

THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS

SUPERIOR COURT
2001

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THE STATE OF NEW HAMPSHIRE *

V. *

00-S-888-896-F: 934-935I

CHAD EVANS *

* * * * *

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

OF DECEMBER 14, 2001

The above-entitled matter came on for hearing
before the Honorable Tina L. Nadeau, Presiding Justice, on
December 14, 2001, at Dover, New Hampshire.

APPEARANCES:

For the State of New Hampshire:

N. William Delker, Esquire

Simon R. Brown, Esquire

New Hampshire Attorney General's Office

For the Defendant:

Mark L. Sisti, Esquire

Alan J. Cronheim, Esquire

COPY

Carol A. Perry, Transcriber

1 THE COURT: Okay. Mr. Cronheim.

2 MR. CRONHEIM: Your Honor, may I approach for a
3 moment?

4 THE COURT: Sure.

5 MR. CRONHEIM: We have prepared some time ago, but
6 I elected to give to the State two instructions entitled
7 Testimony of a Police Officer, and one that's entitled
8 Lack of Evidence.

9 THE COURT: Okay. These both say the same thing.

10 MR. CRONHEIM: Oh, then that's great. We must
11 really needed them.

12 THE COURT: I really, really want this instruction.
13 They have different titles, but they say the same thing in
14 the body.

15 MR. CRONHEIM: I just pulled the wrong thing out of
16 the package, judge. I'm sorry.

17 THE COURT: Okay.

18 MR. CRONHEIM: Otherwise, we're in reasonable
19 agreement with the State on a lot of the stuff.

20 THE COURT: Okay.

21 MR. CRONHEIM: They want to vary some of the
22 standard -- I don't know how you want to do this.

23 THE COURT: Okay. Let me tell you what I did. I
24 looked at the State's requests, and I also understood from

1 you that you wanted instructions on alibi and
2 jurisdiction. Go ahead.

3 MR. CRONHEIM: We were going to withdraw the
4 request on an alibi.

5 THE COURT: Okay.

6 MR. CRONHEIM: We think that's not ---

7 THE COURT: Great.

8 MR. CRONHEIM: -- warranted under the
9 circumstances.

10 THE COURT: Okay. And so I put something together.
11 I didn't -- I changed around a bit what the State asked
12 for. I haven't included anything on these, because I
13 didn't know about the requests. So if you want, you can
14 go through the State's requests, and tell me what your
15 positions are, and then I can have argument on your two
16 requests, and then I'll go doctor mine up a bit, if you
17 wouldn't mind waiting for a few minutes. I'll give you
18 what I've written up, and then we can come back, and you
19 can go through my instructions, page by page, on what you
20 agree with or disagree with. Okay? So why don't we --
21 oh, shoot. Babe, would you go -- out on my desk, there's
22 a -- right at the top of my desk, there's a piece of
23 pleading that says State's Request for Jury Instructions.
24 I wrote "alibi jurisdiction" on the top. If you could

1 just grab that for me. Okay. Once he gets that, we can
2 go through this.

3 [Pause in proceedings - waiting for bailiff to bring
4 document into courtroom].

5 THE COURT: Thank you.

6 THE BAILIFF: You're welcome.

7 THE COURT: Okay. Why don't I start with you, Mr.
8 Cronheim, and you can tell me what, if anything, of the
9 State's requests that you object to.

10 MR. CRONHEIM: Okay. I'm gonna pass on page one,
11 which are the ---

12 THE COURT: The usual.

13 MR. CRONHEIM: Yes.

14 THE COURT: Okay.

15 MR. CRONHEIM: Page two, State's burden of proof.
16 The State has it right, in a general way. I think it is
17 not appropriate to say the decisive issue. I just think
18 that that's ---

19 THE COURT: Yeah. I have taken some of this
20 language, but I did not include that quote.

21 MR. CRONHEIM: Right.

22 THE COURT: So you can see my final version.

23 MR. CRONHEIM: Okay. The false exculpatory
24 evidence. I'm not sure that that is appropriate to this

1 case or supported by the evidence in this case. And to
2 make up evidence is a phrase that I think is very
3 prejudicial and not appropriate for a jury instruction.
4 If the State wants to argue it, I'm not sure that the
5 evidence is there, but they're free to argue how they
6 choose. But that phrasing, I think, is completely
7 inappropriate.

8 THE COURT: Okay.

9 MR. CRONHEIM: I think it's not -- it's not, I
10 think for the Court to use that kind of phrasing, and if
11 the jury wants to consider all of the evidence that it's
12 heard and make its own judgments about the evidence, and
13 so be it. Sure, if the State wants to argue it, I mean,
14 if that's the fashion that they want to approaching
15 things, I think they're free to do that in closing. But I
16 think it's completely inappropriate in an instruction.

17 THE COURT: Okay. Why don't I take them one at a
18 time.

19 MR. DELKER: Sure. I think the State's position on
20 this -- actually, I think in light of the testimony, the
21 State would actually ask to change the instruction
22 somewhat. What is in here right now is verbatim, the
23 instruction out of the Fisher case that was given.
24 There's a quote towards the bottom of the Fisher case that

1 fits the facts of this case even better. Fisher is 143,
2 311. And the quote is at 319. And I think that either
3 adding this quote to it, or perhaps changing the language
4 to reflect this idea, the idea here is that there is -- at
5 the time we proposed this instruction, we weren't sure
6 what Amanda Bortner would say with respect to her and the
7 defendant's excuses about Kassidy's bruising, and so
8 forth. And she has on the stand admitted that they would
9 make up a whole variety of excuses, most obviously, the
10 trampoline story. But I think she testified to a litany
11 of different excuses and false statements about the cause
12 of Kassidy's injury. On page 319, right before the
13 citation for the United States v. Perkins case, it says:
14 If a defendant has intentionally made a statement tending
15 to demonstrate his or her innocence, and that statement is
16 later discovered to be false, then the jury may
17 consider -- may properly consider whether this constitutes
18 circumstantial evidence of consciousness of guilt. The
19 defendant, in his statement to the police, again
20 reiterated many of the statements that Amanda Bortner,
21 who's now testified were false, were the type of excuses
22 that they would make up to cover for Kassidy's injuries.
23 He told those to the police the night that Kassidy died.
24 Those are exactly the type of false statements I think are

1 contemplated by this -- this rule and this instruction.

2 THE COURT: Well, if I give this instruction,
3 wouldn't it make more sense to simply quote from page 319
4 where it says: "The jury may infer consciousness of guilt
5 from an exculpatory statement if, in the light of other
6 evidence produced at trial, the jury determines that the
7 defendant knew the statement was false when it was made"?

8 MR. DELKER: Just trying to find -- oh, I'm sorry,
9 where are you?

10 THE COURT: Right after the United States v.
11 Bayer Hiller.

12 MR. DELKER: Right after United States ---

13 THE COURT: Page 319.

14 MR. DELKER: Sorry. Can you read the quote you
15 were reading again?

16 THE COURT: Sure.

17 MR. DELKER: Sorry about that.

18 THE COURT: That's okay. The sentence starts with:
19 "The instruction merely informs..."

20 MR. DELKER: Oh, okay. Uh-huh.

21 THE COURT: And then what I would ---

22 MR. DELKER: The only concern I've got about that
23 is exculpatory is sort of a legal ---

24 THE COURT: Right.

1 MR. DELKER: -- phrase.

2 THE COURT: Sure.

3 MR. DELKER: I think the sentence before that makes
4 it clear what they're talking about, where the
5 defendant -- the one before the Perkins case makes it
6 clear that what they're talking about is when the
7 defendant intentionally makes the statement he knows is
8 false in order to make up an excuse ---

9 THE COURT: Okay.

10 MR. DELKER: -- about his innocence. I think that
11 is just legalese ---

12 THE COURT: Okay.

13 MR. DELKER: -- than the next quote. But either
14 way, I think that would be appropriate.

15 THE COURT: Mr. Cronheim?

16 MR. CRONHEIM: We're in the ballpark. I would --
17 if we're focusing on what the State submitted, I think --
18 in the first line it says "make up evidence." I think
19 that that's not an appropriate phrase.

