARY.

14                 SO WE'VE GOT FOUR CRIMES. BUT THE LESSER  
15          INCLUDED INSTRUCTION ON THE DEAL JUST SAYS "BURGLARY".  
16          IT DOESN'T GIVE THOSE DEGREES, DOES IT?

17          MR. BENDER: NO, IT DOES NOT. DO WE WANT TO PUT  
18          THOSE ON THE VERDICT FORM, IN THAT ORDER?

19          THE COURT: WELL, I DON'T THINK YOU WANT TO PUT  
20          FOUR BURGLARIES DOWN THERE.

21                 DO YOU, MR. EIDE?

22          MR. EIDE: (SHAKES HEAD)

23          THE COURT: TELL ME WHAT THE DEFENSE WANTS, AND  
24          THAT MAY GOVERN. IT MAY HELP.

25          MR. EIDE: YOUR HONOR, WE WOULD -- THERE'S NO

1           CONTENTION, I THINK, NO EVIDENCE SHOWING THAT THIS IS  
2           ANYTHING BUT A DWELLING. WE THINK THE STATE CAN PUT  
3           AS A LESSER INCLUDED OFFENSE OF BURGLARY OF A DWELLING  
4           ON THERE. AND WE KNOW THAT'S THEIR OTHER OPTION.  
5           THAT'S OBVIOUSLY AN F-2. WE CAN GO FROM THERE.

6           THE COURT: THAT'S FINE. AS LONG AS YOU DON'T  
7           NEED THE BURGLARY INSTRUCTION, THAT'S FINE. SO WHAT  
8           YOU NEED IS -- CAN WE USE THE SAME CHECK-OFF FORMS AS  
9           WE DID ON THE SEXUAL BATTERY SIDE OF IT, AND SAY THAT  
10          IT WAS A DWELLING AND THAT THERE WAS A CRIME COMMITTED,  
11          OR DO YOU WANT TO HAVE A SEPARATE ONE THAT: "WE,  
12          THE JURY, FIND THE DEFENDANT GUILTY OF BURGLARY TO  
13          A DWELLING"?

14          MR. EIDE: MY UNDERSTANDING IS IT WOULD BE BURGLARY  
15          WITH A BATTERY THEREIN.

16          MR. BENDER: RIGHT.

17          MR. EIDE: THAT'S THE PRIMARY OFFENSE: "WE, THE  
18          JURY, FIND HIM GUILTY OF BURGLARY."

19          THE COURT: BURGLARY TO A DWELLING.

20          MR. EIDE: LESSER INCLUDED OFFENSE OF BURGLARY  
21          TO A DWELLING.

22          MR. BENDER: AND AREN'T YOU REQUESTING TRESPASS?

23          MR. EIDE: WE WOULD BE REQUESTING TRESPASS ON  
24          THE CASE.

25          MR. BENDER: ALL RIGHT.

1           THE COURT: WELL, I NEED TO GO BACK AND READ THE  
2 INSTRUCTION ON BURGLARY, OR AM I COVERED BY READING IT  
3 ONE TIME?

4           MR. EIDE: I DO NOT BELIEVE YOU HAVE TO RE-READ  
5 IT. BUT READING THIS ONE SECTION WHICH SAYS: "IF  
6 YOU FIND HIM GUILTY OF BURGLARY OF A DWELLING, IT WILL  
7 BE NECESSARY FOR YOU TO STATE ON YOUR VERDICT WHETHER  
8 THE DEFENDANT COMMITTED A BATTERY THEREIN."

9           AND THEN IT'S BURGLARY, AND THEN YOU HAVE  
10 BURGLARY WITH A BATTERY. SO YOU'VE ALREADY INSTRUCTED  
11 THEM OF THAT. IN OTHER WORDS, I DON'T THINK YOU NEED  
12 TO READ BURGLARY TWICE.

13          MR. BENDER: I AGREE WITH THAT.

14          THE COURT: HALLELUJAH.

15          MR. BENDER: SO WE'RE GOING TO HAVE BURGLARY TO  
16 A DWELLING, STRAIGHT BURGLARY AND TRESPASS.

17          THE COURT: IS A TRESPASS A MANDATORY LESSER?

18          MR. BENDER: IT IS NOT.

19          MR. EIDE: WE BELIEVE THE EVIDENCE HAS COME OUT  
20 THAT WOULD ALLOW TRESPASS. IF IT SHOWS THAT A PERSON  
21 WAS THERE AND THE PERSON HAD ANY PERMISSION IN THE PAST  
22 THEN, OBVIOUSLY, TRESPASS COULD BE A LESSER INCLUDED.

