

Friday, May 23, 1997 (afternoon)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 96-CR-68
UNITED STATES OF AMERICA,
Plaintiff,
vs.
TIMOTHY JAMES McVEIGH,
Defendant.

REPORTER'S TRANSCRIPT

(Trial to Jury - Volume 112)

Proceedings before the HONORABLE RICHARD P. MATSCH,
Judge, United States District Court for the District of
Colorado, commencing at 1:42 p.m., on the 23d day of May, 1997,
in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription
Produced via Computer by Paul Zuckerman, 1929 Stout Street,
P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK M. RYAN, United States Attorney for the
Western District of Oklahoma, 210 West Park Avenue, Suite 400,
Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

JOSEPH H. HARTZLER,, LARRY A. MACKEY, BETH WILKINSON,
SCOTT MENDELOFF, JAMIE ORENSTEIN, AITAN GOELMAN, and VICKI
BEHENNA, Special Attorneys to the U.S. Attorney General, 1961
Stout Street, Suite 1200, Denver, Colorado, 80294, appearing
for the plaintiff.

STEPHEN JONES, ROBERT NIGH, JR., MICHAEL ROBERTS,
AMBER McLAUGHLIN, and ROBERT WARREN, Attorneys at Law, Jones,
Wyatt & Roberts, 999 18th Street, Suite 2460, Denver, Colorado,
80202; JERALYN MERRITT, 303 East 17th Avenue, Suite 400,
Denver, Colorado, 80203; CHERYL A. RAMSEY, Attorney at Law,
Szlichta and Ramsey, 8 Main Place, Post Office Box 1206,
Stillwater, Oklahoma, 74076, and CHRISTOPHER L. TRITICO,
Attorney at Law, Essmyer, Tritico & Clary, 4300 Scotland,
Houston, Texas, 77007, appearing for Defendant McVeigh.

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PROCEEDINGS

(In open court at 1:42 p.m.)

THE COURT: Be seated, please.

(Jury in at 1:42 p.m.)

THE COURT: Next witness, please.

MR. JONES: FBI Special Agent Stuart Doyle, your

Honor.

(Stuart Doyle affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Stuart Doyle, D-O-Y-L-E.

THE COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MR. JONES:

Q. Mr. Doyle, where are you employed?

A. I'm a special agent with the FBI.

Q. And were you so employed after the Oklahoma City bombing, say from April to October, November, of 1995?

A. I was.

Q. When did you first become involved in the Oklahoma City bombing?

A. I believe I was detailed out to Junction City on the 22d.

Q. And by Junction City, you mean Junction City, Kansas?

A. Yes, sir.

Q. All right. I want to ask you about May 1, 1995.

Mr. Doyle, did you have occasion on that day to interview Glynn Tipton at his place of employment, VP Racing Fuel, in Manhattan, Kansas?

A. Yes, sir.

Q. And did you call ahead and tell Mr. Tipton you were coming

Stuart Doyle - Direct

or did you just show up?

A. I don't recall calling him. I just recall going to his business.

Q. When you got to VP Racing Fuel, you introduced yourself as a special agent of the FBI investigating the Oklahoma City bombing?

A. Correct.

Q. And the bombing had occurred, what, 12 days before?

A. Roughly, yes.

Q. And the reason that you had gone to see Mr. Tipton was to follow through on a telephone call that was reflected in some debit phone call records.

A. Yes. Credit card call.

Q. Credit card or debit card?

A. I recall them as credit card calls.

Q. Spotlight debit card or Spotlight credit card, does that ring a bell?

A. I don't recall a name.

Q. All right. Now, do you remember the date of the call that you were making inquiry about?

A. I believe it was the -- October 7 of '94.

Q. That would be over six months prior to your visit?

A. Yes.

Q. Now, do you recall whether you were questioning him about one call or was there more than one call?

Stuart Doyle - Direct

A. I believe it was just one call.

Q. Okay. Now, when you saw Mr. Tipton, did you provide any information to him other than the date and the time and perhaps the duration of the call?

A. No.

Q. Did you tell him where the call originated?

A. I don't know if I knew where the call had originated from.

Q. All right. So you didn't tell him?

A. No.

Q. Okay. Now, while you were talking with Mr. Tipton on that day, did he advise you of an encounter with an individual that he described as having the name John in October of 1994 at the Sears drag race in Topeka?

A. Yes, he did.

Q. And did he relate to you that he had met this person on one occasion?

A. Yes.

Q. Did he discuss with you any unusual features of the voice of this person?

A. The voice?

Q. Yes. The voice of the person that he met, this John?

A. I don't recall him saying anybody's voice.

Q. Did he discuss with you any unusual features of the voice of the person that had called from Arizona?

A. I don't recall him saying that the person was from Arizona,

Stuart Doyle - Direct

but I don't think he said anything unusual about that voice, either.

Q. All right. So there was nothing unusual about the voice either of the person that called or the person named John?

A. That I recall.

Q. All right. Now, did you receive any information from Mr. Tipton that the October 7, 1994 caller to VP Racing Fuel advised him where he was coming from or calling from?

A. No.

Q. Do you understand my question? I'm asking you -- I want to be sure you understand. Did Mr. Tipton tell you where this person calling was calling from?

A. No, he didn't tell me that.

Q. All right. Now, on May 1, 1995, did Mr. Tipton provide you with a physical description of this individual who gave the name John whom he had encountered at the Sears racetrack in early October 1994?

A. He did.

Q. And what did he advise you that this individual's height was?

A. Well, he gave me various heights during the interview.

Q. And what was the first height he gave you?

A. 5' 8" to 5' 10".

Q. All right. And then did he change it to 5' 10" to 6 feet?

A. He said my height, 6-foot.

Stuart Doyle - Direct

Q. All right. Now, did you ask Mr. Tipton to view two photographs and tell you whether either depicted the individual who had described himself as John that he had encountered on October 1, 1994, at the Sears track?

A. Yes.

Q. And one of the two pictures you displayed to Mr. Tipton was Mr. McVeigh?

A. Yes.

Q. And who was in the other one?

A. Mr. Nichols.

Q. So just those two?

A. Yes.

Q. And you showed these two photographs to Mr. Tipton at that time and asked him if he could identify either of the subjects pictured in them?

A. I asked him, if I may --

Q. Sure.

A. -- if he recalled the subject known as John, if either of these two pictures resembled that person.

Q. Now, did you advise Mr. Tipton that the person he knew as John might or might not be in the photos he was looking at?

A. Yes.

Q. Mr. Doyle, let me ask you first, are you positive that you told him that the person that he knew -- that you told him the person he knew as John might or might not be in the photos he

Stuart Doyle - Direct

was looking at?

A. I don't recall putting it that way, Mr. Jones.

Q. All right, sir. Tell me how you recall putting it.

A. I told him to think back to that weekend that we were talking about, August (sic) 1 of '94, and to recall the features of the subject named John that he had -- had a conversation with.

Q. Now, did you ask Mr. Tipton if he had seen any television or other media coverage of the persons arrested for the Oklahoma City bombing?

A. I don't recall talking about that.

Q. And did you ask Mr. Tipton to disregard any television or other media coverage that he had seen or heard or read of the persons arrested for the Oklahoma City bombing?

A. I don't recall giving him that admonition.

Q. Now, the two photographs that you showed him, you knew at that time that those were the persons that were suspected of being involved in the crime and had been taken into custody, didn't you?

A. Yes, I did.

Q. All right. Did you ever advise Mr. Tipton in making a selection from the photos that he should rely only on his independent memory of the events of October 1, 1994, and block out any other information he had subsequently seen, heard, or read?

Stuart Doyle - Direct

A. I don't believe I used those words, no.

Q. Now, when you showed Mr. McVeigh's picture, what did he say to you?

A. He said that they -- John and Mr. McVeigh both had slender features in the face and that he couldn't be sure that McVeigh was John, but they resembled each other.

Q. All right. So he made no positive identification at that time?

A. Correct.

Q. And in fact, he didn't tell you that he was 90 percent certain that John was Mr. McVeigh, did he?

A. No. I didn't ask him for a percentage.

MR. JONES: All right, sir. Nothing further. Thank you, sir.

THE COURT: Any questions?

MR. GOELMAN: Yes, your Honor.

CROSS-EXAMINATION

BY MR. GOELMAN:

Q. Good afternoon, Mr. Doyle.

A. Good afternoon.

Q. I just want to clarify something. I think you might -- when answering one of Mr. Jones' questions, referred to a weekend of August 1, 1994, when describing what Mr. Tipton said about the Sears Craftsman drag race. Was that the weekend that he indicated? What was the date that his encounter with John

Stuart Doyle - Cross

took place according to Mr. Tipton?

A. I thought it was in September. September 30, October 1, that weekend.

Q. Okay.

A. '94.

Q. It's not August, in any case?

A. No. If I said that, I was incorrect.

Q. You described that Mr. Tipton initially gave a different height than the height that he ended up with.

A. Yes.

Q. Can you -- do you remember how that happened?

A. Mr. Tipton said he was at his exhibit, VP Racing, at the drag race and he was on a different height angle than when John approached him. As we talked through the interview, he remembered that, and we then calculated that the height would be about my height.

Q. Do you remember if he explained why he was on a different height level?

A. He -- he said he was either on the back of a truck or not on the same level, I'll put it that way, as the subject named John.

Q. In responding to Mr. Jones' questions, Mr. Doyle, you said that Mr. Tipton indicated -- or that when you showed up and

started interviewing Mr. Tipton, you indicated you wanted to talk to him about some credit card phone calls; is that right?

Stuart Doyle - Cross

A. That's what I told him, yes.

Q. And you might have told him the time of the call, the date, and possibly the duration?

A. Possibly, yes.

Q. Did you tell him who you thought might have made that phone call?

A. No.

Q. Did you tell him where that call was from?

A. No.

Q. Did you tell him what you thought that call might have been about?

A. No.

Q. Did you know what that call was about?

A. No. That's why I was there.

Q. At that point in the investigation, had you heard mention of racing fuel in connection with this investigation?

A. No, sir.

Q. Had you heard mention of rocket fuel in connection with this investigation?

A. No, sir.

Q. Had you heard mention of anhydrous hydrazine in connection with this investigation?

A. No, sir.

Q. Had you heard mention of nitromethane in connection with the OKBOMB investigation?

Stuart Doyle - Cross

A. No, sir.

Q. Had you ever heard of anyone named Gregory Pfaff?

A. Who?

Q. Gregory Pfaff.

A. No.

Q. What about David Darlak?

A. No, sir.

Q. Had you ever heard of a gentleman named Tim Chambers?

A. No, sir.

Q. Had you ever heard of someone named Linda Jewell?

A. No, sir.

Q. Did Mr. Tipton -- Mr. Jones asked you whether it was Mr. Tipton was describing something that took place six months earlier.

A. Yes.

Q. Did Mr. Tipton give you any reasons that he recalled the encounter with John?

A. Yes. He gave me several reasons.

Q. And what were they?

A. First of all, when John approached him, Mr. Tipton did not know him or had seen him -- not seen him around the drag-race

circuit before, and that's basically what Tipton's business is providing fuel to dragsters and hot-rod owners.

Second of all, after the encounter, he was asked by John to check on the price for anhydrous hydrazine. He called

Stuart Doyle - Cross

his supplier.

Q. Before that encounter, had Mr. Tipton ever heard of anhydrous hydrazine?

A. I'm not for sure. He may have heard of it, but he did not supply it that I know of.

Q. Agent Doyle, when you went out to see Mr. Tipton on May 1, 1995, did you have with you a photo spread showing a lot of different subjects?

A. No.

Q. What did you have with you?

A. I had two photos, one of McVeigh and one of Nichols.

Q. Why didn't you bring a photo spread on that occasion?

A. I didn't plan on showing the photo spread to Tipton.

Q. Were you expecting to find someone who actually might have had contact with a suspect in this case?

A. No. Not really.

Q. How many of these phone leads had you run down before you went out to VP Racing?

A. Twelve, fifteen.

Q. And how many of those previous phone leads had resulted in you talking to someone who might have actually seen someone involved in the bombing?

A. None.

Q. So you had two pictures with you, one of Tim McVeigh and one of Terry Nichols?

Stuart Doyle - Cross

A. Yes.

Q. Did you show Mr. Tipton the picture of Terry Nichols?

A. Yes.

Q. And what was his reaction?

A. He said that wasn't the subject known as John.

Q. And you showed Mr. Tipton the photo of Tim McVeigh?

A. Yes.

Q. What was his reaction to that picture?

A. As I stated earlier, he said he could not be sure, but both of them had slender faces, and he couldn't be sure that John was McVeigh.

Q. What was your response after Mr. Tipton said that he resembled John, but he couldn't be sure?

A. I thanked him for his time and left.

Q. Did you tell him that he was right?

A. No.

MR. GOELMAN: One moment, your Honor.

THE COURT: Yes.

MR. GOELMAN: Your Honor, may I approach the clerk and get an exhibit that's already been admitted into evidence?

you an exhibit that's already been admitted into evidence.

THE COURT: Yes. You can just ask for it.

MR. GOELMAN: 52. Government Exhibit 52.

May I publish, your Honor?

THE COURT: Yes.

BY MR. GOELMAN:

Stuart Doyle - Cross

Q. Mr. Doyle, I'm going to ask you to look down at your screen you'll see popping up there in one second. This has already been admitted into evidence as Government Exhibit 52. Is that the picture of the defendant that you showed Mr. Tipton on May 1, 1995?

A. No, it's not.

Q. Was the picture of the defendant that you showed Mr. Tipton -- in that picture, did the defendant have any facial hair?

A. No, he did not.

Q. He was clean-shaven?

A. Yes, sir.

Q. And at that time in the investigation, had you ever seen a picture of the defendant with facial hair?

A. No.

Q. Had you ever heard a description of the defendant having facial hair?

A. I don't believe so.

MR. GOELMAN: One moment, your Honor.

BY MR. GOELMAN:

Q. And when Mr. Tipton gave his description to you, did it include the fact that John had facial hair?

A. What he said was that he thought the subject had a two- to three-day growth of whiskers.

MR. GOELMAN: Nothing further, your Honor.

Stuart Doyle - Cross

THE COURT: Anything else of this witness?

MR. JONES: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. JONES:

Q. Mr. Doyle, when you went out to see Mr. Tipton, Mr. -- and Mr. Goelman asked you a series of names and Mr. Tipton's name was a stranger to you, you were going to see him because of a phone call that showed up on a list; is that correct?

A. Yeah. I -- we went out on VP Racing.

Q. Right. And so you were actually just going out to see VP Racing and then interviewed Mr. Tipton?

A. Correct.

Q. So Mr. Tipton some ten, twelve days after Mr. McVeigh's arrest had not called the FBI and you were responding to that call, had he?

A. I was responding to the credit card call, not to him calling us.

Q. And you had no information that he had contacted the FBI

about this John after April 21, did you?

A. No, I did not.

Q. Now, one other question. There wasn't anything that prevented you from having Mr. Tipton come in to an FBI office and look at a photo spread, was there?

A. I guess not, no.

MR. JONES: All right. That's all. Thank you.

MR. GOELMAN: No questions, your Honor.

THE COURT: All right. Are you excusing Mr. Doyle?

MR. JONES: Your Honor, we don't need him the rest of the day, but we would need him later if he could remain under call.

THE COURT: All right. You'll remain under call, please.

Next, please.

MS. MERRITT: Dr. Gary Wells.

THE COURT: All right.

(Gary Wells affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

THE WITNESS: Thank you.

THE COURTROOM DEPUTY: State your full name for the record and spell your last name.

THE WITNESS: Gary L. Wells, W-E-L-L-S.