20 THE COURT: Right.

21 MR. CRONHEIM: The other thing that I think's
22 critically important is that the term "defendant" not be
23 used. A witness. Because there are other people other
24 than the defendant who have made stuff up here. And we do

1 not -- this is a credibility issue. I mean, what you're
2 basically saying is you can consider misstatements in
3 judging the credibility of a witness. And it is not
4 appropriate to limit it to the defendant.

5 THE COURT: Okay, Mr. Delker?

6 MR. DELKER: Yeah. I'm confused about that. Let
7 me address the first issue, first. I think it's
8 appropriate -- I think I agree. I think we agree with the
9 defense about striking the language to make up evidence.
10 We would request that the instruction continue to tell the
11 jury about influencing a witness, because it's still our
12 position that, with respect to Amanda Bortner and the
13 defendant's conduct afterward, that this part of the
14 instruction is still relevant for the jury's consideration
15 on his post-arrest contact with Amanda.

16 The problem I have with the second part of what the
17 defense said is, first of all, this instruction's geared
18 toward the defendant's state of mind. Second of all, I
19 don't think there's any evidence about the fact that
20 there's nothing of the nature of Amanda Bortner's
21 testimony with respect to any other witnesses in this case
22 making up excuses about Kassidy's condition. No one else
23 came in here and said, yeah, you know, so and so and I
24 made up excuses about Kassidy. I think they're getting to

1 Jeffe Marshall, and there's nothing in the record at this
2 point that shows that Jeffe Marshall made up excuses that
3 he knew were false at the time. It's not of the same
4 nature, the stuff that Amanda Bortner's testified to in
5 her testimony.

6 MR. CRONHEIM: We disagree with the record, how the
7 State characterizes the record of the case. Jeffe
8 Marshall absolutely made up stuff about the truck,
9 pinpricks, and other things. And it is -- there are very
10 real questions from that perspective about Jeffe
11 Marshall's misstatements that can also be argued
12 demonstrate a consciousness of guilty. So I think, again,
13 the concept is a fair one in terms of judging the
14 credibility of a witness, but it's not simply to judge the
15 credibility of the defendant. And it will skew the jury's
16 view of the case to that perspective if credibility
17 assessments are made about the defendant, but that same
18 framework for making credibility assessments do not apply
19 to other witnesses, because it's our view that they're
20 misstatements by Jeffe Marshall.

21 And I don't know where we are on the first sentence
22 of the false exculpatory evidence.

23 THE COURT: We're not going to use "to make up"
24 anyway. We'll use the language on 319.

1 MR. CRONHEIM: Okay.

2 THE COURT: If the defendant has intentionally made
3 a statement tending to demonstrate his or her innocence.

4 MR. CRONHEIM: Okay. But, again, we would ask that
5 it not be simply the defendant.

6 THE COURT: Right. I understand your request.

7 MR. CRONHEIM: So that the phrase "attempts by a
8 defendant" also is not going to be included?

9 THE COURT: Well, what I'm going to do is listen to
10 your arguments, I'll write up something, and then we can
11 have further discussion.

12 MR. CRONHEIM: Okay. And my only comment would be
13 about that first sentence, that there is a way of
14 introducing that concept. When you say attempts, when the
15 State suggests attempts by defendant, it almost implies
16 that those, necessarily, are part of the record and occur.
17 And so it becomes, I think, an inappropriate comment on
18 the facts of the case by the Court. And I think there's
19 ---

20 THE COURT: Right. So I should say something like
21 if you find there were.

22 MR. CRONHEIM: Right.

23 THE COURT: Okay. Okay. And then on the direct
24 and circumstantial-evidence instruction, I'm going to use

1 the model instruction, and I have included some of the
2 language that the State included here after reading the
3 cases. But it probably would make more sense for me to
4 give you what I wrote and then you can tell me what
5 portions you might object to or not. In the
6 second-degree-murder instruction I have used what the
7 State has here, with an exception. It says "First the
8 State must prove the defendant caused the death of Kassidy
9 Bortner, that is, that the defendant's actions were a
10 substantial cause." I think the case law says "Were a
11 direct and substantial cause." So I used both words
12 there. And that's where I inserted the issue of
13 jurisdiction, and I also indicated -- let me tell you what
14 I said, and you'll get -- you'll get a copy of this. I
15 don't know, Mr. Cronheim, if you have a specific language
16 on the jurisdiction issue, but I'll tell you what I said,
17 okay, on cause of death. I have "If the defendant caused
18 the death of Kassidy Bortner, that is, that the
19 defendant's actions were a direct and substantial factor
20 in bringing out Kassidy's death, and that his actions in
21 bringing about death occurred in New Hampshire - you need
22 not find that the death occurred in New Hampshire - but
23 you must find that the defendant's actions in bringing
24 about the death occurred in New Hampshire." But I'll let

1 you look at it, and if you want to make other suggestions.

2 MR. CRONHEIM: Yeah, if I might give a general
3 comment ---

4 THE COURT: Sure.

5 MR. CRONHEIM: -- just to let you know our concern.
6 It is that they need to prove, beyond a reasonable doubt,
7 that, as the indictment alleges, he caused her death by
8 inflicting multiple blows to Cassidy's head and abdomen.
9 So it's our view that it should not -- because there's a
10 lot of this stuff about, oh, if I'd taken her to the
11 hospital, or things like that. These are the allegations.
12 And I am concerned that the jury not think that he can be
13 found guilty by his, for instance, lack of bringing her to
14 the hospital. So I think it needs to be tied to the
15 allegations in the indictment.

16 THE COURT: How does that fit with, I think it was
17 State v. Francour where the supreme court says the means
18 by which the injuries caused may not be proven beyond a
19 reasonable doubt.

20 MR. CRONHEIM: Because as a matter of due process,
21 pursuant to Part 1, Article 15, and the 14th amendment of
22 the Constitution of the United States, this would be such
23 a fundamental difference in theory of death that for us
24 not to be put on notice for us -- this opens the door to

1 all sorts of medical issues, which have not been part of
2 the case, yet; whether, based on those circumstances, he
3 should have known enough to take her to the hospital. I
4 mean, it's just a completely different set of factors,
5 judge. We've been defending this case based on the
6 indictment read to the jury claiming that there was a
7 cause of death due to abdominal injuries and injuries to
8 the head. That's the reason -- that's how we focused the
9 cross-examination of Dr. Greenwald.

10 THE COURT: Yeah. The State's not going to argue
11 that he caused the death by not bringing her to the
12 hospital, right?

