No. 17-5343

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST LEE DEAN, aka EARNEST LEE DEAN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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QUESTION PRESENTED

A detective testified without objection about the concept of "serial robberies" and its application to the investigation of defendant's crimes. In closing argument, the prosecutor referred, also without objection, to defendant as a "serial robber." Did the prosecutor's comment or the trial court's failure to give a curative instruction *sua sponte* violate petitioner's rights arising under the Fifth and Fourteenth Amendments, or the Federal Rules of Evidence?

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner asks this Court to grant certiorari to consider the question of whether the prosecutor's comments regarding the term "serial robber," and the trial court's failure to give a curative instruction *sua sponte*, violated petitioner's rights arising under the Fifth and Fourteenth Amendments or the Federal Rules of Evidence. But that question is not squarely presented by this case. First, this Court lacks jurisdiction to review this case. Defendant's arguments were unpreserved on direct appeal, and thus the federal claims advanced here were neither addressed by, nor properly presented to, the state court that rendered the decision challenged. Rather, the state court decided the matter based upon the adequate and independent grounds of state preservation requirements. Second, even if this Court has jurisdiction, this case does not warrant certiorari. The record does not support several matters material to petitioner's legal arguments, his arguments are wrong on the merits, and there is no open question to answer or split of authority to resolve. This Court should therefore deny the petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," where a "right" is "specially set up or claimed under the Constitution" or "statutes" of the United States. 28 U.S.C. § 1257(a) (alterations supplied). But as explained below, this Court lacks jurisdiction because the federal claims advanced here were neither addressed by, nor properly presented to, the state court below.

STATEMENT OF THE CASE

The State of Oregon charged petitioner with several offenses for his commission of two robberies occurring ten days apart in the Portland area.[1] (*See* Trial Court File ("TCF"), Indictment at 1–4). In the first robbery, petitioner, wearing dark clothing and a mask, entered the Silver Cloud Inn in Portland at 3:30 a.m. on September 5, 2013, tied up the hotel clerk and a deliveryman with plastic zip ties, threatened the clerk with a gun and a bomb, and demanded money from the hotel cashier drawer and safes. (*See* Trial

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[1] Those offenses included 17 total counts of first-degree robbery, Or. Rev. Stat. § 164.415; second-degree robbery, Or. Rev. Stat. § 164.405; second-degree kidnapping, Or. Rev. Stat. § 163.225; first-degree burglary, Or. Rev. Stat. § 164.225; felon in possession of a firearm, Or. Rev. Stat. § 166.270; and unlawful possession of a destructive device, Or. Rev. Stat. § 166.382. (TCF, Indictment at 1–4).

Transcript ("Tr") 216–26, 376–80). Similarly, in the second robbery, petitioner, wearing black clothes and a mask, entered the Holiday Inn in Gresham at around 3:00 a.m. on September 15, tied up the hotel clerk with plastic zip ties, threatened him with a gun and a bomb, and demanded money from the hotel till and deposit boxes. (*See* Tr 257–68).

At trial, a detective testified about the concept of "serial robberies"—in which a suspect employs similar methodology to rob similar victims over time—and its application to the investigation of petitioner's crimes. (*See* Appendix ("App.") 4–19, 21–64). Petitioner did not object to the detective's testimony about serial robberies or request a curative instruction. (*See* App. 1–107).

In closing argument, the prosecutor recounted the detective's testimony about serial robbery and argued that petitioner's crimes fit that investigatory paradigm. (App. 108–12). Specifically, she argued that, in both incidents, petitioner had carefully planned and executed the robberies by picking isolated victims (hotel clerks, working alone at night), wearing gloves and a hat to conceal his identity, securing his victims with plastic zip ties, and threatening his victims with both a gun and a bomb. (App. 109–111). Finally, she argued that it was precisely the uniqueness of petitioner's criminal methodology that led to his apprehension, and that—especially when combined with the unique

items discovered in petitioner's possession after his arrest, such as plastic zip ties and clothing similar to that worn by the robbery suspect—demonstrated his guilt beyond a reasonable doubt. (App. 111–12). Petitioner did not object to the prosecutor's argument about serial robbery or request a curative instruction. (*See* App. 109–28).

The jury found defendant guilty of all 17 counts as charged. (TCF, Verdict at 1–5). The trial court sentenced petitioner to 300 total months' incarceration. (*See* Cert. Pet., at App. A (Judgment), 1–17).

Petitioner appealed his convictions to the Oregon Court of Appeals. (TCF, Notice of Appeal). Petitioner's appellate counsel filed a *Balfour*[2] brief—the Oregon analog to an *Anders*[3] brief—in which counsel explained that he had "thoroughly reviewed the record," "discussed the case with trial counsel and [petitioner]," and that, despite that exhaustive review, appellate counsel had

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[2] *See State v. Balfour*, 814 P.2d 1069, 1080 (Or. 1991) (specifying procedure for appointed appellate counsel who "determines that there are no meritorious issues for appeal" despite "thoroughly" "review[ing]" "the record" and "discuss[ing] the case with the trial counsel and the client") (alterations supplied).

[3] *See Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967) (specifying that if appointed appellate "counsel finds [the] case to be wholly frivolous, after a conscientious examination of it, [counsel] should so advise the court and request permission to withdraw," and that such request must be accompanied by a brief identifying any arguably meritorious issues) (alterations supplied).

"not identified any arguably meritorious issue on appeal." (App. 134) (quotation marks and citation omitted; alterations supplied).

Petitioner then filed a *pro se* "supplemental brief" in which he argued, as he does here, that the prosecutor made "[i]mproper closing argument" by "referring to [petitioner] as a serial robber," and that such argument violated his Fourteenth Amendment due process rights.[4] (App. 142) (alterations supplied). He conceded that he had failed to object or make argument on that basis in the trial court. (App. 139). He requested that the Oregon Court of Appeals review his unpreserved argument for plain error.[5] (App. 139).

The state responded that petitioner's concededly unpreserved argument did not qualify for plain-error review. (*See* App. 150). Specifically, the state argued that petitioner failed to present any cogent analysis in support of his contention; that the trial court did not plainly err because, at the very least, it was not legally "obvious" that the trial court had a duty to intervene *sua sponte*;

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[4] Petitioner subsequently moved to remove appointed appellate counsel and to proceed *pro se*, and the Oregon Court of Appeals granted that request by order dated May 12, 2016.

[5] Petitioner actually requested that the Oregon Court of Appeals review his unpreserved contention for "manifest constitutional error." (App. 139) (emphasis removed). "Manifest constitutional error" is the plain-error review standard employed by the neighboring jurisdiction of Washington State. *See, e.g.*, *State v. Powell*, 206 P.3d 321, 327–28 (Wash. 2009) (explaining that Washington courts will not consider an argument for the first time on appeal absent a showing of "manifest constitutional error," and describing standard).

and that, even if the trial court plainly erred, the appellate court should not exercise its discretion to correct the error because any error was harmless in light of the overwhelming evidence of petitioner's guilt—including DNA evidence and a taped confession. (App. 151–58).

The Oregon Court of Appeals affirmed without written opinion and the Oregon Supreme Court denied review. (*See* Cert. Pet., at App. B (Appellate Judgment), App. C (Order Denying Review)). This petition followed.

REASONS TO DENY REVIEW

In his petition for writ of certiorari, petitioner asks this Court to answer the question of whether the prosecutor's comment in closing argument, and the trial court's failure to give a curative instruction *sua sponte*, violated his rights arising under the Fifth and Fourteenth Amendments and the Federal Rules of Evidence. (*See* Cert. Pet. 1–6). But this Court lacks jurisdiction because defendant's arguments were unpreserved and thus the decision below was based upon an adequate and independent state ground. And even if this Court has jurisdiction, several factors militate against granting certiorari.

A. This court lacks jurisdiction because the decision below was based upon an adequate and independent state ground.

As an initial matter, this Court lacks jurisdiction because the decision below was based upon an adequate and independent state ground. This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court

of a State in which a decision could be had," where a "right" is "specially set up or claimed under the Constitution" or "statutes" of the United States. 28 U.S.C. § 1257(a) (alterations supplied). But "[u]nder that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [that it has] been asked to review.'"[6] *Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 858, 160 L. Ed. 2d 873 (2005) (*per curiam*) (quoting *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997) (*per curiam*), and collecting cases) (alterations supplied).

Petitioner's federal claims were neither addressed by, nor properly presented to, the state court that rendered the decision challenged. Petitioner made *no* argument below about the Federal Rules of Evidence, and thus, no state court had an opportunity to consider that question. (*See* App. 139–43).

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[6] In at least one case, this Court has declined to "decide . . . whether [its] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential," because, "even treating the rule as purely prudential, the circumstances . . . justif[ied] no exception" to that rule. *See Adams v. Robertson*, 520 U.S. 83, 90, 117 S. Ct. 1028, 1031, 137 L. Ed. 2d 203 (1997) (*per curiam*) (alterations supplied). Similarly, here, even if the properly-presented rule is merely prudential, no circumstance justifies departing from this Court's well-established requirement that federal claims be addressed by, or properly presented to, the state court that rendered the decision challenged.

And regarding petitioner's constitutional arguments, petitioner did not object to the prosecutor's comment or request a curative instruction in the trial court, and his arguments on appeal were concededly unpreserved. (*See* App. 109, 139). *See also State v. Wyatt*, 15 P.3d 22, 27 (Or. 2000) (to preserve a claim of error for appellate review in Oregon, a party must object below on a basis "specific enough to ensure" that the trial court can "identify its alleged error" and "correct" it "immediately"). Thus, as the state explained in its answering brief, petitioner's argument was reviewable only for plain error, which, in Oregon, requires that the asserted error be "(1) an error of law, (3) 'obvious,' that is, 'not reasonably in dispute,' and (3) apparent from the face of the record." (App. 155 (quoting *State v. Brown*, 800 P.2d 259, 265 (Or. 1990) and citing Or. R. App. P. 5.45(1)).[7] Moreover, an Oregon appellant who seeks plain-error review must

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[7] The version of Or. R. App. P. 5.45(1) in effect at the time of petitioner's appeal provided, in pertinent part:

> No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error of law apparent on the record.

The rule has since been amended to effectuate minor changes in phrasing; the substantive requirements have not changed.

explain "why an error satisfies the requisites of plain error and, further, why [the appellate court] should exercise [its] discretion to correct that error." (App. 155 (quoting *State v. Tilden*, 288 P.3d 567, 571 (Or. Ct. App. 2012))). (alterations supplied). But petitioner failed to meet even that threshold requirement, and thus, the state argued, the appellate court should reject his unpreserved contention for that reason alone. (*See* App. 155).

In any event, as the state further explained, petitioner's argument did not satisfy the strictures of Oregon plain-error review because any error was, at the very least, not "obvious." (*See* App. 155–56). That is, because the prosecutor's comment merely referred to uncontested evidence in the record, it was not obvious that the comment was improper or that the trial court had any duty to intervene *sua sponte*. (*See* App. 155–56).

Moreover, even if the trial court had committed plain error, the case did not warrant the exercise of the appellate court's discretion to correct the error, because, as explained at length in the state's answering brief, any error was harmless in light of the overwhelming evidence of petitioner's guilt. (*See* App. 156–58 (reviewing evidence received at trial, including DNA evidence and petitioner's taped confession)). *See also Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 959, 959 n. 6 (Or. 1991) (an Oregon appellate court must determine whether to exercise its discretion to correct plain error, and, in so doing, should

consider such factors as "the gravity of the error" and whether "the ends of justice" support review).

Thus, the sole issues before the state appellate court were whether the trial court plainly erred, and, even if it did, whether the case warranted the exercise of the appellate court's discretion to correct the error. By affirming without written opinion, and by denying review without any further analysis, the Oregon Court of Appeals and Oregon Supreme Court expressed their decisions that petitioner's unpreserved arguments did not warrant such review. Because petitioner's failure to meet Oregon procedural requirements for plain-error review was an adequate and independent basis for the state court's decision, this Court lacks jurisdiction to review that decision.