THE COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MS. MERRITT:

Q. Dr. Wells, where do you live?

A. I live in Ames, Iowa.

Q. And what's your occupation?

A. I'm a professor of psychology at Iowa State University.

Q. And how long have you been a professor?

A. I've been a professor since 1977.

Gary Wells - Direct

Q. Have you held any other positions at the university?

A. I was chair of the psychology department. I've also been a visiting professor at other universities.

Q. Have you served on any editorial boards?

A. I've served on editorial boards of numerous scientific journals in psychology such as the Journal of Applied=20 Psychology; Law and Human Behavior; Psychology, Public Policy=20 and Law, and other -- other such journals.

Q. Do you belong to any professional organizations?

A. Yes. I'm a member and a fellow of the American Psychological Association, of the American Psychological Society, of the Society of Experimental Social Psychologists. I'm a member of the American Psychology Law Society.

Q. What's your educational background?

A. I have a bachelor's degree in psychology from Kansas State

University and a Ph.D. in psychology from Ohio State University.

Q. Okay. Can you tell us what your position at Iowa State entails.

A. It entails research. It entails teaching at both the undergraduate and graduate level, and also professional service.

Q. What do you mean by professional service?

A. Well, professional service is serving on committees or with -- within the university or in other kinds of capacities

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where you're using your professional expertise or knowledge to -- in some kind of beneficial way to the community or to society.

Q. Do you have a specialty -- an area of specialty in your research?

A. My specialty is -- is human memory; and as a part of that, social influence, the way people influence other people as well as the way people make decisions.

Q. Do you have a subspecialty within that area?

A. The subspecialty -- yes. My subspecialty is eyewitness identification of criminal suspects from lineups and photo spreads with particular emphasis on the procedures that are used with lineups and photo spreads.

Q. And what do you mean by the study of eyewitness identification?

A. Well, it's the study of how people -- of the ability of people to recognize others that they have seen before, recognize them from photographs or recognize them from live-lineup-type situations.

Q. And what's the primary emphasis of your research in eyewitness identification?

A. Primary emphasis is on the procedures that are used in obtaining such identifications from people.

Q. How do you study this?

A. Well, the principal way in which we study it -- I'll say

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"we" because there's always a team when -- when I'm doing this research. I have graduate students or other kinds of paid assistants who are assisting -- but is to stage crimes or -- or sometimes we'll present things on video to people and then subsequently, we ask them questions about it. We ask them to describe the -- the thief if we -- if we staged a crime. And then we might follow that up with lineups or -- or photo spreads and -- and then look at the pattern of -- of responding by these people.

Q. Okay. Why do you do this?

A. Well, we do this in order to study the -- the accuracy of eyewitness identification under various conditions; and because we have created the event ourselves, we know exactly what happened so there's never any question about, for example, who the culprit is since the culprit was one of our people or there's never any question about what was said or who did what because we created that -- those events in the first place.

Q. And what do you learn from this?

Q. AND WHAT DO YOU LEARN FROM THIS:

A. Well, we learn how, for example, we can vary the procedures by which people are asked questions or by which lineups or photo spreads are constructed or conducted and see if those procedures affect the accuracy of the eyewitnesses.

Q. Have you been doing this kind of research long?

A. Yes. Over -- over 20 years.

Q. How many eyewitnesses would you say you've tested with

Gary Wells - Direct

these staged events?

A. It would be some -- something over 10,000 all together, over that period of time.

Q. And how many studies would you say you've personally been involved in?

A. The number of separate studies would probably be around 60.

Q. Is that a lot?

A. Well, it's more than probably anyone else has ever done, but I think it's a lot -- I mean, I guess it's -- it would be a lot if you consider that it takes about four and a half months from the time that you first design a study -- start designing a study until the time in which you can actually run it completely and then in the end analyze and interpret the data. About four and a half months per study.

Q. Is your research funded by any government sources?

A. Yes. It's -- it's funded by a federal source, the National Science Foundation.

Q. Have you published any books in this area of research?

A. Two books.

Q. And what are they?

A. One is titled Eyewitness Identification: Psychological=20 Perspectives. The other is titled Eye -- Eyewitness=20 Identifi -- the first one is titled actually Eyewitness=20 Testimony: Psychological Perspectives. The second one was titled Eyewitness Identification: A System Handbook.

Gary Wells - Direct

Q. Have you --

A. There's a colon between those -- in those titles.

Q. Okay. Have you published any scientific articles or book chapters in this area of research?

A. Yes. Many. I've -- I've published, I suppose, about 20 chapters on eyewitness identification in scholarly texts and probably 45 to 50 articles in scientific journals on eyewitness identification.

Q. Does your work have to be reviewed by anyone before it's published?

A. In the scientific journals, there is a very strict review system that -- where the manuscript that you submit is -- you have to describe the methods and the results and the conclusions, so on, in great detail. That's submitted to experts around the country who pass judgment on whether it meets the certain standards for making these kinds of

conclusions. And then if it -- if it doesn't, it's rejected; and if it meets those standards according to these reviewers or experts, then it's accepted for publication.

Q. And in addition to your own research, are you familiar with the research of other eyewitness experts?

A. Yes. Quite familiar.

Q. And how are you familiar with that?

A. Well, it's something that I, of course, keep up with because it's my major field, but it's also -- also, I review

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for -- I serve as a reviewer and on the editorial boards of major journals; so when people submit their manuscripts or submit their work for review, then I see it. Also, pretty much every year since 1978, I've written some kind of review article or review chapter that looks at where -- you know, what -- what the current knowledge is, where we're at with regard to our knowledge about eyewitness identification.

Q. How much of the research of others in eyewitness identification would you say you're familiar with?

A. I'd say I'm familiar with virtually all of the published work on eyewitness identification and even quite a bit of the work that's not published.

Q. Have there been any studies published on the extent of agreement among eyewitness researchers on the principles of eyewitness identification?

MR. MENDELOFF: Objection, your Honor. That's awfully broad.

THE COURT: Yes. I don't understand the question.

BY MS. MERRITT:

Q. Okay. Well, let me try and rephrase it then. Do -- in your experience, do eyewitness researchers tend to agree with each other on the basic core principles of eyewitness identification?

A. Yes.

Q. And are you aware of any studies that show that?

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MR. MENDELOFF: Objection as to which --

THE COURT: Studies that show agreement among experts?

THE WITNESS: Yes. There is a study that was done that shows that eyewitness re --

MR. MENDELOFF: Judge, I object to the --

THE COURT: Sustained.

MS. MERRITT: Okay.

BY MS. MERRITT:

Q. Has the United States Department of Justice sought your opinion on matters related to eyewitness identification?

A. Yes, they have.

Q. Okay. And when was that?

A. Well, in January of this year, I was invited to Washington by people in the Department of Justice to discuss a report that

was issued by -- that was issued by the National Institute of Justice, and at that meeting were also police, attorneys, and judges from across the country.

Q. What study was this?

A. This was a study commissioned by the National Institute of Justice. The title of it is "Convicted by Juries, Exonerated by Science."

Q. And what was the subject matter of the study? What was it about?

A. It was about cases where people had been wrongfully convicted of serious crimes; innocent people had been convicted

Gary Wells - Direct

of serious crimes.

Q. How did they know these people were innocent?

MR. MENDELOFF: Objection, your Honor, as to how they knew they were innocent.

THE COURT: Sustained.

MS. MERRITT: Okay.

BY MS. MERRITT:

Q. Do you know how their innocence was later proven?

MR. MENDELOFF: Objection, Judge. This calls for hearsay.

THE COURT: Overruled.

THE WITNESS: It was proven with DNA evidence.

BY MS. MERRITT:

Q. What did the study show?

A. Well, it showed that of the -- of the 28 cases that they looked at in which innocent people were convicted and then proven -- and served time and then were proven later innocent on DNA, that in 24 of those 28 cases, eyewitness identification evidence was the primary evidence that led to their conviction.

Q. Were -- how many other eyewitness researchers were invited to this conference by the Department of Justice?

A. Just myself.

Q. Now, have you ever testified in court as an expert on eyewitness identification?

A. Yes, I have.

Gary Wells - Direct

Q. How many times?

THE COURT: That's irrelevant.

MS. MERRITT: Okay.

BY MS. MERRITT:

Q. Would you say that court testimony is a large or small part of your professional activities?

A. Very small.

Q. Why is that?

MR. MENDELOFF: Objection.

THE COURT: Overruled.

THE WITNESS: Well, I spend most of my time doing research and writing up the results or teaching on

research and -- and writing up the results or teaching or lecturing, and expert testimony takes a lot of time. I really don't do very much of it.

BY MS. MERRITT:

Q. Did you agree to be a consultant to the defense in this case?

A. I did.

Q. And what were you asked to do?

A. I was asked to review the procedures that were used for obtaining eyewitness identifications in -- in this case.

MR. MENDELOFF: Objection, your Honor. That was outside the scope of the testimony --

THE COURT: Yes. He's not going to testify about these particular procedures.

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MS. MERRITT: That's correct. That's what the next question is going to be.

THE COURT: Then I don't see the purpose of the question you just asked.

MS. MERRITT: Okay.

BY MS. MERRITT:

Q. Did you review any materials in preparation for -- in conjunction with your work in this case?

A. I reviewed various FBI reports, 302's --

MR. MENDELOFF: Objection, Judge.

THE COURT: You know, what I said was that we could have this type of testimony with respect to the principles.

MS. MERRITT: That's what he's going to be testifying about.

THE COURT: Well, that isn't what your question was. Please stay within the parameters of my ruling.

MS. MERRITT: He's not going to express --

THE COURT: What he did is irrelevant. Ask him about the principles.

BY MS. MERRITT:

Q. Okay. You said that your research focuses on the procedures used by law enforcement -- correct -- to identify criminal suspects?

A. Correct.

Q. What do you mean by procedures?

Gary Wells - Direct

A. What I mean by procedures are -- are the ways in which eyewitnesses are instructed, things that happen before they view a photo spread, while they are viewing a photo spread or lineup, the structure, content of that photo spread, the questions that are asked of the eyewitness in response to the photo spread, those kinds of things. Those are procedures.

Q. Does your research show that some procedures are more likely to result in mistaken identifications than others?

A. Yes.

Q. And in your opinion, what is a reliable identification

procedure?

A. Well, a reliable identification procedure is one that for the most part -- I mean, there are other elements to this; but primarily, there are four rules that -- that need to be followed in order to conclude that there is -- that the identification procedure is reliable.

Q. Okay. How do you know, though -- let's go back for a minute. How do you know what a properly conducted identification procedure is?

A. Oh, from our -- from our experiments. So by varying the procedures systematically in our experiments and using large numbers of these eyewitnesses to our staged events, we can compare one kind of procedure against another. We can count up, in effect, the rate -- or the number of -- of mis -- mistaken identifications that come from one kind of procedure

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versus another kind of procedure, and that allows us to make conclusions about which procedures will produce the most correct identifications and which produce the least or the -- or which produce the fewest misidentifications.

Q. And what have you learned using this research technique?

MR. MENDELOFF: Objection. Vague.

THE COURT: Overruled.

THE WITNESS: Well, we've learned that -- that the procedures matter a lot; that -- that there are certain general rules, four in particular; that, if these rules are followed, are likely -- are -- will constitute a good procedure, would constitute a procedure that is more likely to yield an accurate identification.

BY MS. MERRITT:

Q. Okay. Can you summarize these four rules for us, starting with the first rule.

A. Okay. Well, the first rule is that a proper identification procedure has to have distractors or fillers.

Q. And what are distractors or fillers?

A. Well, "distractors," that's the term that -- that eyewitness experts tend to use. "Fillers" is a term that, let's say, police often use, and these are people -- other people or other photos that -- in which the suspect's photo is embedded in; and those other people are not suspects. They are known to be innocent of the offense in question, and so those

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are fillers or distractors.

Q. Can you give me an example of a procedure that does not use distractors or fillers?

A. Well, that would just simply be showing, let's say, one photo of -- of a suspect in the case. That would be a procedure that does not use distractors or fillers.

Q. Okay. How about if you showed -- if you -- if there was a procedure where you showed a photo of a suspect and photos of

other persons who did not match the general description of that first person?

A. Well, that -- the -- the -- the requirement for a true filler or distractor is that that person matches the general description of the perpetrator, of the culprit. In other words, these fillers cannot -- these fillers need to at some level resemble the person who is the suspect in the case.

Q. So in the example I just gave you, if there was nobody that matched the description of the first person, there would be no distractors or fillers; right?

A. That's correct.

Q. Okay. How about if you used a procedure where you showed two photos and both of the photos were of suspects?

A. Well, that -- that -- that -- that violates Rule 1. I mean, Rule 1 is that the -- that there need to be fillers. If they are both suspects, there are no fillers.

Q. Okay. Is there some kind of principle involved here with

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the -- well, first of all, do you have a name for this kind of procedure where there's no distractors or fillers?

A. Well, when there are no distractors or fillers, we simply call that a showup.

Q. Is there a principle behind the showup?

A. Well, the -- the -- the principle -- well, the principle behind why a showup is problematic is that it is merely the principles of suggestion -- suggestiveness and also the principle of -- of chance. So the procedure is suggestive in the sense that it communicates immediately to the eyewitness who the suspect is, who the person is that the police suspect if there aren't fillers.

And -- and then there's the principle of chance involved. In other words, the -- one of the reasons why you have fillers is because if someone -- if the eyewitness really doesn't have a good memory and they simply were to simply, let's say, make a guess and pick one, that if there are fillers, then by chance at least the -- the innocent suspect -- or the suspect has some protection against -- against being just picked by chance; whereas if there are no fillers and there's just one photo, then it violates the idea that -- that they can't be picked by chance.

Q. Let's move on to the second rule. What's the second rule?

A. The second rule is that the person who administers the photo spread or lineup -- the principles are the same for photo

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spread and lineups, live lineups. The person who administers the photo spread should not know which person is the suspect.

Q. Okay. And what's the principle behind this?

A. Well, the principle behind this is that of the -- the experimenter expectancy effect, which is a very well-known phenomenon in which the person who administers a test -- if a

person who administers a test or is asking a question knows the answer, they can influence the person who is being tested.

Q. Is there research to back this up?

A. Well, there's a great deal of research to back it up. Robert Rosenthal at Harvard University has been one of the leaders in this area, but there are a large number of studies that show the experimenter expectancy effect.

Q. Is this effect -- is there anything that has to be intentional on the part of the tester?

A. No. In fact, the -- it does not have to be an intentional behavior on the part of the -- the tester, nor does the tester have to be aware that he or she is doing it.

Q. Can't the agent just simply try and not influence the eyewitness?

A. Well, no. I mean, the -- the -- neither -- again, neither intention nor awareness are necessary for the experimenter expectancy effect to occur, for this kind of influence to occur. And in fact, in -- in behavioral science studies, it's absolutely required that -- we call this double-blind testing,

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by the way.

Q. And what is double-blind testing?

A. Double-blind testing is where the person who's administering the test does not know the answer. And in behavioral science research, that is so well accepted that the person who administers the test should not know the answer when they are interacting with someone that failure to do that is something that will often result in that work not being published; being rejected by -- by the scientific community.

Q. Is there any way other than double-blind testing to ensure against the experimenter expectancy effect?

A. Well, I have recommended that -- that all lineup and photo spread procedures be videotaped so that at least we can have some sense of the extent to which the -- this kind of expectancy effect is occurring and that we're not relying on people to come back and -- and -- and -- and use their memory or try to reconstruct that out of their memory, but, rather, we could actually observe this on videotape what the witness said, what the person who administered the photo spread said and so on and so forth so that we know exactly what those things are. But it's still -- that doesn't -- that's no substitute for double-blind testing.

Q. Have you ever published this recommendation about the video-taping?

A. Yes, I have.

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Q. And where did you publish that?

A. Well, I think I published it more than once, but it's certainly in the book that I published in 1988.

Q. Now, what's the third rule?

A. Well, the third rule is that the eyewitness should be

A. Well, the third rule is that the eyewitness should be instructed that -- must be instructed that the person in question might or might not be in the photo spread.