13 MR. CRONHEIM: I don't know that they're going to
14 argue that, but I don't want the jury ---

15 THE COURT: Right.

16 MR. CRONHEIM: -- to use that as a factor.

17 THE COURT: Right.

18 MR. CRONHEIM: I think that that is fundamentally
19 different. It's -- it's going back to the possibility of
20 the defendant being convicted on a charge that was never
21 brought ---

22 THE COURT: Right. Right.

23 MR. CRONHEIM: -- to the grand jury under State v.
24 Erickson. So we're very concerned that the allegations in

1 the indictment be tied to how he caused, allegedly,
2 Kassidy Bortner's death.

3 THE COURT: Is it your position that the jury has
4 to find the defendant caused both the injuries to the head
5 and the injuries to the stomach?

6 MR. CRONHEIM: The initial -- our initial position
7 is yes.

8 THE COURT: Mr. Delker?

9 MR. DELKER: Thank you. I think the Court is
10 right, that it would be inappropriate to instruct the jury
11 as to the means of bringing about the death. And the
12 State's going to argue that. The defendant's failure,
13 alone, to bring Kassidy to the hospital was the cause of
14 her death. If Jeffe Marshall had inflicted the injuries,
15 the defendant caused the death by not bringing her to the
16 hospital. But the defendant's actions with respect to
17 Kassidy, if he inflicted these injuries, his failure to
18 seek medical treatment for Kassidy is a relevant factor
19 with respect to the recklessness of his actions and the
20 extreme indifference to the value of human life. So those
21 are important facts for the jury to consider in
22 considering the defendant's mental state and, ultimately,
23 the objective reasonableness of his actions that night.
24 And so I've got a concern in limiting the jury in any way

1 with respect to the facts that they can consider in terms
2 of the defendant's treatment of Cassidy.

3 Secondly, I think that with respect to the head and
4 abdomen injuries, that the State's position is that we
5 don't need to prove that both caused her death. That I
6 think the evidence is that multiple blunt -- or the
7 testimony is that multiple blunt-force injuries is what
8 caused Cassidy's injury -- Cassidy's death, and that's
9 what the jury can -- that's what the jury can consider,
10 any multiple blunt-force injuries that lead to her death.

11 THE COURT: Okay. Mr. Cronheim?

12 MR. CRONHEIM: We're just going to ask that the
13 State be held to its allegations in the indictment, and
14 that is, that Evans inflicted multiple blows to Cassidy's
15 head and abdomen, thereby causing her death.

16 THE COURT: Okay. I'll give you my instructions
17 and then you can take a look at them. And I think,
18 manslaughter I have used the language contained in the
19 State's requests, with the additions that I described on
20 causation, same as with second-degree murder.

21 MR. CRONHEIM: And we just would ---

22 THE COURT: Incorporate.

23 MR. CRONHEIM: -- incorporate.

24 THE COURT: Okay. Now, are there any other issues

1 with respect to those requests before we move on to the
2 two that the defense presented this morning?

3 MR. BROWN: Sorry, your Honor, we're talking.

4 THE COURT: That's okay.

5 MR. BROWN: Can you repeat your question?

6 THE COURT: Sure. Are there any other issues with
7 respect to the ones we just reviewed before we get to the
8 two the defense submitted this morning?

9 MR. BROWN: No.

10 THE COURT: Okay. And I -- it seems like everyone
11 understands that once you get my instructions, we can come
12 back out and have some more discussion. Okay. Mr.
13 Cronheim, anything further before we move on to your
14 requests?

15 MR. CRONHEIM: No, but to the extent that 212,
16 which is the simple-assault instruction is referenced,
17 we're going to ask for a lesser included on the
18 violation-level charge.

19 THE COURT: Okay. Mr. Delker, your position on
20 that, or Mr. Brown?

21 MR. DELKER: Yes. Can we just discuss that for a
22 second?

23 THE COURT: Sure. Yup.

24 [Pause in proceedings - counsel conferring].

1 MR. DELKER: I think that the request for a lesser
2 included is inappropriate. This isn't a situation where,
3 you know, two guys are in a bar and say, hey, let's go
4 take it outside, and get into a fist fight. That's mutual
5 combat. That's the idea there. Amanda Bortner didn't ask
6 to get choked by the defendant that night. And so I think
7 that it would be inappropriate to have a mutual combat
8 instructions, given the state of the evidence.

9 THE COURT: Okay.

10 MR. CRONHEIM: Our view is the State is free to
11 argue it. I think that there is a fact question that's
12 been legitimately raised by the proof in the case where
13 she said, essentially, she started it. The other thing
14 that I would mention is I think that the instruction, the
15 model instruction, may use the phrase "mutual combat."
16 I'm not sure that that word is actually in the statute.
17 This is from memory. But it's 631:2-a II, and it's:
18 Simple assault is a misdemeanor, unless committed by --
19 entered into by mutual consent. So I think that it's a --
20 combat has another term.

21 THE COURT: Consent, rather than combat. Okay.
22 Then, Mr. Cronheim, why don't you address the two
23 instructions, one at a time.

24 MR. CRONHEIM: I think they're pretty

1 straight-forward. They've been given before. It's
2 nothing particularly new. And I think the Court
3 understands the testimony of police officers are probably
4 one of your form instructions, anyway. And I think that
5 the lack-of-evidence instruction is a fair statement of
6 the law, and one that's been given by many courts before.

7 THE COURT: Who's given the lack-of-evidence
8 instruction before?

9 MR. CRONHEIM: To my memory Judge Gray. I guess I
10 want to be careful. It is one that I have used before,
11 and has been given on a number of occasions. I believe
12 Judge Coffey is going to give it. I guess I want to be
13 circumspect so I don't overstate.

14 THE COURT: Okay.

15 MR. CRONHEIM: I can just tell you that it's been
16 given in a number of cases that I've done.

17 THE COURT: Okay. Mr. Delker?

18 MR. DELKER: I think with respect to the
19 lack-of-evidence instruction, the model standard
20 instructions with respect to burden of proof, I think the
21 definition is beyond a reasonable doubt. I think it
22 covers these issues. There's no -- as far as defense
23 hasn't cited any published cases, any case law that
24 supports the instruction. So I think the State's position

1 on that is it's not appropriate.

2 Testimony of a police officer. I, frankly, don't
3 remember what the standard sort of instructions are in
4 this. I know that there are -- in the context of the
5 credibility of witnesses the Court goes through a number
6 of factors that witnesses -- I mean, that the jury can
7 consider, in evaluating witnesses' testimony. And that
8 applies to all witnesses. And so I think if the Court
9 just makes it clear in the context of those instructions
10 that it applies to all the witnesses in the case, that
11 that's appropriate without singling police officers, in
12 particular. We covered these issues with the jury in voir
13 dire. None of the jurors had problems with these -- that
14 particular issue, and so I don't think it's appropriate to
15 single out police officers in the context of final
16 instructions.

17 THE COURT: Okay. All right, I'll take this under
18 advisement. Do you want to give me 'til like 11 o'clock,
19 and I'll give you what my final version is, and we can go
20 through it and make changes. Okay.

21 MR. DELKER: Thank you, judge.

22 MR. CRONHEIM: Thank you.

23 THE COURT: Okay.

24 [Court recessed at 10:30:31 A.M.]

1 [Court resumed at 11:05:17 A.M.].

2 THE COURT: Okay. Why don't we go on the record.
3 What I just wanted to do is tell you some of the things I
4 decided, give you these -- give you a chance to read them
5 over, and then we can go back on the record.

6 First of all, I've left in a section on the
7 defendant not testifying, and I can take that out,
8 depending on what you do with your case.

9 On the causation issue, I've left it the way I
10 originally read it, but I'm going to do some research and
11 I haven't made a final decision on that particular issue.
12 I want to read some cases and then we can talk about that
13 one issue on Monday.