Finally, petitioner may argue that the state appellate courts were silent as to petitioner's underlying arguments, and thus, the state court *may* have passed on the federal question presented here. But when the "highest state court is silent on a federal question" urged in a petition for writ of certiorari, this Court "assume[s] that the issue was not properly presented" to the state court, and the petitioner "bears the burden of defeating" that presumption "by demonstrating that the state court had a fair opportunity to address" the question. *Adams*, 520 U.S. at 86–87, 117 S. Ct. 1028 (internal quotation marks and citation omitted; alterations supplied). Petitioner has not done—and cannot do—so here.

In short, because the state court rejected petitioner's unpreserved arguments on state procedural grounds, the federal question was not properly presented to the state court. This Court should deny certiorari for lack of jurisdiction.

B. This case does not warrant review.

Even if this Court determines that it has jurisdiction, it still should deny certiorari because this case does not warrant review. First, the issue is not squarely presented because petitioner's arguments rest on a number of assertions that are not borne out by the record. Second, petitioner's argument is wrong on the merits, and review would neither answer any open question nor resolve any split of authority.

1. The issue is not squarely presented because the record does not support many of petitioner's predicate assertions.

Petitioner's legal arguments rest on a number of factual and procedural assertions that are unsupported by the record. For example, petitioner contends that he was "not indicted as a serial robber" and that "[t]he elements of serial robbery could have been included in the indictment or the jury instructions." (Cert. Pet. 2) (alterations supplied). But there is no such crime as "serial robbery" in Oregon. That concept was, as explained, only an investigatory construct employed by the police in solving petitioner's crimes. Thus, the jury did not find petitioner guilty of an uncharged offense. Nor did the prosecutor,

by referring to unchallenged evidence in the record, "instruct[]" the jury in a manner contrary to the trial court's instructions. (*Cf.* Cert. Pet. 7).

Petitioner also contends that the prosecutor's "comment was very damaging" because there were "other hotel robberies unsolved" that were "published in the newspaper" and "received extensive media coverage"—including reports of "a possible serial robber"—during petitioner's trial. (Cert. Pet. 6). But petitioner cites nothing in the record for his assertion about media coverage during his trial, let alone reports of a "possible serial robber," and the state has been unable to locate anything in the record supporting that assertion.

Additionally, petitioner argues that, "in closing argument, the prosecutor walked over to the defendant" and "pointed at him" before making the challenged statement. (Cert. Pet. 7). But the record does not reflect that the prosecutor made any such gesture. (*See* App. 109).

Finally, petitioner appears to argue that the "trial court compounded the prejudice by overruling" his objection in the presence of the jury. (Cert. Pet. 8). But petitioner did not object and thus the trial court could not have done so.

In any event, because a number of factual and procedural assertions material to petitioner's arguments are, at the very least, not clearly supported by the record, this case does not furnish an appropriate opportunity to address those arguments.

2. Petitioner's arguments fail on the merits, there is no open question to answer, and there is no split of authority to resolve.

Finally, this Court should deny certiorari because the question presented does not warrant this Court's attention. For one, petitioner's arguments fail on the merits. This Court has long recognized that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial[.]" *See Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L. Ed. 2d 78 (1982) (so observing). But petitioner identifies no authority—and the state is aware of none—supporting the proposition that a prosecutor's argument is improper (let alone so improper as to deprive a defendant of a fair trial) when that argument does no more than refer to uncontested evidence in the record. To the contrary, as the Ninth Circuit has observed, "[c]ourts must allow the prosecution the freedom to strike 'hard blows' based on the evidence and all fair inferences therefrom[.]" *United States v. Prantil*, 764 F.2d 548, 555 (9th Cir. 1985) (citation omitted; alterations supplied). No court appears to have endorsed a contrary position.

Nor could the prosecutor's comment or the trial court's failure to take action *sua sponte* have violated petitioner's rights arising under the Federal Rules of Evidence. By their own text, those rules apply only "to proceedings in United States courts." Fed. Rule Evid. 101(a). It would serve no purpose to grant certiorari merely to confirm that clear limitation.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

A. Yes, that's correct.

Q. It happened?

A. Yes.

Q. Do sometimes mistakes happen?

A. Yes.

MS. PLANK: No further questions.

THE COURT: Okay. You may take your microphone off, sir, and step down.

Thank you.

Push the gate open. You have all your stuff?

Let's keep going. Call your next witness, please.

MS. PLANK: The State's next witness will be Detective Brett Hawkinson.

BRETT HAWKINSON,

called as a witness by the State,

having been duly sworn, testified as follows:

THE WITNESS: I do.

THE CLERK: Please be seated.

THE WITNESS: State your name and spell it.

THE WITNESS: My name is Brett, B-R-E-T-T. And my last name is Hawkinson, H-A-W-K-I-N-S-O-N.

APP - 2

DIRECT EXAMINATION

BY MS. PLANK:

Q. Mr. Hawkinson, how are you employed?

A. I am a detective with the City of Portland, Oregon.

Q. How long have you worked in law enforcement?

A. Oh, I was hired by the City of Portland as a police officer in November of 2001. Prior to that I was assigned to the Police Corps Academy. Did my training then. And I worked as a police cadet, which is a nonsworn, like assistant since 1988. And that was in Lynnwood, Washington.

Q. How long have you been a detective?

A. I was promoted to detective in August of 2007. It's difficult math for me on the spot, so I'll let you calculate that.

Q. Okay. And what's the difference between a patrol officer and a detective with respect to the Portland Police Bureau?

A. Police officer, patrol officers, their primary responsibility in the city of Portland is to respond to 9-1-1 calls. You get a call for service, you respond, you help out the citizen. You take care of the business. You patrol at nighttime. You look and deter a crime.

Detectives, on the other hand, are more like linebackers. So we actually receive reports taken from

patrol and we initiate investigations as a result of that.

So a patrol officer will take down initial information of a crime that occurred, and if they're not able to resolve it right then and there, depending upon what type of crime it is, it will get assigned for follow-up to an investigator; i.e., a detective.

Q. Would it be fair to say that part of the labor division between patrol and detectives is that cold cases go to detectives?

A. Yes. That's very accurate.

Q. And when you and I use the word "cold case," can you describe what does that mean to you?

A. The term "cold case" is -- it refers to a case where an incident has occurred, time has passed, and the investigation then begins, as opposed to -- the opposite of a hot case, I suppose, would be a case that a police officer stumbles -- stumbles upon, is dealing with it right then, they make the arrest, and they're done with it that night. They've resolved the issue.

Q. Now, you mentioned that you work on the robbery detail.

A. Yes, that's correct.

Q. How long have you worked in the robbery detail?

A. I've been a robbery detective since January of 2009.

Q. How many robberies would you estimate -- with respect to the city of Portland -- are reported in a week?

A. Lots. All robberies. We get -- I think we could take anywhere from -- oh, average number is 1,300 a week -- I'll give you a monthly number. A little over 100 a month.

Q. We're just talking the city of Portland. Is that correct?

A. That's -- I'm only talking about the city of Portland.

Q. And of those 100 robberies reported a month, if you had to estimate, what percentage are unsolved?

A. Oh, unfortunately, more are unsolved than are solved. What percentage? 50, 60 percent are maybe unsolved. 40 percent are resolved in some manner.

Q. Okay. So with that sort of baseline understanding that most robberies go cold and are unsolved, what sorts of steps does the detective division try to implement to solve these cold robberies?

A. Well, we track robberies. Robbery is an interesting crime in that oftentimes they're serial in nature, depending upon what type of robbery. There's a large spectrum when it comes to robbery, because there's different types of robberies.

One thing that we do -- we do -- I do is I track robberies and I categorize robberies and we look for patterns

and trends. Part of the patterns and trends includes modus operandi. Like what does the offender -- what does the robber do while they're committing that robbery? How are they doing it? Do they use certain words? Are they using a certain weapon, certain style? Did they wear particular clothing or the same type of clothes over and over again? Are they brandishing or using a unique weapon? Physical characteristics. Are the physical characteristics of this robber the same as the physical characteristics of the robber that was reported last week and the robbery that was reported the week before?

And then you try -- from that information, you try to develop a pattern. And then by developing that pattern, the more information that overlaps and is the same, you call that the pattern, and then you link those crimes together. So when the robber -- the robber is eventually caught, then you investigate all of those back robberies as part of that pattern to see if you can identify and find additional evidence which will then lead you to complete and solve that pattern.

Part of that investigation could be getting the robber, when you're talking to the robber, when you've caught that robber, to confess to those other robberies. Part of that could be finding the specific items used during the commission of that robbery -- i.e., you know was a specific,

special type of gun brandished? Was certain clothing worn? Special, unique clothing worn? Shoes? Right? Shoes are, for us, very, very important.

Video surveillance. What does the surveillance from these robberies show us? Are the movement patterns consistent from one robbery to the next robbery to the next robbery.

These are all tools that we use to try to link and solve these older cases.

Q. How about the robbery targets themselves? Do you look at patterns of those?

A. Absolutely. One of the -- again, it falls kind of under modus operandi. We find that rob -- robbers tend to prefer the same targets because they're familiar with those targets, like, you know, a subway robber, right? There's guys that they -- they frequent subways.

Video poker establishments. Those are -- those are very commonly robbed areas and common serial -- serial robberies, because they're cash businesses. There's usually one employee there. They're easy targets. Guys go in, they repeat, and, you know, eventually -- you know, we usually, hopefully solve them.

Q. With respect to sort of linking all these patterns, do you also meet or at least have communication with outside agencies?

A. Absolutely. That's -- that's crucial to developing patterns, because it's been my -- my experience that robbers don't recognize city boundaries. They're regional. They'll go wherever. You know, just because City of Tigard draws a line and says, "This is our city and that's your city, Portland," doesn't mean that the robber doesn't go into Tigard, won't go into Gresham, won't go into Multnomah County unincorporated, Washington County.

So as a result, we have a regional robbery meeting that takes place monthly in which, as investigators, we share cases. We share our unsolved cases, and we share our solved cases as well. "Hey, we've identified this person. We made an arrest. This is what he did. This is how he did it. This is what he was wearing. This is the type of instrument he used. This is what he drove," right?

And so we go back and we look, "Oh, I have a robbery where the bad guy was seen driving away in a green Honda. Hey, that matches. How tall is he?"

"Oh, he's the same height."

Oh, hey, now we're getting a little closer. "What was he wearing at the time of arrest?"

"Oh, he was wearing black striped pants."

"Oh, this is -- this is looking really good."

So then you'll start taking a look at that and seeing what you can do to progress your case based off the

other information from the other agency.

Q. How often do you collaborate with Gresham?

A. Detective Tony Cobb is on speed dial on my phone. So weekly. I'd say weekly. It averages out weekly. I've worked with him directly on cases. Like him and I are there making the arrest at the same time.

We've actually never done an interview together. We usually separate out duties, but...

Q. Would you say that that's by far your most common interagency overlap, Portland to Gresham/Gresham to Portland?

A. It's a tie between Gresham and Clackamas County Sheriff.

Q. And what would you describe, based on all your agency meetings and sort of your robbery detail and when you sit down.

You already video poker establishments. Are there certain types of targets that are more common than others?

A. Yes. Cash establishments tend to be the most -- the most common places. They deal in cash. So Plaid Pantry, Subways, 7-Elevens, Mini Marts, banks. That's actually my primary job is to investigate bank robberies. Banks are robbed because, well, what do banks deal with? They deal in cash, which is a common stolen commodity and is useful. So banks.

Other common businesses would include -- I'll say

store -- like department stores, but with an asterisk because those are oftentimes shoplifts that escalate into violence. So it's not the same type of robbery that you're really trying to focus on.

Primarily those video poker establishments seem to be really popular. Banks.

We don't see as many check cashing places. Occasionally we get a pharmacy that will get -- that will be robbed. Not necessarily for cash but for Oxycodone or OxyContin. That's something that we track and we look for.

Q. How about motels or hotels? How commonly are those robbed?

A. Not that often. We get motel robberies. They happen infrequently. Maybe -- typically for us in the city of Portland we'll get one or two a year. They're usually a big deal when it happens. We -- and we investigate those. We look into them, because they tend to almost always occur at night. They're usually preying on an alone clerk. You know, they have the potential of being very, very violent, so we -- we try to jump on those cases as quickly as we can.