23          MR. BENDER: THE STATE'S POSITION IS, YOUR HONOR,  
24 ALTHOUGH WE DON'T FEEL TRESPASS SHOULD BE INCLUDED AS  
25 ONE OF THEIR CHOICES, IN AN ABUNDANCE OF CAUTION, TO

1       AVOID ANY POSSIBLE REVERSIBLE ERROR, WE HAVE NO PROBLEM  
2       WITH THAT BEING GIVEN TO THE JURY.

3       THE COURT:   WHERE IS TRESPASS?

4       MR. EIDE:   TRESPASS IS 141 AND 143.

5       THE COURT:   I DON'T THINK IT NEEDS TO BE GIVEN.  
6       I DON'T THINK ANY BURGLARY IS GOING TO INVOLVE A  
7       TRESPASS.   BECAUSE THE PERSON DOESN'T HAVE THE CONSENT  
8       OF THE OWNER TO BE THERE.

9       THIS IS A LONG INSTRUCTION ON THE "TRESPASS"  
10      IN HERE.   I'M NOT GOING TO GIVE THE TRESPASS INSTRUCTION.  
11      I DON'T THINK IT'S APPROPRIATE.

12      MR. EIDE:   WE WOULD ALSO ASK, YOUR HONOR, FOR  
13      VOLUNTARY INTOXICATION.

14      THE COURT:   VOLUNTARILY INTOXICATION?   WELL,  
15      THAT REMAINS TO BE SEEN.   I'LL HEAR WHATEVER TESTIMONY  
16      IS OFFERED FROM HERE ON OUT.

17      MR. EIDE:   WHAT'S REQUIRED IN ORDER TO HAVE A  
18      VOLUNTARY INTOXICATION IS WHETHER THERE WAS SOME  
19      EVIDENCE THAT HE WAS INTOXICATED.   THE STATE, THROUGH  
20      THEIR OWN WITNESSES, BROUGHT OUT EVIDENCE OF  
21      INTOXICATION.

22      THE COURT:   AT THE CLOSE OF THE CASE I'LL HEAR  
23      ARGUMENT ON VOLUNTARY INTOXICATION.

24      I'M NOT GOING TO READ THE TRESPASS  
25      INSTRUCTION.



1                   SO LET'S GO. ANYBODY FOUND OUT WHAT THE  
2                   STORY IS ON OUR AIR-CONDITIONING? LET'S FIND OUT WHAT  
3                   THE PROBLEM IS.

4                   THE ONLY LESSER INCLUDED WE HAVE OF THESE  
5                   CASES ARE BATTERY, ON SEXUAL BATTERY; AND BURGLARY TO  
6                   A DWELLING, ON BURGLARY TO A DWELLING WITH BATTERY  
7                   THEREIN.

8                   SO IT SAYS GIVE THE CHARGES ON LESSER INCLUDED  
9                   CRIMES AND ATTEMPTS BEFORE READING THE INSTRUCTION ON  
10                  THE LESSERS. BUT WE'RE GOING TO READ THEM ALTOGETHER,  
11                  ON BOTH OF THEM.

12                  SO WHAT I MAY DO IS -- LET'S TALK ABOUT IT.  
13                  BEFORE I READ ANY OF THE INSTRUCTIONS, I MAY TELL THE  
14                  JURY THAT THESE CONTAIN LESSER INCLUDED OFFENSES AND  
15                  THAT WILL BECOME MORE CLEAR WHEN I EXPLAIN THE VERDICT  
16                  FORM TO THEM.

17                  BUT THAT EACH OF THESE DEFINITIONS OF  
18                  SEXUAL BATTERY AND OF BURGLARY TO A DWELLING WITH  
19                  BATTERY THEREIN CONTAIN LESSER INCLUDED OFFENSES.

20                  THERE'S BATTERY, ON THE SEXUAL BATTERY; AND,  
21                  BURGLARY TO A DWELLING ON THE BURGLARY TO A DWELLING  
22                  WITH A BATTERY THEREIN.