Q. And why is this important?

A. Well, eyewitnesses approach a photo spread or live lineup with the expectation that the culprit or the person in question is there and so that creates big problems if the actual culprit or person isn't there; that is, this assumption leads them to select somebody nevertheless. The natural tendency of eyewitnesses is to approach a photo spread with the assumption that the actual culprit is there, and then, therefore, they will tend to pick the person who looks most like the culprit relative to the others. Sort of a process of elimination.

Q. And what's the fourth rule?

A. The fourth rule is that at the time of the identification -- not later but at that time, at the moment at which the witness makes a selection, that eyewitness should be asked how certain he or she is as well as then followed up by any other pertinent questions like what is the basis by which you're make -- for which you're making this identification.

Q. And what is the principle behind this rule?

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A. Well, what the research shows is that at the time of the selection, at the time of the identification, there is some correlation -- it's not strong, but there's some correlation between confidence and accuracy. But later, that correlation begins to go away because confidence tends to become moved around, up and down, but primarily up by other things that happen later, so --

Q. Are you talking about confidence inflation? Is that what you're talking about?

A. Confidence inflation, yes.

Q. And what causes confidence inflation?

A. Well, lots of things can cause confidence inflation. Certainly, repeated questioning can cause confidence inflation. The more times that someone answers the same question over and over again, the more confident they tend to become. Also, in the case of photo spread identifications, learning that this person who was selected was the suspect in the case has a dramatic -- dramatically raises the confidence or certainty of that eyewitness. Or being told that another eyewitness identified the same person, that also leads to confidence inflation.

Q. So if an eyewitness were not very certain at the time of the photo spread but later reports being almost totally certain, is this an example of confidence inflation?

A. That would be confidence inflation.

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Q. And would you say that the confidence statement of a witness that's made at the time of the identification is a better measure or not as good a measure of the witness's memory

than is a confidence statement later?

A. A confidence statement taken at the time of the identification, again by a neutral party -- in other words, we're assuming that the confidence statement is being asked for by someone who does not know whether the witness picked the suspect or not.

Q. Why would the witnesses learning that she or he chose the suspect serve to increase the confidence of the witness?

A. Well, because we've discovered that the confidence that an eyewitness holds in his or her identification or the certainty that we hold -- we use those terms interchangeably -- is really a belief that the eyewitness has about whether the suspect is the guilty party.

Q. Suppose the eyewitness knew before making the choice which person was the one the police had as a suspect because they had seen them on television or knew for some other reason. How does that affect the witness?

A. Well, that's even more problematic, because what that means is that -- I mean, it violates the first rule. The first rule is that it should not be -- the eyewitness should not know which person is the suspect, so you're talking about a situation where, let's say, they have learned through some

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other means that this -- that a particular person is the suspect, and now they are looking at a photo spread that includes that suspect in it. So not only will that increase the likelihood that we simply pick that person, but also enhance or inflate the certainty with which they do it.

Q. Suppose you were a witness and you were being questioned by the police but you had not yet seen a photo spread. Then you happened to see a suspect on television being escorted by the police and he's clearly described or identified as a suspect and you think you recognize the person. Does this present a problem?

A. Yes. Because you might -- it presents a number of problems. One is that you might simply -- if you remember this person from television, then you might then just simply make the inference, Oh, this is the person who's the suspect, and therefore, that's going to lead you to be more likely to pick that person. It's also possible that -- that your memory that -- this person looks familiar and your memory of that person is really coming from what you saw on television when you were exposed to this person, not from the original event that you might have witnessed.

Q. But suppose this eyewitness is later shown a photo spread that includes the person from television but also other people who match the general description. Wouldn't this take care of the problem?

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A. No. Because they still would just -- could just simply

remember the person that they saw on television.

Q. Now, suppose the eyewitness was told to shut the television image out of their mind and only rely on their memory of the previous event. Wouldn't that take care of the problem?

A. No. You're asking an -- you're asking a person to do something that they can't do. Their -- their memory by this point is blended. In other words, the -- the first time in which they saw the person which they are being asked about has been blended with -- with this second time in which they may have seen the same person or a different person on television, and so there's no real way for them to -- for people to sort that out. It's just a single memory.

Q. Well, what if the witness tells you that he can do that? What if he tells you that the memory is coming from the original event and not from television?

MR. MENDELOFF: Your Honor, I interpose an objection at this point as to --

THE COURT: Sustained.

MS. MERRITT: Your Honor, I have another question but it might be objected to, so should I tell you what the question is before I ask it?

THE COURT: Go ahead and ask it.

MS. MERRITT: Okay.

BY MS. MERRITT:

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Q. All right. Suppose that -- that an eyewitness worked with a sketch artist to create a composite -- and we'll call that Witness No. 1 -- and then the composite is shown to a second eyewitness who is asked --

MR. MENDELOFF: Objection, your Honor.

THE COURT: Let her finish the question.

BY MS. MERRITT:

Q. -- was asked if that looks like the person in question. The second witness is later shown a photo spread to try and identify the person. In your opinion, is that a valid procedure?

MR. MENDELOFF: Objection.

THE COURT: Sustained.

BY MS. MERRITT:

Q. Okay. You've now summarized the four rules. Can you tell us how important it is, in your opinion, that each of these rules be followed?

A. It's really essential that each of the rules be followed. Every rule that's violated increases the likelihood or the chance that the identification is inaccurate.

MS. MERRITT: I have nothing further.

THE COURT: Mr. Mendeloff.

CROSS-EXAMINATION

BY MR. MENDELOFF:

Q. Hello, Dr. Wells.

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A. Hi.

Q. How are you?

A. All right.

Q. Now, you just told us at some length about rules. Are these -- these really aren't rules, are they? These aren't rules. You're talking about trends in human behavior, aren't you?

A. Trends in human behavior?

Q. Well, Dr. Wells, isn't it true that just because one of your rules is violated doesn't mean that a witness's identification -- a given witness's identification is any more or less likely or -- will be -- excuse me -- that a given witness's identification will be inaccurate?

A. It will be more likely to be inaccurate.

Q. That's not what I asked you, Dr. Wells. What I asked you is you could -- the authorities could violate Rules 1 through 4, and the witness's identification can still be accurate; isn't that correct?

A. It could be, yes.

Q. And in fact, what you're talking about are not rules of physics; they are not natural law, are they?

A. They are not rules of physics.

Q. They are not natural law, are they?

A. Well, it depends on what you mean by "natural law."

Q. Dr. Wells, what I'm asking you --

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A. There's the natural law of mathematics.

Q. I'm talking about -- the question I'm asking you is the trends you're talking about are trends. They are not necessarily going to occur in every instance, are they?

A. No.

Q. You can have somebody violate your so-called "Rule No. 1" and the witness can still provide an accurate identification; isn't that right?

A. That can happen, yes.

Q. And violate No. 2 and the witness can still provide an accurate identification?

A. Yes.

Q. Etc., etc.; isn't that right?

A. That's true.

Q. And in fact, you're not attempting in your testimony today to tell us whether or not any witness in this case has provided an accurate or inaccurate identification, are you?

THE COURT: He's not attempting to because I haven't permitted it.

MR. MENDELOFF: Very well, your Honor.

BY MR. MENDELOFF:

Q. Dr. Wells, you're familiar with the fact that in this country, thousands upon thousands upon thousands of identifications are made every year that are accurate; isn't that right?

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A. That are accurate?

Q. Yes. That are accurate.

A. The estimates are something like over 80,000 people become suspects based on eyewitness identification every year.

Q. And thousands upon thousands of people are accurately identified; isn't that correct? Yes or no?

A. Among those, thousands would be accurate, yes.

Q. Now, you mentioned an eyewitness identification study that you took part in in Washington --

A. Yes.

Q. -- in your testimony.

A. Yes.

Q. And in that study, you talked about cases in which -- excuse me. That study involved cases in which the main source of evidence was eyewitness identification; isn't that right?

A. In 24 of the 28 cases, yes.

Q. Okay. In those cases, you did not -- the evidence did not involve witnesses who are eyewitnesses mixed in with witnesses who knew the defendant, mixed in with other corroborative proof like scientific proof of all different kinds -- did they?

A. Well, there were various other kinds of other circumstantial evidence that were at times thrown in.

Q. Okay. Now, let me ask my question again. All right?

A. Okay.

Q. Those cases did not involve eyewitnesses mixed in with

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other mutually corroborating evidence, like all different sorts of science evidence, evidence involving actual witnesses who knew the defendant, and other kinds of proof such as that, did they?

A. Well, I think some of the cases did. Some of the cases involved multiple eyewitnesses. One involved, for example, five eyewitnesses.

Q. Dr. Wells -- I'm sorry. I don't mean to interrupt you.

A. That's corroborating evidence, five witnesses.

Q. I'm talking about mutual corroborating evidence, not including other eyewitness testimony, but all sorts of other corroborating proof -- did they?

A. No. Those particular cases, the -- it was the eyewitness evidence that was crit -- critical in the case.

Q. Now, everything that you're talking about is based on the source -- the process of memory that you have found and other researchers have found that people go through; isn't that right?

A. Yes.

Q. All of your studies are based on that memory process; isn't that right?

A. Yes.

Q. And that memory process has been broken down into three stages; isn't that correct: Acquisition, storage, and retrieval?

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A. That's a way to break it down, yes.

Q. And the acquisition stage is the -- is the foundation stage. It's the -- it's the ground floor of the process where the witness actually perceives the memory; isn't that right?

A. Yes.

Q. And at that stage, the issue of how indelibly a memory is recorded in somebody's mind is essential in later abilities to recall; isn't that right?

A. Yes, it is.

Q. And that has a major impact on everything else that happens after that; isn't that right?

A. That does, yes.

Q. If a witness has a -- a lesser ability to observe during the acquisition stage, then it may be that their later memories will be less indelibly imprinted on their mind and they will be able to pull them out less easily; isn't that right?

A. Well, they may pull out memories from things that are acquired in later stages.

Q. I'm not asking you that. I'm asking you -- let me ask you a different way: They are more susceptible to inaccuracies if they are not recorded clearly at the beginning.

A. Yes.

Q. And if they are recorded clearly at the beginning, there are studies that show that later kinds of influences are less likely to occur; isn't that right?

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A. If they are -- if they are -- yes. The stronger the original memory, the less likely it is to be subsequently distorted, yes.

Q. And you and other researchers like you have identified certain acquisition-stage factors that you consider in trying to decide whether or not or in examining whether or not the original memory is indelibly imprinted; isn't that right?

A. Well, whether it -- whether the conditions were right for such.

Q. Right. Some people call that "event factors" and other things like that; isn't that right?

A. That's right.

Q. And among those factors are lighting; isn't that right?

A. Well, certainly lighting --

Q. One of those factors?

A. -- would be a factor.

Q. That's obvious. If you can't see the person you're going to later identify, your ability to bring that memory up is going to be inhibited?

A. Sure.

Q. And conversely, if you're standing across a counter from somebody in a well lit office and you are looking at them within feet, then the ability to remember may be more

substantial; isn't that right?

A. You have -- you -- it's not impaired by lack of lighting or

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distance.

Q. It's more substantial than in somebody who has not that ability -- not had that opportunity to observe; isn't that right?

A. Well, you still have to attend and --

Q. Well, I'll get to that.

A. Okay.

Q. That's -- that's one significant factor among many?

A. Opportunity.

Q. Yes. Opportunity. In addition, the degree of attention?

A. Yes.

Q. If the person that's observing is paying attention to the person that they are looking at, their attention is not deflected by, in our office example, other employees, phone ringing, business going on, but they are just looking at the person across the counter from them and nothing else, that is a positive factor in terms of setting that very crucial acquisition; isn't that right?

A. That would be -- that would be a positive factor, yes.

Q. Another positive factor is the amount of time that the person is looking at the second person; isn't that correct?

A. Yes.

Q. If you're looking at somebody for just a moment, from across a distance, maybe up some stairs, that's different and less substantial than if you're 3 or 4 feet from somebody,

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looking at them right in the face for 5 or 10 minutes, isn't it?

A. Well, looking and attending are two things. Looking and processing are two different things.

Q. I understand.

A. You can interact with somebody for quite a period of time and walk away with no image of their face at all.

Q. On the other hand, if you focus on the face and there's nothing to divert your attention, that can create a substantial imprint on your memory; isn't that right?

A. It can.

Q. In fact, lab studies that we talked about generally don't focus on time limits or time expanses of that great a period of time, do they? They are usually shorter exposures to the people; isn't that right?

A. It would be pretty common for exposures to be relatively short.

Q. One to 2 minutes, usually. And the reason is that it costs too much money to have exposures that are going to be much longer than that; isn't that correct?

A. Well, I think that's part of it; and also because usually, you have no -- in these experiments. you have very little

you have no . . . in these experiments, you have very little delay. You're not waiting days, for example, before you test the eyewitness. You may be waiting 20 minutes, so . . .

Q. So the original exposure time that you test for is usually

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shorter?

A. So often, the original exposure time is shorter, yes.

Q. And it's very rare for anybody to test for exposure time of as long as 5 to 10 minutes; isn't that right?

A. Certainly, it's less common, yes.

Q. It's rare, isn't it? In a lab setting? I'm talking about in a lab setting.

A. In the -- in the lab studies, sure.

Q. Okay. In addition, the number of opportunities that an individual has to observe the person that they are looking at is significant; isn't that right?

A. Yes.

Q. Something that is experienced repeatedly is going to be remembered better than something that is repeated -- experienced only once; isn't that right?

A. Yes.

Q. And there are studies also that show that people are better able -- tend to be better able to make identifications of people from their same racial group than from other racial groups. There are studies that show that; isn't that right?

A. There are studies that show that, yes.

Q. There are also factors that can affirmatively reduce the accuracy of a person's observations, isn't there?

A. That can --

Q. Affirmatively reduce the accuracy of an individual's

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ability to recall.

A. What was the word you said right before "reduced"?

Q. Affirmatively?

A. Affirmatively reduce?

Q. Yeah. In other words, I can't -- that actually reduce the ability to recall. We've talked about all these acquisition factors that, if they are present, they help. There are things that can hurt; is that right?

A. Certainly.

Q. Such as extreme levels of stress. Isn't that right?

A. If they are extreme.

Q. And by "extreme," I mean, for example, a bank teller who's confronted with a gun to her face; isn't that right?

A. That could do it.

Q. There's a phenomenon called weapon focus, isn't there?

A. Yes.

Q. Tell the jury what that is.

A. It's the tendency to look at a weapon that's used and thereby spend less time looking at, let's say, the person's face.

Q. And the weapon captures the witness's attention; and as a result, your ability to observe other things is less; isn't that right?

A. That's correct.

Q. Witnesses that see things thus in a nonstressful setting

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tend to be better observers, better acquisition, than people who see things in an extremely stressful setting; isn't that right?

A. Well, it depends on what you mean by "nonstressful." I mean, you know, oftentimes, people just simply are so relaxed that they are not really attending or they are just simply -- I mean, when you're doing your normal duties, your normal everyday duties, you have the routines that you go through, usually, you're not stressed. But also, you're not a very good eyewitness under those circumstances.

Q. The low level stress cases, though, involve people who are under extremely low levels of stress, such as upon awakening; isn't that right? That's what we're really talking about when we're talking about low stress.

A. That would be very low or low arousal.

Q. The studies that address that are the studies that say that those low levels of stress may inhibit somebody's degree of attention; isn't that right?

A. Yes. That's really sort of low arousal --

Q. Right.

A. -- at that point.

Q. Now, a level of stress that may be medium would be a level of stress in which you, for example, engaged in a business transaction of some substantial importance or value; isn't that right?

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A. Of substantial importance or value. I suppose that might produce medium stress.

Q. And that is the optimum level of stress, isn't it? The medium level of stress that you're talking about? Isn't that correct?

