

V!
STRAFFORD, SS

THE STATE OF NEW HAMPSHIRE

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 18, 2001

The above-entitled matter came on for hearing before the Honorable Tina L. Nadeau, Presiding Justice, on December 18, 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 BAILIFF: You may be seated.

2 THE COURT: Good morning. Let me just put a couple
3 of things on the record that we talked about in chambers
4 on final jury instructions. And the defense indicated
5 that on page five, they want to reiterate their objection
6 to a sentence regarding circumstantial evidence. And I
7 know that objection is on the record from our previous
8 discussions, and it's still preserved, from the Court's
9 perspective.

10 The second issue that was raised involves an
11 instruction on page seven regarding false exculpatory
12 evidence. The defense argued that the Court should not
13 give that instruction for a couple of reasons. Number
14 one, that it's an improper comment on the evidence. And,
15 number two, that because it only applies to the defendant,
16 that it unnecessarily highlights the defendant's testimony
17 without also addressing other witnesses. And the State
18 objects to the defendant's request to exclude it
19 indicating that it's a proper instruction under Fisher,
20 and that it's akin to the flight instruction given in
21 cases where there's evidence that the defendant has fled
22 from the scene.

23 If I've adequately stated your positions on the
24 record, then I can tell you what my ruling is. If there's

1 something you want to add to the record, just let me know.
2 All set?

3 MR. CRONHEIM: I would just point out I also
4 indicated that you've, in your instructions, thoroughly
5 talked about how to assess witness testimony. So that
6 more general instruction would, I think, address the issue
7 that the State wants you to focus on with the defendant's
8 statement.

9 THE COURT: Okay. After taking a look at Fisher
10 again and the cases cited in Fisher, I'm going to leave
11 this instruction in. I agree with the State that it's
12 akin to the flight instruction, and I'm also making sure
13 that the jury understands that it's up to them to find
14 whether or not the defendant intentionally made statements
15 tending to demonstrate his innocence, and that they can
16 give that the weight they think it deserves. But I
17 understand the defense objection, and I know that's on the
18 record.

19 The next issue involved ---

20 MR. CRONHEIM: And, judge ---

21 THE COURT: Yes?

22 MR. CRONHEIM: -- just because I raised it in
23 chambers ---

24 THE COURT: Yes.

1 MR. CRONHEIM: -- I asked you to make comments on
2 Mr. Marshall's testimony and some of the false statements
3 he made. And I understand you've declined to do that as a
4 comment on the evidence.

5 THE COURT: Well, I declined to do that because I
6 think the false exculpatory evidence instruction is
7 specific to exculpatory evidence, which is defined as
8 defendant's statements tending to demonstrate his
9 innocence that are later proven to be false, and that's
10 why.

11 MR. CRONHEIM: I understand. And we would
12 analogously say that Jeffe Marshall has also made false
13 exculpatory evidence in regard to his own behavior, and we
14 believe there ought to be equal treatment.

15 THE COURT: Okay. Then the defense requested that
16 I include in the reasonable-doubt instruction that the
17 jury cannot find only that the defendant probably
18 committed the crime. And I agree that that ought to be in
19 there. I'm not going to change the Wentworth instruction,
20 but on page 10, I'll give you a copy, and you can see in
21 the first full paragraph I've added a sentence that says
22 "It is not enough for the State to prove the defendant is
23 probably guilty; rather, the State must prove the
24 defendant's guilt, beyond a reasonable doubt." And that

1 precedes the Wentworth instruction, if you see that. Then

2 ---

3 MR. CRONHEIM: And, your Honor, excuse me. To be
4 consistent with what I recall your general instruction to
5 be, I think you used the phrases both "possibly" and
6 "probably."

7 THE COURT: Okay.

8 MR. CRONHEIM: And so we would ask you to use both
9 of those terms.

10 THE COURT: Okay. And I've made copies for you so
11 you can just add the word "possibly" into your copy. The
12 next issue had to do with, it's sort of the same issue,
13 for the first-degree assault and the second-degree assault
14 charges. The defense argues that the Court should
15 instruct the jury that the State must prove the time
16 alleged in the indictment as an element of the offense,
17 and the State objects. I've taken a look at Seymour and a
18 couple of other cases and find that this has not been a
19 time-based offense, and I am going to deny that request,
20 because time is not an element of the offense, but the
21 defense is certainly free to argue that the evidence
22 deviates from the time alleged in the indictment.

23 MR. CRONHEIM: I don't think we've had a chance to
24 put that issue on the record. So if I might?

1 THE COURT: Sure, why don't you go ahead.

2 MR. CRONHEIM: It is our view that under the
3 circumstances of the case and the proof at trial that time
4 is an element. We've defended on the ground that there
5 are two fractures; one, which is not within the indictment
6 and, therefore, not an allegation which the jury must
7 address; but, instead, because one of the -- talking now
8 about the leg fractures, there is evidence that one
9 occurred outside the October 9 to November 9 timeframe.
10 We've introduced evidence for that specific purpose, to
11 get it outside of the one-month timeframe, recognizing
12 that there is a -- what was characterized as a recent
13 fracture, which is two to three days old and consistent
14 with Jeffe Marshall falling over Cassidy Bortner. So we
15 have focused our defense on the indictment as it was
16 written. And we have focused our defense using time as a
17 stated part of the indictment, functionally an element of
18 the indictment. To change it now permits, in our view,
19 the jury to go outside the indictment timeframe. I know
20 the Court is going to give the unanimous-verdict
21 instructions, so I would anticipate that that concern,
22 which is one we have, may be addressed. But that's the
23 reason why we focused our questioning of the doctor as we
24 did. And to now tell us that the rules have changed, the

1 State is not particularly held to the indictment, but can
2 broaden it, is problematic. Part 1 Article 15 of the New
3 Hampshire Constitution says that charges need to be fully
4 explained. This one is fully explained. The claim is
5 between October 9 and November 9 that the fracture
6 occurred. To now say it's a different timeframe,
7 functionally means we didn't really explain it, we're
8 changing it now. I know the Court is concerned about
9 time.