Q. So you said one or two a year out of how many total robberies a year do you receive?

A. We -- on average -- we get a fluctuation between 11- and 1,300 a year, like since I've been there. Kind of up and down.

So out of -- let's just use the high number, 1,300 a year, I'd say we maybe see in the city of Portland one or two.

Q. And how -- how common are robberies where the robbers are with a gun?

A. They're less common with a gun than they are with, say, an implied gun -- i.e., put my hand in my pocket -- than with, say, a knife than with -- the general trend is the deadlier weapon, the more dangerous or the scarier the weapon, the less common it is.

Q. So would it be fair to say it's not uncommon, but it's not the most common type of robbery?

A. It is not our most common type of robbery.

Q. How about robberies with a bomb? How often do you see those?

A. I can't say never, but I can say it's pretty darn rare. It's definitely eye-opening and it's like, wow.

So, let's see, since I've -- again, I've been a robbery detective since 2009, and I can think of, right now, off the top of my head, in Portland alone, I can think of two.

Q. Two since 2009 with a bomb?

A. That's correct.

Q. How about the number of robberies where the robber uses a gun and a bomb?

A. Well, now we're down to one.

Q. And are you describing the robbery that was investigated in the city of Portland on September 5th, 2013, when you say one?

A. Yes.

Q. Did you also receive information about a similar robbery occurring in Gresham?

A. Yes, I did.

Q. So does that make for the county that you're aware, two?

A. In the same year, yes. Two.

Q. And since 2009 are those the only two that you're aware of occurring in Multnomah County?

A. With a gun and a bomb, yes.

Q. Can you describe what you mean when you use the term "take-over style robbery"?

A. A take-over style robbery, when we use that term, it refers to absolute 100 percent control over the victims in the establishment.

So that trend, it's -- it's rare. It usually involves immobilization or hiding of the victim in some way. Binding the victim up. Tying them up. Putting them on the floor. Directing them from one location to the next.

Most of our -- we'll call them a stick-up. Most of our stick-ups, old-fashioned stick-ups where the robber

goes to the counter, you know, makes the demand for money, the clerk accesses the money, hands over the money to the robber, and the robber makes a quick escape.

Take-over robbery is more controlling than that. You're not allowing your victim access to the cash. The actual robber is controlling the movement of the victim to hand over the cash and/or taking the cash themselves.

And, again, it typically involves immobilization and/or hiding of the victim -- like locking them in a closet somewhere or making them cower in a corner, laying them on the floor. Those -- when they hit that level, we refer to that as a take-over.

Q. How often do we see take-over style robberies in Multnomah County?

A. Not often. When they do, they're -- they're a big deal. They're high -- they're high-stress cases. They're the ones that really -- they're eye-popping for us because, again, this is now another level of violence that's being notched up, so they're very concerning. So my blood pressure would always be super high if we were always investigating those kinds of robberies all the time.

Q. When did you first become aware of or assigned to the robbery that occurred at the Silver Cloud Inn on September 5th, 2013?

A. That was on September 5th, 2013, when I first

became aware of it.

I actually -- my first initial awareness was getting dressed that morning and turning on the news. And there it was. There the news was reporting this -- a robbery had happened at the Silver Cloud.

I remember my first thought being, Aww, great. I guess we'll have some work to do when I get in that morning."

Q. When did you get assigned to that case?

A. Well, "assigned" is an interesting word. Detective Russell was assigned it initially off the bat, but Detective Russell's my partner, so I went out with him on September 5th and helped him do an area canvas.

So I'll take ownership of that case as of September 5th, but I didn't get real direct -- I didn't get directly involved as a lead until much later in 2014.

Q. So you were working on the case, though, as early as literally the day of September 5th, 2013?

A. Absolutely.

Q. When were you first notified about the robbery occurring at the Holiday Inn in Gresham on September 15th, 2013?

A. I believe I learned about that either September 15th or 16th. May have been the next day. And, again, learned about it through -- I may have been reviewing with dispatch reports. You know, it's typical, what we'll do is

in the morning we look back at the calls dispatched overnight and we look at robberies. And then from looking at the overnight robberies, you triage them. Like, oh, what kind of -- you know, that's this type of robbery. That's this type of robbery. That's that type of robbery. And I remember seeing that type of robbery, thinking, oh, uh-oh. Now we're starting to see a pattern.

Q. Okay. So you already mentioned you believed that these cases were connected. Why did you think that?

A. Well, a number of reasons. No. 1, the suspect description. The suspect was described with a similar build in the Silver Cloud as was in the Holiday Inn. The methodology, or modus operandi, was very unique in that the subject threatened and used a bomb and a firearm in -- during the commission of that robbery, which is a very unique signature.

And interesting -- seeing the video surveillance from both robberies, and there was interesting and unique clothing worn by that robber, specifically a -- what I call a Fargo style hat but some people call it an Elmer Fudd hat. But it's a hat that's like a winter hat that has like these flappy ears on it. I don't even know where I could buy one if I wanted one. So that was a unique signature as well.

Oh, and --

Q. Let me --

A. -- of course --

Q. While you're talking about the surveillance, let me slow you down.

A. Sorry.

Q. I'm going to show you what's been marked as State's Exhibit 39 through 43.

And pretty shortly after the Gresham robbery on the 15th did you compare the surveillance from the Silver Cloud to that of the Holiday Inn?

A. Yes.

Q. I'm going to show you what's been marked State's Exhibit 39 through 43.

Exhibits 38, 39, and 40 --

A. Okay.

Q. -- are those the types of images from the surveillance that you looked at from the Silver Cloud Inn?

A. Yes.

Q. Exhibits 42 and 43. Are those the still images that you looked at from the Gresham Holiday Inn robbery?

A. Yes.

Q. Have these images been altered in any way?

A. No.

Q. Are these the images that you also used in forming your opinion that this was the same robber?

A. Yes.

MS. PLANK: State would move to admit State's Exhibit 39 through 43.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. All right. I'm going to show them to you in a bigger format so you can maybe better describe the hat that you're talking about.

Is this still image that you reviewed from the Silver Cloud robbery?

A. Yes, it is.

Q. Now, when you described the Elmer Fudd style hat or hat with earflaps, does this -- does this image show what you're talking about?

A. Yes, it does.

Q. Did you believe that this is an earflap coming down?

A. Yes.

Q. How about this right here?

A. What you're referring to on the screen there is a fuzzy flap that flaps up like in front of the hat and back.

I'm familiar with the hat because it was an authorized uniform police hat of the Portland Police Bureau at one time, and I always wanted to get one and wear it on patrol, but I couldn't find one.

Q. Moving to the next still. Is that just another angle of that hat as you described it?

A. Yes.

Q. How about the top? Is this the top that you look for? Is it -- I mean, appears just black.

A. Yes, it's a black long-sleeved, tight-fitting top.

Q. How about the pants?

A. The pants appeared to me to be navy blue BDU-style pants. When I say "BDU," it stands for battle dress uniform. It's a pant that's commonly worn by military and police. They have cargo pockets on the side. They tend to have a bottom that you can -- you can tighten to make them, if you wanted to tuck into shoes if you wanted. They're a tactical pant. They're meant to allow for free, nonrestrictive movement and have access to utility items in a convenient nature.

Q. Now, moving down.

Is this one of the stills from Gresham?

A. Yes.

Q. Would you agree it's not nearly as good quality?

A. Correct.

Q. What were some of the items that appeared similar to you?

A. It appeared to me that the hat was the same. It appeared to be the flappy -- the floppy-eared style,

Fargo/Elmer Fudd hat. A black, tight long-sleeved dark top. And it appeared that the subject was wearing dark shoes and BDU pants.

Q. Would you agree that the gloves look different?

A. The gloves did appear to be different.

Q. Looking back up again at -- the gloves from the Portland case, do you agree that they appear to have like a dark palm and a lighter top?

A. Yes.

Q. And that the gloves maybe a blue, light color?

A. Yeah. In my opinion, that was a blue color. I thought perhaps it was a vinyl glove or a latex glove.

Q. And this next being just a different angle, that same Gresham surveillance?

A. Yes, it's a different angle.

Q. Now, as part of your training with detectives, are you also trained to look at the way suspects move in trying to come up with an identity of a person?

A. Could you clarify "how they move"?

Q. Well --

A. Meaning like movement patterns?

Q. Yes.

A. Yes. I -- I -- as a detective, I have watched, studied, reviewed I can say hundreds -- I'm almost probably to the thousands of videos surveillance. That's -- you know,

video surveillance is a robbery detective's best friend, because it captures the event right there and you get to see -- you don't have to rely on the witness's memory. You get images and you get to see for themselves what people could have seen.

And so as part of that, you learn to watch, to see how people move. You can identify people who -- like if they have a particular limp. If their right-handed or left-handed, how they wield a certain weapon. How they carry their movements and their manners. So absolutely.

Q. So were there things about --

THE COURT: Counsel, we're going to take a break in about a minute, so unless you have just one more follow-up question to finish this.

Okay. We're going to go ahead and break at this point, ladies and gentlemen. So I'm going to ask that you leave your notebooks here, step into the jury room with my clerk. We'll let you know whether you have a walk-around break in just a moment or two.

If you'll go ahead and step in.

And, Detective, if you'll just wait till the jurors step out, I'd appreciate that.

THE WITNESS: Yes, Your Honor. Thank you.

(Jurors exiting courtroom.)

THE COURT: You can take your microphone off

because you'll be taking a break too.

You can step down.

Okay. We're going to take about a 15-minute break, so the question is whether Mr. Dean wants to take a break.

THE DEFENDANT: No, Your Honor. I'm good.

THE COURT: Deputies, are you okay with it?

Be about 15 minutes.

All right. So we'll keep Mr. Dean here. We'll let the jurors walk.

MR. DAY: Hey, Judge, I don't know if now's the time to talk briefly about --

MS. PLANK: Well, there's a couple -- there's a couple of items of --

THE COURT: Why don't we stay on the record.

Let's have the jurors go ahead and walk. We'll just stay on the record and talk for a little bit.

MS. PLANK: One, I'd submitted my first stab at a revised version --

THE COURT: Right. And I did want to talk to you a little bit about that, but thanks for starting that.

MS. PLANK: Yeah.

THE COURT: It may be, given how fast this case is starting to move, that we may not have that much time to change it, but that's -- are there other subjects as well

and battery with a dangerous weapon." I think that's what I understood.

MS. PLANK: There will be no testimony about that.

(Jurors enter courtroom.)

THE COURT: All right. Ladies and gentlemen, thank you for your forced patience. We've been working on other matters. And we're ready to proceed with you.

Thank you, sir.

MS. PLANK: Thank you, Your Honor.

THE COURT: Okay. I think you're still examining.

DIRECT EXAMINATION

BY MS. PLANK: (Continuing)

Q. Detective Hawkinson, we looked at these surveillance photos. Now, in both of those photos the suspect appears to be fully-- fully clothed and fully gloved.

In an instance like that where you're dealing with a suspect who's covered basically all parts of their body, is it difficult to produce a lead on a suspect's identity?

A. Yes, it is. When the -- (indiscernible) to make facial recognition, fingerprint evidence -- potential evidence is eliminated as a possibility. So absolutely. It's no longer an issue of putting out a picture of a guy on the news to see if you can identify him, but as -- it could be anybody.

Q. Now, while you were working on these cases, simultaneously was evidence being worked at the crime lab?

A. Yes.

Q. Using that information and some stuff from outside agencies, did you develop a potential suspect of Ernest Dean?

A. Yes.

Q. Before you ever contacted Mr. Dean, did you look at any photos of him or any, like, DMV information? Anything like that?

A. Yes, I did.

Q. Based on Mr. Dean's recorded height and weight, did you believe he at least matched the general physical descriptors?

A. Absolutely.

Q. Then did you apply for search warrants for Mr. Dean's hotel room, his vehicle, and a storage locker in his name?

A. Yes, I did.

Q. And were these warrants granted?

A. Yes, they were.

Q. When were these warrants executed?

A. These warrants would have been executed on -- part of the delay -- I just want to look up the actual date. Friday, February 21, 2014.