A. Well, medium levels of arousal are optimal, yes.

Q. So a witness that sees the face of another person in good lighting with the person's face repeatedly -- sees the person's face repeatedly from a distance of several feet for an extended period of time, who focuses on that person's face, is not under extreme stress, is not confronted with violence, and sees somebody of the same race have a lot of acquisition factors going for them in terms of their ability to recall; isn't that right?

A. If they were paying close attention.

Q. Let me talk to you about maximum levels of stress. Are you familiar with studies that involve maximum levels of stress?

A. Yes.

Q. And have you engaged in any of those studies yourself?

A. No. I haven't done -- I haven't conducted any of the high stress studies.

Q. And when we talk about high stress, we're talking about people who have lived through natural disasters and things like

that?

A. Yes.

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Q. What is the -- other than this case, other than what you've heard today in court, what is the highest level of stress of any example you can think of that has been studied?

A. The highest level of stress that's been studied?

Q. Yes.

A. I suppose it would be Vietnam vets.

Q. Going through battle?

A. Right.

Q. And it is common that people who engage in high levels of stress have severe problems with their memories; isn't that correct?

A. They can.

Q. In a highly stressful state, people tend to concentrate and narrow their concentration on the thing right before them; isn't that correct?

A. Stress is thought to, yes, narrow the focus of attention.

Q. And people who have gone through high levels of stress have oftentimes, or the -- have at the end of that experience, remembered nothing of what they went through; isn't that right?

A. Yes.

Q. Now, Dr. Wells, let me ask you about the ability of people to recall once they've got that memory imprinted in their mind. All right? There are certain people -- even though somebody has gone through an experience in which they have many acquisition factors going for them -- all the things I just

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mentioned, for example -- that doesn't mean that that person will necessarily be able to describe the person they just saw or recently saw well, does it?

A. No.

Q. In fact, the studies show, don't they, that there are some people who are naturally better descriptors, describers, than other people; isn't that right?

A. No. I don't know of any studies that show some people to be naturally better describers.

Q. Well, you do know of studies that show that there are people -- there is very little correlation between the accuracy of somebody's recognition of a person they saw just because they were able to describe them better; isn't that right?

A. I believe I published the definitive study on that even to this date. There is a -- there's something of a correlation between -- it's not -- it's not large but between -- and it's

BETWEEN IT'S NOT IT'S NOT large, but BETWEEN and IT'S not between -- it's not that people who are good describers are good identifiers but, rather, faces that are easy to describe tend to be more easy to identify because they have unique features.

Q. I'm familiar with your study, Dr. Wells; but that's not what I'm asking you.

A. All right.

Q. What I'm asking you is people who give relatively accurate descriptions are not more likely or have been found to be not

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more likely to be able to make an accurate identification than people who gave poorer descriptions; isn't that right?

A. Well, again, it depends on how you define that. And in fact, it's exactly the study I was talking about, because if you're talking about -- now if you're talking about the people who gave good -- do people who give good descriptions -- are they more likely to be accurate in their identifications, no. If you're -- but there's this other flip side, and that is that faces that are easier to describe are easier to identify.

Q. Okay.

A. It's sort of a subtle point. It may be one we need not to get bogged down in.

Q. It is a little subtle. I'm not exactly sure I follow the distinction. The bottom line point that I was trying to make is that just because people -- one person may give a relatively good description doesn't mean he's going to be able to recognize the person any better than somebody who doesn't give a good description; isn't that right?

A. That's true.

Q. Okay. Now, you've talked about blended memories and source monitoring error in your testimony.

A. I don't think I said anything about source monitoring errors.

Q. Blended memories in your testimony. And the fact is that there are studies that have shown that if you have a very

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strong acquisition stage, that it tends to -- to reduce the level of problems of blended memories; isn't that right?

A. True.

Q. Now, let me just ask you one question about photo spreads for a moment.

A. Okay.

Q. You have published a study that indicates that the research literature does not show photo spreads to be any -- at all inferior to lineups; isn't that correct?

A. To live lineups?

Q. Yes. The principles governing both of them are about the same; isn't that right?

A. Well, I'm not sure if you're referring to my study; but

that is at this point in time the general conclusion of -- of the literature on this.

Q. And you've spoken about blind testing in connection with your testimony today; isn't that right?

A. Yes.

Q. And what you would posit would be that it would be important for an eyewitness to be tested with somebody who did not know who the suspect was in a given photo spread?

A. Yes.

Q. Now, in a case such as this one, where every police officer in the country --

MS. MERRITT: Your Honor, I'm going to object. He

Gary Wells - Cross

said we're not supposed to talk about the specifics of the case.

MR. MENDELOFF: Okay. Let me rephrase. I'm sorry. I apologize, your Honor.

BY MR. MENDELOFF:

Q. In a notorious case of great national attention, isn't it very difficult to try to find somebody who wouldn't know who the perpetrator or suspect was? Isn't that correct?

A. Well, there are -- there are alternative procedures that -- that --

Q. I didn't ask you about alternative procedures.

A. It would be difficult to find someone. That's true.

Q. Have studies been performed for experimenter expectancy effect on eyewitness memory for faces?

A. Experimenter expectancy effect for eye -- yes.

Q. Tell me what study that is.

A. Well, Fanslow and Buckaugh showed that, for example, the behavior of a person who -- of a person who's administering the photo spread -- that the person administering the photo spread could influence the person who is trying to make an identification by the person administering the photo spread leaning, rocking, making various kinds of nonverbal behaviors. It's all nonverbal.

Q. Now, you've talked about confidence factors, the principle of asking an individual what their confidence level is at the

Gary Wells - Cross

time that they make the observation.

A. Right.

Q. Is that -- and that's -- you testified that that's something you recommend?

A. Yes.

Q. Is that something that is well established in the literature, or something that you believe is an appropriate course of action?

A. Well, we know that confidence measure before the identification does not correlate with the identification. We know that confidence at the time -- at the moment of the

identification tends to correlate somewhat with the accuracy of identification, and we know that confidence measure at later points in time does not -- again starts to not correlate with the accuracy of identification. So it needs to be taken out of time.

Q. And my question is is that something that you're recommending or is that something that's broadly accepted within the literature?

A. I believe it's broadly accepted.

Q. And there are other people who have advanced it; is that right?

A. The specific recommendation about making -- about taking a confidence statement at that time?

Q. Right.

Gary Wells - Cross

A. Well, I think I've largely led the way in making that recommendation.

Q. That's primarily your baby, isn't it?

A. Yes. But the foundation of that recommendation --

Q. That's all I asked you.

A. Okay.

Q. All right, sir. Let me just -- let me turn finally to the last question.

A. Okay.

Q. The last area. I'm sure you'll be happy to -- for me to sit down, but let me just ask you --

A. I'm actually kind of enjoying it. Maybe I don't look like I'm enjoying it.

Q. No, you do. Let me ask you about post-event information such as media coverage.

A. Okay.

Q. And let me specifically ask you, isn't there a field study that was done by Yuille and Cutshall that found that media coverage did not influence the people in that study?

A. By Yuille and Cutshall?

Q. Yes. You're familiar with that study?

A. Yes. I am familiar with that study. Quite.

Q. That's an authoritative study, isn't it?

A. Pardon?

Q. That's an authoritative study, isn't it?

Gary Wells - Cross

A. I wouldn't describe it as an authoritative study. It is -- it is published in -- it's true that it's published in a good journal, Journal of Applied Psychology.

Q. In fact, you're on the board of that journal, aren't you?

A. I am.

Q. Okay.

A. In fact, I reviewed that article and finally relented to allowing it to be published. It's based on only 13 observations, 13 people. In our experiments, they use 150, 200, 250 people.

200, 250 people.

Q. Unlike your experiments, this was a field study?

A. Right.

Q. This isn't a lab study?

A. That's true.

Q. And there have been criticisms lodged at your limiting your research to just lab studies; isn't that right?

A. There have been criticisms like that, yes.

Q. In fact, notwithstanding your view, you're familiar with a chapter of a book by a man named Sporer.

A. Yes.

Q. A book by Narby, Cutler and Penrod, aren't you?

A. Yes, I am.

Q. And you affirmatively reviewed that book, didn't you?

A. I did give the book overall a positive review, yes.

Q. And in Chapter 4 of that book, didn't Sporer write that in

Gary Wells - Cross

particular, there is a dire need for studies like you and Cutshall's that have not only analyzed the number of details provided, but have applied the quantitative approach to qualitative aspects of testimony? Isn't that included in that chapter?

A. That is included in that chapter. That's the way that Sporer, in effect -- Siegfried Sporer justified, you know, and built up his own work where he did exact -- he did that same thing. He studied a -- in his case, a large number of actual eyewitnesses.

Q. Well, in Yuille and Cutshall's study, didn't they find that inconsistent media accounts did not impact substantially the accuracy of later witness identifications? Inaccurate media accounts; isn't that right? That the witnesses were able to cull out those inaccuracies?

A. Well, they were asked about those things, and those things were established before the media accounts, I believe. So I think there's some difficulties with the interpretation.

Q. Isn't that their finding, regardless of whether --

A. That's their conclusion.

Q. And didn't they also find, by the way, that most people lack the training and experience to provide accurate estimates of height and weight when given -- when giving physical descriptions? Isn't -- didn't they find that?

A. Yes.

Gary Wells - Cross

Q. And in fact, that's not only been found by them, but also by Sporer in his chapter in his book; isn't that right?

A. Yes. As well as in virtually all the lab studies.

Q. Height and weight estimates are very difficult for people to make; isn't that right?

A. They are.

Q. As a general matter? And also, didn't the Yuille study find that the people in that study tended to be error prone

when it came to describing the style and color of clothing?

A. They found that, yes.

Q. And they found, in fact, that although the general trend is for memory persistence, the people in the study tended to forget specific aspects of the event, such as the style and color of the clothing; isn't that right?

A. That's right.

MR. MENDELOFF: Nothing further, your Honor.

REDIRECT EXAMINATION

BY MS. MERRITT:

Q. Dr. Wells, you were asked a lot of questions about acquisition of memory. Let's go back to what we originally started talking about, which was procedures and eyewitness identification procedures. Is anything you said any -- in any way less accurate because somebody's memory or their acquisition is strong? Isn't there still a problem with eyewitness identification if the procedures are not valid?

Gary Wells - Redirect

A. Well --

MR. MENDELOFF: Objection, your Honor.

THE COURT: Which question do you want him to answer?

MS. MERRITT: The second.

THE WITNESS: Can you repeat the second?

BY MS. MERRITT:

Q. Would you rather do the first?

A. I still have -- I blended the two, actually.

Q. Okay. You were just asked a lot of questions about acquisition --

A. Yes.

Q. -- which is one of the three stages of memory; right?

A. Yes.

Q. Okay. And we started out talking when I was questioning you about identification procedures and identifi -- which procedures are likely to lead to accurate identifications and which are likely to lead to inaccurate identifications?

A. Yes.

Q. Okay. Does anything you said about procedures which are likely to be -- to lead to inaccurate identifications -- is any of that changed because -- or would you have any different opinion because somebody had good acquisition?

A. Well, I suppose at the extreme, if you're talking about, for example, you know, a person's memory for their mother, it's unlikely that these rules need to be followed for purposes of

Gary Wells - Redirect

identifying your mother. But if you're talking about a stranger seen on one or two prior occasions in which anything more than, let's say, 24 hours has passed and for which you had no particular belief at the time you were going to have to try to identify this person later, then I would say that you should always follow these rules.

Q. And didn't you say at the beginning of your testimony that the rules were in conjunction with your research, which is identification procedures used in identifying criminal suspects?

A. Yes.

Q. Now, you were asked about source monitoring error, but you said you didn't talk about that in your direct. What is source monitoring error?

MR. MENDELOFF: Your Honor -- beyond the scope, your Honor.

THE COURT: Overruled.

THE WITNESS: Well, source monitoring error is when, for example, you -- you -- you experience something -- you have a memory, but you have confused where that memory came from. So, for instance, you might see someone and then later hear or -- reference to that person and think that -- and then think that that's what you originally saw when, in fact, what you were remembering is what you were told. So it's a -- source monitoring error is a confusion of -- of a memory from how you

Gary Wells - Redirect

got that memory.

BY MS. MERRITT:

Q. So would that apply to a situation where somebody commingles their own memory with a memory of another person that was told to them?

A. Yes.

Q. You were asked about post-event information. Can you give a description of what that means?

A. Post-event information is -- is information that the person comes across after the event -- after the event so you may experience something and then later learn something else about that event. That would be post-event information. It happens -- it's information that you acquire about the event after you've already experienced that event.

Q. And does post-event information -- can post-event information interfere with the accuracy of an eyewitness identification?

A. Certainly.

Q. And again, can you tell us why that is.

A. Well, because post-event information will often be incorporated back into the original memory. In other words, it can change the original memory or somehow attach itself to the original memory; and if that post-event information is incorrect, then it could lead to an incorrect recollection.

Q. And does any of the questions that you were asked by

Gary Wells - Redirect

Mr. Mendeloff change your opinion as to the importance of the four rules you described to us?

A. No.

MS. MERRITT: I have nothing further.
MR. MENDELOFF: Just one question, Judge.
THE COURT: Yes.

RE-CROSS-EXAMINATION

BY MR. MENDELOFF:

Q. One question area. I apologize. This -- this area of source monitoring error that you were just asked about --

A. Yes.

Q. -- one of the primary authorities in that area is a woman named Marcia Johnson?

A. Marcia Johnson, yes, at Princeton.

Q. Didn't she write in the psychological bulletin that source monitoring error relies fundamentally upon the quality of the information recorded about the events during the acquisition stage at the beginning?

A. Yes.

MR. MENDELOFF: Thank you. Nothing further.

THE COURT: Is the witness excused?

MS. MERRITT: Yes.

MR. MENDELOFF: Yes, your Honor.

THE COURT: You may step down. You're excused.

Next, please.

MR. NIGH: Todd Bunting, your Honor.

THE COURT: All right.

(Todd Bunting affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Todd David Bunting, B-u-n-t-i-n-g.

THE COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MR. NIGH:

Q. Good afternoon, Mr. Bunting.

A. Good afternoon, sir.

Q. You might have to lean a little bit forward so that the jury can hear you.

If you would, tell us where you live.

A. I live in Sumter, South Carolina.

Q. How long have you lived in South Carolina?

A. I've been there since October of '95.

Q. I'm sorry?

A. October of '95, sir.

Q. October of 1995?

A. Yes, sir.

Q. Have you lived in the South for quite a while?

A. Well, yes, sir. I lived there previously before I went in the military.

Todd Bunting - Direct

Q. Anybody ever tell you you have an accent at all?

A. Yes.

Q. What do you currently do for a living, Mr. Bunting?

A. I'm a private investigator slash fugitive recovery agent.

Q. What is a "slash fugitive recovery agent"?

A. Bounty hunter

A. County number.

Q. All right. How long have you been doing that kind of work?

A. About nine -- nine months, going on a year.

Q. Do you have to have a license to perform that kind of work?

A. Yes, sir.

Q. And are you currently licensed?

A. Yes, sir.

Q. When did you obtain your license?

A. November of '96.

Q. All right. You are not a stranger to Colorado, are you?

A. No, sir.

Q. Have you lived in Colorado before?

A. Yes, sir.

Q. Different parts of Colorado, or all in one city?

A. Different parts, sir.

Q. In the past, have you worked for a battery company?

A. Yes, sir.

Q. And when approximately was that?

A. Right at the time I got out of the military in October of '95, I went back to work.

Todd Bunting - Direct

Q. Had you worked at that battery company before?

A. Yes, sir. Before I went --

Q. I'm sorry. I didn't mean to interrupt you.

A. Before I went in the military, sir.

Q. What was the name of the battery company?

A. Uwasa Exxon (phonetic).

Q. All right. Let me direct your attention, if I may, back to the time that you were in the military.

A. Okay.

Q. When did you go into the Army?

A. March of '94, sir.

Q. Were you stationed originally at Fort Riley, or did you go somewhere else first?

A. I went to Fort Benning and did my initial training and then was stationed at Fort Riley.

Q. In Kansas?

A. Yes, sir.

Q. During the spring of 1995, were you stationed at Fort Riley?

A. Yes, sir.

Q. And if I could direct your attention to that part of the year, did you have an occasion to be at a place called Elliott's Body Shop?