23                  AND I CAN READ THE INSTRUCTIONS BEFORE I  
24                  READ THE ENTIRE INSTRUCTION OR I CAN READ IT AFTERWARDS.  
25                  MAYBE IT WOULD BE HELPFUL IF I JUST READ IT AFTER I

1 READ BOTH CASES AND EXPLAIN THE JURY INSTRUCTIONS  
2 TO THEM. IT'S UP TO YOU ALL.

3 DOES THE STATE CARE?

4 MR. BENDER: NO, YOUR HONOR.

5 THE COURT: THE DEFENSE?

6 MR. EIDE: NO, YOUR HONOR.

7 THE COURT: YEAH, ALL RIGHT. I'LL READ THAT AFTER.

8 2.03, THE DEFENSE WANT ME TO READ THAT?

9 MR. EIDE: YES, YOUR HONOR.

10 THE COURT: ALL RIGHT. 2.04, LET'S SEE; WERE  
11 THERE ANY INCONSISTENT PRIOR STATEMENTS THAT WE'VE  
12 USED ON ANY OF THIS STUFF?

13 MR. BENDER: APPARENTLY.

14 THE COURT: I DON'T REALLY THINK THERE'S BEEN  
15 ANYTHING GLARING FROM THE STANDPOINT OF WHO LEFT THE  
16 ROOM FIRST.

17 MR. EIDE: THERE WAS, YOUR HONOR, AS FAR AS  
18 MR. STOCKWELL; WHETHER OR NOT HIS WIFE HAD LEFT THE  
19 ROOM, AND IT WAS DIFFERENT FROM WHAT HE STATED IN HIS  
20 DEPOSITION.

21 THE COURT: WELL, THERE WAS AN INCONSISTENCY IN  
22 THE NUMBER OF SPEED BUMPS AT THE TRAILER PARK, TOO.

23 I DON'T CARE. DO YOU WANT TO INCLUDE THAT?

24 MR. BENDER: I PREFER THAT IT NOT BE READ, YOUR  
25 HONOR.

1 THE COURT: I DON'T THINK IT'S A BIG DEAL EITHER  
2 WAY. THE JURY IS GOING TO CONSIDER IT, AND THEN THEY'RE  
3 GOING TO MAKE A DECISION CONCERNING INCONSISTENT  
4 STATEMENTS ONE WAY OR THE OTHER.

5 MR. BENDER: I THINK MR. STOCKWELL EXPLAINED THE  
6 INCONSISTENCY.

7 THE COURT: ANYTHING ELSE THAT YOU'RE REFERRING  
8 TO, OTHER THAN MR. STOCKWELL'S TESTIMONY, MR. EIDE?

9 MR. EIDE: OFF THE TOP OF MY HEAD RIGHT NOW, I  
10 CANNOT THINK OF IT.

11 THE COURT: WHAT THE HECK. I'LL GIVE IT.

12 YOUR INVESTIGATOR WASN'T CLASSIFIED AS AN  
13 EXPERT.

14 MR. EIDE: NO.

15 THE COURT: I ASSUME IF YOUR CLIENT TESTIFIES --  
16 AND YOU INTEND TO CALL HIM, RIGHT?

17 MR. EIDE: YES, YOUR HONOR.

18 THE COURT: SO DO YOU WANT ME TO GIVE 2.04(C)?

19 MR. EIDE: YES, YOUR HONOR.

20 THE COURT: 2.04(E), WE WENT THROUGH ALL THE  
21 MIRANDA ON THIS. I'M NOT SO SURE THAT THE STATEMENTS  
22 WERE NOT INCULPATORY. BUT I ASSUME WE OUGHT TO GIVE  
23 2.04(E).