Q. And did you also have contact with Mr. Dean on

Friday, February 21st, 2014?

A. Yes, I did.

Q. Do you see the person by the name of Ernest Dean seated here in the courtroom here today?

A. Yes, I do.

Q. Is he seated next to defense counsel wearing a white shirt and a multicolored tie?

A. Yes, he is.

Q. During the search of Mr. Dean's vehicle, did you locate anything that you believed to be of evidentiary value?

A. Yes.

Q. Specifically, did you locate any binoculars?

A. Yes, we did.

Q. And these binoculars, why did you believe that they were of evidentiary value?

A. Binoculars are a tool that can be used for scouting locations, to be able to watch and observe from far away without being detected by a business's video surveillance.

Q. I'm going to show you what's been marked as State's Exhibit 44.

Do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is a photograph of a pair of binoculars in

the back or rear seat of a green Ford Explorer that was registered to Mr. Dean.

MS. PLANK: State would move to admit State's Exhibit 44 into evidence.

MR. DAY: No -- yes. No objection.

THE COURT: Received. Pardon me. Received.

BY MS. PLANK:

Q. Did you receive any items in Mr. Dean's -- well, let me back up.

Where was Mr. Dean's motel room?

A. It was located at the Unicorn motel, which is located in the city of Portland along SE 82nd Avenue.

Q. And did you locate any items of potential evidentiary value in that motel room?

A. No, I don't -- yes, we did, actually.

Q. I'm going to show you State's Exhibit 45.

What is that?

A. This is a picture of --

THE COURT: Not -- not received yet.

THE WITNESS: Oh, I'm sorry.

It's a picture of a black bag, which has multiple tools in it. A battery, a drill, and -- inside of a black bag.

BY MS. PLANK:

Q. And did you seize that bag full of tools?

A. Yes, we did.

Q. Is that a fair and accurate representation of the bag with tools that you seized?

A. Yes.

Q. And why did you believe this bag of tools was potentially evidence in this case?

A. There was allegations in this case that a bomb was made. And making bombs requires extensive use of tools.

MS. PLANK: State would move to admit State's Exhibit 45 into evidence.

MR. DAY: Can I just take a --

THE COURT: Received.

BY MS. PLANK:

Q. I'm going to go through these one at a time here.

Did you then come to find out that Mr. Dean was in possession of a storage locker?

A. Yes.

Q. How did you come across that information?

A. A number of ways. The first -- we conducted a search of Mr. Dean's person, and inside his wallet we found a card that said the name of the storage business on it with a combination and information. And then we also had a conversation with his girlfriend who confirmed that.

Q. And then did Mr. Dean himself subsequently confirm --

A. Yes. And Mr. Dean himself told us he had one.

Q. And did you search that storage unit?

A. Yes, we did.

Q. I'm going to show you what's been marked as State's Exhibit 46. Do you recognize that?

A. Yes. This is a photograph of the inside of the storage locker with all the items in place as it was.

Q. Showing you what's been marked as State's Exhibit 47. Do you recognize that?

A. Yes. This is a picture of like -- it's like a blue ice chest type container or -- with a handle on it that contains zip ties and some -- many other items inside of it.

Q. Is that a fair and accurate representation of the items located in the storage locker?

A. Yes.

Q. Showing you now what's been marked as State's Exhibit 48. Do you recognize that?

A. Yes, I do. It's a photograph of the zip ties located inside of the blue container.

Q. Showing you what's been marked as State's Exhibit 49. Do you recognize that?

A. Yes. These are preloaded zip ties made -- configured in a manner which is consistent used for handcuffing people, which were also located in the same blue container.

Q. Now, I'm showing you State's Exhibit 50. Do you recognize that?

A. Yes. It's a picture of some clothing items that were in the bottom of the same blue container.

Q. Did you seize those clothing items?

A. Yes, I did.

Q. Why did you seize those clothing items?

A. They to me were consistent with the clothing worn by the robber in the reported robberies.

MR. DAY: No objection.

MS. PLANK: State would move to admit Exhibits 46 through 50 into evidence.

THE COURT: Received.

BY MS. PLANK:

Q. I'm going to show you now what's being marked as State's Exhibit 51 through 55.

State's Exhibit 51, please tell me what that is?

A. That's an additional picture of additional clothing found in the bottom of the aforementioned blue cooler-like bag, including a black thermal top.

Q. Show you what's been marked as State's Exhibit 52. Do you recognize that?

A. Yes. It's a photograph of black electrical tape.

Q. And was that seized?

A. Yes.

Q. Whey was that seized?

A. Again, there's -- purported that a bomb was used as part of the robberies, and we could use that as evidence of that crime.

Q. Show you State's Exhibit 53. What is that?

A. It's a container of super glue. A picture of a container of super glue.

Q. And was that also located in the storage locker?

A. Yes, it was.

Q. And why did you seize it?

A. Super glue can be used by suspects to conceal their fingerprints and cover them up, so we believe that maybe they have been used in those series of robberies.

Q. Could it also be part of a bomb-making equipment?

A. Yes.

Q. Show you State's Exhibit 54.

A. This is a blue pair of BDU pants that we also located in the storage unit.

Q. And show you State's Exhibit 55. (Indiscernible.)

A. Yes. This is a picture of the black bag we located, opened -- in the open position that had a black pair of Nike sneakers with blue soles.

MR. DAY: No objection.

THE COURT: All right. And those numbers are?

MS. PLANK: (Indiscernible.)

THE COURT: All right. Received.

BY MS. PLANK:

Q. I'm going to show you what's being marked as State's Exhibits 56 through 60.

Can you please tell me what State's Exhibit 56 is?

A. Yes. This is a photograph of a glove located inside Mr. Dean's storage unit. It is black with light gray on the top, and we believed it was consistent with the gloves worn in the Silver Cloud robbery.

Q. Showing you now what's been marked as State's Exhibit 57. Can you tell me what that is, please.

A. This is a photograph of blue latex gloves that were located inside Mr. Dean's storage unit.

Q. And why did you seize those blue latex gloves?

A. Believed that they were consistent with the gloves worn in the Holiday Inn robbery in Gresham.

Q. Showing you what's been marked as State's Exhibit 58. What is that?

A. This is a photograph of a hat that we located inside Mr. Dean's storage unit. The hat I would describe as an Elmer Fudd or Fargo style hat. It has a cloth front flipped up to the front. It has long floppy ears on the side. And it is dark in color.

Q. Did you believe that that hat fit with the one seen in the two robberies?

A. Yes.

Q. Showing you what's been marked as State's Exhibit 59. What is that?

A. This is a cell phone with electrical components that was located inside Mr. Dean's storage unit.

Q. And I'm showing you State's Exhibit 60. Can you please tell us what that is.

A. It's a photograph of another cell phone located inside Mr. Dean's storage unit?

Q. Were there, in fact, several cell phones or cell phone components located in that storage unit?

A. Yes, there were.

Q. And why did you seize those as evidence?

A. Because I know that cell phones can be -- have been and can be used as bomb-making material.

Q. And in Mr. Dean's interview with you, did he, in fact, tell you he was using cell phones in the fabrication of the bombs he had used?

A. Yes.

MR. DAY: No objection.

MS. PLANK: State would move to admit State's Exhibits 56 through 60.

THE COURT: Received.

BY MS. PLANK:

Q. I'm showing you what's being marked as State's

Exhibits 61, 62, and 63.

Can you please tell me what State's Exhibit 61 is a photo of?

A. This is a picture of a piece of mail located inside of the storage unit rented by Mr. Dean. It's addressed to Ernest L. Dean, Moving & Labor, LLC, with an address of 650 NW Irving Street in Portland, Oregon. The mail's from Wells Fargo.

Q. Showing you what's been marked as State's Exhibit 62. What is that?

A. This is a photograph of another piece of paper located in Mr. Dean's storage unit. It's an IRS billing summary showing that he owes $655.96 from overdue taxes in 2003 from the Internal Revenue Service, addressed to Mr. Ernest L. Dean.

Q. Show you what's being marked as State's Exhibit 63. Can you tell me what that is?

A. Yeah. This is a birth certificate from the state of Missouri. It's in the name of Ernest Lee Dean, with date of birth March 26th, 1973. And it was located -- also located in Mr. Dean's storage unit.

Q. So if I'm understanding you correctly, these three exhibits which you've described as either pieces of mail, pieces of government mail, or birth certificate were all located in the storage unit?

A. Yes.

Q. And why did you seize these three pieces of personalized pieces of mail from the storage unit?

A. It's to show that Mr. Dean exercises dominion and control over the storage unit.

Q. Did you find anyone else's personal items in that storage unit other than Mr. Dean's?

A. No, I did not.

MR. DAY: And I have no objection to those.

MS. PLANK: State would move to admit State's Exhibits 61 through 63.

THE COURT: Received.

BY MS. PLANK:

Q. And, finally, a bit out of order, what's been marked as State's Exhibit 18 (indiscernible) admitted. Do you recognize that?

A. Yes. It's a photograph of a very realistic replica firearm, which turns out to be a pellet gun, that was located in Mr. Dean's storage unit. It's out of a black bag.

MS. PLANK: State would move to admit State's Exhibit 18.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. (Indiscernible.)

All right. Sorry to repeat myself, Detective, but the jury can see -- you mentioned the search warrant was executed on Mr. Dean's vehicle.

What type of vehicle was that?

A. It was a -- mid-90s green Ford Explorer.

Q. And inside that Ford Explorer, are these the binoculars you reportedly located.

A. Yes.

Q. You mentioned a search warrant was also executed in Mr. Dean's motel room.

A. Yes.

Q. And you described some tools that you seized from that motel room. Are these the tools you were describing?

A. Yes.

Q. How would you describe the condition of Mr. Dean's motel room?

A. Oh, it was -- it was immaculate. It was one of the cleanest motel rooms that I've searched. Yeah, very organized.

Q. Would it be fair to say that the items in the motel when you searched, they consisted of pretty much personal articles -- articles of clothing and these tools?

A. Yes.

Q. And now the storage unit. Is there a photo of the storage unit.

A. Yes.

Q. And this is the storage unit in Mr. Dean's name that he stated belonged to him?

A. Yes.

Q. It's hard to tell from that photo how big that unit is. Can you describe for us?

A. Yes. It's kind of a smaller-sized unit that had like an opening -- like an opening sliding door. I would say the door was approximately arm's -- it's about arm's length or a little wider in either direction, and depth-wise it went back about 10 to 12 feet.

Q. Is this a close-up of one of the items you located inside the storage unit?

A. Yes.

Q. And are these, in fact, the clear zip ties that you located inside the storage unit?

A. Yes, they are.

Q. These -- where were these located?

A. Those were inside the previously pictured bag. They were loose, just sitting in the bag. They were in there. They're locked, opened, ready to go.

Q. Did these zip ties appear consistent with those that recovered from the Gresham robbery that were preloaded but not used.

A. Yes.

Q. Show you what's being marked as State's Exhibit 64.

What is inside State's Exhibit 64?

A. These are the zip ties that were located in the previous picture inside the blue bag inside Mr. Dean's storage unit.

Q. So those are the actual zip ties that you located inside the storage unit?

A. Yes.

Q. Would you mind removing what you described as the preloaded zip ties.

MS. PLANK: State would move to admit State's Exhibit 64 into evidence.

THE COURT: Received.

BY MS. PLANK:

Q. Is this again just a close-up photo of the unused zip ties?

A. That's correct.

Q. And this package of zip ties, was it already opened when you found it in the storage unit?

A. Yes.

Q. Now, we heard you when you were going through the photos describing articles of clothing.

What is this exhibit?

A. That's a photograph of the same blue bag that we

were going through that's down a layer after removing the zip ties. That shows, like, some sweatpants and a black top.

Q. How about this?

A. That's the next layer down after removing those items of clothing that you saw. Underneath that was this black -- black thermal long-sleeved type top.

Q. Let me show you what's been marked as State's Exhibit 65.

Do you recognize that?