A. Yes, sir.

Q. And do you remember approximately what the date of that

Todd Bunting - Direct

was?

A. I was there in -- I believe July of '94 was when I first was stationed at Fort Riley. I took my Ryder truck there when I moved my family to Fort Riley.

Q. I see. So you were there in connection with your own renting of a Ryder truck?

A. Yes.

Q. Was there a time that you were there in connection with somebody else renting a Ryder truck?

A. Yes, sir.

Q. And when did that happen?

A. That happened in April of '95.

Q. Do you remember approximately when in April?

A. The 18th, sir.

Q. April 18 of 1995?

A. Yes, sir.

Q. Let me show you, if I may, what I think has previously been admitted into evidence as Government's Exhibit 301. It should appear on the television screen in front of you.

Is that the place that you went on April 18, 1995?

A. Yes, sir.

Q. All right. If you would, tell us what the circumstances were that caused you to go to Elliott's Body Shop that day.

A. A friend of mine, Sergeant Hertig, asked me to help -- take him to pick up his truck because it -- he was PC'ing to Fort

Todd Bunting - Direct

Benning.

Q. You're going to have to tell me what that means.

A. It's a permanent change of duty station. You get cut orders and you go to another -- another duty station. And he was going to Fort Benning.

Q. So he was leaving Fort Riley and going to Fort Benning?

A. Yes, sir.

Q. And needed to move his personal belongings and household goods?

A. Yes, sir.

Q. All right. What time of day was it when the two of you went to Elliott's Body Shop?

A. It was later on in the afternoon.

Q. How was it that you got from Fort Riley to Elliott's Body Shop?

A. I borrowed a car from a Private Chief, and it was a Ford Victoria, Crown Victoria, and drove Sergeant Hertig to the Elliott's Body Shop.

Q. All right. Did you go straight to the body shop, or did you stop somewhere on the way?

A. No, sir. We stopped at Fort Riley National Bank, where Sergeant Hertig took out some money; and we left from there and went to Elliott's.

Q. Do you know why Sergeant Hertig took out the money?

A. He took the money out to rent the truck.

Todd Bunting - Direct

Q. What kind of money did he take out?

A. If I'm not mistaken, it was a thousand dollars.

Q. And was that a thousand dollars in cash?

A. Yes, sir.

Q. All right. Then you went straight to Elliott's Body Shop from there?

A. Yes, sir.

Q. Let me show you what's been previously admitted as Government's Exhibit 302. Let me make sure it's been admitted before I -- does that look like the inside of Elliott's Body Shop?

A. Yes, sir.

Q. That looks to me like I picked one where the person that took the picture was standing behind the counter. You probably didn't see it from that point of view, did you?

A. No, sir, but I do remember the computer being off to the . . .

Q. Let me show you a different one, what's been marked as Government's Exhibit 303. I believe it's been admitted into evidence.

THE COURTROOM DEPUTY: Yes.

BY MR. NIGH:

Q. Is -- is that a vantage point that you were able to see inside Elliott's Body Shop?

A. Yes.

Todd Bunting - Direct

Q. There should be a light pen on the table in front of you. It's a pen with a black string on it. And if you put it underneath the glass, can you show the jury or make a mark where you were in Elliott's Body Shop on that day.

A. Okay. This looks like the counter goes around like this right here. Sergeant Hertig was standing here, and I was standing to the left of him.

Q. All right. Okay. So were both of you at the counter, or was only one of you --

MR. MENDELOFF: Judge, can I have that please, this image.

THE COURT: All right. Proceed, please.

MR. NIGH: Thank you, your Honor.

BY MR. NIGH:

Q. What happened when you went inside the body shop there?

A. He was just giving the information to rent his truck, and the woman and him engaged in some conversation. I just kind of stood there, listening to them.

Q. Did you hear part of the conversation?

A. Yes, sir.

Q. Did you see him pay for the truck?

A. Yes, sir.

Q. And how did he pay?

A. Cash.

Q. What was the conversation about that you recall?

Todd Bunting - Direct

^ One -- the only thing that I really recall that stands out

A. One -- the only thing that I really recall that stands out in my mind is the fact that -- him mentioning he just got married. And she said that "Well, I've probably been married longer than you've been alive."

Q. Any -- any other conversation that you recall?

A. I'm sure there was. I just don't really remember in detail what it was about.

Q. Was there anybody else inside the body shop besides yourself and Sergeant Hertig and the woman who conducted the transaction?

A. To my recollection, there was a -- two people there, sitting in the seats. There was a black gentleman and a -- and a black woman.

Q. Was there anybody else in there?

A. Not to my -- my recollection. There could have been. I don't know.

Q. Do you know if you ever saw the owner of Elliott's Body Shop that day?

A. No, sir, I just don't remember.

Q. So that we're clear, are you saying that he wasn't there, or you don't know?

A. I just don't know. He could have been. I just don't know. I was looking towards -- focussing on Sergeant Hertig and the woman. I wasn't paying attention what was going on behind me or to the left of me.

Todd Bunting - Direct

Q. How long did this transaction take?

A. I'd say to my knowledge, 15, 20 minutes at the most.

Q. Then to leave, who drove the truck and who drove the car?

A. He drove the truck and I followed behind him in the -- the Ford Victoria, Crown Victoria.

Q. I'm sorry. I didn't mean to interrupt. Where did you go from Elliott's Body Shop?

A. We left there, and he was headed towards a grainery to get an empty weight on the truck; and it was closed. And so then we headed from there and went to his storage shed, which was right down the street from the grainery.

Q. All right. Well, I want to stop you for a minute. Why is an empty weight on the truck important?

A. Because the Army pays by weight when you move, and you have

to have an empty weight and a full weight to get your money.

Q. All right. Okay. So he couldn't weigh the truck.

A. Right.

Q. And so then he went to a storage shed?

A. Yes.

Q. And what did he have in the storage shed?

MR. MENDELOFF: Objection, your Honor. Relevance.

THE COURT: Is this relevant?

MR. NIGH: Probably not. Let me move right on past it.

THE COURT: Okay.

Todd Bunting - Direct

BY MR. NIGH:

Q. You went back to the post after you went to the storage shed?

A. Yes, sir. I went to inform the chief that I was going to go ahead and help him load his stuff, and I changed my clothes in case I got dirty, and came back.

Q. All right. And then Sergeant Hard -- Hertig, rather, went ahead and moved; is that right?

A. Yes.

Q. And left the post about 2 a.m. that morning?

MR. MENDELOFF: Judge, objection.

THE COURT: Yes. We're beyond anything that's relevant to this case, aren't we?

MR. NIGH: Let me get to something that is, your Honor.

BY MR. NIGH:

Q. Mr. Bunting, did the FBI come to see you?

A. Yes, sir.

Q. Do you remember approximately when it was that the FBI came to see you?

A. It was the 6th of May. And I remember from a date that's on a receipt that I have.

Q. All right. And in connection with that, did they take some photographs of you?

A. Yes, sir.

Todd Bunting - Direct

Q. Let me show you what's been marked for identifications -- let me show this only to you, if I may, C20. Do you recognize that?

A. Yes, sir.

Q. Is that a picture of you that was taken by the FBI?

A. Yes, sir.

Q. Were you wearing the clothes that you wore at Elliott's Body Shop on April 18 when you were there?

A. Yes, sir.

Q. Had you put those clothes on at the request of the FBI?

A. Yes, sir.

MR. NIGH: Your Honor, I'd move for the admission of Defendant's Exhibit C20.

MR. MENDELOFF: No objection.

THE COURT: C20 received.

BY MR. NIGH:

Q. Mr. Bunting, in the photograph, you appear to be wearing a Carolina Panthers cap.

A. Yes.

Q. Were you wearing a Carolina Panthers cap on the day that you went to Elliott's Body Shop with Sergeant Hertig?

A. Yes, sir, I was.

Q. And are the rest of the clothes that you're wearing there consistent with what you were wearing on the day that you went to Elliott's Body Shop?

Todd Bunting - Direct

A. Yes, sir, except for the jacket. I had the jacket on before I went in, and I took it off. So they just asked me to go ahead and put that on, too.

Q. All right. Let me show only you what's been marked for identification as Defendant's Exhibit C23. Do you recognize that?

A. Yes, sir.

Q. Is that a photograph of you taken on the same day but without the jacket?

A. Yes.

MR. NIGH: I'd move for the admission of C23.

MR. MENDELOFF: No objection.

THE COURT: Received, C23. Publish.

BY MR. NIGH:

Q. Now, does that accurately depict what you were wearing when you actually went inside --

A. Yes, sir.

Q. -- Elliott's Body Shop on April 18?

Mr. Bunting, did there come a time when you became aware of the investigation concerning the Oklahoma City bombing and media coverage concerning those events?

A. Yes, sir.

Q. Let me show you what's been previously admitted as defendant -- Government's Exhibit 317.

MR. MENDELOFF: Objection, your Honor. Relevance to

Todd Bunting - Direct

this.

THE COURT: Well, I don't know what the question is going to be.

MR. NIGH: The first question is whether he remembers seeing it, Judge, in connection with watching TV.

THE WITNESS: Yes, sir, I do.

BY MR. NIGH:

Q. Did you have a specific thought when you saw the composite drawing that's depicted --

MR. MENDELOFF: Objection.

THE COURT: Sustained.

BY MR. NIGH:

Q. Let me back up for a minute. Are you familiar and had you been familiar with the appearance of Sergeant Michael Hertig?

A. Yes.

Q. Prior to the time that you saw this composite drawing?

A. Yes, sir.

Q. Did you have any thoughts in that regard at the time you saw this composite drawing?

MR. MENDELOFF: Objection.

THE COURT: Well, establish where he saw it.

MR. NIGH: Okay, your Honor.

BY MR. NIGH:

Q. Mr. Bunting, did you recall any conversation with anyone that

Q. Mr. Bunting, do you recall approximately when it was that you first saw this composite drawing?

Todd Bunting - Direct

A. When it was, you know, not too long after the bombing. I was in my barracks room and seen it on TV.

Q. All right. In connection with watching media about the case?

A. Yes, sir.

Q. And did you have any specific thoughts in reference to the drawing at that time?

MR. MENDELOFF: Objection.

THE COURT: Overruled.

THE WITNESS: I thought he looked real familiar.

BY MR. NIGH:

Q. Did you have any thoughts in connection with Sergeant Hertig?

A. Just the chin.

Q. I'm sorry?

A. The -- the chin; but that was after I put two and two -- after the FBI agents came and saw me that when I got to looking at -- to the sketches.

Q. That you associated the chin with Sergeant Hertig?

A. Yes.

Q. Let me show you what has previously been admitted into evidence as Government's Exhibit 320. Did you ever see that on TV?

A. Yes, sir.

Q. And did you see it in the same circumstances that you saw

Todd Bunting - Direct

the other composite drawing?

A. Yes, sir. As a matter of fact, I think they came up at the same time.

Q. Had there been any talk around the barracks there about a reward in connection with this case?

MR. MENDELOFF: Objection, your Honor.

THE COURT: A reward?

MR. NIGH: Yes, your Honor.

THE COURT: Overruled.

THE WITNESS: I believe it was \$2 million.

BY MR. NIGH:

Q. Did you say anything when you saw this picture about the \$2 million reward to your friends there in the barracks?

MR. MENDELOFF: Judge, objection as to relevance.

THE COURT: Overruled.

THE WITNESS: To -- to the reward? I'm not --

BY MR. NIGH:

Q. Did you make a joke about it in terms of this sketch and yourself?

A. Well, I did say that the -- that the hat looked like my Carolina Panthers hat, and we kind of joked about that. And I said. "Well. shoot. if that was me. I'd turn myself in."

...and, well, there, it was me, I can myself in.

Q. Collect that \$2 million reward?

A. Yes, sir.

Q. Mr. Bunting, do you still have your Carolina Panthers hat?

Todd Bunting - Direct

A. No, sir.

Q. Where -- where is it?

A. On May 6, I believe the FBI came and picked it up.

MR. NIGH: That's all I have, your Honor.

MR. MENDELOFF: No questions, your Honor.

THE COURT: No questions? Okay. You may -- I take it he's excused then.

MR. NIGH: Yes.

THE COURT: You may step down, you're excused.

Members of the jury, we'll take our afternoon recess.

During this time, of course, please continue to follow the cautions given at all earlier recesses. I know that your memory retention is good from repetition, if nothing else, with respect to these cautions; but of course, they are important, you realize. So please continue to follow what I'm sure you have been following at all recesses, avoiding discussion about the case and anything in connection with it so that you can keep open minds until you've heard it all.

You're excused now. 20 minutes.

(Jury out at 3:20 p.m.)

THE COURT: Recess.

(Recess at 3:20 p.m.)

(Reconvened at 3:40 p.m.)

THE COURT: Please be seated.

(Jury in at 3:40 p.m.)

Todd Bunting - Direct

THE COURT: Next, please.

MR. JONES: Sergeant Michael Hertig, your Honor.

THE COURT: All right.

THE COURTROOM DEPUTY: Raise your right hand, please.

(Michael Hertig affirmed.)

THE COURTROOM DEPUTY: Have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Michael Paul Hertig, H-E-R-T-I-G.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Mr. Jones.

MR. JONES: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. JONES:

Q. Mr. Hertig, where do you live now?

A. Fort Benning, Georgia, sir.

Q. And are you still in the armed forces of the United States?

A. Yes, sir.

Q. In the Army?

A. Yes, sir.

Q. And how old are you?

A. 26, sir.

Q. Sergeant Hertig, were you at Fort Riley and the Junction City, Kansas, area in April of 1995?

A. Yes, sir.

Michael Hertig - Direct

Q. What was your rank then?

A. Sergeant.

Q. And when did you enter the Army?

A. January of 1989.

Q. And when did you come to Fort Riley?

A. March of 1993.

Q. And were you there continuously until you left?

A. Yes, sir.

Q. And when did you leave?

A. April of 1995.

Q. And when you came in 1993, where did you live?

A. I was living in the barracks on post.

Q. All right. And did you continue to live in the barracks the entire time, or did your residence change?

A. I -- I had a room in the barracks, but I was staying with my then fianc=82e in Chapman, Kansas, prior to me leaving.

Q. So when did you sort of start staying in Chapman, Kansas?

A. I would say between September through December of 1995.

Q. 1995?

A. Excuse me. 1994.

Q. All right. 1994. Now, when you were living in Chapman, Kansas, were you staying there pretty much full-time except when you were on duty?

A. Yes, sir.

Q. And then did there come a time when you decided to move?

Michael Hertig - Direct

A. Yes, sir.

Q. And where were you moving?

A. Well, my wife was -- we had just gotten married, and my wife went ahead and moved on to Kentucky, because I knew I was getting ready to be transferred to Fort Benning in Georgia; so we moved out in December of 1994. She went on to Kentucky, and I stayed at Fort Riley.

Q. And then did there come a time when you decided to move?

A. Yes, sir.

Q. And when was that?

A. That was -- I got orders to transfer to Fort Benning, and my orders required me to leave in April of 1995.

Q. Did you have to move some things?

A. Yes, sir.

Q. Was it enough that you could move in a car, or was it more?

A. More, sir.

Q. All right. And how did you plan on moving?

A. With a rental truck, sir.

Q. Did you rent a Ryder truck?

A. Yes, sir.

Q. And how did you do that?

A. We did what we called a do-it-yourself move through the Army, where the Army pays for you to move your own personal belongings. I went to the Ryder truck place in Junction City, Kansas, rented a Ryder truck to complete my move.