24 MR. BENDER: I HAVE NO PROBLEM WITH THAT.

25 MR. EIDE: THAT'S FINE, YOUR HONOR.

1 THE COURT: 2.05, 2.07 AND 2.08.

2 MR. EIDE: 2.08(A), YOUR HONOR.

3 THE COURT: HMM-HMM, AND 2.09. I DON'T READ THE  
4 LAST SENTENCE IN 2.09.

5 MR. EIDE: YOUR HONOR, WE WOULD ALSO BE REQUESTING  
6 THE COURT READ 3.02.

7 THE COURT: 3.02, YOU FILED A STATEMENT OF  
8 PARTICULARS ON THAT?

9 MR. EIDE: YES, WE DID, YOUR HONOR. WE FILED OUR  
10 MOTION FOR STATEMENT OF PARTICULARS, WHICH WAS DENIED.

11 THE COURT: WELL, IF IT WAS DENIED, THEN THERE  
12 WASN'T A STATEMENT OF PARTICULARS FILED.

13 MR. BENDER: YOUR HONOR, THE INFORMATION READS ON  
14 OR ABOUT THE 17TH DAY OF MAY. I THINK THE TESTIMONY  
15 IS FAIRLY CLEAR THAT THE OFFENSE OCCURRED APPROXIMATELY  
16 1:30 A.M. TO TWO A.M. ON THE 18TH, WHICH WOULD CERTAINLY  
17 BE ON OR ABOUT THE 17TH.

18 THE COURT: I'M NOT GOING TO GIVE IT IF THERE'S  
19 NO STATEMENT OF PARTICULARS.

20 MR. BENDER: THANK YOU. WE WOULD ASK THE ALIBI  
21 INSTRUCTION 3.04(A), UNDER "AFFIRMATIVE DEFENSES".

22 THE COURT: ALL RIGHT.

23 MR. BENDER: I THINK THAT'S IT.

24 THE COURT: ALL RIGHT. I WILL DO THAT RIGHT  
25 AFTER THE INSTRUCTIONS, RIGHT AFTER THE SUBSTANTIVE

1 CRIME INSTRUCTIONS. SO I'M GOING TO GIVE THAT RIGHT  
2 AFTER 2.02(A).

3 ANYTHING ELSE? WHERE IS THE INTOXICATION --

4 MR. EIDE: I'M LOOKING AT IT.

5 THE COURT: WELL, THAT'S ALL RIGHT. WE'LL LOOK  
6 AT THAT.

7 MR. EIDE: PAGE 45 (E), YOUR HONOR.

8 THE COURT: "A DEFENSE ASSERTED IN THIS CASE IS  
9 VOLUNTARY INTOXICATION."

10 MR. BENDER: ARE WE GOING TO TALK ABOUT THAT NOW  
11 OR LATER, YOUR HONOR?

12 THE COURT: LET'S TALK ABOUT IT LATER. BECAUSE  
13 IT HAS TO BE SOMETHING ASSERTED. IT'S THE SAME AS  
14 SELF-DEFENSE OR THE OTHER KIND OF DEFENSE. THE ALIBI  
15 HAS CERTAINLY BEEN ASSERTED.

16 MR. BENDER: IT'S JUST THE INTOXICATION WOULD  
17 ONLY APPLY TO THE BURGLARY CHARGE AND NOT TO THE  
18 SEXUAL BATTERY. SO WE NEED TO DISCUSS THAT LATER.

19 THE COURT: YEAH, ALL RIGHT. BUT I DON'T SEE  
20 IT AS HAVING BEEN ASSERTED BY THE DEFENSE AT ALL.

21 MR. BENDER: RIGHT.

22 THE COURT: ALL RIGHT, GANG. ARE WE READY?

23 MR. BENDER: YES.

24 THE COURT: ERIC, YOU'RE GOING TO CALL YOUR  
25 CLIENT?

1 MR. EIDE: YES.

2 THE COURT: THAT'S YOUR ONLY OTHER WITNESS?

3 MR. EIDE: YES.

4 THE COURT: AND, MARK, YOU WANT TO RECALL YOUR  
5 DETECTIVE?

6 MR. BENDER: THAT WILL BE VERY BRIEF, YOUR HONOR,  
7 FIVE MINUTES.

8 THE COURT: AND THAT'S ALL? THAT'S IT?

9 MR. BENDER: THAT'S ALL WE HAVE.

10 THE COURT: ALL RIGHT. THEN WE'LL PROBABLY TAKE  
11 A FEW MINUTES FOR YOU ALL TO GATHER YOUR THOUGHTS ON  
12 CLOSINGS.

13 MR. EIDE: DO WE DO CLOSINGS BEFORE LUNCH?

14 THE COURT: PROBABLY NOT NOW, SINCE IT'S ELEVEN  
15 O'CLOCK.

16 LET ME ASK YOU. I NEED TO GET AN IDEA  
17 BEFORE THE JURY GOES OUT AND NOT KNOWING WHAT TIME  
18 THEY ARE GOING TO BE OUT. I DON'T LIKE TO SEQUESTER  
19 JURIES. IT'S THE OPTION, AS FAR AS THE ATTORNEYS ARE  
20 CONCERNED AND THE COURT IS CONCERNED.