10 THE COURT: That's okay.

11 MR. CRONHEIM: So we would strongly suggest that
12 the legs are being pulled out from under us on our defense
13 on that issue based on how we've structured our defense.
14 And so we would object to a modification of the
15 indictment, what is now more than a year after it was
16 issued by the grand jury.

17 THE COURT: Okay. Just so -- let me hear from Mr.
18 Delker.

19 MR. DELKER: Sure. I think the Court is correct in
20 its ruling, the time is not an element of either first or
21 second-degree assault charges. The jury has to be
22 unanimous with respect to the injury, and there is a
23 unanimity instruction here. Seymour and the other
24 time-based offense cases make it clear that a time-based

1 offense is one in which the defendant argues that -- that
2 he didn't have an opportunity to commit the crime beyond
3 the time alleged in the indictment. Where that is the
4 nature of the defense, then it's appropriate to give a
5 time-based instruction. But here, that's not the claim,
6 because the evidence in this case for whenever the
7 fractures occurred, the defendant had an opportunity
8 throughout the entire timeframe for when the fractures
9 occurred, and if the jury finds that the fractures
10 occurred on October 1st or September 15th, that those are
11 still in times when Amanda and Cassidy were with the
12 defendant. He had an opportunity to commit both the
13 first degree and the second-degree assaults during the
14 particular times referenced. So in light of the Seymour
15 and other cases on time-based offenses, time is not an
16 element in this case.

17 MR. CRONHEIM: And our view would be, obviously,
18 the contrary. We accept that Chad was with Cassidy
19 Bortner during that timeframe. But we restricted our
20 cross-examination to a number of other people who were
21 with Cassidy Bortner during that timeframe. Dr.
22 Greenwald, remember, talks about two to three months. So
23 we're going back to August. And there were any number of
24 witnesses who were with Cassidy Bortner during that

1 timeframe who had also the opportunity to play with her,
2 accidentally or recklessly fracture her leg. And we
3 stayed away from that, because that was not part of what
4 was charged. It was irrelevant as to whether there was an
5 injury in August or September, up 'til October 9, based on
6 the charges as we started the trial. So we've restricted
7 our presentation of evidence, we've restricted our
8 cross-examination, we focused on that timeframe, and now
9 the rules are being changed. Mr. Sisti isn't even here
10 for the moment. I'll talk with him about it. But it has
11 been the focus of our closing argument that there is no
12 fracture for which Chad Evans is responsible during that
13 timeframe.

14 THE COURT: Okay. Well, I understand the
15 arguments. And just so my ruling is clear, the rules are
16 not being changed, because the indictment stands as
17 written and the case law is very clear that time is not an
18 element of the offense. Whether the defense chooses to
19 restrict its cross-examination or presentation of evidence
20 to fit within the timeframe is certainly a strategic
21 choice they're entitled to make, but does not change the
22 legal affect of the Court's ruling, which is to not give
23 an instruction indicating that the jury must find, beyond
24 a reasonable doubt, that the incident occurred within the

1 time alleged in the indictment.

2 MR. CRONHEIM: Right. And just I think the last
3 point, because there were two fractures; we were focusing
4 on the last fracture. I think that because there are two
5 fractures, that's the reason why we're left hampered at
6 this point ---

7 THE COURT: Okay.

8 MR. CRONHEIM: -- with that change of rules.

9 THE COURT: Okay.

10 MR. CRONHEIM: We had a similar argument in terms
11 of the indictments for the second-degree assault. So I'm
12 not sure how the Court plans to address the timeframe
13 issue on that.

14 THE COURT: I'm -- I'm going to leave it the way I
15 have it written here, and that is where I have introduced
16 them as each indictment alleging a separate offense, and
17 that's it. I don't tell them that they need to find that
18 each offense occurred within the timeframe, but I do
19 remind them again that they must consider each -- all of
20 the eight charges separately, and reach a unanimous
21 verdict as to each offense. Okay. All right. I'm going
22 to have the bailiff get the jury, but that should give you
23 enough time to get Mr. Sisti, if you could, Mr. Cronheim.

24 MR. CRONHEIM: Yeah, I will. And, judge, the other

1 thing that we had asked, and I will simply incorporate
2 what I said about the first-degree assault ---

3 THE COURT: Sure.

4 MR. CRONHEIM: -- and the second-degree assault
5 charges. We had asked that there be a summary point made
6 at the end of your discussing the nine charges, that there
7 are multiple indictments and independent judgments be made
8 about each.

9 THE COURT: Yes. I have included that. And there
10 are -- are there eight charges now, since I dismissed the
11 second-degree assault -- I mean, the first-degree assault.

12 MR. CRONHEIM: There are nine.

13 THE COURT: Six ---

14 MR. CRONHEIM: There's six second degrees ---

15 THE COURT: Oh, that's right. Right, right, right.
16 Yes. Okay. Okay, hold on a second.

17 MR. CRONHEIM: Thank you, judge.

18 THE COURT: Okay.

19 MR. CRONHEIM: May I spend a moment with Mr. Sisti?

20 THE COURT: Sure.

21 MR. CRONHEIM: Thank you.

22 THE COURT: Why don't we just get the jury lined
23 up, and I'll let you know.

24 [Pause in proceedings - counsel conferring].

1 [The following is a discussion at the bench].

2 MR. BROWN: Good morning.

3 THE COURT: Good morning. When I pick the
4 alternates, do you want -- I know they don't have to stay
5 in the courthouse. Do you want them to stay in the
6 courthouse or -- usually what I do is excuse them and tell
7 them to follow my instructions until they hear there's
8 been a verdict.

9 MR. BROWN: That's fine.

10 THE COURT: Okay.

11 MR. BROWN: We may need a minute to move stuff
12 around after Mark is done.

13 THE COURT: Sure. Well, we won't leave the court

14 ---

15 MR. BROWN: Right.

16 THE COURT: But take your time.

17 MR. BROWN: Okay.

18 THE COURT: Okay.

19 [End bench conference].

20 [Jury enters at 10:03:00 A.M.].