A. Yes.

Q. Is that the same black top that's featured there?

Before you pull it out of the bag -- is that the same black top that's featured in that photo?

A. Yes, it is.

MS. PLANK: State would move to admit State's Exhibit 65 into evidence.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. Can you please pull it out.

And why did you seize that particular shirt?

A. I believe this shirt was consistent with the shirt worn in both the Silver Cloud and Holiday Inn robberies in Portland and Gresham.

Q. Is this the tape you were describing?

A. Yes.

Q. The super glue?

A. Yes.

Q. This, State's Exhibit 18, where did you find this?

A. This was located in a black duffel bag which was also in Mr. Store -- Mr. Dean's storage unit.

Q. Showing you what's been marked as State's Exhibit 66. Can you please tell me what that is?

A. This is like a zippered -- it's a zippered small, little baggie, which is in the photograph, which contains the replica firearm, which is also in the photograph.

MS. PLANK: State would move to admit State's Exhibit 66 into evidence.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. Can you pull that out?

A. Sure.

Q. So this is the Airsoft pistol?

A. That is actually a pellet -- I believe it's a pellet gun.

Q. That you located in Mr. Dean's storage locker?

A. Yes.

Q. Where was that located in relation to, like, the black -- the black shirt and the zip ties? Was it all kind

of bunched together?

A. It was very close. It was in a separate bag that was next to the blue bag. There was like a black -- like a duffel bag. It was inside the duffel bag.

Q. So there was one bag containing unused zip ties; preloaded zip ties; that black, thin long-sleeved T-shirt.

A. That is correct.

Q. And then next to it was this?

A. In -- yes, in another bag, yes.

All right -- there we go.

Q. What's this a photo of?

A. Those are blue BDU-style pants.

Q. And were these seized?

A. Yes, they were.

Q. And why did you seize these?

A. I believed these pants were consistent with the pants worn in the Silver Cloud and Holiday Inn robberies located in Portland and Gresham respectively.

Q. Showing you what's been marked as State's Exhibit 67. Can you tell me what that is?

A. I believe them to be the blue BDU pants.

Q. The actual pants that we see in that photo?

A. That is correct?

MS. PLANK: State would move to admit State's Exhibit 67 into evidence.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. Can you describe for us what that is and where you found it?

A. Yes. Those are a black pair of Nike shoes that were located in a black duffel bag.

Q. And where did you seize -- well, you say black duffel bag. Was that in the storage locker also?

A. That was also located in the storage locker, yes.

Q. And that black duffel bag, where was it in relation to the bag full of zip ties and clothing?

A. It was next to it. There's a blue -- the blue big bag and then there was the black duffel bag, which is located right next to it.

Q. Was that pellet gun inside this bag?

A. I believe so, yes.

Q. And these particular shoes, did you believe they looked consistent with those seen in the surveillance video?

A. Yes, I did.

Q. What is this a picture of?

A. That's a picture of a -- it's like a dark glove with a -- with a lighter gray top on it. It was located in Mr. Dean's storage unit.

Q. Where in the storage unit were those located?

A. I believe they were located in one of those bags. Sorry.

I believe it was located inside the -- in a black bag.

Q. Like one of the same bags with all the other stuff that you'd seized?

A. Yes.

Q. And what are these?

A. Those are a blue pair of latex gloves which were also located in Mr. Dean's storage locker.

Q. Why did you seize this pair of gloves and this pair of gloves?

A. Each pair of gloves I believed were consistent with the gloves worn by the robber in the Silver Cloud robbery and again in the Holiday Inn robbery. The blue latex gloves, I believe, were consistent with the gloves worn by the robber in the Holiday Inn Gresham robbery. And the dark-over-gray gloves were consistent with the style of gloves worn by the robber in the Silver Cloud robbery.

Q. Showing you what's being marked as State's Exhibit 68. Those gloves we just looked at, are they contained inside State's Exhibit 68?

A. Yes.

Q. Also contained in State's Exhibit 68, are there other sets of textured gloves?

A. Yes.

Q. Were all of these gloves seized from Mr. Dean's storage locker?

A. Yes, they were.

MS. PLANK: State would move to admit State's Exhibit 68 into evidence.

MR. DAY: No objection.

THE COURT: Received.

Ladies and gentlemen, I want to say this next. I'll forget later. During deliberation when you look at the exhibits that have more than one thing, I want to make sure you take it out of the bag, you put it back in the bag. Make sure they all go in the right bags.

Go ahead.

BY MS. PLANK:

Q. What is this that we're looking at?

A. This is a picture of an Elmer Fudd or Fargo-style winter cap that we located inside Mr. Dean's storage unit.

Q. I'm going to show you what's been marked as State's Exhibit 69.

Can you tell me what's inside State's Exhibit 69, please.

A. This is picture of the same winter-style hat as in the picture located on there. This is that same hat. It's located in its own little handy zip container.

MS. PLANK: State would move to admit State's Exhibit 69 into evidence.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. Detective, that particular item, can you please remove it, show us the bag you're talking about.

Was that what you located initially inside the storage locker?

A. Yes.

Q. And then can you please open it and show us what's inside.

And is that how you found that particular hat? It was inside that little bag?

A. That is correct.

Q. And was that little bag inside anything else?

A. Yes. The little bag was inside the blue bag that we've seen pictures of that was open.

Q. What else was inside that blue bag?

A. There were the zip ties. There was the black tight-fitting shirt.

Q. And that hat?

A. And this hat.

Q. Are these the cell phones you were describing?

A. Yes.

Q. And various cell phone components?

A. Yes.

Q. How many broken apart cell phones would you estimate you located?

A. I believe there may have been up to three or four. I believe there was a flip phone also in there.

Q. And are these the pieces of personal mail that you described?

A. Yes.

Q. Bank mail, mail from the government, and a birth certificate?

A. Yes.

Q. Detective, did you locate all of these items in Mr. Dean's storage locker prior to interview with him?

A. Yes, I did.

Q. Inside that storage locker did you find any articles of women's clothing?

A. No, I don't believe we did.

Q. Did you find anything that was very obviously possessed by somebody other than Mr. Dean?

A. No, we did not.

Q. Did you, in fact, interview Mr. Dean on the same date that you executed the search warrants?

A. Yes.

Q. Did you read Mr. Dean his *Miranda* rights?

A. Yes, I did.

Q. Did he indicate he understood them?

A. Yes, he did.

Q. Did Mr. Dean initially tell you he wished to speak to an attorney before speaking with you?

A. Yes.

Q. Did he later then recontact you?

A. Yes, he did.

Q. When he recontacted you, did he make comments to you about wanting to clear his conscience?

A. Yes, he did.

Q. Did he also make comments about it's a messy condition he's in and he wanted to get it off his chest?

A. Yes.

Q. Did you ask him specifically any questions about whether or not he had used a real firearm in any of these robberies?

A. Yes, I did.

Q. Detective, I'm going to begin playing for you what's being marked as State's Exhibit 70. I don't believe Defense counsel has any objection at this time.

MR. DAY: I do not have objection.

BY MS. PLANK:

Q. Now, Mr. Dean, when you were asking him about whether or not he had used a real gun, did you ask him that

because what you'd found was, in fact, not a real gun?

A. That is correct.

Q. Did Mr. Dean indicate, though, that he had been in possession of weapons beyond that -- that BB gun that you'd found?

A. Yes, he did.

Q. And the date at which you were interviewing Mr. Dean, this 5 1/2 months after the robberies that occurred in Portland and Gresham?

A. Yes.

Q. When you spoke to Mr. Dean, did he, in fact, tell you that in addition to that pellet gun he had at one point been in possession of a real gun?

A. Yes.

(State's Exhibit 70 being played 4:06 p.m.)

(Not able to be transcribed.)

BY MS. PLANK:

Q. Detective, are you familiar with firearms?

A. Yes.

Q. The firearm he's described a 9 mm Luger, smaller, would that look just like the fake gun that you retrieved or would it look different?

A. It would look similar but different.

Q. What would be the differences between a real 9 mm Luger versus that gun?

A. Well, one, what it's able to fire. A -- you know, shooting a real bullet as opposed to a pellet.

Q. No. I meant visibly, if you were just looking at it?

A. The gun -- the gun that we introduced into evidence today is a replica Walter handgun, which is different than a Glock. It's a totally different make. They're both semiautomatic firearms and they're both black. Glock makes a black -- black 9 mm semiautomatic handgun. So they're similar in that they're square shaped, they have square ends. They have like a canted handle with, like, you know, with a little -- some angular handle that comes back towards you. They're similar in that regard.

Q. Would the Luger have a potentially longer barrel than what --

A. Yes. A Glock would have a long -- could have a longer barrel, yes.

Q. Would that be one of the obvious differentiating points between that fake gun and a Glock?

A. Yes.

(State's Exhibit 70 resumes playing at 4:12 p.m.)

BY MS. PLANK:

Q. All these other robberies that Mr. Dean has described, the (indiscernible) sack bandit, the man who got caught in the (indiscernible) Wilsonville, are these actually

real people that you're aware of?

A. Yes. Two of which I was the lead investigator on.

(State's Exhibit 70 resumes playing at 4:16 p.m.)

BY MS. PLANK:

Q. Detective, at the beginning of that clip we hear you ask the question, "Tell me what tools you used."

Why didn't you just outright say, "Hey, did you use a gun and a bomb?"

A. I didn't -- I didn't outright ask that because when I interview suspects, I like for them to provide intimate knowledge of the crimes. And so by asking, you know, "Did you use a gun?" I outwardly right off the bat, I feel that that's giving them that information; I'm feeding that to them. Whereas, if I hold my cards back, I can then corroborate statements that they make to me.

Q. Do you then start specifically asking him about the Silver Cloud robbery particularly?

A. Yes.

(State's Exhibit 70 resumes playing at 4:18 p.m.)

BY MS. PLANK:

Q. When he says "You have a picture of it," what's -- what's Mr. Dean referring to?

A. The still of the surveillance video from the Silver Cloud Inn.

Q. So you'd shown him one of the stills from the

Silver Cloud?

A. Yes, I had.

Q. And finally --

THE COURT: The question and answer didn't quite track.

MS. PLANK: I'm sorry.

THE COURT: The tense didn't. I think you'll find out if and when he showed it.

BY MS. PLANK:

Q. When did you show him a still from the Silver Cloud Inn?

A. Previous to that point in the interview.

Q. Prior to him making that statement?

A. That is correct.

Q. I should ask you also, would it be fair to say these clips were jumping around in the interview?

A. Yes.

Q. Had you shown Mr. Dean the photo of the still of himself from the surveillance from the Silver Cloud pretty near the beginning of the interview?

A. Yes, I did.

Q. At this point in time when he's describing it as a Halloween mask, prior to him saying it's a Halloween mask, had you been referring to it all along as a hockey mask?

A. I think I'd just been referring -- I don't

remember if I actually even called it by a name itself at all. I think I try to use as little detail as possible. I want to have him elaborate on the detail.

Q. Did you at a later point in the interview ask Mr. Dean why he targeted motels?

A. Yes, I did.

(State's Exhibit 70 resumes playing at 4:22 p.m.)

BY MS. PLANK:

Q. Did you again at a later point in the interview try to direct Mr. Dean back to more specifics about the Silver Cloud robbery itself?

A. Yes, I did.

Q. And why were you trying to get specifics about that particular event as opposed to just generalized information about why motels?

A. Because in a confession, specific information is useful. It shows that that one person who I am talking to has intimate knowledge that only the robber or the investigator or the victim would know, because they were there at the time.

Q. The other long way of saying it shows you got the right guy?

A. Yes.

(State's Exhibit 70 resumes playing at 4:24 p.m.)

BY MS. PLANK:

Q. Now this particular clip --

THE COURT: Which will be the last clip you'll be examining about today, but go ahead.

BY MS. PLANK:

Q. Was that clip significant to you -- a significant moment in the interrogation?

A. Yes, it was.

Q. That information about sneaking in behind the *Oregonian*, had that been in the news or disseminated publicly in any way?

A. No, it had not.

Q. And that specific information about removing the deliveryman's wallet, looking at it, and then putting it back in his pocket, does that even appear in the police reports?