Michael Hertig - Direct

Q. Now, did you make a reservation ahead of time?

A. Yes, sir.

Q. And how did you do that?

A. Initially with a phone call to get a quote, and then I went in to make a cash deposit reservation.

Q. And when did you --

A. Correction. A check deposit reservation.

Q. When did you go in to make the check deposit reservation?

A. The week prior -- I left April 18 -- or I got the truck on April 18, so it was the week prior to that. I'm not sure of the date.

Q. Now, when you moved from Chapman to Fort Riley, did you use a Ryder truck for that?

A. Yes, sir.

Q. Where did you obtain the Ryder truck?

A. Same place I got it on the second --

Q. Was that Elliott's Body Shop?

A. Yes, sir.

Q. Now, you went in about a week before April 18 to make the deposit; correct?

A. Yes, sir.

Q. And who did you deal with when you made the deposit?

A. The lady that worked at the -- I'm not -- I can't remember his name -- her name exactly. I believe her first name was Vicki.

Michael Hertig - Direct

Q. All right. Now, was anybody with you when you went in to make the deposit?

A. No, sir.

Q. Then you came back on April 18?

A. Yes, sir.

Q. And was anyone with you then?

A. Yes, sir.

Q. Who was that?

A. Todd Bunting, one of my soldiers.

Q. And why was he going with you?

A. He was the only one who volunteered to help me move.

Q. All right. So he rounds up a car somewhere and you all go down there?

A. I had a vehicle that was -- one of my soldiers had let me use to get from Point A to Point B

USE TO GET FROM POINT A TO POINT B.

- Q. Okay. So the two of you go down to Ryder?
A. Yes, sir.
Q. And about what time of the day was that?
A. Afternoon, around 4. 4 p.m.
Q. And how are you dressed?
A. I'm in my camouflage uniform.
Q. Military uniform?
A. Yes, sir.
Q. And how is Mr. Bunting dressed?
A. He was in civilian clothes, jeans, T-shirt, and a hat.

Michael Hertig - Direct

- Q. He's not squared away?
A. No, sir. He got off duty. I worked later than he had.
Q. I'm sorry?
A. I had worked later than he had.
Q. Okay. So you all go up to Elliott's, and just tell me what happens from the time you exit the car and what happens after that.
A. When we got to Elliott's, he stayed in the vehicle. I went in initially to let them know that I was there to pick up the vehicle -- or pick up the truck. They started the paperwork to get -- to give me the vehicle. I have let them know that I needed furniture pads and a dolly as well. And someone was sent to go get the vehicle and get all the other -- the furniture pads and the dolly. And about a few minutes later, Todd came inside and we were having a little conversation there, got the vehicle, in there maybe 10 or 15 minutes tops, and then walked out, got in the truck and drove off.
Q. All right. Let me show you what's previously been admitted as Government's Exhibit 300. Is this the place that you went to rent the Ryder truck?
A. Yes, sir.
Q. All right. And I'll show you what's been marked as Government's Exhibit 301. Is that a closer view of the same facility?
A. Yes, sir.

Michael Hertig - Direct

- Q. Now, can you tell me about where you parked there?
A. You can see where the Ryder sign is.
Q. Yes, sir.
A. I'd be parked on that sign facing into the building.
Q. Facing into the building?
A. Yes, sir.
Q. So you pulled right up --
A. Yes, sir.
Q. -- against the wall?
A. And you're in a white Crown Victoria, did you say?
A. Yes, sir.
Q. Four-door?
A. Yes. Excuse me. Yes, sir.

Q. Now, let me show you Government's Exhibit 302. Does this look familiar to you?

A. It would -- I guess it would be the back side of the counter, but I never saw the back side of the counter.

Q. Well, let's try another one. Let's look at 303. Does that look familiar to you?

A. Yes, sir. Looks like the doorway going inside of Elliott's.

Q. All right. Now, when you came in, where did you stand?

A. If you're coming through the doorway, to the right side facing the counter about where that Ryder truck -- the Ryder truck poster is at --

Michael Hertig - Direct

Q. Yes.

A. -- I'd be on that side closest to the wall.

Q. All right. And you were talking to somebody at the desk?

A. Yes, sir.

Q. And that was Ms. Beemer?

A. Vicki, yes, sir.

Q. All right. And did then Mr. -- Mr. Bunting come in?

A. Yes, sir.

Q. And where did he stand?

A. He'd be to my left.

Q. Okay. In the front counter?

A. Yes, sir.

Q. Now, when you came in there, was there anyone else inside that office besides you and Ms. Vicki Beemer initially?

A. There was an older gentleman behind the counter, directly behind where Vicki was working. And then there was a black couple sitting off to the side. I guess they were waiting for work that was being done on the vehicle there.

Q. What's your definition of "older," Sergeant?

A. Older than me.

Q. All right. Well, I'll take that --

A. 40's.

Q. Sir?

MR. JONES: Your Honor, I'm not sure this witness is competent.

Michael Hertig - Direct

BY MR. JONES:

Q. Let me show you 304.

A. More mature.

MR. JONES: I'm satisfied he's competent.

BY MR. JONES:

Q. Let me show you 304, which has been admitted into evidence. Can you see that?

A. No, sir.

Q. See it now?

A. Yes, sir.

Q. Now, you said you saw a man and a woman sitting?

A. Yes, sir.

Q. And where were they sitting?

A. Near where that dolly is at. The chair is there. If I remember correctly, there were chairs closer to the -- they'd be on the left side as you're looking at it -- left side of that dolly at the time that I was in there.

Q. All right. And did you know what their business was?

A. No, sir.

Q. Now, you said there was a -- an older gentleman that was behind Ms. Beemer?

A. Yes, sir.

Q. And what was he doing?

A. I believe paperwork.

Q. Okay. Do you know who he was?

Michael Hertig - Direct

A. I'd seen him before. He either ran the shop or was the owner. I'm not sure exactly.

Q. Okay. Now, I will take it that you and Ms. Beemer began to have some kind of conversation to get your truck.

A. Yes, sir.

Q. And just describe what happens.

A. We talked -- I put a check deposit down on the vehicle. She asked whether I was going to pay with cash or check on that instance; if I needed insurance. There was other paperwork I had to initial as well, dos and don'ts when you have a rental truck; and just we had a conversation not dealing with just -- just a slight one, not dealing with the actual renting of the vehicle.

Q. What was that conversation?

A. She had made a comment in reference to my birthday; that she was -- had been married longer than I had been alive.

Q. How did she know what your birthday was?

A. It was on the driver's license I had to show her before I rented the vehicle.

Q. All right. So you took out your driver's license and showed it to her?

A. Yes, sir.

Q. Did you hand it to her, or just hold it?

A. I don't remember, sir.

Q. And she made this comment?

Michael Hertig - Direct

A. Yes, sir.

Q. Now, did you take insurance out on this truck?

A. Yes, sir.

Q. And was the transaction then completed?

A. Once they said the vehicle was ready, the transaction was complete. I paid for it and then walked out to my truck.

Q. Now, did you get a dolly?

A. It was already in the vehicle when I went outside, yes, sir.

Q. Now, at any time did anybody else come in the front office?

Q. Now, at any time did anybody else come in the front office there while you were there?

A. Not that I remember, sir.

Q. Was Mr. Bunting -- did he have a hat on or a cap?

A. Yes, sir.

Q. And was he with you the whole time once you came in?

A. Once I came in? No, he came in --

Q. I'm sorry. Once he came in.

A. Once he came in, he was there until I walked out, yes, sir.

Q. All right. Now, Sergeant Hertig, in April of '95, you had a mustache, didn't you?

A. Yes, sir.

Q. And did Mr. Bunting have a mustache?

A. I believe he had a slight one, not too prominent. I don't remember, sir. I don't remember exactly, sir.

MR. JONES: I don't believe I have any further questions. Thank you, sir.

THE COURT: Mr. Mendeloff.

MR. MENDELOFF: Thank you, your Honor.

I need to retrieve one thing from Mr. Jones, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. MENDELOFF:

Q. Sergeant Hertig, how are you doing today?

A. Fine, sir.

Q. Now, you rented trucks from Elliott's Body Shop on two occasions; is that right?

A. Yes, sir.

Q. And the first one was December of '94, December 26th?

A. Yes, sir.

Q. And the second one was April 18, 1995. Is that right?

A. Yes, sir.

Q. And during both of these rentals, you had a mustache?

A. Yes, sir.

Q. You grew that mustache in November of '94?

A. Yes, sir.

Q. And what was the reason you grew the mustache?

A. I don't remember the exactly reason.

Q. Do you remember being on field maneuvers at that time?

A. Well, yeah. That was the only time I was allowed to grow

Michael Hertig - Cross

it. My girlfriend, you know, wouldn't let me grow one during -- my girlfriend at the time would not let me grow one while I wasn't in the field. I could come back from the field with a full mustache, and it was already a done deal, so --

Q. And is that what you did?

A. Yes, sir.

Q. Now, let me show you what's been marked Government's Exhibit 331 first.

MR. MENDELOFF: I'm going to need the ELMO, please.

BY MR. MENDELOFF:

Q. Does that accurately depict the way you looked back in April of '95?

--r--- -- ---
A. Yes, sir.
Q. Your hair was a little longer than it is today?
A. Yes, sir.
Q. And your mustache, full-grown, was there?
A. Yes.
Q. Is that right?
A. Yes.
Q. And was it just as full as it appears in this picture?
A. Probably a little bit fuller.
Q. A little fuller?
A. More nonregulation.
Q. Now, let me show you Defense Exhibit C38. Does this accurately depict the way you looked when you went into

Michael Hertig - Cross

Elliott's Body Shop on April 18, 1995?

A. No, sir.
Q. By the way, when you went into Elliott's Body Shop on April 18, did you have any acne?
A. Acne? No, sir.
Q. Had you had an acne problem recently?
A. No, sir.
Q. And in May of 1995 -- let me withdraw that.

During both rentals, Vicki Beemer -- Vicki, the woman at the Elliott's Body Shop, waited on you?

A. Yes, sir.
Q. Both in December and again in April of '95?
A. Yes, sir.
Q. And you got to know Vicki a little bit in that first transaction, didn't you?
A. Yes, sir.
Q. That was the one in December?
A. Correct.
Q. You lived in Chapman, Kansas; you were moving out?
A. Yes, sir.
Q. And she lived there then; isn't that right?
A. Right. She made a reference because of the address that I had given when I rented the vehicle.
Q. You gave the Chapman address and she said, "I live there"?
A. Yes, sir.

Michael Hertig - Cross

Q. Chapman is a small town?
A. Yes, sir.
Q. And you guys had a discussion about that?
A. Yes, sir.
Q. You discussed where you lived in Chapman and where each of you lived and how close you were and whether you knew each other's homes.
A. Yes, sir.
Q. You have to answer audibly.
A. Yes.

Q. All right. Now, the truck that you rented in December of '95: That was a 15-foot truck?

A. Yes, sir. Smaller truck.

Q. And in mid April of '95, you were preparing to move from Fort Riley and Junction City to Fort Benning. Is that right?

A. Yes, sir.

Q. And you decided to rent a truck for that?

A. Yes, sir.

Q. You went in -- you called Elliott's to get a quote?

A. Yes, sir.

Q. And then you went in on Thursday, April 13, to put down your money. Is that right?

A. Sounds correct, sir, a week prior.

Q. When you went in on Thursday, April 13, you met with Vicki Beemer?

Michael Hertig - Cross

A. Yes, sir.

Q. And you discussed Chapman again a little bit?

A. Yes, sir.

Q. And then you arranged to pick up the truck the following Tuesday, April 18; isn't that right?

A. Yes.

Q. You didn't go to Elliott's on April 14, did you?

A. No, sir.

Q. Let me just ask you some details about your rental on April 18. You rented the 24-foot truck. Is that right?

A. Yes, sir.

Q. And your travel: Was that to Georgia?

A. Yes, sir.

Q. You didn't tell anyone you were going to Omaha and then to Iowa and back to Omaha, did you?

A. No, sir.

Q. You paid for your quote with a check, didn't you?

A. Yes, sir.

Q. Your reservation?

A. Yes, sir.

Q. And then you -- when you went in to pick up the truck, you paid for the rest of it in cash; is that right?

A. Yes, sir.

Q. But the reservation you put down on April 18 -- excuse me -- April 13 was a personal check, wasn't it?

Michael Hertig - Cross

A. Yes, sir.

Q. Did you ask for any extra days on your rental?

A. No, sir.

Q. And you asked for furniture pads; is that right?

A. Yes.

Q. 12 furniture pads?

A. Yes.

Q. You ordered to pick up -- when you made your rental, you ordered the truck to be picked up at 8:00 in the morning on the 18th; isn't that right?

A. I believe that's a standard time that they set, but I wasn't going to need it till the afternoon; but it was the 18th that I needed the vehicle.

Q. Now, when you went to pick up your truck, did your driver's license indicate that your birthday was April 19, 1970?

A. No, sir.

Q. Your birthday was months before that; is that right?

A. Yes, sir.

Q. When you made your quote call, by the way, where did you make that call from?

A. Be at my work -- workplace on Fort Riley.

Q. And when you made that quote call, did you tell Ms. Beemer that you wanted to rent the truck by virtue of the amount of weight it would carry, or by the number of rooms it would hold?

A. Number of rooms, sir.

Michael Hertig - Cross

Q. Did you say anything about renting a truck that was capable of carrying 5,000 pounds?

A. No, sir.

Q. Did you provide -- were you able to provide a local address and phone number for that rental?

A. Yes.

Q. You didn't say anything to Ms. Beemer about not being able to provide a local number and Ms. Beemer asking you whether or not you had an aunt or something in Omaha that would give you a number, did you?

A. No, sir.

Q. Now, when you went to pick up the truck -- or, excuse me, when you went in to make your reservation, that was on the 13th. Is that right?

A. Yes, sir.

Q. And Vicki Beemer, not Eldon Elliott, is the one that handled that reservation; isn't that right?

A. Yes, sir.

Q. You gave a Kansas address, didn't you?

A. Yes, sir.

Q. Did you ever say to anybody at Elliott's Body Shop that you want to pay for the entire amount of the rental while you have the money at the reservation stage?

A. No, sir.

Q. Did you ever make any reference to saying to anyone that

Michael Hertig - Cross

you wanted -- you did not want insurance because you drove deuce-and-a-halves in the service and you're only going to Omaha and then over to Iowa?

A. No, sir.

Q. And were you -- you weren't at Elliott's at any time during that weekend, were you, that followed this reservation

that weekend, were you, that followed this reservation agreement?

A. No, sir.

Q. Now, when you got to Elliott's on the 18th to pick up your truck, you went in alone -- isn't that right -- initially?

A. Initially, yes, sir.

Q. And it was a few minutes later that Sergeant -- excuse me -- that Private Bunting followed you. Is that right?

A. Yes, sir.

Q. So initially you were there by yourself. You didn't go in together?

A. No, sir.

Q. And when you came in, did you tell anybody that you have a truck reserved that you paid for on Saturday?

A. No, sir.

Q. And when Eldon Elliott -- did Eldon Elliott come in and say to you, "Have you changed your mind about taking insurance?"

A. No, sir.

Q. In fact, you did take insurance, didn't you?

A. Yes, sir.

Michael Hertig - Cross

Q. Now, you mentioned that there was a white -- there was a white -- you drove a white Crown Vic.

A. Yes, sir.

Q. It was not a blue sedan, it was a white Crown Vic?

A. White Crown Victoria.

Q. And when you went into the shop, you mentioned that there was a black couple sitting over in the chairs?

A. Yes, sir.

Q. You didn't see any employees sitting there eating popcorn, did you?

A. No, sir.

MR. MENDELOFF: Nothing further, your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. JONES:

Q. Sergeant Hertig, in April of 1995, how long had you been married?

A. Three and a half months, almost four months.

Q. Do you know any reason why then the subject would come up that Ms. Beemer had lived longer than you had been married (sic)?