21 THE BAILIFF: Jury entering. You may be seated.

22 THE COURT: Good morning again, ladies and
23 gentlemen. Nice to see you here today. I'm going to ask
24 you again one question before we get started. Has

1 anything come up for any of the jurors overnight,
2 including something you may have read, or seen or heard
3 about which causes you to believe that you cannot sit and
4 hear this case fairly and impartially? [Jurors answer in
5 the negative].

6 THE COURT: No. Great. Let me tell you a little
7 bit about what we're going to do today. You're going to
8 hear the closing arguments. The defense will go first and
9 then the State will go next. And then we'll take a very
10 short break, and then you'll hear my closing argument --
11 sorry, my jury instructions. During the break, we'll ask
12 you to order your lunches from the menu, so that when
13 you -- when you finish with my jury instructions, the
14 lunches will be ready for you. So it'll be a bit of a
15 long morning, but then once we're complete with
16 everything, you'll be able to start up with your
17 deliberations. Okay. Thank you. Mr. Sisti?

18 [Closing arguments to the jury previously transcribed].

19 THE BAILIFF: You may be seated.

20 THE COURT: All right. Ladies and gentlemen,
21 obviously, now, the evidence and the arguments are
22 complete, and it's my obligation to tell you what the law
23 is in this case. Then you will retire to deliberate and
24 reach a verdict.

1 In order for you to reach a fair and just verdict,
2 you need to understand a lot of things. You need to
3 follow my law -- the law as I explain it to you. For
4 example, you need to understand the definition of each of
5 the crimes. You need to know how persuaded, one way or
6 the other, you must be before reaching a verdict. And you
7 need to know what kind of things to consider in
8 determining the credibility of the witness. So my
9 instructions will attempt to explain these and other
10 matters to you.

11 It is your duty as jurors to follow all of the
12 instructions that I'm about to give you. Regardless of
13 your view of what the law is, the law that I explain to
14 you is the law that you must use in reaching your verdict.
15 And it's up to you, as I said, to decide the facts of the
16 case. And you decide the case solely from the evidence
17 presented during the trial. Then you will apply the
18 facts, as you find them to be, to the law that I will now
19 give you, and, in this way, reach a fair and just verdict.
20 And you need to decide the facts in this case without
21 prejudice, without fear, without bias or without sympathy.

22 The fact that Chad Evans has been arrested, charged
23 and indicted and brought to stand trial, as I said at the
24 beginning of the case, is not evidence of guilt. The

1 indictment or charge is simply the way that we give a
2 person notice of the accusations against him in order to
3 bring him to stand trial. So in your deliberations, you
4 must not consider the fact of his arrest, the fact that
5 he's been charged, or the fact that he was brought to
6 stand trial as evidence of the defendant's guilt.

7 In addition, the defendant has an absolute right
8 not to testify. The fact the defendant did not testify in
9 this case may not be considered by you in any way in
10 reaching your verdict. That State has the burden of
11 proving guilt, beyond a reasonable doubt, and the
12 defendant has no obligation, whatsoever, to prove his
13 innocence.

14 The possible punishment the defendant may receive,
15 if you return guilty verdicts, should not influence your
16 decision. The matter of imposing sentencing is up to the
17 judge, and it's not something for you to decide. So you
18 should base your verdict only on the evidence presented,
19 without regard to any possible punishment.

20 Now, you've heard the lawyers discuss the facts in
21 the case through their arguments to you, through their
22 opening statements, and through the questioning of the
23 witnesses. Arguments, opening statements and questions
24 are not evidence. Those are simply the tools that the

1 lawyers use to help you reach a verdict in this case. So
2 if the lawyers have stated the law differently from the
3 way I now explain it to you, then you must disregard what
4 the lawyers have said about the law, and follow my
5 instructions. Likewise, if the lawyers have stated the
6 evidence differently from the way you recall the facts,
7 then you should disregard what the lawyers have said about
8 the evidence, and follow your own recollection.

9 Now, let me tell you what is evidence in this case.
10 The evidence in this case consists of the view, the
11 testimony under oath of the witnesses, and the exhibits
12 that have been introduced into trial. And you must base
13 your decision solely on the evidence presented.

14 Now, during the trial, as we discussed, lawyers
15 made objections. And they're supposed to do that when
16 they think certain evidence is not admissible, or if they
17 think a piece -- a witness shouldn't answer a question.
18 If I sustain an objection, in other words, excluded
19 evidence, you must not guess or speculate about what the
20 answer was or what the evidence was. And I think that, in
21 this case, if I ordered a question and answer to be
22 stricken, you must not consider the question or answer. I
23 think I did that a couple of times. As you will recall,
24 in addition, I ordered the testimony of Cory Merrill

1 stricken in this case, and that means you may not consider
2 any of his testimony in your deliberations. And let me
3 remind you again the reason why I did that. Cory Merrill
4 declined to continue to answer questions during his
5 testimony; therefore, counsel for the defendant did not
6 have a full chance to cross-examine him. And as you can
7 tell from this trial, cross-examination is an important
8 way to test the reliability of any witness's testimony.
9 Therefore, because Mr. Merrill declined to answer
10 cross-examination questions, his testimony cannot be
11 considered reliable or admissible. So under these
12 circumstances, I'm directing you not to consider Mr.
13 Merrill's testimony during your deliberations.

14 If I overruled an objection, which means I allowed
15 a witness to answer, you must not give that answer any
16 greater weight than you would any other testimony simply
17 because I allowed it in over an objection. When I may
18 make these rulings, I'm not trying to express my views
19 about the facts or the weight of the evidence. I'm simply
20 applying the rules of evidence and the law, as is my
21 obligation. So if you think I have expressed an opinion
22 about the facts of this case through those rulings, then
23 you must disregard that expression. My job in this and in
24 all cases is to remain entirely neutral, and it's up to

1 you, alone, and not up to me to decide the facts in this
2 case.