14 MR. CRONHEIM: I'm sorry, what is that ---

15 THE COURT: The causation regarding whether the
16 defense is entitled to an instruction that the jury has to
17 find, beyond a reasonable doubt, that he caused her death
18 by blows to the head and stomach, or whether I instruct
19 them indicating that they need to find blows to the head
20 or stomach, but if they find one, they have to find it was
21 a direct and substantial cause of the death; because I do
22 think it's important to make sure that I rule out them
23 finding that he caused the death simply by not bringing
24 her to the hospital as his only act. If they find Jeffe

1 Marshall did everything, and that -- and they find him
2 guilty of second-degree murder for not going to the
3 hospital, I want to make sure we rule that out. But I'm
4 not -- I haven't decided what I'm going to do, so I'm
5 going to read some cases, and we can reserve that one
6 issue for Monday.

7 MR. CRONHEIM: And in keeping with that issue,
8 we'll just raise the issue of unanimous verdict, depending
9 on ---

10 THE COURT: Yeah, okay.

11 MR. CRONHEIM: How you rule on it.

12 MR. DELKER: Actually, while we're on the issue of
13 causation, I know you had said earlier that you were
14 adding the word direct and substantial.

15 THE COURT: Yes.

16 MR. DELKER: When I took a look at State v. Soucy,
17 and they only talk in this case about substantial cause in
18 there.

19 THE COURT: Look at State v. William Seymour, too.

20 MR. DELKER: Seymour?

21 THE COURT: Yeah.

22 MR. DELKER: But Soucy, which I have, is an
23 intervening-cause case.

24 THE COURT: Right.

1 MR. DELKER: Different from our circumstance here.

2 THE COURT: Well, take a look at Seymour, and we
3 can -- we can -- I'll leave the whole issue open. Okay.
4 Mutual combat I was going to give until I started reading
5 the instruction. And it says that if you find the parties
6 agree to have a fight. So I'm not going to include mutual
7 combat. I don't know if it's a ---

8 MR. SISTI: I mean, agreement could be inferred to
9 action, so I -- and the testimony, as I heard it, was that
10 she started it. And I believe there was other testimony
11 as to how she could manipulate or push his buttons or
12 something. Again, I think that would be an unfair
13 interpretation of the evidence to leave that out.

14 THE COURT: Okay.

15 MR. SISTI: I know it's not -- I know it's not the
16 centerpiece of the prosecution, but I think we would be
17 wrong if we didn't ask for that instruction.

18 THE COURT: Sure. Yeah. And I think there's a
19 difference between reacting to someone throwing a mug at
20 them and agreeing to have a fight. So that's why I'm --
21 I'm not going ---

22 MR. CRONHEIM: And, for the record, I can
23 understand that that's a judgment any individual might
24 make, but I think it is also a fair interpretation of the

1 evidence, most particularly based on what she said, that
2 she started it, and he responded. And so the law does not
3 require a conversation.

4 THE COURT: No, I agree with that.

5 MR. CRONHEIM: And if her testimony is accepted
6 that she started it, I think that it is fair to believe
7 that if you throw a mug at someone, the person might
8 respond in a physical way. That is the stuff of agreeing
9 to have an altercation.

10 THE COURT: Mr. Delker?

11 MR. DELKER: I think what the defense is trying to
12 do here is get a self-defense instruction without having
13 given notice and all of the requirements of self-defense.
14 They've been aware of this for a long time. I mean, this
15 is really a back-door way to get -- to say that the
16 defendant was responding to Amanda starting the fight, it
17 was self-defense.

18 THE COURT: Okay.

19 MR. SISTI: Will, we're not trying -- we're not
20 trying to do anything, all right. That isn't above board
21 here, first of all. I mean, we'll tell her what we're
22 trying to do. What we're trying to do is to allow the
23 jury to determine whether or not it was a mutual consent
24 from the facts that have been presented to them, and

1 whether or not they can reasonably come to that, and
2 whether or not we're entitled to that instruction, because
3 we believe we've put in at least a minimal amount of
4 evidence to sustain that under State v. Aubert.

5 THE COURT: Okay.

6 MR. SISTI: We think we're entitled to the
7 instruction.

8 THE COURT: Based on the record, I'm making a
9 finding that there is not evidence of an agreement
10 sufficient to entitle you to a mutual-combat instruction.
11 And as I heard you describe the encounter, it did sound
12 more to me like a self-defense situation, if that were
13 going to come up. But aside from that, I don't believe
14 that the defense is trying to back-door anything. That's
15 my ruling on the mutual combat. Causation we talked
16 about.

17 You know, the next issue that I sort of -- as I'm
18 drafting these, knowing that my responsibility is to
19 explain the law correctly to the jury, I know the State
20 requested 1.16, Confession by the Defendant. And you can
21 see my instructions, and you have it. The voluntariness
22 one I left in there, but I changed it from confession to
23 statement.

24 MR. CRONHEIM: Right.

1 THE COURT: Because I don't -- you know, it's not,
2 in the true sense of the word, confession. So I thought
3 confession by the defendant was not a necessary
4 instruction, because, really, the State is offering it as
5 a bunch of lies, most of it. Maybe there are one or two
6 things that you want the jury to believe about it, so I
7 don't think the corroboration instruction really applies
8 in this case. But I'll let you look at my whole
9 instruction, and then you can tell me what you think after
10 that.

11 MR. CRONHEIM: You're talking about 1.16.

12 THE COURT: One sixteen. One point one six, yeah.
13 The next issue is the jury instruction requested by the
14 defense on testimony of a police officer. I'm not going
15 to give this as the way it's written here, because I think
16 it highlights the police officer over any other witness.
17 But I do say in my general instructions on credibility
18 that they must consider the testimony of all witnesses the
19 same, including police officer, lay witnesses, and expert
20 witnesses. And that they should apply the same test to
21 credibility for all those witnesses. So you can look at
22 what I did.

23 On the lack-of-evidence instruction, I believe that
24 the model instruction on reasonable doubt is appropriate.

1 This seems to sort of address reasonable doubt. However,
2 I am going to add the sentence: The defendant may also
3 rely on evidence brought out in cross-examination, but I
4 say it a bit differently. I think I say in deciding which
5 witnesses to believe and how much to believe, you need to
6 consider both the direct and cross-examination, regardless
7 of who called the witness. It may be that a witness
8 called by one side may have something helpful to offer for
9 the other side, which I think is a more neutral way of
10 saying that last sentence.

11 MR. CRONHEIM: Okay. But I think it is also a fair
12 statement of the law that the lack of evidence can create
13 a reasonable doubt.

14 THE COURT: Right. And I think it's just another
15 way of saying the model instruction. So you can certainly
16 argue it this way, but I think that my instruction on
17 reasonable doubt is appropriate. Okay. So those are the
18 specific issues. Why don't I give you copies of these.
19 And other than causation, which we'll take up on Monday,
20 we can go back on the record and address any additional
21 concerns that you have that we haven't already talked
22 about.

23 [Court recessed at 11:13:03 A.M.].

24 [Court reconvened at 11:49:17 A.M.].

1 THE COURT: Okay. Ready? Why don't we start with
2 the State, and we can go -- tell me of any page number
3 that you have a concern, and then we'll go to the defense.
4 I actually made a couple of corrections, myself, too.

