

1 MR. EIDE: I HAVE NO CROSS, YOUR HONOR.

2 MR. BENDER: THANK YOU.

3 THE COURT: THANK YOU, INVESTIGATOR. YOU MAY
4 STEP DOWN.

5 THE STATE MAY PROCEED.

6 MR. BENDER: YOUR HONOR, AT THIS TIME THE STATE
7 WOULD ANNOUNCE REST.

8 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN OF
9 THE JURY. WHAT WE'RE GOING TO DO IS RECESS NOW FOR
10 OUR LUNCH. WE'LL START BACK UP AT 1:30.

11 SO YOU'RE FREE TO GO WHEREVER YOU WISH FOR
12 LUNCH, EXCEPT FOR CERTAIN RESTRICTIONS. AND I READ
13 THE INSTRUCTION BEFORE, AND THAT IS NOT TO VISIT ANY
14 AREA TALKED ABOUT IN THE TESTIMONY. AND YOU ARE NOT
15 TO DISCUSS THE CASE AMONG YOURSELVES NOR ARE YOU TO
16 DISCUSS THE CASE WITH ANYONE ELSE.

17 YOU CAN TALK ABOUT THE WEATHER OR ANYTHING
18 ELSE WITH YOUR FELLOW JURORS. YOU MAY HAVE LUNCH
19 TOGETHER, IF YOU WISH, OR YOU MAY NOT. IT'S UP TO
20 YOU. BUT YOU'RE NOT TO DISCUSS THE CASE WITH ANYONE
21 NOR PERMIT ANYONE TO SAY ANYTHING TO YOU OR IN YOUR
22 PRESENCE ABOUT YOUR CASE.

23 THE OTHER INSTRUCTION IS THAT YOU ARE NOT
24 TO FORM ANY DEFINITE OR FIXED OPINION CONCERNING THE
25 CASE UNTIL YOU'VE HEARD ALL OF THE TESTIMONY, THE

1 ARGUMENTS OF THE ATTORNEYS AND THE INSTRUCTIONS ON
2 THE LAW BY THE COURT. AND UNTIL THAT TIME YOU SHOULD
3 NOT DISCUSS THE CASE AMONG YOURSELVES.

4 ANY OTHER INSTRUCTIONS REQUESTED BY THE
5 STATE?

6 MR. BENDER: YOUR HONOR, THE STATE WOULD JUST
7 REQUEST THAT THE RULE OF SEQUESTRATION THAT HAS BEEN
8 INVOKED, THAT THE DEFENSE COUNSEL REMIND HIS WITNESSES
9 AGAIN OF THAT RULE.

10 MR. EIDE: I DID SO THIS MORNING, YOUR HONOR.

11 THE COURT: OKAY. THAT'S NO PROBLEM. THAT APPLIES
12 TO ALL THE WITNESSES.

13 ANY OTHER INSTRUCTIONS REQUESTED BY THE
14 DEFENSE?

15 MR. EIDE: NONE OTHER, YOUR HONOR.

16 THE COURT: ALL RIGHT. WE'LL BE IN RECESS AS FAR
17 AS THE JURY IS CONCERNED UNTIL 1:30. AND I HAVE SOME
18 OTHER MATTERS I NEED TO TAKE UP WITH THE ATTORNEYS.

19 (THEREUPON, THE JURY DEPARTED THE COURTROOM, AFTER
20 WHICH THE FOLLOWING PROCEEDINGS TRANSPIRED:)

21 THE COURT: MR. EIDE, ANY MOTIONS YOU WISH TO
22 MAKE TO THE COURT?

23 MR. EIDE: YES, YOUR HONOR, AT THIS TIME I WOULD.
24 SINCE THE STATE HAS CLOSED ITS CASE, YOUR HONOR, I
25 WOULD AT THIS TIME MOVE FOR JUDGMENT OF ACQUITTAL IN

1 THAT THE STATE HAS FAILED TO PROVE A PRIMA FACIE CASE
2 BOTH IN COUNT ONE AND IN COUNT TWO.

3 COUNT ONE WAS THE CHARGE OF SEXUAL BATTERY
4 AGAINST THE VICTIM OF, ALLEGEDLY, ANGELA ██████. YOUR
5 HONOR, THE STATE WOULD HAVE TO SHOW AND PRESENT A PRIMA
6 FACIE CASE THAT THE VICTIM WAS LESS THAN 12-YEARS-OLD.