3 Now, you may not guess or speculate about evidence.
4 You may consider only what has been introduced into
5 evidence and the reasonable inferences that you can draw
6 from the evidence. By reasonable inferences, I mean
7 conclusions which reason and common sense would lead you
8 to draw from the facts that are proven to your
9 satisfaction.

10 Now, there are two types of evidence: There is
11 direct evidence and there is circumstantial evidence.
12 Direct evidence is the testimony of a person who claims to
13 have personal knowledge of the facts about the crime
14 charged, such as an eyewitness. Circumstantial evidence
15 is different. It is the proof of a chain of facts and
16 circumstances which tend to show whether the defendant is
17 guilty or not guilty. There is no distinction between the
18 weight to be given either direct or circumstantial
19 evidence. Both types of evidence are equally acceptable
20 and may be sufficient to establish the elements of a
21 crime, beyond a reasonable doubt.

22 However, to be sufficient to establish guilt,
23 beyond a reasonable doubt, a case based solely on
24 circumstantial evidence must exclude all other rational

1 conclusions consistent with innocence. This means that
2 if, from the circumstantial evidence, it is rational to
3 arrive at two conclusions, one consistent with guilt and
4 one consistent with innocence, then you must choose the
5 rational conclusion consistent with innocence. However,
6 you do not consider each item of circumstantial evidence
7 in isolation. And in determining whether all other
8 rational conclusions have been excluded, you should
9 consider each item of circumstantial evidence in the
10 context of all other evidence, which includes all other
11 circumstantial evidence and direct evidence.

12 Keep in mind that the State is not required to
13 prove each fact or each piece of evidence, beyond a
14 reasonable doubt, nor is it required to rule out every
15 hypothesis except that of guilty. Rather, the State must
16 prove the elements of each crime, beyond a reasonable
17 doubt. And if the case rests on circumstantial evidence,
18 then the State must exclude all rational conclusions
19 consistent with innocence.

20 Now, the rule requiring you to exclude all rational
21 conclusions applies only to circumstantial evidence and
22 not direct evidence. And let me give you an example that
23 will help demonstrate that distinction.

24 We talked about one example in general jury

1 instructions. Let's presume, for the purposes of this
2 example, that it would be unlawful for the defendant to
3 travel by plane; that would be the crime. First, let me
4 give you an example of direct evidence. Witness "A"
5 testifies in court that she was at the gate at the airport
6 and saw the defendant board the plane. Witness "B" comes
7 and testifies that he was at the gate, as well, and saw
8 the defendant, but that the defendant did not board the
9 plane. Each of those witnesses provided direct evidence,
10 and you would have to decide which of those witnesses to
11 believe. You would not be required to select the rational
12 conclusions consistent with innocence, because this is an
13 example of direct evidence. You would then have to
14 consider things like the credibility of each witness. Did
15 one witness leave to go to the bathroom? Did one witness
16 drink coffee and divert attention from the gate? Did one
17 witness have the motivation to lie?

18 Now, let me use the same example and give you an
19 example of circumstantial evidence. Let's say that
20 witness "A" sees the defendant in Dover, New Hampshire, on
21 Monday, and witness "B" sees the defendant in California
22 on Tuesday. No one saw the defendant board the plane.
23 But the only rational conclusion you could draw from that
24 evidence is that the defendant boarded the plane in order

1 to get to California. If witness "B" saw the defendant in
2 California on Tuesday, and the first witness saw the
3 defendant on Monday, or Wednesday, the circumstantial
4 evidence would still lead to the only rational conclusion
5 that the defendant flew on the plane. But if witness "B"
6 saw the defendant in California on Saturday, then a
7 rational conclusion consistent with innocence may exist,
8 and, that is, that the defendant drove to California.
9 Then you would have to consider other circumstances. Was
10 there a car available to the defendant? Is so, how fast
11 could it drive? How many miles is it to his destination?
12 How long would it -- how long would you have to be in the
13 car to get there? Those kinds of things. So hopefully
14 that example gives you some context in which to consider
15 direct and circumstantial evidence.

16 Now, when you review the evidence, you need to
17 consider the quality of the evidence, and not the
18 quantity. It's not the number of witnesses or the
19 quantity of evidence that's important, but, rather, what
20 the witnesses say to you and how persuaded you are by
21 their testimony. So in deciding whether the State has
22 proven a charge -- these charges against the defendant,
23 you must decide the credibility of the witnesses. That
24 means it's up to you to decide whom to believe. If there

1 is a conflict between the witnesses, then you need to
2 resolve that conflict and decide what the truth is.
3 Simply because a witness has taken an oath to tell the
4 truth does not mean you must accept that testimony as
5 true. Obviously, you're going to use your own personal
6 experiences, your common sense, and your good judgment.

7 And let me suggest another -- some other factors
8 that you should consider in weighing credibility: Whether
9 the witness appeared to be candid; whether the witness
10 appeared worthy of belief; the appearance and demeanor of
11 a witness; whether the witness had an interest in the
12 outcome of the case; whether the witness had any reason
13 for not telling the truth; whether what the witness said
14 seemed reasonable or probable; whether what the witness
15 said seemed unreasonable or inconsistent with other
16 evidence in the case or with prior statements by the
17 witness; and whether the witness had any friendship or
18 animosity toward other people in the case. And you should
19 consider these factors when you decide the credibility of
20 all witnesses, whether or not they happen to be ordinary
21 citizens, police officers or expert witnesses.

22 Now, the credibility of a witness who is also a
23 law-enforcement officer or agent is entitled to no greater
24 weight than a civilian witness, and is to be viewed by you

1 using the same standards as you would weigh civilian
2 testimony.

3 When you decide which witnesses to believe and how
4 much of their testimony to believe, you should consider
5 both the direct and cross-examinations of each witness,
6 regardless of who called the witness. It may be that a
7 witness called by one side might have something helpful to
8 say to the other side. You can accept all of what a
9 witness has said; you can reject all of what a witness has
10 said; or you can accept some of it, and reject some of it.
11 It's entirely up to you.