5 MR. DELKER: I'm curious. On page five, what
6 example you give for the ---

7 THE COURT: Oh. The example I gave is if you
8 needed to find -- if the jury had to determine whether or
9 not somebody actually took a plane to California and they
10 had one witness in Boston that said they saw him get on
11 the plane, and one witness in L.A. said they saw him get
12 off the plane, that would be direct evidence, because they
13 saw him get on. If two people were in the boarding area,
14 one saw him get on, one said he didn't get on, that would
15 be direct evidence, they'd have to decide who's telling
16 the truth. If nobody was in either boarding area, but
17 somebody saw him at the gas station in Boston on Friday at
18 ten in the morning, and then someone else saw him at a gas
19 station in L.A. on Friday at ten at night, then the only
20 logical conclusion you could draw from that is that he
21 took a plane there. But then as more days go by it
22 becomes more rational to conclude that he might have
23 driven there. So then you have to look at other things
24 like did he rent a car, did someone see him on the road,

1 you know.

2 MR. DELKER: Okay.

3 THE COURT: Anything else?

4 MR. DELKER: Not on that one. I think on the
5 defendant's statement ---

6 THE COURT: Yup.

7 MR. DELKER: -- just in terms of the placement of
8 it. I don't know that it made sense to put it after all
9 of the crimes.

10 THE COURT: Okay.

11 MR. DELKER: We were thinking maybe putting it up
12 further when you were talking about the different types of
13 evidence. I mean, one proposal, I'm not wedded to this,
14 but our page eight, after the expert, after you talk about
15 expert ---

16 THE COURT: Okay.

17 MR. DELKER: -- on how to consider expert
18 testimony, then maybe how to consider the defendant's
19 statement.

20 THE COURT: Sure. That makes more sense. Do you
21 agree, Mr. Cronheim?

22 MR. CRONHEIM: Sounds right. I'm just trying to
23 look at it. So you're talking about the section that is
24 on ---

1 THE COURT: Page 15, where it says ---

2 MR. CRONHEIM: -- page 15, leading up to page 8.

3 THE COURT: And move it to page 8 just before
4 "Under our constitutions...". That makes sense.

5 MR. CRONHEIM: Sure. Above it.

6 THE COURT: Right, above. Isn't that right?

7 MR. DELKER: Just above.

8 THE COURT: Just before, yeah.

9 MR. DELKER: Or just before.

10 THE COURT: Yeah. Okay.

11 MR. DELKER: And I guess along that line, I
12 didn't -- we didn't have the Court's instruction on the
13 false exculpatory ---

14 THE COURT: Oh, shoot, that was the one thing that
15 I didn't add or look at, read the case on. Okay. I knew
16 there was something else missing. Sorry about that.
17 Okay. Yeah, I'm going to give it in the way that we
18 changed it, so that we're not saying "made up." And I'm
19 also going to add, if you find. The issue I have not
20 decided yet is to whether I will apply it to all
21 witnesses. So let me read the case in full and I'll let
22 you know.

23 MR. DELKER: Page 12. I know this isn't a model
24 instruction, but the depraved heart murder. That doesn't

1 mean anything for me. It doesn't conjure up any images or
2 help me in any way, I don't think. I think it's just
3 ancient.

4 THE COURT: Okay, so you would want that sentence
5 out?

6 MR. DELKER: Yeah.

7 MR. CRONHEIM: Sounds good to us.

8 MR. SISTI: It's appropriate to include.

9 MR. CRONHEIM: I don't know what it means, though.

10 THE COURT: Yeah. I mean, I think I remember that

11 ---

12 MR. SISTI: It should be included.

13 MR. DELKER: How does it help the jury?

14 MR. CRONHEIM: Well, I mean it shows the severity
15 of what is needed to be found.

16 MR. DELKER: Huh?

17 MR. CRONHEIM: I think it's a statement that
18 characterizes the severity of the increased element.

19 THE COURT: Okay.

20 MR. CRONHEIM: I think that ---

21 THE COURT: I'm going to leave it in, since it's
22 probably the model instruction. And we'll see what
23 happens if the jury asks a question about it, which, when
24 I was at the AG's office, they always did. So, we'll see

1 what we do from there. Okay.

2 MR. DELKER: I just -- I had -- I didn't know if
3 you wanted to address this at this point. I had a thought
4 on the causation issue, the hospital taking -- how to
5 address the issue about ---

6 THE COURT: Yeah.

7 MR. DELKER: -- the defendant taking -- not taking
8 Kassidy to the hospital.

9 THE COURT: Yup.

10 MR. DELKER: I think a proposal we would have would
11 be to say something along the lines of: In order for you
12 to find the defendant guilty of second-degree murder --
13 and I suppose this applies to the manslaughter as well --
14 you must find that the defendant caused injury to Kassidy
15 that was a direct and substantial cause of her death. I
16 think what that is, it makes it clear that it's not simply
17 the fact that he didn't take her to the hospital, but, at
18 the same time, the State's not required to prove the
19 mechanism and the means of her death. And so I think, you
20 know, it's appropriate to give the jury that type of
21 instruction.

22 THE COURT: Okay. And I understand that you ---

23 MR. CRONHEIM: Vehemently disagree.

24 THE COURT: Right.

1 MR. CRONHEIM: We have planned our whole defense
2 based on the charge as issued by the grand jury, the
3 charge read to this jury, and we cannot go back to
4 cross-examining witnesses at the end of the State's case
5 based on another theory of the case. I think there was
6 clarity as to what the State is alleging in this case,
7 that Chad Evans killed Kassidy Bortner by a blow to the
8 head and a blow to the abdomen. We want the State kept to
9 its word, to its proof, and any modification which permits
10 the jury to speculate ---

11 THE COURT: Sorry.

12 MR. CRONHEIM: -- would deprive Mr. Evans of
13 critical constitutional rights of due process under Part
14 1, Article 15, the 14th amendment of the Constitution of
15 the United States, statutory right under RSA 601 to a
16 grand-jury presentment, cite State v. Erickson, 129 NH.
17 And this is just too serious a matter to leave to
18 speculation. I mean, there is clarity as to what the
19 State has been charging, and we have been focusing on
20 that. We have all been focusing on that.

21 THE COURT: Okay. Well, we'll have further
22 argument on Monday, but I'll consider this language when I
23 read the cases. But I won't make a decision until I have
24 argument on Monday. Okay.

1 MR. CRONHEIM: And just again, we defended based on
2 those particular allegations. We've tailored our
3 cross-examinations to that, we've cross-examined the
4 medical examiner based on that. There's been specific
5 questioning about where and when these two items listed in
6 the second-degree murder indictment occurred, when they
7 occurred. And now to change the rules is a substantial
8 prejudice.

9 THE COURT: So you're claiming that it would be an
10 improper amendment of the indictment?

11 MR. CRONHEIM: Absolutely.

12 THE COURT: Okay.

13 MR. CRONHEIM: It impacts on his right to confront
14 and cross-examine. It impacts his right to present
15 favorable evidence, because we would rely on
16 cross-examination to present that evidence. It's a
17 different case.

18 THE COURT: Okay. All right. We'll take that up
19 on Monday. Anything else?

20 MR. DELKER: No, we don't have anything else.

21 THE COURT: Okay. I'll start with the defense.

22 MR. CRONHEIM: By the way, judge, so that you know,
23 we would have a motion to dismiss at the end of State's
24 case.

1 THE COURT: Oh, we might as ---

2 MR. CRONHEIM: We can do that whenever you want.

3 THE COURT: Yeah. Okay.

4 MR. CRONHEIM: But just to write it down so we
5 don't forget. On page two, the middle paragraph, you talk
6 about the defendant having the right not to testify.