A. Other than me making a reference -- when I rented the truck initially, I had just gotten married.

Q. I see. So when you initially rented the truck, you had been married even less time than that?

Michael Hertig - Redirect

A. Yes, sir.

Q. Now, when you lived in Chapman, did you know Ms. Beemer?

A. When I lived in Chapman?

Q. Yes, sir.

A. No, sir.
Q. Did you ever have any contact with her other than at the Ryder rental place?
A. No, sir.
Q. And so your first contact with her at Ryder rental would have been in what month?
A. December.
Q. Of 1994?
A. Yes.
Q. And how many times were you in there then?
A. Once to get the vehicle, and then I didn't see her when I turned the vehicle back in. I turned it in after hours.
Q. And how long was the first contact with her in December of 1994?
A. Same thing, about 10 or 15 minutes.
Q. And then you did not see her again that month?
A. No, sir.
Q. You didn't see her in January?
A. No, sir.
Q. Or February?
A. No, sir.

Michael Hertig - Redirect

Q. Or March?
A. No, sir.
Q. And then you saw her again in April, when you made the deposit.
A. Yes, sir.
Q. And about how long did that take?
A. That was only a few minutes.
Q. Five minutes?
A. At tops.
Q. And then you saw her a week later when you picked up the truck?
A. Yes.
Q. So from December to April, a period of approximately five months, you saw her less than an hour?
A. Yes, sir.
Q. Now, in April of 1995, how tall were you?
A. April of 1995?
Q. Yes.
A. 5' 11", just about 6-foot.
Q. And how much did you weigh?
A. 155, 160.
Q. And how tall was Sergeant Bunting?
A. Private Bunting?
Q. Yes. I'm sorry. Private Bunting.
A. He was about 5' 8", 5' 9".

Michael Hertig - Redirect

Q. And how much did he weigh?
A. 180 -- about 180, 185.

Q. Now, did he ever take off the cap while he was inside?
A. Don't remember, sir.
Q. And do you recall whether he had a tattoo?
A. He does have a tattoo, yes.
Q. Where is that?
A. It's on his left -- left upper arm.
Q. And when he is wearing a T-shirt, can you see any part of the tattoo?
A. Depends on the sleeve length, but you could.
MR. JONES: Nothing further. Thank you, sir.
MR. MENDELOFF: Nothing further, your Honor.
THE COURT: All right. Are you excusing the witness,

Mr. Jones?

MR. JONES: Yes, your Honor.

THE COURT: You may step down. You're excused.

Next, please.

MR. NIGH: Arthur Wells.

THE COURTROOM DEPUTY: Would you raise your right hand, please.

(Arthur Wells, III, affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Arthur Wesley Wells, III, W-E-L-L-S.

THE COURT: Mr. Nigh.

MR. NIGH: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. NIGH:

Q. Good afternoon, Mr. Wells.

A. Good afternoon, sir.

Q. Where do you currently live?

A. 521 North Spruce, Abilene, Kansas.

Q. How long have you lived in Abilene?

A. Oh, since August of last year.

Q. August of 1996?

A. Yes.

Q. All right. What do you do there in Abilene?

A. I work at Don's Tire in Abilene.

Q. What do you do at Don's Tire in Abilene?

A. Car tires, truck tires, stuff like that.

Q. Change them out?

A. Change them out, yeah.

Q. Fix them, that kind of thing?

A. Yes, sir.

Q. Have you been doing that kind of work for quite a while?

A. Since I've been out of the military.

Q. Let's talk about the military for a moment. After high school, did you go into the military?

Arthur Wells, III - Direct

A. Yes, I did, sir.

Q. Which branch of the service did you go in?

A. U.S. Army.

Q. And do you recall what year it was when you entered the
army?

ALMY:

A. It was January 17 of '87, I believe.

Q. And were you stationed ever at Fort Riley?

A. Yes.

Q. Did you during the course of your Army service go to the Gulf War?

A. Yes, sir.

Q. You were in the Persian Gulf and saw combat duty there?

A. Yes, sir.

Q. Were you a mechanic in the service?

A. Yes, sir, 63 Bravo.

Q. I'm sorry. 63 Bravo?

A. Yes.

Q. What does that mean?

A. That's your job, mechanic, light wheel.

Q. What kind of cars and trucks did you work on there?

A. Humvees, deuce-and-a-halves, 5-tons, anything that had four wheels.

Q. Deuce-and-a-half would be a 2-1/2-ton truck?

A. Yes, sir.

Q. Then after you went to the Persian Gulf -- you were

Arthur Wells, III - Direct

stationed for a while in Germany, also, were you not?

A. Yes, sir. Ansbach.

Q. After that, then you went to Fort Riley?

A. Yes, sir.

Q. Then after you got out of the service, did you work for a period of time at the Firestone dealership there in Junction City?

A. First I went to B.F. Goodrich, Boyer, and then I went to Firestone.

Q. Approximately when did you start working at the Firestone dealership in Junction City?

A. November 21 of '94, I believe.

Q. All right. And did you work for a fellow there named Tom Manning?

A. Yes, sir.

Q. During April of 1995, were you also working at the Firestone dealership?

A. Yes, sir.

Q. What were -- what was your job at the Firestone?

A. Same thing I'm doing at Don's Tire, but there we had like oil changes; and sometimes they would have me change parts, like alternators and general GS stuff, general service.

Q. All right. Is that the kind of work you were doing in April of 1995?

A. Yes, sir.

Arthur Wells, III - Direct

Q. I'd like to direct your attention, if I can, to April 14 of 1995. Do you remember a transaction that day?

A. What kind of transaction? You have to get me there.

Q. Okay. Do you remember Tim McVeigh coming into your store?
A. Yes, sir.
Q. And do you remember a transaction of him trading cars with Tom Manning?
A. Yes, sir.
Q. All right. What time approximately was it in the morning where you became aware that this was going on?
A. I would say -- I didn't see him come into the store, but I would say it would have to be between 9:30 and 10:30. It was in the morning time.
Q. What were you doing when this all started?
A. When I seen Timothy McVeigh?
Q. Yes, sir.
A. I was working on the yellow Mercury.
Q. That was the first time that you saw him?
A. Yes, sir.
Q. How did it happen that you came to be working on the yellow Mercury?
A. Well, Tom said he sold a car; and Joe brought it in the bay, and we started changing it out -- like the right rear tire, it was bald, so I put a spare on and put stuff in the back of the trunk like oil, antifreeze, you know, your stuff

Arthur Wells, III - Direct

for road -- road-ready.
Q. Did it need some of those items?
A. Yes, it did.
Q. How about transmission fluid?
A. Yes, it did.
Q. Did you put any transmission fluid in the trunk?
A. Yes, sir.
Q. Is there any particular reason --
A. And a transmission filter kit, too.
Q. Was there a reason for putting transmission fluid and a filter kit in the trunk?
A. Tom just said put it in there.
Q. All right. You can draw a little bit, can't you?
A. Yes, sir.
Q. Would it help you to describe where you were working on the car and your interaction with Mr. McVeigh that day if you were to draw it for the jury on that screen in front of you?
A. Yes, sir.
Q. Well, let's give this a try.
MR. NIGH: I think this will work, your Honor. If it doesn't, we'll do something different.
THE COURTROOM DEPUTY: Just blank?
MR. NIGH: Yeah, just blank.
THE WITNESS: Is there a way I can see it? I can't see it on the screen.

Arthur Wells, III - Direct

BY MR. NIGH:

Q. If you put that pen on the screen, it should make a mark that you can see.

A. Okay.

Q. All right. You've put --

MR. NIGH: Can we have that printed, your Honor?

THE COURT: Yes.

MR. NIGH: Before it disappears.

BY MR. NIGH:

Q. You've put a series of lines there and the letter K, GS -- is that a GS?

A. Yes, sir. General service.

Q. All right. The next GS?

A. General service, same thing.

Q. And then alignment?

A. Alignment, yes, sir.

Q. And then 5 and 6?

A. Yes, sir.

Q. Do those represent the base there at the Firestone?

A. Yes, sir.

Q. Which direction would be north on this particular drawing, if you can tell from looking at that?

A. I've got to kind of remember how it's set up.

Well, this is 8th Street.

Q. Okay.

Arthur Wells, III - Direct

A. So Washington would run north and south.

This would be the -- the bays are on the east side of the building.

Q. Okay. Fair enough.

Now, if you would, using that diagram, tell the -- tell us what happened, where the car was and how it got into the bay and which bay it was in.

A. Well, Tom told us to get it all ready because of the transaction. And then over here, these little lines here would represent the parking lot where we would have cars come in when we're getting ready to GS them, general service. And the gray Pontiac station wagon, Tim and Tom were over here. We was working on the car -- whoops -- over here in Bay 5, and I was standing about right in there doing the tire. And I seen Tom and Tim over here talking. That's when I first seen everything.

Q. Okay. All right. Let's leave that diagram the way -- the way that it is and --

MR. NIGH: Your Honor, I'd ask for that one to be printed as well.

The first one I'd offer is Defendant's Exhibit F21, and the second one is F22.

THE COURT: All right.

THE COURTROOM DEPUTY: I'm not sure that the second one will print properly. I'm not picking it up.

Arthur Wells, III - Direct

MR. NIGH: Not picking it up?

Then I'll withdraw my offer of it.

MS. RAMSEY: Do you want the first one, F21?

MR. NIGH: Yes.

We'll get by without a physical copy of it, your

Honor.

BY MR. NIGH:

Q. Let's skip the drawing for a minute, Mr. Wells. And tell me when you saw Mr. Manning and Mr. McVeigh, what were they doing?

A. Just talking, it looked like. Just standing there discussing.

Q. Was that right outside the bay area?

A. Yes.

Q. Towards the parking lot side?

A. Yes, sir.

Q. How long did they stay there?

A. I don't know. They stood there and talked for a little bit.

Q. Did you see where Mr. McVeigh went after he finished talking to Mr. Manning?

A. He walked over to the car behind it, where I was working.

Q. And what did he do after that?

A. Well, first of all, Tom said, "This is the guy that's buying the car." I just shook his hand. I can't remember what

Arthur Wells, III - Direct

kind of conversation we had. I knowed he was military because of the haircut, because I was prior military. And then I started working on the car.

Q. What did he do while you worked on the car?

A. Stood there and watched.

Q. Did he go anywhere while you were working on the car?

A. No, he didn't. He was just standing there watching.

Q. How long did it take you to work on the car?

A. I can't say. However long it takes to change a spare out and put the stuff in the car; and Joe looked underneath the hood, make sure that the engine and stuff is okay, you know, like fan belts, radiator hoses.

Q. He stood there while all of that went on?

A. Yes, he did.

Q. After the car was finished getting the general service, what happened after that?

A. Well, I went to go fill the car up at the Jim's 66.

Q. Where was Mr. McVeigh when you went to fill the car up?

A. Still standing by the bay door.

Q. Was he with anybody at that point in time?

A. Tom.

Q. How long were you gone to get the car filled up?

A. It takes a couple minutes to go put fuel in it because the gas station was just a few blocks away -- well, to get to the gas station was just a few minutes away and then however long

Arthur Wells, III - Direct

it takes to put a full tank in there and then to come back.

Q. So what would your estimate be of the number of minutes you were gone?

A. 10, 15 minutes maybe.

Q. What did -- what did you observe when you got back?

A. Well, Tom and Tim was there, and Tim got in the car and left.

Q. When you got back, were they in the same place that they had been when you left?

A. Well, they was outside of the bay.

Q. How far were they from where they had been when you left?

A. Just a few feet. I don't know exactly.

Q. And then Mr. McVeigh got in the car and drove away?

A. He drove away.

Q. Now, you can't say whether or not Mr. McVeigh left the Firestone dealership when you went to get gas; is that correct?

A. No. No.

Q. All right.

A. I wasn't there.

Q. And you can't say whether he left the Firestone dealership prior to the first time you saw him as he was introduced to you by Mr. Manning. Is that right?

A. No. I didn't even know who he was until Tom and him came over there.

Q. During the time that you were servicing the car, can you

Arthur Wells, III - Direct

say whether or not Mr. McVeigh left the Firestone dealership?

A. No, because he was standing there watching us do the service on the car.

Q. So during that period of time, you know he did not leave?

A. Yes, sir.

MR. NIGH: I believe that's --

Your Honor, I think the F22 did print, and I would offer it.

THE COURT: All right. We're receiving it, illustrating his testimony.

MR. NIGH: That's all I have, your Honor.

Thank you, Mr. Wells.

THE WITNESS: You're welcome, sir.

THE COURT: Mr. Mendeloff?

MR. MENDELOFF: Your Honor, I'm going to need a couple of exhibits from the court clerk, Government's Exhibit 278 and 279.

THE COURT: Okay.

MR. MENDELOFF: We'll start with something else, if it's permissible, your Honor.

THE COURT: Yes, go ahead.

CROSS-EXAMINATION

BY MR. MENDELOFF:

Q. Mr. Wells, when -- when you began to work on this -- excuse me. Prior to the time you began to work on Mr. McVeigh's car,

Arthur Wells, III - Cross

had you seen him?

A. Excuse me?

Q. You had not seen him prior to the time --

A. No, I hadn't.

Q. Prior to the time you began to work on the car.

The first thing that happened regarding this car was that Mr. Manning walked up and told you somebody needed to do a general service on the car?

A. I would say that.

Q. And he was alone when he did that? When Mr. Manning walked up to tell you that, he was alone. Is that right?

A. I believe he told Joe about doing the service on the car.

Q. He was by himself?

A. Yeah.

Q. And as a result, you don't know whether or not Mr. McVeigh had left the area at that point?

A. No.

Q. Joe Grimes -- is that right?

A. Right.

Q. Brought the car into the bay and you all started working on the car. Is that right?

A. Yes, sir.

Q. And it was after you started working on the car that you looked over and you saw Mr. McVeigh and Mr. Manning standing near the Pontiac J2000. Is that right?

Arthur Wells, III - Cross

A. Yes, sir.

Q. And you didn't see that Pontiac J2000 come into the lot, did you?

A. It was already setting out there.

Q. The first time you saw it, it was already out. Isn't that right?

A. Yeah.

Q. You didn't see anybody examine it, did you?

A. No.

Q. And prior to the time that Mr. McVeigh and Mr. Manning walked up to the car as you were working on it, you didn't see them engaging in any kind of dealings, did you?

A. No.

Q. You didn't see them walk around to the back of the building?

A. No.

Q. They could have --

A. They walked straight from that car to the car that we was working on.

Q. I'm talking -- what I'm referring to is the time frame before the first time you saw them.

A. I have no -- I didn't know nothing about it.

Q. You didn't know where they were, did you?

A. No.

Q. And Mr. McVeigh could have left the premises for 10 or 15

Arthur Wells, III - Cross

minutes and you would have no way of knowing that he had done that. Is that right?

A. No.

Q. Now, let me just show you what's been marked Government's Exhibit 279.

We still have the computer screen on there.

There we go.

If you look at that computer screen in front of you, Mr. Wells, you'll see 279. Is that familiar to you?

A. Yes, sir.

Q. What is that?

A. Firestone.

Q. Does that fairly and accurately depict the way that building and vicinity looked back then in '95?

A. I can't say, really, but I guess close enough.

Q. Do you see any differences that you can remember?

A. No.

Q. Looks about the same?

A. Uh-huh.

Q. All right.

MR. MENDELOFF: We move the admission of Government's Exhibit 279, your Honor.

MR. NIGH: No objection.

THE COURT: Received, 279. May be published.

BY MR. MENDELOFF:

Arthur Wells, III - Cross

Q. Mr. Manning -- Mr. Wells --

A. Mr. Manning, hey.

Q. Sorry about that, Mr. Wells.

Mr. Wells, let me direct your attention first to the Firestone station.

A. Okay.

Q. That's the station you're talking about?

A. Yes, sir.

Q. And the bays you're talking about are along this side of the building. Is that right?

A. Right.

Q. And that would be the west side of the building?

A. Well, let me think, north and south, north and south. I can't think of east and west, but --

Q. That's all right.

Now, are you familiar with the business located down the alley and across the street?