12 And in deciding whether you believe a witness, you
13 may also consider whether the witness made statements
14 before trial which were not consistent with what the
15 witness said at trial. If the witness made an
16 inconsistent statement before trial, you may use that
17 pretrial statement in deciding whether to believe the
18 witness's in-court testimony. You may not use the
19 pretrial statement as proof that the facts in that
20 statement are true. The statement made before trial is
21 only to be used by you as a tool in deciding whether to
22 believe the witness's in-court testimony.

23 Evidence has been introduced regarding statements
24 the defendant offered to explain certain bruising on

1 Kassidy. If you find the defendant intentionally made
2 statements tending to demonstrate his innocence, or to
3 influence a witness, and that the statements are later
4 discovered to be false, then you may consider whether the
5 statements show a consciousness of guilt, and determine
6 what significance, if any, to give to such evidence.

7 Now, you also heard the testimony of certain
8 individuals who are qualified as experts in this case.
9 You are not required to accept an expert's opinion. An
10 expert's opinion, as I just said, is subject to the same
11 rules regarding the reliabilities as I've described for
12 all other witnesses. The opinion was given to you in
13 order to assist you in reaching a decision in the case.
14 It's not controlling on your judgment of the facts. You
15 may reject an expert's opinion if you decide the facts are
16 different from the facts that formed the basis of the
17 expert's opinion. And you may also reject an expert's
18 opinion, if, after careful consideration of all of the
19 evidence in the case, expert and otherwise, you disagree
20 with that opinion.

21 Now, in examining an expert witness, an attorney
22 may ask hypothetical questions. And a hypothetical
23 question is one in which an expert witness is asked to
24 assume that certain facts are true, and to give an opinion

1 based on that assumption. It is for you to decide, from
2 all the evidence, whether or not the facts assumed in the
3 hypothetical have been actually proved. If you do not
4 think the facts assumed in a hypothetical have been
5 proved, then you should disregard the opinion based on
6 those facts. If, however, you think the facts assumed
7 have been established by the evidence, you may consider
8 the opinion and give it the weight you think it deserves.
9 Such an answer is essentially expert opinion, and like all
10 other evidence of this nature, you may accept it, reject
11 it in whole or in part, according to your best judgment.

12 Now, in this case, evidence has been introduced
13 that the defendant made a statement concerning the crime
14 charged. You should carefully examine the circumstances
15 surrounding the statement to decide whether it was made
16 freely and voluntarily. If you decide the defendant gave
17 a statement freely and voluntarily, then you may use the
18 statement together with all of the other evidence in
19 deciding the verdict. For the defendant's statement to be
20 free and voluntary, he must give a statement with an
21 understanding of what he's saying. The statement must be
22 given without fear, threat, coercion, force and without
23 promise or reward. If you find that the statement was not
24 made freely and voluntarily by the defendant, you must not

1 use it as evidence in reaching a verdict.

2 In deciding whether the statement was free and
3 voluntary, you may consider the nature of the full
4 exchange between the police and the defendant, including
5 whether the defendant was warned of his rights, the time
6 and place the statement occurred, the length of time the
7 defendant was questioned, the other people present, the
8 physical and mental condition of the defendant, and all
9 other circumstances surrounding the making of the
10 statement. You may also consider the age, education,
11 experience, character, and intelligence of the defendant.

12 A statement is not involuntary simply because it
13 was the product of interrogation, or was made while the
14 defendant was under arrest, or was made without the
15 defendant's lawyer present, or was made without the
16 defendant being warned that he had a right to remain
17 silent, and that the statement could be used against him.
18 However, you should consider such circumstances in
19 deciding whether the statement, in its entirety, was given
20 free and voluntarily. The burden is on the State to
21 prove, beyond a reasonable doubt, that the alleged
22 statement was voluntary. Unless you are convinced that
23 the State has proven, beyond a reasonable doubt, that the
24 statement was voluntary, you must not consider that

1 statement in deciding a verdict.

2 Now, under our Constitutions, all defendants in
3 criminal cases are presumed to be innocent until proven
4 guilty, beyond a reasonable doubt. And the burden of
5 proving guilt rests entirely with the State. The
6 defendant does not have to prove his innocence. The
7 defendant enters this courtroom an innocent person, and
8 you must consider him to be an innocent person unless and
9 until the State convinces you, beyond a reasonable doubt,
10 that he's guilty of every element of the alleged offense.
11 It is not enough for the State to prove that the defendant
12 is possibly or probably guilty. Rather, the State must
13 prove the defendant's guilt, beyond a reasonable doubt.

14 If, after all the evidence and arguments, you have
15 a reasonable doubt as to whether the defendant has
16 committed any one or more of the elements of an offense
17 charged, then you must find him not guilty as to that
18 offense.

19 And a reasonable doubt is just what the words would
20 ordinarily imply. The use of the word "reasonable" simply
21 means that a doubt must be reasonable, rather than
22 unreasonable. It must be a doubt based upon reason. It
23 is not a frivolous or a fanciful doubt, nor is it one that
24 can be easily explained away. Rather, it is such a doubt

1 based upon reason that remains after consideration of all
2 of the evidence that the State has offered against it.

3 The test you must use is this: If you have a
4 reasonable doubt as to whether the State has proved any
5 one or more of the elements of a crime charged, then you
6 must find the defendant not guilty. However, if you find
7 the State has proved all of the elements of an offense
8 charged, beyond a reasonable doubt, then you should find
9 the defendant guilty as to the offense.

10 Now, the laws of New Hampshire set forth certain
11 crimes. And if something's not defined in the criminal
12 code, then it's not a crime. And each crime has a precise
13 definition. The definition of each crime requires that
14 the State prove both that a defendant committed certain
15 acts, and that he acted with a certain mental state. So
16 each crime has at least two parts, an action and the
17 mental state. In deciding whether a person is guilty of a
18 crime, it will be necessary for you to know both what a
19 person's actions were, and what his mental state was. The
20 words "mental state" refer to what a person mentally
21 believes his physical acts will accomplish. And the word
22 act, of course, refers to a physical deed. For a person
23 to be guilty of a crime, he must have the requisite mental
24 state, and he must have physically acted to do something

1 that is criminal.