A. No, it does not.

MS. PLANK: That will be my last question, Your Honor.

THE COURT: Okay. Ladies and gentlemen, we're going to stop for the day, pick up again as close to 9 a.m. tomorrow as possible.

I'd like you here -- have you here at five of 9:00. That will help us to get to our next steps as quickly as possible.

So with that, I'll ask that you leave your notebooks here, step out with my clerk to the jury room.

we have to do. We're still on the same target.

We're going to -- we're going to finish with the evidence this morning, but we're not going to be ready for closing arguments and other legal issues until about three o'clock. You're going to end up with a break in between whenever it is we stop this morning -- and maybe later this morning -- and three o'clock. I just want to let you know. That's just -- otherwise, we'd have you here waiting as compared to out on a break. So we're going to plan for it accordingly.

So that's to let you know where we are.

Okay. Let's -- you're still under oath from yesterday, sir.

THE WITNESS: I understand, Your Honor.

BRETT HAWKINSON,

called as a witness by the State,

previously sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PLANK: (Continuing)

Q. Thank you, Detective. I'm going to try and pick us up where we last left off, which is right in the middle of some of our audio/video clips from Mr. Dean's interview.

A. Okay.

Q. I believe, actually, specifically, Detective, the question that was our last one before we broke was the statements that Mr. Dean had made about following the *Oregonian* deliveryman in and taking his wallet, but then deciding to leave it with him.

Why were those significant points during the interrogation?

A. Because that's information that until I had reviewed the video surveillance myself, I was not aware of that information. It was not contained in any of the police reports. So until I seen that in the video surveillance, I wasn't aware of it.

So the only people that were aware of it were Detective Russell, myself, the victim, and the robber.

Q. Now, with respect to the Silver Cloud, did Mr. Dean give you a pretty detailed explanation about sort of the surveilling he did of his target?

A. Yes.

(State's Exhibit 70 resumes playing at 9:49 a.m.)

BY MS. PLANK:

Q. This time frame Mr. Dean provided, between 3:00 and 4:00, did those correspond with our robbery time frames?

A. Yes, they did.

Q. Did Mr. Dean describe to you the clothing he had worn during the robberies?

A. Yes.

Q. Now, to be fair, prior to his description of the clothing, had you told him about the items you'd found in the storage locker?

A. Yes, I had.

(State's Exhibit 70 resumes playing at 9:50 a.m.)

BY MS. PLANK:

Q. Those comments about getting off from a job, had Mr. Dean discussed with you a business he'd actually owned at the same time frame that these robberies were going on?

A. Yes. Mr. Dean had told us he'd owned and operated a business called Moving & Storage LLC.

Q. And were you able to verify that that actually was a real business that existed?

A. Yes.

Q. And actually inside the storage locker did you find anything to corroborate that Mr. Dean did, in fact, during the same time period as the robberies, own a moving business?

A. Yes, I did. There was a Wells Fargo card in the name of Moving & Storage LLC. Business paperwork that was related to that business as well.

(State's Exhibit 70 resumes playing at 9:53 a.m.)

BY MS. PLANK:

Q. And at the time of Mr. Dean's arrest, did you, in

fact, find that he was living at the Unicorn motel?

A. Yes.

Q. Did Mr. Dean also make statements about the Gresham robbery?

A. Yes, he did.

Q. Were they less specific than the Silver Cloud?

A. Yes, they were much less specific.

(State's Exhibit 70 resumes playing at 9:54 a.m.)

BY MS. PLANK:

Q. Detective, did you confirm that the Gresham Holiday Inn does, in fact, have those $164 suites?

A. Yes.

Q. How about the bomb? Did you ask Mr. Dean about the bomb?

A. Yes, I did.

(State's Exhibit 70 resumes playing at 9:56 a.m.)

BY MS. PLANK:

Q. Let me stop you there. I know that you just asked specifically about Silver Cloud, but some of your questioning where you say, you know, "Hey, maybe there's some you didn't use a real bomb."

Are you asking questions like that necessarily because you believed that he didn't use a bomb in both of these robberies? Or are you asking questions like that at points in the interview to see if the defendant will disagree

with you?

A. I'm looking to see if he will latch on to the idea that he did not use a bomb and only implied a bomb. Trying to give him that opportunity of out.

When he disclosed to me that it was a real bomb, my response "No shit" -- pardon my French -- was that was a genuine surprise. We were investigating this case with the theory that it was an implied bomb, and so to hear this out of his mouth to me, it was a shock.

Q. So you had just assumed that he had something else in the bag, was telling these victims it was a real bomb?

A. That is correct. That was my assumption, and apparently it was incorrect.

(State's Exhibit 70 resumes playing at 9:58 a.m.)

BY MS. PLANK:

Q. Detective, do you personally have any knowledge or experience about explosive devices?

A. I have some knowledge, but very limited -- well, experience igniting, no, but I have knowledge.

Q. As part of your training as a law enforcement officer, you all trained to deal with potential explosive devices or bomb threats, things like that?

A. Yes.

Q. Now, the particular device that Mr. Dean described with the black powder, cell phone, the type of piping, the

type of wiring. Would that all be capable of making an actual functional explosive device?

A. Yes.

Q. And specifically the detonator created by the cell phone, I don't personally understand necessarily how that works, but is that an actual method by which a bomb can be detonated?

A. Absolutely.

Q. Did you have conversations with Mr. Dean about how it was he was able to get away from these crime scenes without being detected?

A. Yes.

(State's Exhibit 70 resumes playing at 10:02 a.m.)

BY MS. PLANK:

Q. Now, this description that Mr. Dean gave you about leaving a vehicle parked maybe a block or two away, could that potentially explain why none of the perimeters and none of the K-9 searches were ever fruitful in these robberies?

A. Yes.

Q. And then, finally, Detective, at the conclusion of the interview, was Mr. Dean allowed to call his significant other?

A. Yes.

Q. Was the recorder still going and were you actually still watching Mr. Dean while he was speaking to his

significant other?

A. Yes, I was.

Q. And why is that that you're continuing to record and continuing to watch?

A. Well, he's in custody. You know, he's under arrest. He's not free to just walk around the floor. We're doing it near where the recording devices are. He's not handcuffed. So there's a safety issue that's involved with that.

And I told him. I gave him that warning that he was being watched.

Q. And prior to his conversation with his significant other, had Mr. Dean made various statements throughout the interview about, you know, basically wanting to come clean, wanting to get this off his chest?

A. Yes.

Q. And did he make a statement that you personally observed, not directly to you, but that you observed to him making to his significant other about having basically told the detectives everything?

A. Yes.

(State's Exhibit 70 resumes playing at 10:04 a.m.)

BY MS. PLANK:

Q. Is that the statement to his significant other --

A. Yes.

Q. -- the conclusion?

Now, would it be fair to say that this entire interview lasted much, much longer than what we've played here?

A. Much, much is accurate.

Q. But these are edits -- are these edits themselves accurate representations of those portions of the interview?

A. Yes.

MS. PLANK: State would move to admit State's Exhibit 70 into evidence.

MR. DAY: No objection.

THE COURT: Received.

BY MS. PLANK:

Q. Now, Detective, I want to talk to you a few things that we didn't hear but they were also present in the interview.

Do you recall Mr. Dean explaining to you that he had a pattern for how he would deal with the clerks and the employees inside a motel?

A. Yes, I do.

Q. What -- what did he tell you was his sort of his game plan when he got in there?

A. He said it was all business. And when he would go into a hotel he would get them on the floor. He would use zip ties to tie them up. He would always ask for the key

because he doesn't want just the register money; he wants what's in the safety -- like the safety deposit box with the safety boxes, because that's where the big score was.

Q. Did he talk to you about taking the individual employees', like, wallets and purses?

A. Yes.

Q. Did he explain to you why it was he would take their purses or would look their wallets?

A. He did that as a form of intimidation for the victim, to let them know that he knew.

Q. And when you say "to let them know that he knew," you mean --

A. Where they lived. Their personal information. How to contact them. He felt that it was more controlling.

Q. During a clip that we had in here, Mr. Dean described that he had had a real gun, but that he'd gotten rid of it prior to his arrest?

A. Yes.

Q. Based on the time frames that he was describing, did you understand that to mean that he was in possession of a real gun with two clips at the time in September that he committed both of these robberies?

A. Yes.

Q. Did Mr. Dean ever talk about, you know, why the elaborate cover -- head-to-toe cover-up?

A. Yes. He told me it would make it hard to identify him. If the victims can't see his face, makes an easier clean getaway.

Q. Did Mr. Dean tell you specifically, you know, why use a gun and a bomb? Why both? Why two?

A. He said that he'd done research and he read of how these -- how robbers would just go use a gun or a fake gun and they'd get taken over. He felt that by having the bomb and the gun, the bomb would cause the motel clerks to have to think about the safety of their patrons and also give them an extra -- it gives him an extra layer of protection in case they decide to go for the gun, that he has the fallback of the bomb.

Q. Did you at the conclusion of the interview also take confirmatory swabs from Mr. Dean that there forwarded to the lab and used to confirm the DNA match to those Gresham flex ties?

A. Yes, I did.

Q. At some point -- you already testified to this, but, you know, at some point during the interview, you list out all of those items in the storage locker that you found. The BDU pants, the Elmer Fudd hat, the zip ties, the black shirt. You list those all out to Mr. Dean. Is that correct?

A. Yes.

Q. At any point did Mr. Dean say, "Hey, that stuff's

not mine. The other stuff in the storage locker, that's mine, but that stuff, that is not mine"?

A. No, he never, ever had any disownership over those items.

Q. For some of those items did he actually specifically state "Those are mine"? Like the pellet gun?

A. Yes.

Q. Any other items that he specifically said, "Yeah, those are mine"?

A. Not that I remember at this time specifically.

Q. And all of the items that you found that you believed matched the clothing worn in those two robberies, all those items that you found in the storage locker, were they scattered throughout the locker, or were they all contained together?

A. They were all contained together in two different containers. One was the large cubical blue bag -- it seemed like a cooler. Had a handle on it -- and then a black duffel bag.

Q. Did Mr. Dean at any point ever say, "Hey, I'm storing my buddy's blue cooler and black duffel bag in that storage unit"?

A. No.

Q. Did Mr. Dean ever say anybody else's stuff was in that storage unit?

A. No.

Q. And that pellet gun that Mr. Dean specifically stated was his, was that in one of those containers with all the other robbery items?

A. Yes, it was in the black duffel bag.

Q. Now, we heard testimony prior to you from folks from the lag that they tested DNA from a remote control, zip ties from the Silver Cloud Inn, and zip ties from the Holiday Inn. We looked at a whole bunch of exhibits, both photos and physical exhibits of the items found in Mr. Dean's storage locker. Did you submit any of those items found in Mr. Dean's storage locker to the lab for analysis?

A. No, I did not.

Q. Why not?

A. It was found in Mr. Dean's storage locker. The -- the incident happened in September. We recovered these items in February. There's no way to tell who's handled those items between the date of the incident and February.

Furthermore, what would that information really tell me if we did do a DNA analysis on that -- on those items? It would tell me who handled those items between the time we see it on a video and the time we recover it, but that's not nearly as useful as an actual item of evidence located within the crime scene at the time of the crime itself -- i.e., a flex cuff left behind at the scene.

Q. Is it fair to say that you didn't submit those items also because Mr. Dean had stated that storage locker was his.

A. Yes.

Q. Basically stated all of that stuff was his?

A. Absolutely.

Q. And had Mr. Dean stated that he had committed these two robberies?

A. Yes.

Q. At that point all of those items -- do you think the crime lab would have even accepted -- given that information, accepted those for analysis?

A. I don't think they would have. They would have called me and asked why. We would -- they probably would have --

MR. DAY: Objection. Speculation.

THE COURT: All right. Sir, I want to make sure you're not just guessing. If you're talking about things based on your experience and knowledge, you can answer the question, but I don't want you to just guess as to what they might have done.

THE WITNESS: Absolutely.

Based on my experience, the lab is very tight as to what they will test. And I find it difficult to submit items of evidence for DNA analysis on other cases. And so I

felt it would be very unlikely that they would test those items.