7 THE ONLY STATEMENT AS TO THAT WAS BY HERSELF,
8 HER OWN AGE. SHE DOES NOT KNOW HER AGE. SHE WAS NOT
9 THERE WHEN SHE WAS BORN. SHE WAS TESTIFYING FROM
10 NON-HEARSAY. THE COURT WOULD NEED SOME OTHER ADDITIONAL
11 EVIDENCE BESIDES THAT, IN ORDER TO FIND THAT THE AGE WAS
12 ESTABLISHED.

13 FURTHER, YOUR HONOR, THEY WOULD HAVE TO
14 SHOW THAT THE ACT WAS COMMITTED, THAT THE ELEMENTS
15 WERE COMMITTED -- AN ACT WAS COMMITTED UPON HER IN
16 WHICH THE SEXUAL ORGAN OF THE VICTIM, IN THIS CASE
17 ANGELA, WAS PENETRATED OR HAD UNION WITH THE MOUTH,
18 IN THIS CASE, OF MR. MERSON.

19 WE WOULD SAY THAT THAT HAS NOT BEEN PROVEN
20 BY THE EVIDENCE. THERE'S QUESTION AS TO IT. SHE, HER
21 TESTIMONY THROUGHOUT WAS CONFUSED, AND THAT SHOULD BE
22 TAKEN INTO CONSIDERATION.

23 FURTHER, YOUR HONOR, WE QUESTION WHETHER
24 THE EVIDENCE THAT MICHELLE BROUGHT FORTH AS TO THAT
25 ADDS ANYTHING TO IT. WE DON'T BELIEVE IT DOES.

1 SHE STATED AT THAT POINT SHE DID NOT SEE
2 ANYTHING OR HEAR ANYTHING UNTIL LATER, AS HE LEFT.
3 SHE SAID SHE HEARD HIM SAY, "BE QUIET, OR I'LL BLOW
4 UP THE HOUSE."

5 BUT SHE DOESN'T KNOW, HERSELF, OF ANY OF
6 THE ACTS PERFORMED. IN FACT, EVEN ANGELA ADMITTED
7 THAT MICHELLE WAS PRETENDING TO BE ASLEEP.

8 FURTHER, WE THINK THAT ALTHOUGH NONE OF
9 THE ELEMENTS HAVE BEEN MET, NOR HAS THE IDENTIFICATION
10 BEEN PROPER. THE ONLY IDENTIFICATION BY THE VICTIM
11 WAS THAT THE PERSON, SCOTTY MERSON, IS SITTING BETWEEN
12 TWO ATTORNEYS. SHE COULDN'T IDENTIFY HIM BY CLOTHES
13 OR DESCRIPTION OR ANYTHING ELSE.

14 SHE'S NEVER MET MISS CASHMAN. THAT'S MERELY
15 AN INDICATION HE WAS BETWEEN TWO ATTORNEYS, BUT THERE'S
16 NOT A SUFFICIENT IDENTIFICATION BEYOND THAT. SHE DIDN'T
17 POINT ANYONE ELSE OUT.

18 THE OTHER IDENTIFICATION AS TO HIM BEING
19 SCOTTY MERSON, "THAT'S HIM," IT MEANS NOTHING. BECAUSE
20 WHAT THE IDENTIFICATION HAS TO BE IS THAT THE PERSON
21 THAT SITS HERE, NOT SCOTTY MERSON, BUT IT WAS THE
22 PERSON WHO WAS THERE AND COMMITTED THE CRIME AS ALLEGED.