2 Now, the matter of determining a person's mental
3 state is something you're going to have to decide in this
4 case. And there's often no direct evidence of mental
5 state, because there's really no way of examining the
6 operation of a person's mind. So you should consider all
7 of the facts and all the circumstances that have been
8 introduced into evidence to decide whether the State has
9 proven the requisite mental state.

10 Now, as you know, there are several charges in this
11 case. And each of the charges against the defendant
12 constitutes a separate offense. You must consider each
13 charge separately and determine whether the State has
14 proven the defendant's guilt, beyond a reasonable doubt,
15 as to each charge. The fact that you may find the
16 defendant guilty or not guilty on one of the charges
17 should not influence your decision with respect to the
18 others. And your verdict with respect to each charge must
19 be unanimous.

20 Now, in this case, the defendant is charged with
21 one count of second-degree murder, one count of
22 first-degree assault, six counts of second-degree assault,
23 one count of simple assault, and one count of endangering
24 the welfare of a child. Remember that the State does not

1 have to prove every fact alleged at trial upon which it
2 relies, but the State must prove each part of the
3 definition, beyond a reasonable doubt.

4 Now, as you may recall, at the beginning of the
5 case, the clerk read to you two counts of first-degree
6 assault. There is now only one count of first-degree
7 assault before you for your consideration. And that is
8 the charge alleging that defendant fractured Cassidy's
9 leg. You must not guess or speculate about why only one
10 charge involving first-degree assault remains. It's
11 simply not relevant to your consideration.

12 Now, let me first define the crime of second-degree
13 murder. The definition of second-degree murder has three
14 parts or elements. The State must prove each part of the
15 definition, beyond a reasonable doubt. The State must
16 prove the following: Number one, that the defendant
17 caused the death of Cassidy Bortner, that is, you must
18 find that the defendant caused injury, which was a direct
19 and substantial factor in bringing about Cassidy's death;
20 number two, that the defendant's actions in bringing about
21 death occurred in New Hampshire. You need not find that
22 the death occurred in New Hampshire, but you must find
23 that the defendant's actions in bringing about death
24 occurred in New Hampshire; number three, that the

1 defendant acted recklessly under circumstances showing an
2 extreme indifference to the value of human life.

3 To prove the defendant acted recklessly, the State
4 must prove, first, that the defendant was aware of a
5 substantial and unjustifiable risk. This means that there
6 must be proof that the defendant knew that there was a
7 substantial risk that his conduct would cause Cassidy's
8 death; second is the defendant was aware of the risk.
9 There must be proof that the defendant consciously
10 disregarded the risk. In other words, the defendant
11 decided to disregard the risk and took a chance in doing
12 certain acts that Cassidy's death would occur. Third, you
13 must examine the circumstances known to the defendant.
14 From what he knew of the circumstances, you must decide
15 whether his disregard of the risk was a gross deviation
16 from what a law-abiding person would have done.

17 The key words here are gross deviation. If you
18 find the defendant's actions were unreasonable or
19 thoughtless, that is not enough. To find the defendant
20 acted recklessly, you must find that his disregard of the
21 risk was a substantial departure from the actions of a
22 law-abiding person under the same circumstances. It is
23 not enough for the State to prove the defendant acted
24 negligently. That means it's not enough for the State to

1 prove the defendant failed to become aware of a risk
2 involved. The State must prove that the defendant was
3 aware of the risk and consciously disregarded it.

4 Now, for a killing to be second-degree murder, the
5 defendant must not simply act recklessly, but, rather,
6 must act recklessly under circumstances showing an extreme
7 indifference to the value of human life. This means
8 something more than merely being aware of and consciously
9 disregarding a substantial and unjustifiable risk. The
10 circumstances must show a blatant disregard for the value
11 of human life. It is not enough if the evidence shows a
12 gross deviation from a law-abiding conduct. The State
13 must prove what may be called a depraved-heart murder.

14 Now, if you find the defendant not guilty of
15 second-degree murder, you may go on to consider whether
16 the defendant is guilty of the lesser-included offense of
17 manslaughter. A lesser-included offense is a similar but
18 less serious crime. However, you may not consider whether
19 the defendant is guilty or not guilty of manslaughter
20 unless you first find him unanimously not guilty of
21 second-degree murder.

22 The definition of manslaughter has three parts or
23 elements. The State must prove each part of the
24 definition, beyond a reasonable doubt. So the State must

1 prove the following: Number one, that the defendant
2 caused the death of Kassidy Bortner. And as I said, that
3 means you must find the defendant caused injury, which was
4 a direct and substantial factor in bringing about
5 Kassidy's death; number two, that the defendant's actions
6 in bringing about the death occurred in New Hampshire.
7 Again, you need not find the death occurred in New
8 Hampshire, but you must find the defendant's action in
9 bringing about the death occurred in New Hampshire. And,
10 number two, [sic] that the defendant acted recklessly, as
11 I've already defined that term for you.

12 Now, the difference between second-degree murder
13 and manslaughter is that to prove second-degree murder,
14 the State must prove the defendant caused Kassidy's death
15 recklessly, under circumstances manifesting an extreme
16 indifference to the value of human life. However, to
17 prove manslaughter, the State must prove the defendant
18 caused Kassidy's death recklessly. Proof of manslaughter
19 does not require proof of extreme indifference to the
20 value of human life. And that's the difference between
21 those two charges.

22 Let me now define the crime of first-degree
23 assault. As I just explained, only one charge alleging
24 the defendant fractured Kassidy's leg remains for your

1 consideration. The definition of the crime has four parts
2 or elements. So the State must prove the following,
3 beyond a reasonable doubt: Number one, that the defendant
4 acted recklessly, as I've just defined that term; number
5 two, that the defendant caused serious bodily injury to
6 Kassidy Bortner by fracturing Kassidy's leg. Serious
7 bodily injury means any harm to the body which causes
8 severe, permanent, protracted loss of or impairment to the
9 health or function of any part of the body; number three,
10 that the defendant's conduct causing serious bodily injury
11 occurred in New Hampshire; number four, that Kassidy was
12 under the age of thirteen years old.