Q. Did you have any question after your interview with Mr. Dean about the ownership of that storage locker?

A. I'm sorry, I missed the question.

Q. After your interview with Mr. Dean, did you have any doubt in your mind that anyone other than Mr. Dean controlled that storage locker?

A. No, there was no doubt in my mind --

Q. Pardon me.

A. It was Ernest Dean's storage locker.

Q. After you interview with Mr. Dean, did you have any doubt in your mind about the ownership of the items inside the storage locker?

A. There was no doubt in my mind at all that those were -- that was Mr. Ern -- Mr. Dean's hat, those were Mr. Dean's gloves, Mr. Dean's dolly. Every item in that storage locker belonged to Mr. Dean.

MS. PLANK: I have no further questions, Your Honor.

THE COURT: Cross-exam.

MR. DAY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DAY:

Q. So everything in that storage locker was directly related to Mr. Dean? Yes?

A. Yes.

Q. You didn't find anybody else's IDs in there. Is that correct?

A. I did not.

Q. Didn't find Ms. Fang's ID or purse in there, did you?

A. We actually looked hard for Ms. Fang's purse and ID, but we did not locate that in the storage locker.

Q. Were you the first on the scene at the serving of the search warrant at the storage locker?

A. First on the scene?

Q. Who served -- who opened the storage locker?

A. Oh, I was there when the storage locker was opened. I forget who used the key. May have been -- it may have been Sergeant Santos that opened it, but I was standing right there with my camera.

Q. And how many officers were there with you?

A. Well, had myself, Sergeant Santos, Detective Mudrick, Detective Russell, Detective Frantz --

Q. And --

A. -- and Lieutenant Wilbur.

Q. So that was about seven?

A. Yes, that's -- yes.

Q. And do you recall -- withdrawn.

Who took possession of all of the items that were recovered from there what time?

A. Detective Mudrick served as the -- as the evidence custodian in my presence. When an item was located, I'd photograph it and he would take possession.

Q. And who maintained control after that?

Did he maintain possession or did it go to somebody else?

A. It went to Portland Police Evidence Division.

Q. And then do you go down to that evidence room and get the cuffs and then send them off to OSP yourself?

A. I did not do that myself, no.

Q. Who does that?

A. We have several ways do it. I do not know if Detective Russell did it in person or we completed a -- because he can -- the way our agency is, we're fortunate enough to have enough support staff that I can fill out the request form, interoffice to them, and they will deliver it from evidence to the Oregon State Police Crime Lab, which saves me a lot of time.

Q. You -- and you -- he was staying at a motel, the Unicorn motel?

A. I was? I'm sorry?

Q. Mr. Dean, he was at that time --

A. Yes.

Q. -- located at the Unicorn motel?

Was he staying there with anybody, to your knowledge?

A. In the room, no.

Q. And what was it -- did you find anything of interest or evidentiary value at that location?

A. Related to this investigation?

Q. Related to this case, yes.

A. No. With the exception of tools.

Q. The tools we're talking about were found at that location, not at the storage locker?

A. That is correct.

Q. And were these -- what officers were with you at the motel?

A. There was detective Sergeant Santos, myself, Detective Mudrick, Detective Brent Christensen. I believe Detective Tracy Chamberlain. Special Agent Michael Palmer of the FBI. Lieutenant Wilbur. Detective Frantz.

Q. Would you say this case got a moderate amount of publicity or more than moderate amount?

A. I think moderate. Well, it got a lot of initial publicity, and then it was moderate after that.

Q. Did you bring the tools that you got from the Unicorn motel? Do we have those in the courtroom today?

A. I do not believe so.

Q. We just have the picture?

(Indiscernible background conversation.)

BY MR. DAY:

Q. Sorry. I meant to get these couple of pictures out earlier.

Did you make any kind of a receipt or notation in your report about what was contained in that bag?

A. I believe I may have called it "miscellaneous bag of tools." But I will look and see what words I used.

Q. I mean, does the specific items -- the tools specifically are relevant, are they not?

A. Yes.

Q. And you're alleging these tools are used to do what?

A. I'm sorry?

Q. What are you saying these tools are used do?

A. I believe these tools are capable of making bombs.

Q. Did you find your list of what tools were in that bag that were used for making bombs?

A. I did not.

Q. I'll give you another minute to find your receipt on that, then?

A. Okay.

(Pause.) From my recollection -- I'm not finding it right now. My recollection tells me it was a bag of miscellaneous tools, and we took all of the tools.

Q. Okay. What is your training or experience regarding the composition or manufacturing of explosive devices?

A. Okay. Well, I've had conversations with members of the Portland Metropolitan Explosive Disposal Unit, EDU.

I've had personal conversation with Ron Stankey of the Federal Bureau of Investigation who is certified bomb technician.

Went to the basic police academy and learned about responses to explosive devices. That cell phone -- one of the things they teach and train you to do is you turn your police radio off and you turn your phone off before you respond to check a suspicious device. And we do that because your cell phone and your radio may trigger that -- may trigger the detonation. It's standard police protocol for that.

Q. And the cell phones that you found here, they were intact cell phones --

A. Yes.

Q. -- the three cell phones?

Do you know anything specifically about the wiring

of bombs?

A. I know specifically that in order for a bomb to happen that it needs an enclosed space, it needs an explosive, and it needs a mechanism to cause that explosion within that enclosed space.

Electricity, a spark initially. That's why static electricity can cause a bomb to go off when you're screwing the end of a pipe bomb. A spark metal on metal can cause that spark, which would cause then, if it's a closed -- if it's a closed container at that point, it can cause immediate combustion, and the explosion, which would cause the bomb to go off.

So -- so I know that you need spark, you need something that's capable of flammability, and you need it in an enclosed space for that to happen very fast and rapidly.

Q. Did you find any incendiary devices in the storage unit?

A. Did not.

Q. Did you find any incendiary devices at the Unicorn motel?

A. Did not.

Q. Did you find a piping -- piping at the storage unit?

A. No.

Q. Did you find any piping at the Unicorn motel?

A. I did not.

Q. Did you -- and is your recollection of the case and your understanding of the case that what was presented to at both of these hotels was something along the lines of a box, a small box?

A. It was described -- yes, I believe it was described as a -- yeah, I believe it was described as a box.

Q. To your recollection, did any of the victims mention a pipe bomb?

A. No. The words "pipe bomb" weren't -- was not used.

Q. So, this is State's Exhibit 45 on the screen that we're looking at. And is this the bag that we're talking about?

A. Yes.

Q. And can you clearly see from where you are --

A. Yes.

Q. -- the contents of the bag?

A. Yes.

Q. And what is it from in that bag that you're alleging is used and how is it used in the construction of a bomb?

A. I have to be -- okay.

Well, the battery attached to the bottom of the drill is relevant. It's capable of providing a power source.

The screwdrivers are capable of using -- of drilling the holes necessary into the pipe bomb to have the wiring attached to the -- whatever the detonator would be. The -- let's see, there's, like, an electric screwdriver there. There's a drill. The drill is capable of drilling metal components which allows, you know, to construct the pipe in a way to where you can then put in the powder.

Those cords are capable if you were to strip them down, take off -- strip them. Those cords are capable of conducting current, so you could take a cord apart and use that as a way of having current transport from your power source to your item to be detonated.

Yeah, that -- and that's about it.

Q. Did I ask you if you found any powder in that location?

A. I think you asked me if I found any incendiary devices.

Q. Un-huh.

A. So powder I would -- I didn't find anything that would go boom that I saw.

Q. No -- nothing resembling gunpowder, is what I'm getting at.

A. I did not see anything resembling gunpowder.

Q. And what was your understanding of Mr. Dean's business?

A. He was involved in a moving and -- a moving company.

Q. Involved or owner of?

A. Well, owner, but involved because he did many of the moves himself.

Q. That's the kind of business where one might also do the work that one's hired people to do?

A. Absolutely.

Q. Saves a little money, right?

A. Absolutely.

Q. Now, would you agree that people that work in the moving industry or moving capacity, when they're working in teams, there's going to be -- there's going to be physical contact?

A. Yes.

Q. What was your understanding as to how many employees Mr. Dean had?

A. He -- well, my -- my understanding is I was aware of -- I was aware of three, but there -- he had stated that at one point I think he had over 65 employees.

Q. And you verified that he had this corporation and --

A. Yes, I verified that he did -- he did indeed --

Q. -- that that's a fact?

A. -- earned -- he earned money too and went to --

people would call. He had a -- in fact, he even -- he has a phone number and an ad on craigslist, and when you call it, it's -- it was a functioning phone number, leave messages, and he even called us back to arrange a move. That's part -- that was part of the investigation.

Q. What is this Airsoft -- now this is not a real gun that I'm holding. Is that correct?

A. That is -- well --

Q. State's Exhibit No. 66?

A. It is not a real firearm, but it does indeed shoot a projectile.

Q. Okay. Is it loaded right now?

A. I hope not.

Q. Usually there's like a -- a strip in there. Do you want to check that?

I saw you being very gingerly with it yesterday. Now I'm concerned. I --

A. Well, I was concerned as well yesterday.

Q. You should check that right away --

A. Yeah.

Q. -- Detective.

A. It's -- the problem is I don't know how it really -- well, see --

THE COURT: Well, if you're not sure --

THE WITNESS: There's nothing in it.

THE COURT: I want you to only check it in a way that is safe to check it.

THE WITNESS: Yeah. It's -- it's not functional.

BY MR. DAY:

Q. This has got some weight to it. Would you agree?

A. Absolutely.

Q. What is this a replica of?

A. It's a Walter brand handgun.

Q. Now, how -- I'm sorry, what is a Walter brand handgun? What does that mean?

A. Well, it's the make -- I believe it's -- I believe it tells you on the firearm itself what it's a replica of, but --

Q. Oh, yeah. Could you take a look and let me know that?

I'm not a gun guy at all. So I have a simple questions.

A. Yeah. So -- so it says on here "Call Walter," and it has the Walter brand logo. Walter is a firearm manufacturer. They're German in origin. Obviously they have an import into the United States, because they're allowed to have and sell those firearms in the United States.

So this is a very, very real looking replica of a Walter.

Q. And so what caliber of gun would this be?

A. It could be any sort of caliber. It could be -- well, that one specifically or -- or the -- the --

Q. That.

A. -- Walters in general?

Walter makes 9 mm. They make -- I believe they have a 40 caliber, and I believe they have a 45 caliber.

Any -- any model of semiautomatic handgun, it could be either one of those.

Q. Let me ask you. So this basic structure that is in evidence that I'm looking at, I know there are variations, but it could be a 9 mm. It could be a 45. Could it be any number of calibers that go into this kind of square-looking gun?

A. Yes.

Q. And then the Beretta -- or not Beretta -- the Luger --

A. Luger.

Q. -- that we've been talking about a little bit, I had in my mind a certain picture kind of, you know, and so then I went and looked at some pictures.

A Luger doesn't look a whole lot different than this. Is that correct?

A. Luger --

Q. The 9 mm Luger.

A. Luger -- Lugers do. Glock --

Q. I'm sorry.
A. Glocks --
Q. Glock 9. We're talking about the Glock 9 mm?
A. A Glock --
Q. I mean, the word "Luger" was put on the end of it, was it not?
A. It was. Not by me. By someone else.
Q. Okay. So you're saying that doesn't even exist?
A. Luger is a reference to the type of -- to 9 mm -- okay. Luger makes -- Ruger makes a firearm. It's a long history that I'm almost not qualified to even talk about.
Q. Well, yeah. And we don't -- I can -- I think we're good there.
A. Okay.
Q. My basic question is the Glock 9 mm --
A. The Glock looks different.
Q. Looks different than this?
A. Yes.
Q. More -- okay.
A. Yes. But I mean if you were to see a Glock, which I could show the jury if I made it safe --
Q. Un-huh.
A. -- because I have one on me.
Q. Un-huh.
A. Or -- and you were to look at a Walter, you could

see that they -- they appear to be two different types of handgun.

But as far as basic structure and basic generic description, you know, the (indiscernible) quite a bit.

Q. Detective, can you please show us your firearm?

THE COURT: Is it safe for the courtroom?