A. Yes.

Q. J & K Bus Station?

A. Right.

Q. Are you familiar with the fact that there is a set of pay phones in front of that bus station right where my finger is

PHONES IN FRONT OF THAT BUS STATION RIGHT WHERE MY FINGER IS pointing?

A. Yeah.

Q. Let me show you Government's Exhibit 278. Do you see it on

Arthur Wells, III - Cross

your screen?

See Government's Exhibit 278 on your screen there,

Mr. Wells?

A. 278?

Q. That's the one that you're looking at. See that?

A. Yeah.

Q. Do you see the Firestone station there in the background?

A. Yes, sir.

Q. Does that accurately depict the way the Firestone station looks from the J & K Bus Station?

A. Yes, sir.

Q. And that pay phone is the pay phone that I was referring to; is that right?

A. Yes, sir.

MR. MENDELOFF: We move the admission of Government's Exhibit 278, your Honor.

MR. NIGH: No objection, your Honor.

THE COURT: Received, 278.

MR. MENDELOFF: I'm sorry.

BY MR. MENDELOFF:

Q. Just for the benefit of the jury, what am I pointing to?

A. A car.

Q. Not the car.

A. Firestone. Okay.

Q. Is that the place you worked?

Arthur Wells, III - Cross

A. Yes, sir.

Q. And you come down the alley and across the street to get to this --

A. Okay.

Q. Get to this pay phone?

A. There you go. Okay.

Q. I haven't graduated anywhere near computers. Okay.

Now, you testified that after you got done working on the car, you then drove it to a gas station and you were gone about 10 or 15 minutes. Is that right?

A. Yes.

Q. And had you shown some personal interest in that car before?

A. Personal interest, like purchase it myself?

Q. Yes.

A. Yeah, because I had a '76 Chevy Monte Carlo and Tom was saying, "Well, I'll sell this one to you cheap."

Q. And when you drove it, did you like it?

A. Yeah.
Q. Did it drive well?
A. I reckon so. Got me to the gas station and back.
Q. And when you went to the gas station, did you have a problem with the battery?
A. Did I have a problem with the battery? No.

Arthur Wells, III - Cross

Q. Fire right up?
A. Yeah.
Q. And was the car smoking in any way?
A. No.
Q. Then you brought the car back from the gas station to the Firestone dealership. Is that right?
A. Right.
Q. And Mr. McVeigh got in the car and left?
A. Right.
Q. Did you see him move anything from his J2000, any --
A. No, he got the Mercury and left.
Q. From the J2000 --
A. He got in the Mercury and left.
Q. Didn't move a TV set in the Mercury?
A. No.

MR. MENDELOFF: Thank you. Nothing further, your Honor.

THE COURT: Mr. Nigh?
REDIRECT EXAMINATION

BY MR. NIGH:

Q. Mr. Wells, you were interested in buying that car for a little bit?
A. For a little bit.
Q. What were you going to do with it if you bought it?
A. Drive it back and forth to work.

Arthur Wells, III - Redirect

Q. Is there any other purpose you were going put for it?
A. No.
Q. Did you ever hear Mr. Manning -- Mr. Manning describe it as a "roach mobile"?
A. As a roach mobile?
Q. Yes.
A. I mean, that's been a long time ago. He may have, may not have.

No.

Q. You don't remember him saying that?
A. No.

MR. NIGH: That's all I have, your Honor.

THE COURT: I take it he's excused?

MR. NIGH: Yes, your Honor.

THE COURT: You may step down. You're excused.

THE WITNESS: Thank you.

THE COURT: Next, please.

MR. NIGH: Nancy Kindle, your Honor.

THE COURTROOM DEPUTY: Nancy Kindle?

MR. NIGH: Kindle.

THE COURTROOM DEPUTY: Would you raise your right hand, please.

(Nancy Kindle affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Nancy Jean Kindle, K-I-N-D-L-E.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Proceed.

MR. NIGH: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. NIGH:

Q. Ms. Kindle, how do you currently make your living?

A. I work as a waitress.

Q. Where do you work as a waitress?

A. At Denny's.

Q. In what city is that Denny's located?

A. Junction City.

Q. Junction City, Kansas?

A. Uh-huh.

Q. Is that where you grew up in Junction City, or did you grow up somewhere else?

A. Well, I finished high school in Junction.

Q. Up until you were in the eleventh grade, where did you live?

A. Oh, in Mission, South Dakota.

Q. Did you move to Junction City in connection with marrying someone in the military?

A. Uh-huh. Yes.

Q. And as a result of that, did you move to the Fort Riley

Nancy Kindle - Direct

area?

A. Yes.

Q. And then into the Junction City area?

A. Yes.

Q. Approximately when was that that you moved to that part of the country?

A. In July of '91.

Q. Have you lived there in that part of the country ever since?

A. Yes.

Q. Did there come a time when -- well, let me ask it a better way.

When did you start working at the Denny's restaurant there?

A. In October of '93.

Q. October, 1993?

A. Yes.

Q. Have you been a waitress there ever since?

A. Yes.

Q. Can you tell us where in Junction City the Denny's is

Q. Can you tell us where in Junction City the Denny's is located?

A. I think it's Washington Street, 1039, I think, Washington Street.

Q. 1039 Washington Street. Do you know about how far that is off the interstate?

Nancy Kindle - Direct

A. Half a block -- block and a half.

Q. If I could, I'd like to direct your attention to the spring of 1995. Were you working at Denny's during that period of time?

A. Yes.

Q. And if I could call your attention specifically to Easter Sunday of 1995. Do you remember that day?

A. Yes.

Q. Were you working on that day?

A. Yes.

Q. What time did you get to work there?

A. 6 a.m.

Q. And you worked the breakfast shift and through until the noon hour. Is that right? You worked until noon?

A. Yes.

Q. And then slightly after noon, did you have a group of three people come in?

A. Yes.

Q. Do you remember the names of any of them?

A. One.

Q. And what was that name?

A. McVeigh.

Q. What time was that approximately?

A. Between 12:30 and 1.

Q. All right. How many people were in the group?

Nancy Kindle - Direct

A. Three.

Q. Was it you that greeted them at the door, or was it somebody else?

A. It was me.

Q. Is there anything in particular that causes you to remember the name?

A. I asked the spelling.

Q. Why would you ask the spelling of a customer's name?

A. So I know how many people and if it's smoking or non and who to call.

Q. So that we're clear about this, on Easter Sunday, was it busy that day at Denny's?

A. Yes.

Q. Were there people waiting for seats?

A. Yes.

Q. And were you having to take names as a result?

A. Yes.

O. All right. If you would, I'd like you to look around the

2. ... courtroom and tell me if you see the man who gave you the name McVeigh.

A. Yes.

Q. And if you would, tell us what article of clothing he's wearing.

A. A blue shirt -- the blue shirt with stripes.

MR. NIGH: Your Honor, may the record reflect that

Nancy Kindle - Direct

she's identified Mr. McVeigh.

THE COURT: Well, I'd call it plaid, but I think -- okay.

MR. NIGH: With that caveat.

THE COURT: Okay.

BY MR. NIGH:

Q. Ms. Kindle, I'm going to ask you a leading question. Is he wearing a plaid shirt?

A. Yes.

Q. Now, do you remember what the other fellas that were with him looked like that day?

A. I remember one was like a scraggly looking man, about 5' 7". That's all I really remember.

Q. What about the third fellow?

A. No.

Q. Don't remember him at all?

A. No.

Q. Since all of this happened and since the Oklahoma City investigation, have you seen some television coverage concerning this case?

A. Yes.

Q. Have you seen on television pictures of Terry Nichols?

A. Yes.

Q. Was either of the men with Mr. McVeigh Terry Nichols?

A. No.

Nancy Kindle - Direct

Q. All right. Do you remember what these three fellas ate or anything about what they had there at the Denny's that Sunday afternoon?

A. I just remember having to fill the coffee. That was all.

Q. What time did you get off work that day?

A. About 3, 3:30.

Q. Did you have plans for after you got off work?

A. Yes.

Q. What were those plans?

A. An Easter egg hunt.

Q. Do you have a child that you were going to take to an Easter egg hunt that day?

A. Yes.

Q. Where was the Easter hunt -- I'm sorry -- Easter egg hunt scheduled?

A. Milford Lake.

Q. Is that right there in Junction City, or pretty close?
A. Yeah, about 15 miles.
Q. 15 miles away?
A. About 15 miles.
Q. I see. After you got off work, where did you go?
A. To get my son.
Q. And after you picked up your son, where did you go from there?
A. Home.

Nancy Kindle - Direct

Q. What did you do when you were at home?
A. Showered and got dressed.
Q. Put on different clothes than you had been working in?
A. Yeah, uh-huh.
Q. And then after you showered and got dressed, what did you do?
A. Went and got gas.
Q. Where did you get gas?
A. Texaco.
Q. Do you remember what the address of the Texaco was, or where it's located in Junction City?
A. Washington Street.
Q. Pretty close to where you work?
A. Uh-huh.
Q. I'm sorry?
A. Yes.
Q. About how far from where you work?
A. Half a block.
Q. And you got gas. Did you fill up before you paid, or did you pay first?
A. I filled up.
Q. And then I assume -- well, tell me, what happened after you actually physically put the gas in the car?
A. I started to walk in and I saw the gentleman I had waited on.

Nancy Kindle - Direct

Q. Which gentleman is that?
A. Mr. McVeigh.
Q. What was Mr. McVeigh doing and what were you doing?
A. I was walking in, he was walking out.
Q. Did you speak to him or did he speak to you?
A. All I said was, "Hi, how you doing," walked on.
Q. Did he respond to you?
A. Uh-huh.
Q. And what did he say?
A. "Hey," walked on. Nothing major.
Q. What time did this occur?
A. It was about 4:30.
Q. 4:30 in the afternoon on Sunday, April 16?
A. Yes.

Q. Was there something -- had you noticed Mr. McVeigh or anything in particular about Mr. McVeigh when you saw him in Denny's?

A. Yeah.

Q. And what was that?

A. Well, I noticed that he was tall, because I had to look up at him when I was spelling his name, and he had cute -- he had a cute appearance to me.

Q. All right. Is that also why you said hi to him at the gas station?

A. Yes.

Nancy Kindle - Direct

Q. Ms. Kindle, I have -- I don't know whether you know the answer to this or not; but do you know the distance between Junction City, Kansas, and Oklahoma City, Oklahoma?

A. No.

MR. NIGH: That's all I have, your Honor.

THE COURT: Ms. Behenna?

CROSS-EXAMINATION

BY MS. BEHENNA:

Q. Ms. Kindle, where is your home located? Where was it located in Junction City?

A. About a block and a half from Denny's.

Q. A block and a half? Do you recall being -- and so you picked up your son first?

A. Uh-huh.

Q. Right?

You go home and you change and then you say you go get some gas. Is that right?

A. Yes.

Q. And it's all right there in the same vicinity, the Texaco station being almost right across the street from the Denny's. Is that right?

A. Yes.

Q. Do you recall when the FBI agents came to interview you in April of 1995?

A. Yes.

Nancy Kindle - Cross

Q. And you recall that you told the FBI agents at that time that you saw an individual in the Denny's; right?

A. Yes.

Q. And it's somebody who you said resembled Tim McVeigh who you had seen on TV before. Is that right? Is that what you told the FBI?

A. Yes.

Q. As a matter of fact, you did not identify Tim McVeigh as being the person in the Denny's restaurant; isn't that true?

A. I don't understand.

Q. Well, your statement to the FBI was that you saw an individual in the Denny's restaurant on Easter Sunday, 1995.

A. Yes

44. 103.

Q. And that that person resembled the person you had seen on TV and who you had come to know as Tim McVeigh.

A. Yes.

Q. Isn't that right?

A. Uh-huh.

Q. Okay. So my question to you is that you did not specifically identify to the FBI agents in April of 1995 that you had seen Tim McVeigh; correct?

A. Yes, I did.

Q. Well, you said that you saw somebody resembling his appearance.

A. Yes.

Nancy Kindle - Cross

Q. All right. Now, you don't know Tim McVeigh, didn't know him beforehand?

A. No.

Q. And the only time you had seen his picture is the picture that you had seen on TV in relationship to the bombing?

A. Yes.

Q. Now, do you know what time Mr. -- or the person resembling Mr. McVeigh and his friends left the Denny's restaurant?

A. They left before I left work. I was busy doing side work.

Q. Well, you were waiting on them supposedly; right?

A. Yes.

Q. In the Denny's?

So how long did it take them to eat their dinner and leave, if they were about 12:00?

A. I wasn't watching the clock.

Q. Sometime before 3:00?

A. Yes.

Q. Because that's when you left.

A. Yes.

Q. When you saw the same gentlemen that you had seen in the Denny's restaurant at the Texaco station, did you notice any vehicles --

A. No.

Q. -- at the Texaco?

Did you notice that they were driving or getting into

Nancy Kindle - Cross

any vehicles at the Texaco station?

A. No.

Q. They were just standing inside the building talking?

A. No. He was walking out and I was walking in.

Q. And you did not follow him where he went when he got out of the building, even though you thought he was kind of cute and made a comment to him?

A. No, I was in a rush to get to the Easter egg hunt.

Q. And you don't know where he went once he left the building?

A. No.

MS. BEHENNA: May I have just a moment, your Honor?

THE COURT: Yes.

MS. BEHENNA: I think that's all I have, your Honor.

THE COURT: Any redirect?

MR. NIGH: No, your Honor.

THE COURT: And I take it she's excused.

MR. NIGH: Yes, your Honor. Thank you.

THE COURT: You may step down. You're excused.

MR. JONES: Your Honor, may we approach the bench for just one moment?

THE COURT: Yes.

(At the bench:)

(Bench Conference 112B1 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

THE COURT: Members of the jury, we're going to recess early.

JUROR: Oh.

THE COURT: And I know that's disappointing. We're substantially ahead of schedule here; and accordingly, the next witness is one whom we will not be able to finish by 5:00; but since there is a three-day weekend here, rather than start this witness and then come back to the testimony of the same person on Tuesday, that's a bit awkward, so that's why we're going to quit early.

Now, of course, there is a three-day weekend, a national holiday on Monday; and of course, that holiday has some considerable significance to many people. But I want you to know, of course, as you already do know, the importance of being careful now during this time and doing the things that you have planned or whatever you're going to do during this time to make sure that it does not involve anything that could influence or affect your decision on the very serious issues for you to decide in this trial, so that you can decide based on the law and the evidence.

And, you know, these long recesses are difficult sometimes. They're difficult on judges. Judges are people who can have nightmares, too; and one of those nightmares is that jurors will violate the instructions that are given, which, of course, would ruin the whole thing.

So I ask of you, don't give me any nightmares or reason to have them. Be careful. Keep open minds. The trial is moving along, but it hasn't been completed; and the case has not been given to you, obviously, for your decision. Not only do we have more witnesses to hear from, exhibits to be received, but the arguments of the lawyers, as I've told you, with respect to what they suggest to you that it all means or doesn't mean, and then the instructions that I'll be giving you about the law. And these are all important parts of the trial, so please bear with us.

Enjoy yourselves. We hope you enjoy yourselves during this time but that you remain true to your oath and fulfill your obligations in this case. And we'll trust you to do that.

So you're excused until 9:00 on Tuesday morning. We hope you have a very pleasant weekend.

You're excused.

(Jury out at 4:42 p.m.)

THE COURT: All right. Trial will resume at 9:00
Tuesday morning.

(Recess at 4:42 p.m.)

* * * * *

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PLAINTIFF'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
278	10700	10700			
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C20	10656	10656			
C23	10657	10657			
F21 &	10691	10692			
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REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter. Dated
at Denver, Colorado, this 23d day of May, 1997.

Paul Zuckerman

Bonnie Carpenter