13 Let me now define the crime of second-degree
14 assault. As you may recall, the defendant is charged with
15 six counts of second-degree assault, each alleging the
16 same conduct, that is, squeezing Kassidy's face. One
17 charge alleges an assault occurred in September. Four
18 charges allege that an assault occurred once a week in
19 October. And one charge alleges an assault occurred in
20 November. Each charge alleges a separate crime, and you
21 must consider each charge separately and return a
22 unanimous verdict as to each indictment.

23 Now, the definition of second-degree assault has
24 four parts or elements. Thus, the State must prove the

1 following, beyond a reasonable doubt: Number one, that
2 the defendant acted knowingly. To prove the defendant
3 acted knowingly, the State must prove that the defendant
4 was aware his conduct would cause bodily injury. The
5 State does not have to prove the defendant specifically
6 intended to commit the crime, or that he had a desire to
7 do so. What the State must prove is that the defendant
8 was aware his conduct would cause bodily injury; number
9 two, that the defendant caused bodily injury to Kassidy
10 Bortner. Bodily injury means harm to the body of another
11 person; number three, that the defendant's conduct causing
12 bodily injury occurred in New Hampshire; and, number four,
13 that Kassidy was under the age of thirteen years at the
14 time of the offense. Again, you must consider these six
15 charges separately and reach a unanimous verdict as to
16 each one of those charges.

17 Let me now define the crime of endangering the
18 welfare of a child. The definition of the crime has four
19 parts or elements; thus, the State must prove the
20 following, beyond a reasonable doubt: Number one, that
21 the defendant acted knowingly, as I've just defined that
22 term; number two, that the defendant endangered the
23 welfare of Kassidy; number three, that Kassidy was under
24 the age of eighteen years at the time; and, number four,

1 that the defendant endangered Cassidy's welfare by
2 purposely violating a duty of care he owed to Cassidy, to
3 provide her care and supervision.

4 Let me now define the crime of simple assault. The
5 definition of the crime of simple assault has two parts.
6 The State must prove each part of the definition, beyond a
7 reasonable doubt. Thus, the State must prove: Number
8 one, that the defendant acted knowingly, as I've just
9 defined that term; and, number two, that the defendant
10 caused unprivileged physical contact to Amanda Bortner.

11 And I'm going to remind you now that I've defined
12 10 charges for you, and I'm going to remind you that you
13 need to consider each of the 10 charges separately, and
14 reach a unanimous verdict as to each charge.

15 Ladies and gentlemen, obviously this case is very
16 important to both the State and the defendant. And in
17 your deliberations you should follow the instructions that
18 I've just given you. And you need to decide this case,
19 not out of bias or sympathy, but with honesty and
20 understanding. And you should make a conscientious effort
21 to determine what a fair and just result is in this case,
22 because that is your highest obligation as officers of
23 this court. Your verdict needs to represent the
24 considered judgment of each and every juror. That means

1 your verdict must be unanimous. And it is your duty, as
2 jurors, to consult with one another with a view toward
3 reaching an agreement, if you can do so, without violence
4 to your individual judgment. Each of you has to decide
5 the case for yourself, obviously, but do so only after
6 impartial consideration of all of the evidence with your
7 fellow jurors. And in the course of your deliberations,
8 don't hesitate to re-examine your views and change your
9 mind if you think you're wrong. But don't surrender your
10 honest conviction as to the weight of the evidence simply
11 because of the opinion of your fellow jurors, or simply
12 for the purpose of returning a verdict.

13 Could I see counsel, please.

14 [The following is a discussion at the bench].

15 THE COURT: Okay. Other than the general
16 objections we talked about, is there anything else you
17 need on that particular ---

18 MR. CRONHEIM: If we can just incorporate their
19 objections previously stated.

20 THE COURT: Okay. All right. I'll pick them at
21 random. And then I'm going to tell them now that they can
22 continue deliberating all day, but that I have to be
23 elsewhere. If they come up with a question, they need to
24 stop deliberating.

1 MR. CRONHEIM: I'm not comfortable with that.

2 THE COURT: Okay.

3 MR. CRONHEIM: Because I think that they would
4 continue to deliberate ---

5 MR. DELKER: With or without a question.

6 THE COURT: Okay. So what do you want me to do,
7 just let them go home when I leave?

8 MR. CRONHEIM: No, I think just let them
9 deliberate, and if they have a question ---

10 THE COURT: Okay.

11 MR. CRONHEIM: -- then stop and then let them ---

12 THE COURT: Okay. Great.

13 MR. DELKER: Thanks.

14 THE COURT: Makes sense.

15 [End bench conference].

16 THE COURT: All right, ladies and gentlemen, what
17 I'm going to do at this time is select three alternates at
18 random from -- I have your names and numbers in this cup.
19 And then after that, I'll give some final instructions to
20 the rest of the panel. When I call your name as an
21 alternate, just remain seated until we've finished with
22 the complete instruction. And before I do that, I know
23 that some of you may be hoping you're an alternate, some
24 of you may be hoping that you're not an alternate. And I

1 just want you all to know that it has been obvious to all
2 of us that each and every one of you has paid incredible,
3 careful attention to this case, and you've given it the
4 attention that we all expected you to, and that you know
5 it deserves. And if you're disappointed when you're
6 selected as an alternate, then I can understand that. If
7 you're relieved, I can understand that, as well. But I
8 want you to know that each and every one of you is
9 important to this process. It was a long trial. I've had
10 three-or-four day trials, and we've gone through three
11 jurors and had to declare a mistrial. So each and every
12 one of you made it possible for us to complete this case.

13 When I pick the alternates' names, I'm going to ask
14 the alternates to leave their name and number with the
15 bailiff. You're welcome to stay and have your lunch
16 before you leave. And you should leave your name and
17 number with the bailiff, because sometimes problems occur
18 during deliberations, that there's suddenly a death in
19 someone's family, we may need to replace one of the jurors
20 with an alternate, so it will be very important for the
21 alternates to continue to follow my instructions about not
22 reading about the case, not discussing it, and until
23 you've learned that there's been a final verdict. Then
24 you can talk about it with your family members.