23 WOULD THE COURT LIKE ME TO MAKE ARGUMENT AS
24 TO THE SECOND ARGUMENT, OR WOULD THE COURT LIKE TO RULE
25 ON THAT POINT AND THEN MOVE ON?

1 THE COURT: AS FAR AS COUNT ONE, YOUR MOTION
2 FOR JUDGMENT OF ACQUITTAL WILL BE DENIED.

3 MR. EIDE: YOUR HONOR, AS FAR AS COUNT TWO, WHICH
4 WAS A BURGLARY WITH A BATTERY THEREIN, WITH THE VICTIM
5 OF THE BATTERY ALLEGED TO BE MICHELLE [REDACTED].

6 FIRST OF ALL, YOUR HONOR, EACH OF THE ELEMENTS
7 HAVE NOT BEEN MET. THERE'S BEEN NO PHYSICAL EVIDENCE,
8 NO SUBSTANTIAL EVIDENCE THAT THERE WAS EVER A BURGLARY
9 OR EVER AN ENTERING OF THE BUILDING.

10 THE ONLY THING THAT HAS COME OUT IS THAT
11 MERSON WAS IN THE ROOM, ACCORDING TO THE TWO GIRLS.
12 NOW, THE TESTIMONY THAT WAS BROUGHT OUT BY HER AS TO
13 IDENTIFICATION, BY MICHELLE, WAS VERY WEAK.

14 SHE COULDN'T EXPLAIN WHAT MR. MERSON WAS
15 WEARING, WITHOUT PROMPTING FROM MR. BENDER. WHEN HE
16 PROMPTED HER, THEN SHE SAID IT WAS A BLACK JACKET.
17 THE ONLY PERSON HERE WEARING A BLACK JACKET WAS MYSELF.
18 SO THE IDENTIFICATION WAS IMPROPER.

19 AND I THINK THE EVIDENCE THAT'S BEEN BROUGHT
20 FORWARD BY ALL OF THE WITNESSES DOES NOT SHOW THAT THE
21 STATE HAS MET THEIR PRIMA FACIE BURDEN IN THIS CASE AS
22 TO THE CHARGE OF BURGLARY WITH A BATTERY THEREIN.

23 THE COURT: DOES THE STATE WISH TO RESPOND?

24 MR. BENDER: YOUR HONOR, I THINK THERE WAS AMPLE
25 TESTIMONY OF MICHELLE [REDACTED] WHICH INDICATED THAT

1 MR. MERSON PLACED HIS HAND OVER HER MOUTH. AS YOU
2 KNOW, THAT IS ALL THAT IS NECESSARY TO CONSTITUTE A
3 BATTERY.

4 AS TO THE BURGLARY CHARGE, IT IS QUITE CLEAR
5 THAT SCOTTY MERSON WAS NOT A RESIDENT OF THAT HOME AND
6 HAD NOT BEEN FOR SOME MONTHS PRIOR TO THAT EVENING;
7 WAS NOT AN INVITED GUEST AND WAS IN THE HOME WITHOUT
8 PERMISSION.

9 THEREFORE, MEETING THE REQUIREMENTS OF THE
10 BURGLARY STATUTE, WHICH MEANS: ENTERING OR REMAINING
11 IN A STRUCTURE OR CONVENIENCE WITH THE INTENT TO COMMIT
12 AN OFFENSE THEREIN.

13 THE OFFENSE THEREIN THAT WAS COMMITTED WAS,
14 OF COURSE, THE SEXUAL BATTERY UPON ANGELA [REDACTED]. YOUR
15 HONOR, WE WOULD SAY THAT THE STATE HAS MET ITS BURDEN
16 IN SHOWING A PRIMA FACIE CASE.