7 THE COURT: Yeah.

8 MR. CRONHEIM: We just thought that that may make
9 more sense to throw in a second full paragraph on page
10 three, just in terms of an ordering -- ordering read it
11 through ---

12 THE COURT: Throw it in the second full paragraph
13 on page three?

14 MR. CRONHEIM: After -- after the -- make it the
15 second full paragraph.

16 THE COURT: Oh, oh, oh, I see. I'm sorry.

17 MR. CRONHEIM: So that when you're talking about
18 evidence ---

19 THE COURT: Now, let me tell you what is evidence,
20 because that's what I say.

21 MR. CRONHEIM: Yeah.

22 THE COURT: Well, the reason I have it there is
23 because I talk about what's not evidence.

24 MR. CRONHEIM: Right.

1 THE COURT: The indictment, his failure to testify,
2 the punishment, the facts and the law. I think I'm just
3 ---

4 MR. CRONHEIM: Okay.

5 THE COURT: -- I'll screw it all up if I move that.

6 MR. CRONHEIM: Okay. We certainly don't want that,
7 judge.

8 THE COURT: All right.

9 MR. CRONHEIM: Okay. Page five. We have a general
10 concern about the modifications for the standard
11 instruction on circumstantial evidence. Those concerns
12 include focusing, we believe, inappropriately. By that, I
13 mean emphasizing that you don't consider each item of
14 circumstantial evidence in isolation. And that's a
15 general rule, that you consider all evidence together. So
16 I think that it is ---

17 THE COURT: I think actually that sentence is in
18 the model instruction.

19 MR. CRONHEIM: I'm going to combine it ---

20 THE COURT: Okay. Okay.

21 MR. CRONHEIM: -- with what ends up being the -- I
22 guess it's the second full paragraph on page five. It's
23 sort of the bottom half. The rule requiring you to
24 exclude all other rational conclusions applies only to

1 circumstantial evidence, not direct evidence. I
2 understand what you mean, and I don't think that's a
3 correct statement of the law. If direct evidence excludes
4 guilt ---

5 THE COURT: Let me tell you what I mean by that.
6 And I think this actually does come from a case. What I
7 mean by that is if you have two witnesses who see
8 something and one says "X" happened and one says "Y"
9 happened, and "Y's" consistent with innocence, you do not
10 have to conclude -- you do not have to reach a verdict of
11 not guilty, because they both gave direct evidence and you
12 have to decide which one you want to believe.

13 MR. CRONHEIM: But if A and B both gave direct
14 evidence, and both could rationally have given that
15 evidence in the context of the case, then that is the
16 definition of a reasonable doubt.

17 THE COURT: No, let me give you a better example.
18 Let's say two people are out in the parking lot where the
19 defendant stabs the victim. And witness "A" says I was
20 there, I saw him, he had a knife. He stabbed him in the
21 chest. Witness "B" says I was there. He did not stab
22 him. He had no knife. They were just fighting. You
23 would not have to reach a verdict of not guilty simply
24 because there was a witness there who provided direct

1 evidence which was consistent with innocence, you know,
2 mutual combat, because they both gave direct evidence.
3 You would have to decide: If I believe witness "A" that
4 he had a knife, I can conclude that the defendant's
5 guilty. I am not required by law to follow the rational
6 conclusion consistent with innocence.

7 MR. SISTI: We understand that. That goes more to
8 credibility or believability.

9 THE COURT: Right.

10 MR. SISTI: That would hold the same in a
11 circumstantial case. If you had circumstantial evidence
12 that an individual was in Los Angles two hours after being
13 in Boston, but the person that reported it was not
14 reliable ---

15 THE COURT: Right.

16 MR. SISTI: -- then, of course, that would be
17 unreasonable.

18 THE COURT: Right.

19 MR. SISTI: Just as you're stating with regard to
20 direct.

21 THE COURT: Right.

22 MR. SISTI: The question is if the direct evidence
23 that is reported that the man did not have a knife, it's
24 just as reasonable and rational as the person that said he

1 did have a knife. And that's the definition of a
2 reasonable doubt.

3 THE COURT: Sure. Sure.

4 MR. SISTI: I'm sorry, judge.

5 THE COURT: Yeah, no, that's the definition of
6 reasonable doubt, but it's not -- it's not ---

7 MR. SISTI: It's direct evidence given by both ---

8 THE COURT: Right.

9 MR. SISTI: -- and they would have to be directed,
10 at that point, to come in with a not-guilty finding if
11 they were both reasonable and rational conclusions.

12 THE COURT: No. No. I mean, they would have to
13 decide did witness "A" have the ability to see what was
14 going on. They would have to decide which of those two
15 witnesses they were going to believe. They wouldn't
16 automatically be required to return a verdict of not
17 guilty.

18 MR. SISTI: They wouldn't automatically have to be
19 able to decide. That the -- I guess that's the flaw and
20 the reasoning. If, at the end of analyzing both
21 individuals' recollections and testimony they could not
22 conclude that one was irrational, or one was lying, or one
23 was unable to see, that both could have equally have seen
24 the same event, and we cannot decide, then that is a

1 rational conclusion ---

2 THE COURT: You need to read State v. McHugh. So
3 ...

4 MR. SISTI: Well, I have read State v. McHugh. But
5 all I'm stating is that ---

6 THE COURT: Okay.

7 MR. SISTI: -- to boldly state that the rule
8 requiring you to exclude all other rational conclusions
9 applies only to circumstantial evidence, not direct
10 evidence, I think is painting that whole concept with a
11 very broad brush. If -- if all we had was direct evidence
12 in a case, and you could conclude that the person was not
13 guilty or guilty through all of the evidence, all of
14 direct evidence, then the person is not guilty.

15 THE COURT: Right. But that has to deal with the
16 State's burden of proof and whether or not the jury
17 believes the particular witnesses. And I think State v.
18 McHugh says -- it says if you have a case based on direct
19 evidence, the defense is not entitled to a
20 circumstantial-evidence instruction.

21 MR. SISTI: We understand that. But that's
22 completely different than what this says. We understand
23 that.

24 THE COURT: Okay, I just ---

1 MR. SISTI: But we're not -- I'm sorry, judge.

2 THE COURT: No, go ahead.

3 MR. SISTI: We're not stating that the State -- or
4 that the case is entirely consisted -- has consisted only
5 of direct evidence.

6 THE COURT: Right.

7 MR. SISTI: So, again, let's take McHugh and put it
8 over there. And we would not be asking for a
9 circumstantial-evidence instruction if we didn't have
10 circumstantial evidence ---

11 THE COURT: Right.

12 MR. SISTI: In the case. So let's get back to the
13 paragraph that we're having problems with. The rule
14 requiring you to exclude all other rational conclusions
15 applies only to circumstantial evidence, not direct
16 evidence means that if this jury concludes that, upon the
17 direct evidence, that they can conclude just as easily
18 that the individual is guilty or not guilty, then you're
19 saying that it doesn't apply. I don't understand what
20 that means. I mean, if, through direct evidence, you can
21 conclude, to a reasonable degree, rationally, an
22 individual is not guilty ---

23 THE COURT: Right. I see what you're saying,
24 because you don't want the jury to be confused about,

1 well, if we have a reasonable doubt, we have a reasonable
2 doubt. What I don't want them to do is say there are two
3 eyewitnesses; one saw the events that indicated the
4 defendant's guilt; one saw the events and didn't. I don't
5 want them to think that, because of this circumstantial
6 evidence instruction, they would be required to pick a
7 witness that was consistent with innocence, when both
8 witnesses provided direct.

