

Defense attorney almost gets truck evidence tossed Testimony allowed despite witnesses' conversation

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DENVER - An improper out-of-court conversation between two FBI witnesses in the second Oklahoma City bombing trial nearly cost the government one of its most crucial bits of evidence Friday.

But U.S. District Judge Richard Matsch, who held an extraordinary hearing on the matter after excusing the jury for the day, denied a defense motion to strike the two witnesses' testimony about a Ryder truck fragment prosecutors say reveals the major ingredient of the bomb.

While he agreed that their conversation about the case "should not have occurred," the judge said he believed it had not affected their testimony.

And besides, he noted, the jurors already had heard about the controversy, suggesting they could decide for themselves how to weigh it.

At issue Friday in the conspiracy and murder trial of Terry Nichols was the testimony of FBI Agent Alton Wilson and Ronald Kelly, a chemist in the FBI Laboratory in Washington.

Both men were involved in the recovery of a small red-and-yellow piece of wood from the cargo box of the rented Ryder truck that carried the bomb to the Oklahoma City federal building on April 19, 1995.

It was on that piece of wood that another FBI chemist, Steven Burmeister, found crystals of ammonium nitrate, which the government contends was mixed with racing fuel to make the bomb.

Without the testimony of Agent Wilson and Mr. Kelly, the government would have been hard pressed to explain to the jury the chain of custody for the evidence, which is key because ammonium nitrate was also found at Mr. Nichols' home.

Mr. Kelly testified last spring in the Oklahoma City bombing trial of Timothy McVeigh, who was convicted and sentenced to death, that Agent Wilson had photographed the crucial piece of wood in a parking lot across the street from the bombed building.

Agent Wilson, however, testified in this trial that he could not recall taking such a photograph. And Mr. Kelly conceded Friday that he didn't know exactly who had taken it, although his "best recollection" was that Agent Wilson did.

But Mr. Kelly said at another point, "I may have been mistaken as far as my recollection of who took the photograph. " Moreover, he told lead defense attorney Michael Tigar that he and Agent Wilson had discussed the evidence within the last few months at the government's Denver bombing command post.

"We were reviewing photos and other materials concerning the recovery" of evidence, he explained at one point.

Federal rules prohibit such discussions between witnesses, and Mr. Tigar sought to strike their testimony.

"I was quite frankly surprised to hear about their conversations," Mr. Tigar told Judge Matsch in the hastily called hearing.

Prosecutor Beth Wilkinson, who handled both witnesses in and out of the courtroom, told the judge that she didn't remember cautioning either one not to discuss the case with the other, but that she may have.

If not, she allowed, she had made a mistake.

Even now, she said the FBI's records were incomplete or so mixed up "we can't determine who the photographer was. " Agent Wilson and Mr. Kelly also conceded that many other mistakes had been made in the collection of evidence from the parking lot.

For instance, Agent Wilson said that he had neglected to mark on a diagram of the parking lot exactly where the piece of wood had been found and that there were discrepancies between his photo log of the evidence and the photographs themselves.

"That was not the correct method," he said.

"It's fair to say that you and Mr. Wilson made some mistakes on the log back on April 21st, 1995? " Ms. Wilkinson asked Mr. Kelly after Mr. Tigar was through with cross-examination.

"Yes, we did," he said.

"Is that the item you recovered on April 21, 1995? " she asked him, indicating the charred red and yellow fragment that another witness would soon display side by side with a shiny, intact square cut from a Ryder truck's cargo box.

"Yes, it is," he said.

Although the government concedes that Mr. Nichols was at home in Herington, Kan., when Mr. McVeigh set off the bomb, he stands accused of the same 11 counts of murder and conspiracy.

Mr. McVeigh was found guilty last June for his role in the April 19, 1995, bombing, which killed 168 people and injured more than 500 others. If this jury finds Mr. Nichols guilty, it will return to determine whether he should be executed.

Earlier in the week, prosecutors had predicted that they would wrap up their case Friday. But with the bulk of the scientific testimony yet to come, it could easily be Tuesday before the defense begins its case.

Friday was all windup and no pitch.

Even after prosecutors called to the stand Mr. Burmeister, who analyzed the all-important truck piece, Judge Matsch halted testimony for the day just before he could state the conclusion he gave in the McVeigh trial: that its surface bore crystals of ammonium nitrate fertilizer.

In the first trial, Mr. Burmeister also testified that the crystals he discovered contained the same brand-specific chemical additives as both jars of ammonium nitrate found at Mr. Nichols' house and the two tons of the fertilizer prosecutors contend he and Mr. McVeigh bought to make the bomb.

Mr. Tigar forestalled jurors from carrying such potentially damning information home for the weekend by inquiring minutely, as he has for days, into every step in the FBI's recovery and handling of the board.

Before Judge Matsch called a halt, however, Mr. Burmeister had described how he had picked up prills of ammonium nitrate from near the porch of Mr. Nichols' house. At Ms. Wilkinson's direction, he displayed to jurors a glass vial that rattled as the small, white pellets rolled around inside.

The chemist said a container of racing fuel and several blasting caps were found in Mr. Nichols' home as well.

"Were you aware that Mr. Nichols had told FBI agents . . . that there were no explosives in his house?" Ms. Wilkinson asked him.

"Yes," he said.

"Did you find explosives in his house?" she asked.

"Yes," he said.