21 BUT DOES THE STATE HAVE ANY DESIRE TO HAVE  
22 THIS JURY SEQUESTERED?

23 MR. BENDER: WE DON'T REALLY DESIRE TO HAVE THEM  
24 SEQUESTERED. IT'S A TERRIBLE INCONVENIENCE FOR THEM.  
25 BUT I DON'T KNOW HOW LONG IT'S GOING TO TAKE US BEFORE

1 THE CASE GOES TO THE JURY.

2 SO IF YOU'RE SAYING IF IT WENT TO THE  
3 JURY, SAY, ABOUT THREE O'CLOCK, ARE YOU SAYING THAT  
4 YOU WOULD WANT TO RECESS UNTIL FRIDAY MORNING FOR  
5 THEIR DELIBERATIONS?

6 THE COURT: NO, NO, NOT NECESSARILY. I'M SAYING  
7 IF WE DON'T HAVE TO SEQUESTER THE JURY -- I DON'T CARE  
8 WHEN WE SEND THEM OUT FOR DELIBERATIONS. I HATE TO  
9 SEND THEM OUT AT MIDNIGHT, BUT THAT WON'T OCCUR.

10 MR. BENDER: MY UNDERSTANDING, JUDGE, AND NOT  
11 THAT I AGREE WITH IT, BUT ONCE THEY BEGIN DELIBERATIONS  
12 THEY CANNOT GO THEIR SEPARATE WAY. THAT'S REVERSIBLE  
13 ERROR. THEY HAVE TO BE SEQUESTERED.

14 THE COURT: BECAUSE OF IT BEING A FIRST DEGREE  
15 FELONY?

16 MR. BENDER: NO. THE WAY I REMEMBER THE LAW AND  
17 THE CASE, IT'S ANY FELONY.

18 THE COURT: NO. IT'S AT THE OPTION OF THE COURT.  
19 BUT I DON'T KNOW WHERE THE RULE IS. DOES ANYBODY KNOW?

20 MR. BENDER: YOUR HONOR, I DON'T MEAN TO BE  
21 DISRESPECTFUL, BUT I'M ALMOST POSITIVE --

22 THE COURT: WELL, YOU MAY BE RIGHT. BUT MY  
23 UNDERSTANDING WAS IT WAS AN OPTIONAL SITUATION.

24 MR. BENDER: WE CAN CHECK ON THAT FURTHER, YOUR  
25 HONOR. BUT I'M ALMOST POSITIVE IT'S NOT AN OPTION.

1 IT'S JUST THAT ONCE THEY BEGIN THEIR DELIBERATIONS,  
2 THEY HAVE TO BE SEQUESTERED IF THEY CANNOT REACH A  
3 VERDICT THAT EVENING.

4 THE COURT: DO YOU KNOW, ERIC?

5 MR. EIDE: MY UNDERSTANDING IS THE SAME AS  
6 MR. BENDER'S. I'VE NEVER HAD IT DONE ANY DIFFERENT.  
7 THAT'S THE WAY I REMEMBERED IT. THERE'S NOTHING IN  
8 THE RULES THAT I FOUND.

9 THE COURT: RULE 3.370: "AFTER THE JURORS HAVE  
10 BEEN SWORN THEY SHALL HEAR THE CASE AS A BODY AND,  
11 WITHIN THE DISCRETION OF THE TRIAL JUDGE, MAY BE  
12 SEQUESTERED."

13 UNLESS THE JURORS HAVE BEEN KEPT TOGETHER  
14 DURING THE TRIAL THE COURT MAY, AFTER FINAL SUBMISSION  
15 OF THE CAUSE, ORDER THAT THE JURORS MAY SEPARATE FOR  
16 A DEFINITE PERIOD OF TIME AND THEN RECONVENE IN THE  
17 COURTROOM BEFORE RETIRING FOR RE-CONSIDERATION OF  
18 THEIR VERDICT.

19 MR. EIDE: THAT WOULD BE BEFORE THEY BEGIN. BUT  
20 ONCE THEY START THEIR CONSIDERATION OF THE VERDICT,  
21 THEY MUST STAY TOGETHER UNTIL THE VERDICT IS REACHED.