9 MR. CRONHEIM: And they couldn't, based on your
10 instruction, because eyewitnesses are not circumstantial.

11 THE COURT: Right.

12 MR. CRONHEIM: Eyewitnesses are direct.

13 THE COURT: Right.

14 MR. CRONHEIM: And you have given the statement ---

15 THE COURT: And the circumstantial-evidence
16 instruction does not apply to direct witnesses.

17 MR. CRONHEIM: I don't disagree with you saying
18 that circumstantial evidence is treated in a way different
19 at times from direct evidence. We just believe that your
20 credibility-of-witness instruction, along with your
21 burden-of-proof instruction deals with that issue. And
22 when you put in these sentences, it is not a correct
23 statement of the law. I don't really think we're in
24 disagreement as to what the law is. But we think that

1 this is a mischaracterization of the law, and that
2 relying, as you generally would on credibility and
3 proof-beyond-a-reasonable-doubt instruction, you
4 accomplish that which you want to do.

5 THE COURT: Can I hear from the State?

6 MR. DELKER: I agree with the Court's
7 interpretation of the law. I think that the concern is
8 exactly what the Court articulated, which is that if the
9 jury has two witnesses who see the same thing and come to
10 different conclusions, we obviously don't want them to
11 simply pick the one that's consistent with innocence. So
12 I think that this is an accurate statement.

13 THE COURT: Okay. Well, I'll give it some thought
14 and I'll let you know on Monday. I'll look at McHugh,
15 again, because I think that's where that language comes
16 from. And I think it is also -- it might not be in the
17 model instruction, but I know it's in all of the judges'
18 personal instructions, but I'll take a look at McHugh.
19 Okay. Next?

20 MR. CRONHEIM: There is no instruction about police
21 credibility as it currently stands.

22 THE COURT: Yeah, it's on page six.

23 MR. CRONHEIM: Is it the part where you ---

24 THE COURT: Yeah, you should consider these factors

1 in deciding the credibility of all the witnesses, whether
2 or not they happen to be ordinary citizens, police
3 officers, or expert witnesses.

4 MR. CRONHEIM: Okay. We're going to, as we think
5 it's important, request that in some fashion, and this is
6 just one sentence, include a statement that credibility of
7 ---

8 THE COURT: Okay, that's fine, I'll do that. It
9 makes sense. Did you see this four?

10 MR. CRONHEIM: Yeah. I guess, and, again, I
11 think -- I think I made this before, but I don't think it
12 makes sense to single out the police officers again. I
13 don't think that's -- in this instruction, the way it's
14 written is neutral. It says apply the instructions -- I
15 mean, apply the test the same way. I think it's
16 inappropriate to single out the police officers. I think
17 we've covered this issue.

18 THE COURT: Okay. I think this is a much more fair
19 way of saying it, and I think there is some risk that a
20 badge carries more believability than other witnesses. So
21 I'll give this one-sentence instruction.

22 MR. CRONHEIM: Thank you. We've, I think, covered,
23 unless you want me to further put on the record the issue
24 about including the allegations of the indictment.

1 THE COURT: No, I'll let you argue some more Monday
2 after I ---

3 MR. CRONHEIM: I'm hoping I won't have to.

4 THE COURT: Well, we'll see. You might not. You
5 might.

6 MR. CRONHEIM: Great.

7 THE COURT: Okay.

8 MR. CRONHEIM: I do think when you come up with
9 your draft language -- one of the concerns, that I just
10 want to put on the record, so you understand some of the
11 concerns we have, it is our view that the acts alleged in
12 the indictment on the second-degree murder, which are the
13 blows to the head and abdomen, are the acts which must
14 demonstrate the depravity to make it a second-degree
15 murder. And so we -- as a general matter [inaudible -
16 paper shuffling] is the acts alleged which must make it
17 second-degree murder, as opposed to unindicted, not
18 mentioned, unincluded acts which can then make the charged
19 acts the second-degree level. I'm not sure if I said that
20 correctly.

21 THE COURT: I know what you mean. Yeah.

22 MR. DELKER: We disagree. I don't think you need
23 to allege each and every fact that lead to -- that the
24 State's going to rely on in proving its case. I think the

1 case is really clear on there. And so the defense knows
2 what the crime is here: It's clear that the issue is that
3 the defendant caused injury to Kassidy on somewhere
4 between the night of November 8th, and the morning of
5 November 9th, that led to her death. And that's what
6 defense is -- needs in order to repair it's case, the fact
7 that the defendant may have slammed Kassidy into a wall,
8 as opposed to punching her in the head, is not the type of
9 material variance from indictment that would alter or
10 prejudice the defendant's case. With respect to the -- to
11 the extreme-indifference aspect of the case, I think,
12 again, the State isn't required to allege all of the facts
13 that it's going to rely on to prove extreme indifference
14 to the value of human life. And it certainly would be
15 appropriate for the jury to consider the fact that the
16 defendant knew Kassidy's condition was deteriorating and
17 did not to correctly protect her, or to assist her, in
18 concluding that he was acting with extreme indifference.

19 THE COURT: Okay.

20 MR. CRONHEIM: I want to respond to that, because I
21 can see where the State's going in closing. I think
22 that's precisely the danger that we have. There is a
23 difference between manslaughter and second-degree murder.
24 The State is basically saying that they can enhance this

1 charge from manslaughter to second-degree murder without
2 stating the underlying facts on which they will rely for
3 that additional element. It is our view that they can't
4 rely on uncharged conduct, because, otherwise, that
5 element is charged without any factual premise. And the
6 State is held to the factual premise listed in the
7 indictment, or else there is the risk that the defendant
8 could be convicted on a charge not found by the grand
9 jury.

10 THE COURT: Okay. That'll -- that'll sort of be
11 dealt with in my causation instruction.

12 MR. CRONHEIM: We understand.

13 THE COURT: So I'll consider those arguments.
14 Okay.

15 MR. CRONHEIM: The next issue, and I don't know how
16 the Court wants to handle it, and, of course, a lot of
17 what we're saying about the second-degree charge applies
18 to the manslaughter.

19 THE COURT: Sure. Yup.

20 MR. CRONHEIM: The next issue is page 13. I'm just
21 not sure how the Court wants to handle this. There are
22 two first-degree assault charges ---

23 THE COURT: Right.

24 MR. CRONHEIM: -- one for fracturing the leg ---

1 THE COURT: Yup.

2 MR. CRONHEIM: -- basically one for fracturing an
3 arm, as you've put in the middle of ---

4 THE COURT: Yup.

5 MR. CRONHEIM: -- page 13. I think it's important,
6 since there are two different charges, to say in some way
7 there are two charges. One, the State needs to prove that
8 the defendant caused serious bodily injury to Kassidy by
9 fracturing her leg. The second is causing serious bodily
10 injury to Kassidy by fracturing an arm. I mean, I
11 understand what you're trying to do. But they're
12 eventually gonna -- I don't know how you're going to do
13 it, but they're eventually gonna have to answer to each
14 charge.

15 THE COURT: Right. They're going to have copies of
16 the charges in there, anyway.

17 MR. CRONHEIM: So I think that it is important to
18 state: Caused serious bodily injury by fracturing an arm,
19 by fracturing a leg.