17 THE COURT: THE MOTION FOR JUDGMENT OF ACQUITTAL
18 AS TO COUNT TWO WILL ALSO BE DENIED.

19 MR. EIDE: THANK YOU, YOUR HONOR.

20 THE COURT: ANYTHING ELSE WE NEED TO TAKE UP
21 BEFORE WE RECESS FOR LUNCH?

22 MR. BENDER: ONE OTHER MATTER. I WOULD AT THIS
23 TIME ASK LEAVE FOR PERMISSION BY THE COURT TO RE-OPEN
24 THE CASE AS TO ONE ISSUE AND ONE ISSUE ONLY.

25 I HAVE BEEN DERELICT IN FAILING TO ESTABLISH

1 THE AGE OF MR. MERSON. WE COULD DO THAT THROUGH
2 INVESTIGATOR ROACH. IT WOULD TAKE ABOUT 30 SECONDS,
3 IF I COULD RE-OPEN THE CASE AT THAT TIME.

4 MR. EIDE: WE WOULD OBJECT, YOUR HONOR.

5 MR. BENDER HAD ANNOUNCED THIS CASE WAS
6 CLOSED AND THE EVIDENCE WAS IN. WE WOULD OBJECT TO
7 THE COURT RE-OPENING THE CASE.

8 THE COURT: I DON'T, I DON'T HAVE ANY OBJECTION
9 TO RE-OPENING THE CASE; UNLESS THE DEFENSE IS WILLING
10 TO STIPULATE THAT HE WAS, IN FACT, 18 YEARS OF AGE,
11 OR OLDER. IF THE DEFENSE IS WILLING TO STIPULATE TO
12 THAT, THEN IT WOULDN'T BE NECESSARY TO HAVE THE
13 TESTIMONY OFFERED BY THE OFFICER.

14 MR. EIDE: WE COULD NOT STIPULATE, YOUR HONOR.

15 THE COURT: ALL RIGHT. RETURN THE JURY. WELL,
16 THE JURY HAS BEEN RELEASED FOR LUNCH.

17 MR. BENDER: WE CAN DO THAT AT 1:30, YOUR HONOR.

18 THE COURT: YEAH, WE'LL HAVE TO.

19 THEN YOU HAVE HOW MANY WITNESSES?

20 MR. EIDE: I BELIEVE EIGHT, YOUR HONOR.

21 THE COURT: ALL RIGHT. SO WE'LL SEE YOU ALL BACK
22 AT 1:30.

23 MR. BENDER: THANK YOU, YOUR HONOR.

24 THE COURT: I WOULD SAY WE COULD LOOK AT JURY
25 INSTRUCTIONS, BUT I THINK WE OUGHT TO JUST WAIT UNTIL

1 WE GET THROUGH WITH EVERYTHING.

2 MR. EIDE: ALL RIGHT.

3 (THEREUPON, COURT RECESSED AT 11:54 A.M.)

4 * * * * *

5 OCTOBER 17, 1990

6 1:40 O'CLOCK P.M.

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

8 THE COURT: THE STATE WISH TO RE-OPEN?

9 MR. BENDER: YES, YOUR HONOR. WE WOULD ASK AT
10 THIS TIME TO RECALL INVESTIGATOR ROACH VERY BRIEFLY.

11 THE COURT: ALL RIGHT.

12 THEREUPON,

13 FRANCIS P. ROACH,

14 WAS CALLED AS A WITNESS BY THE STATE AND, AFTER HAVING
15 BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED
16 FURTHER, ON HIS OATH, AS FOLLOWS:

17 THE COURT: INVESTIGATOR ROACH, YOU WERE PREVIOUSLY
18 PLACED UNDER OATH. YOU'RE STILL UNDER OATH.

19 THE WITNESS: YES, SIR.

20 THE COURT: ALL RIGHT. YOU MAY PROCEED.

21 MR. BENDER: THANK YOU, YOUR HONOR.

22 FURTHER REDIRECT EXAMINATION

23 BY MR. BENDER:

24 Q SIR, WOULD YOU TELL US YOUR NAME AGAIN, FOR THE
25 RECORD, PLEASE?