22 THE COURT: "NEW PROVISION PERMITS NON-SEQUESTERED  
23 JURY TO SEPARATE AFTER RECEIVING CASE FOR CONSIDERATION."  
24 THAT'S THE COMMITTEE NOTE RIGHT BELOW IT.

25 LET'S LOOK AT THE STATUTE. IT JUST SAYS,



1 "SEPARATION OF POTENTIAL JURORS". IT DOESN'T SAY  
2 DURING THE COURSE OF THE TRIAL.

3 MR. BENDER: YOUR HONOR, THEY, TECHNICALLY, AFTER  
4 YOU'VE INSTRUCTED BUT BEFORE THEY BEGIN DELIBERATIONS,  
5 THEY CAN BE EXCUSED TO TAKE CARE OF SOME MATTERS AND  
6 THEN RECONVENE AT A LATER TIME AND BEGIN THEIR  
7 DELIBERATIONS.

8 BUT ONCE THE DELIBERATIONS HAVE BEGUN IN A  
9 FELONY TRIAL, ONCE THEY START TALKING, IF THEY CANNOT  
10 REACH A VERDICT, SAY, BY ELEVEN O'CLOCK OR MIDNIGHT,  
11 THEY CANNOT BE ALLOWED TO SEPARATE AND GO HOME. THEY  
12 HAVE TO BE SEQUESTERED.

13 WE'VE HAD THAT COME UP BEFORE WHERE IT WAS  
14 GETTING VERY CLOSE TO WHETHER OR NOT WE WERE GOING TO  
15 SEND THEM TO A HOTEL. BUT WE'VE NEVER HAD TO DO IT.

16 THE COURT: WELL, WE NEED TO CONTINUE ON WITH THE  
17 TRIAL, AND I'LL FIND AN ANSWER TO IT BEFORE THE CLOSE  
18 OF THE TRIAL.

19 MR. BENDER: IF THEY HAVE CHANGED THAT I'VE NOT  
20 HEARD OF THAT. I DON'T BELIEVE THEY'VE CHANGED THAT  
21 RULE.

22 THE COURT: THIS SAYS: "THE GROUNDS FOR NEW TRIAL,  
23 ONE OF THE GROUNDS IS THAT THE JURORS AFTER RETIRING  
24 TO DELIBERATE UPON A VERDICT SEPARATED WITHOUT LEAVE  
25 OF COURT." SO IT DOESN'T SHOW THERE'S ANY GROUNDS FOR

1 NEW TRIAL BECAUSE THEY SEPARATED WITH LEAVE OF COURT.

2 WELL, WE'LL CROSS THAT BRIDGE WHEN WE GET TO  
3 IT. NOW, IT'S ELEVEN O'CLOCK. I HOPE WE CAN CONCLUDE  
4 THE TESTIMONY THIS MORNING, AT LEAST.

5 RETURN THE JURY. ANYTHING ELSE WE NEED TO  
6 TAKE UP BEFORE WE RETURN THE JURY?

7 MR. EIDE: NO.

8 THE COURT: HE'S UNFETTERED, RIGHT?

9 THE COURT DEPUTY: YES.

10 THE COURT: ALL RIGHT. RETURN THE JURY.

11 (THEREUPON, THE JURY ENTERED THE COURTROOM, AFTER  
12 WHICH THE FOLLOWING PROCEEDINGS TRANSPIRED:)

13 THE COURT: LADIES AND GENTLEMEN, WELCOME BACK.  
14 AGAIN, THERE WERE DELAYS THAT WE REALLY HAD NO CONTROL  
15 OVER. WE ARE STARTING AT ELEVEN INSTEAD OF TEN.

16 BUT WE APPRECIATE YOUR ASSISTANCE AND HOPE  
17 YOU HAD A GOOD NIGHT'S REST. AND, HOPEFULLY, WE WILL  
18 BE ABLE TO CONCLUDE THE CASE TODAY.

19 THE DEFENSE MAY PROCEED. CALL YOUR NEXT  
20 WITNESS.

21 MR. EIDE: THANK YOU, YOUR HONOR. WE WOULD AT  
22 THIS TIME CALL SCOTTY MERSON.

23 \* \* \* \* \*

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