20 THE COURT: Yeah, I think I can put them in
21 paragraph two.

22 MR. CRONHEIM: Yeah. And we would also ask to
23 incorporate similar language on jurisdiction.

24 THE COURT: For the first-degree assault?

1 MR. CRONHEIM: For the assaults.

2 THE COURT: Oh, all assaults?

3 MR. CRONHEIM: Yeah, for all. I mean, I don't know
4 that the simple assault, because it's so clear
5 [inaudible - voice trailing off, background conversation].

6 THE COURT: Yeah.

7 MR. DELKER: I need to look at the ---

8 THE COURT: Yeah. I think what he's saying on page
9 13 is that the jury's going to have the indictments in
10 front of them.

11 MR. DELKER: Sure.

12 THE COURT: And I think in paragraph two, after I
13 define serious bodily injury, I can say for the purposes
14 of one indictment the State must prove defendant caused
15 serious bodily by fracturing her arm. For the purposes of
16 the second indictment, the State must prove ---

17 MR. DELKER: That was fine. I had no problem with
18 that.

19 THE COURT: Now, the second issue is he wants to
20 add my language on jurisdiction that I put in the murder
21 charges to the assault charges.

22 MR. CRONHEIM: Right. And that's where I've got
23 lost. Where is the instruction?

24 THE COURT: The language on -- well, look at page

1 13. That's the manslaughter, but that's what I used. And
2 it starts with: "And that his actions in bringing about
3 the death occurred in New Hampshire. You need not find
4 the death occurred in New Hampshire, but you must find the
5 defendant's actions in bringing about the death occurred
6 in New Hampshire." So, you want me to say that the --
7 that the assaults occurred in New Hampshire.

8 MR. DELKER: Correct.

9 THE COURT: They need to find the assaults ---

10 MR. DELKER: Yes.

11 MR. CRONHEIM: Maybe make the jurisdiction thing
12 just a separate number?

13 THE COURT: Yeah, I could do that.

14 MR. CRONHEIM: So, I'm looking at 10, which is, I
15 think, where you started. One, caused the death; two, it
16 was caused by conduct in New Hampshire; and, three, that
17 he acted recklessly.

18 THE COURT: Yes. The only thing with -- I tried to
19 think this through a little bit when I was coming up with
20 it, but maybe I'll give you some time to think about it.
21 The statute says that -- that -- the statute says something
22 about -- 626 somewhere, if the acts or the results of the
23 actions occur.

24 MR. CRONHEIM: Right. Right.

1 THE COURT: And because death is final, it only
2 occurs in once place. But the results of injuries
3 continue to occur wherever the child is. But maybe I'm
4 analyzing it too much.

5 MR. CRONHEIM: I mean, let's just take a
6 hypothetical that he caused a fracture in Vermont.

7 THE COURT: Right.

8 MR. CRONHEIM: I don't think that he can be charged
9 with causing a fracture in New Hampshire.

10 THE COURT: Even if she came to New Hampshire and
11 ---

12 MR. CRONHEIM: Maybe for the endangering, because
13 it's a continuing ---

14 THE COURT: Yes. Yeah. Yeah. Okay.

15 MR. DELKER: I think I agree with that.

16 THE COURT: So I'll do that for all the assaults.

17 MR. CRONHEIM: I'm just trying to think what
18 evidence there is at all in the case that the fractures
19 occurred anywhere outside of New Hampshire.

20 THE COURT: Yeah, that there are fractures.

21 MR. CRONHEIM: I mean, the homicide, I can
22 understand that concern, but ---

23 MR. DELKER: You know, the truth, and I'm listening
24 to the same case, I don't know when they are -- occurred.

1 MR. SISTI: I believe I asked, really, when, where,
2 how, what State. I think I was that direct with my
3 cross-examination. With regard to ---

4 THE COURT: Of Amanda?

5 MR. SISTI: No, the medical examiner.

6 THE COURT: Oh.

7 MR. DELKER: But Amanda said that -- I mean, there
8 was testimony from Amanda that the grabbing of the arm and
9 the leg occurred at the home in Rochester.

10 MR. SISTI: Yeah, but, Will, I gutta ---

11 MR. DELKER: A grabbing occurred.

12 THE COURT: Yeah.

13 MR. DELKER: We do not ---

14 THE COURT: I'm going to give the jurisdiction
15 instruction as to all the assaults.

16 MR. CRONHEIM: Last ---

17 THE COURT: Hold on. Let me just make a note of
18 it. Okay. Okay. Okay, go ahead.

19 MR. CRONHEIM: Page 15. The Court has chosen
20 gentle language ---

21 THE COURT: Gentle.

22 MR. CRONHEIM: Conversations between the police and
23 the defendant.

24 THE COURT: Oh, I think I used the word statement.

1 I took out the confession and used statement.

2 MR. CRONHEIM: Right.

3 THE COURT: That's the only thing I changed from
4 the model instruction.

5 MR. CRONHEIM: The last paragraph at the bottom.

6 THE COURT: Of 15?

7 MR. CRONHEIM: Of 15.

8 THE COURT: Yup.

9 MR. CRONHEIM: In stating whether the statement was
10 free and voluntary, you may consider the conversations.

11 THE COURT: Yeah, I think that's in the model
12 instruction. Let me go get it.

13 MR. CRONHEIM: We would -- our first choice, of
14 course, would be interrogation.

15 THE COURT: Oh, right.

16 MR. CRONHEIM: And our second choice, anticipating
17 the State's view and the Court's view ---

18 THE COURT: Show me where we are, again.

19 MR. SISTI: Page 15.

20 THE COURT: The last paragraph on the bottom?

21 MR. SISTI: The last paragraph starting "In
22 deciding..."

23 THE COURT: Okay. Right. Yup. How about the
24 nature of the conversations, or ---

1 MR. CRONHEIM: I was going to suggest the full
2 content.

3 THE COURT: Yeah, I think that's fair. So that I'm
4 not the one characterizing ---

5 MR. CRONHEIM: Correct.

6 THE COURT: -- what the conversation was like? I
7 said calling it a conversation, or interrogation.

8 MR. CRONHEIM: What about the nature of the
9 interview? You may consider the nature of the interview.

10 THE COURT: Consider the nature of the interview
11 and the full extent. I'll say both. Nature of the ---

12 MR. CRONHEIM: How about the interrogation?

13 THE COURT: The exchange. How about the nature of
14 the exchange?

15 MR. SISTI: Okay. That's fine.

16 THE COURT: We are words nuts, aren't we?

17 MR. SISTI: You're sitting there going ...

18 THE COURT: You know the trouble with me is my
19 context for an interrogation is Roland Lanya, so
20 everything else is like [inaudible - laughter]. That's
21 all right. I've said that to his face before.

22 MR. SISTI: I've never had a problem with Roland.

23 THE COURT: Me either. He's great.

24 MR. SISTI: The full content.

1 MR. CRONHEIM: Full exchange.

2 THE COURT: The nature of the exchange.

3 MR. SISTI: Yup.

4 THE COURT: Do you want me to say full exchange?

5 MR. CRONHEIM: No.

6 THE COURT: Okay. The nature of the exchange
7 between the police and the defendant.

8 MR. CRONHEIM: You can say full exchange. That's
9 fine with us.

10 THE COURT: Okay.

11 MR. CRONHEIM: We want everything considered.

12 THE COURT: Okay. Great. So, what I think I
13 should do is make all these changes, and do you want to
14 take the rest up on Monday, or do you want...

15 [End proceedings of 12/14/01 according to log notes].

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