1 So I wanted to thank you in advance for your
2 service. And I will pick three alternates at random.
3 Juror number six, Timothy Sprague. You'll be alternate
4 number one. Juror number nine, Jane Taylor. You'll be
5 alternate number two. Juror number 10, Robert Ruel.
6 Where's juror number 10. Okay. You will be alternate
7 number three. Okay, I did that right. If you want to
8 stay and have your lunch, please feel free to do that.
9 Again, thank you, very much for your service. If you also
10 want to wait for a few moments until I'm finished, I'll
11 just come out and personally thank you for serving on this
12 case. So why don't you remain here for a moment while I
13 finish up with my instructions.

14 For the rest of the jurors, I'm going to allow you
15 to elect your foreperson. I'm not going to pick the
16 foreperson. Sometimes when I pick someone, they don't
17 want to be the foreperson, so I don't want to put anyone
18 on the spot. Also, it helps you get your deliberations
19 started by having an election of a foreperson. It sort of
20 breaks the ice.

21 You will have as much time as you need to
22 deliberate on this case. I don't want you to think you
23 have to rush through. There's a lot that's been given to
24 you. And you will have whatever time it takes to reach a

1 verdict in this case. When you do reach a verdict, let me
2 explain what the process will be. You will tell the
3 bailiff that you've reached a verdict. Do not tell the
4 bailiff what the verdicts are. You will have copies of
5 the indictments in the deliberation room with you, so that
6 you can keep track of what your verdicts are. You will
7 come back into the open courtroom, and the clerk will be
8 here, and the foreperson will stand, the defendant will
9 stand, and the clerk will ask the foreperson on each
10 charge whether the jury has reached a verdict, and the
11 foreperson will announce each of those verdicts in
12 response to the clerk's questions in the open court.

13 During your deliberations, the job of the
14 foreperson is basically to act as the chairperson of the
15 jury. Make sure that people are listening to each other.
16 Make sure that people have an opportunity to express their
17 views. Make sure everyone has a chance to see all of the
18 exhibits that they need to see. And other than that, you
19 can design your deliberations in any manner that you think
20 is appropriate.

21 If a question comes up during deliberation, then
22 the foreperson should write the question down on a piece
23 of paper, date it, time it, and sign it, and give it to
24 the bailiff. And the bailiff will give it to me and I

1 will get together with the lawyers to answer the question
2 for you. Sometimes it takes us some time, if we don't all
3 agree on what the answer ought to be. And we'll try to
4 get it back to you as soon as we possibly can. But
5 remember that we cannot answer questions about the facts.
6 We can only answer most questions about the law. You will
7 also have a copy of my written instructions to take back
8 with you in the deliberation room to help you with your
9 deliberations.

10 I think that's about it. You'll have your lunches
11 in the deliberation room with you. The alternates will
12 eat elsewhere. And you can begin your deliberations while
13 you're eating, if you want to, or as soon as you finish
14 your lunch.

15 I need to leave you with one last -- sometimes I
16 call it my plea, but I want you to know, and I'm sure you
17 all know how very important it is for each and every one
18 of you to express whatever thought, or idea, or question
19 you have in the jury room. I don't want anyone to leave
20 this case and go home and say I wish I had raised this
21 issue, or I was afraid to raise this issue because I
22 didn't know how anyone would respond. This is an
23 important case, and there is no question, or concern or
24 thought that is -- that is unimportant for you to raise.

1 And you'll sleep better at night if you know that you
2 raise everything, and everybody else will, as well. So
3 please be free and open, and don't hesitate to talk about
4 what you're thinking in this case. You finally have a
5 chance to do it after me telling you not to talk about the
6 case for so long.

7 So at this time, I'm going to excuse the jury and
8 wish you good luck. And in a few minutes you'll have the
9 exhibits, and the jury instructions and copies of the
10 indictments.

11 Anything further from counsel before we excuse the
12 jury?

13 MR. CRONHEIM: No, your Honor.

14 MR. DELKER: No, your Honor.

15 THE COURT: Okay. All right.

16 THE BAILIFF: All rise, please.

17 [Jury excused to deliberate at 12:59:43 P.M.].

18 [Jury question heard before Judge Mohl in chambers at
19 3:22:19].

20 THE COURT: All set?

21 THE MONITOR: Yup.

22 THE COURT: This is a question from the jury which
23 came at 2:37. It's now 3:21. Judge Nadeau is in
24 someplace that I'm not aware of, had an engagement this

1 afternoon she could not break, and agreed that I would
2 cover the questions, to meet with counsel and determine
3 whether an answer should be provided or whether it should
4 be deferred until her return. The question -- I won't
5 read the question, we have a record of it, related to
6 00-S-934, endangering the welfare of a child. And after
7 some discussion about the question off the record, it
8 was -- there is not agreement as to the answer, and as I
9 understand the process, Judge Nadeau indicated that if
10 either side was uncomfortable pursuing the answer to the
11 question, that that matter would be deferred until her
12 return tomorrow. And I'm certainly happy to do that. It
13 was agreed that we would provide a response to the jury,
14 which states as follows: "We will provide you with a
15 response to your question in the morning. If you wish to
16 recess for the day and resume tomorrow at nine A.M., you
17 may do so. Please indicate your intentions to the
18 bailiff." Is that acceptable?

19 MR. DELKER: Yes, it is.

20 MR. CRONHEIM: It is.

21 THE COURT: Okay. Great. That's going in at 3:24.
22 And what I'll do is simply attach that to their question,
23 or a copy of their question, so they can remember what
24 they asked. Thank you.

1 [End chambers conference].

2 [End proceedings of 12/18/01].

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CERTIFICATE

I Carol A. Perry, do hereby certify that the foregoing is a true and accurate transcript of recorded cassette tape(s) made of this hearing.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties in the action to which this hearing was taken, and further that I am not a relative or employee of any attorney or counsel employed in this case nor am I financially interested in this action.

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