THE WITNESS: I will make it safe, Your Honor.

THE COURT: All right.

THE WITNESS: Would you look and verify that that's empty, please.

BY MR. DAY:

Q. Well, it looks so to me.

A. Okay. So this is my duty that is issued to me by the Portland Police Bureau.

Q. And can you just hold those to yourself --

A. Yes.

Q. -- so the jury can see.

A. Oh, yeah.

Q. Now, would you agree that certainly in a stressful situation, if somebody is pointing a black firearm at you, it's going to be difficult to say if it's a Glock or if it's a --

MS. PLANK: Objection. Calls for speculation.

THE COURT: I think the way the question's framed doesn't really -- it's just what's your opinion. I think you

can --

THE WITNESS: Unless the person is very experienced with firearms -- I think I would be able to tell because I handle a Glock regularly. I would know a Glock if I saw a Glock.

But, yes, I think to many people in a stressful situation it would be difficult to tell the difference between --

BY MR. DAY:

Q. I was curious. We see --- know from straight on --

THE COURT: You need to step out of the way so the jury --

BY MR. DAY:

Q. I'm curious as well to see what the barrel, I think -- I would like for you to show the barrel --

A. Like the barrel length?

Q. It's scary to see a gun pointed at us, but that's what we're asking -- that's what I'm asking you to do, is point --

A. Okay.

Q. Point at me if it makes you feel better.

THE WITNESS: Do I need to fill out a use of force report?

THE COURT: I think you're okay here.

THE WITNESS: Okay. So with the information, my finger's not on the trigger.

Just so you have a vantage point. This feels weird.

I'm sorry. Is that enough?

BY MR. DAY:

Q. Thank you. Yes.

A. Okay.

Q. That's good. Thank you.

THE COURT: You might leave it just safe for the courtroom, please.

THE WITNESS: Okay. I will. It's holstered up. It won't be a problem.

BY MR. DAY:

Q. Would you agree that Mr. Dean never admitted to using a real gun at either of these two hotels?

A. I disagree. He --

MR. DAY: Objection. Asked and answered.

THE COURT: I'm sorry.

MR. DAY: Well, he's answered the question.

So -- I guess if you want to explain.

THE COURT: You can explain your answer.

THE WITNESS: When I -- once he -- once Mr. Dean had told me that he used a real gun -- because I gave him the out of it being the Airsoft. And when he told me it was a

real gun, I strived to try to narrow -- pinpoint which ones were real and which ones were Airsoft. And he told me at the beginning, early on, it was a real gun. And September 5th was early on.

BY MR. DAY:

Q. But your -- now, your interview of him, he alluded to some other things, and your interview with him went on for how many hours?

A. Oh, I believe time-wise, probably two, three hours.

Q. And -- well, do you know about how much time what we heard here in court, about how much time that was of interview?

A. A fraction.

Q. So what is your goal when you interrogate a defendant, suspect? What is your goal going into that interrogation?

A. Find out the truth.

Q. Would you also say one of your goals is to minimize the impact on the victims?

A. Absolutely.

Q. And would you agree that the accomplishment of that goal is best met if cases do not go to trial?

A. Absolutely.

Q. And best way to ensure the cases do not go to

trial is to obtain a confession?

A. I believe confessions are useful in -- in providing -- in order for cases to resolve before they get to a point where they're in a courtroom.

Q. So your goal is the truth?

A. My goal is the truth.

Q. And then you had some other strong considerations as well? The victim, getting the case to resolve, things like that?

A. Yes. But ultimately it's about the truth.

Q. So when you -- in terms of obtaining the truth, what are the means that you use in obtaining the truth in an interrogation?

A. I -- I like to ask -- and I try to ask open-ended questions. And I like to line up the answers I have with the information that I know. And that's really the -- then compare it to witness statements, you compare it to the evidence that I'm aware of, and you -- basically you line up the statement that you're taking with all the facts that you know, and you make that comparison to see if it's truthful or not.

Q. And in terms of getting information, do you play the role sometimes of good cop as well as bad cop?

A. I don't believe in good cop/bad cop, per se. There's not -- I don't -- I actually don't use the tactic of

there's a mean guy in the room over here and then there's a really nice guy over there.

My preferred tactic -- excuse me -- is just to try to be nice and -- and, you know, I like to sell conscience. I like to sell regret and remorse. I like to -- that's -- that's the one I really -- that's my crutch. I kind of stick with conscience an awful lot. Probably more than I should.

Q. So you -- would you say try to befriend them in some way or build a rapport?

A. Rapport building is part of not only the interview process, but just -- just having a -- being in the presence of the suspect in and of itself. I mean, even a victim and even the witnesses, absolutely you develop a rapport. Part of -- part of good customer service.

Q. And then did you spend some time being really clear with him about how much trouble you thought he was in?

A. Yes. In this case, at some point in the interview, yes, I had to tell him --

Q. In fact --

A. -- he's in trouble.

Q. -- that -- that moment happened when -- you met with him in a few segments you could say. Is that correct?

A. Yes, being called segments.

Q. And so at the end of this first segment, we'll call it, he told you he wanted a lawyer. Is that correct?

A. That is correct.

Q. And up until that point he didn't tell you anything about anything. Is that correct?

A. That is -- that is not correct.

Q. Okay. Leave it there.

A. Okay.

Q. And what was your response when he said he wanted an attorney?

A. To explain to him where we were at with the investigation. That we had seized evidence. That he was looking -- I read him an arrest warrant that we had for him, and we placed him in a holding cell.

Q. So you --

A. Oh -- and I let him call -- make a phone call to his -- his girlfriend, but she didn't answer. But we -- I had told him no matter what happens during this interview, I'll let you call her regardless, and I followed through with that.

Q. So he invoked. And you -- fair enough? That's his right. You took him -- let him go back to his cell?

A. Correct.

Q. Some time later -- about how much -- how long was it before he was trying to get your attention again?

A. He knocked on the door about eight minutes after we put him in the cell.

Q. Okay. And expressed that he wanted to talk with you, come clean and that kind of thing?

A. He told another -- yes, he told another person that he wanted to talk to me, so I came back and I spoke to him and he said he wanted to come clean.

Q. And at the same time that he's making this request -- well, did he also ask for a cigarette?

A. Yes.

Q. And did you tell him "I can work on that, but it's not any kind of an exchange"?

A. I made it very clear that, yeah, I'll let you make a -- we'll take a smoke break, but it's not -- I mean, you know -- first of all, I have to go track down cigarettes. It's going to be a while, and, you know, even if you take the smoke break, it has nothing to do with you talking to me. It's going to be independent.

Q. And how many cigarettes did he have on the smoke break?

A. Maybe two.

Q. Three?

A. Perhaps three. Two or three.

He was sucking them down pretty fast.

Q. And did you continue to question him or conversate with him about this case while he was having a cigarette?

A. We engaged -- we -- we were talking, but I tried

to minimize what we were talking about until we were done with our smoke break and back in the room.

Q. So my question is: Did you continue to question him or have conversation with him about this case while on this cigarette break?

It's a "yes" or "no" question.

A. I'm trying to think. When you say this case --

Q. The case we're talking about, the charges that we're looking at today.

A. Yes.

Q. So you spoke with him about this case.

And where did you go for the cigarette break?

A. Downstairs. At the central precinct we have a parking garage. So it's down in the basement level. There's a bunch of police cars down there. That's where we went.

Q. Was anybody else with you when you went down there with Mr. Dean?

A. Yes. Lieutenant Chris Wilbur, Sergeant Joe Santos, and Detective Maury Mudrick.

Q. And did you record your conversation that you were having with him during that smoke break?

A. Yes.

Q. Did you have some conversation or some back -- some -- any words exchanged with Mr. Dean -- withdraw that.

From the time you started recording, did you have

any unrecorded conversations with Mr. Dean?

A. No.

Q. Before you started recording, did you have any conversations with Mr. Dean?

A. No.

Q. What was Mr. Dean's -- how would you describe his overall state of mind in your presence?

A. Smooth. Articulate.

Q. State of mind was smooth and articulate?

Okay.

A. Yeah.

Q. Did he express some -- some emotional stress?

A. Yes.

Q. And what's your understanding of the emotional stress that he was under at the time?

A. Seemed to me that he was -- he was concerned about Iona, and he seemed to me like he was trying to have like a -- well, going back to the -- trying to think of the word that you used. You used the term "segments" or -- so there's segments of this interview. There's an initial interview, there's an invocation, there's a holding cell, and then there's a smoke break and then there's a second interview.

In the first interview seemed nervous, apprehensive. After the invocation he seemed -- he seemed tired, relieved. Like -- and so was there some emotional

stress? Perhaps, but it was -- it seemed to be of that finally coming to terms with holding onto something for a long and finally like spilling a secret. That's --

Q. Was --

A. -- what it seemed to me.

Q. Was he more relaxed after the cigarette break?

A. Yeah, I think that's a fair statement.

Q. Did he state on a number of occasions that he needed to contact Iona?

A. Yes.

Q. During the cigarette break did he say something that suggested that he'd had a suicidal thought that day?

A. Earlier that -- yes.

Q. And what was that?

A. He had made reference to -- he had told me that he, looking back on it, he wished he had reached for a cell phone and pulled it out on the officers when they went to arrest him.

Q. The result being what?

A. Well, the result would prob -- would perhaps be suicide by cop if the officers chose to fire and didn't recognize the cell phone -- recognize the cell phone as a cell phone and thought to be a weapon.

Q. Would you agree that any of these weap -- any of these tools could be used in the course of a moving company

business?

A. Yes.

Q. Would you agree that zip ties as well could be used in the course of a moving company business?

A. Yes, they could.

Q. Would you agree that latex gloves could be used in the course of a moving business?

A. Latex -- yeah, they could.

Q. Sometimes things are icky.

A. Yeah. I think you would use -

Q. Sometimes.

A. -- cloth gloves.

Q. And you saw another kind of glove that would be applicable to a moving company business?

A. Yes.

Q. You -- how long did you follow Mr. Dean before he was arrested?

A. Me personally? I probably followed him for just maybe a few hours the night before he was arrested, and only again an hour before he was arrested.

The time it took to drive from Unicorn motel to North Lombard and about Denver and using I-84 as your route at about ten o'clock in the morning.

Q. And how about anybody else that was following him on this case? Are you aware of anybody else following him?

A. We had started our surveillance on Wednesday. We were trying -- and the reason we started Wednesday is we weren't able to locate -- we didn't know where he was. As you can imagine, when people are staying in motels they're -- they don't have addresses on record.

So we got lucky in that a -- one of our units found his car in a motel room and we learned he was registered there on -- I believe it was the Wednesday of the week that he was arrested.

So we started a continual surveillance operation from that point on.

Q. For about -- is that three, four days?

A. Yeah, with -- with break -- like breaks at night. Like we'd put him to bed and we'd call it good.

Q. With breaks at night?

A. Well, I -- except for Thursday night.

Well, Wednesday we -- Wednesday we didn't have enough people. We were short resources. You know, John Russell and myself were busy investigating and working the case. That left the rest of my unit to handle the surveillance portion, and we just did not have the bodies when we start juggling courtroom appearances, vacations, sick. Those kinds of things.

Q. Mr. -- Mr. Dean was not engaged in any kind of illegal activity at the time he was apprehended?

A. Correct.

Q. This Elmer Fudd hat. Haven't you seen those around Portland?

A. Not often.

Q. Really? Okay. You got to get -- well, withdrawn. Ask you a couple more questions and I'll be done.

At a basic level, would you agree that the bullet is the most dangerous part of a gun?

A. No. At the basic level, I think the trigger is the most dangerous part of a gun, provided the gun is loaded.

Q. Would you agree that a gun that is loaded is far more dangerous than a gun that is not loaded?

A. I have to. Of course, yes.

Q. You don't have to.

A. Well, I'd be foolish not to.

Q. You can talk about.

A. Yeah.

Q. Okay. Have any evidence at all that the gun that's alleged to have been used on September 5th and September 15th had a -- was loaded?

A. Yes. Mr. Dean's statement was that he had two clips with the gun. I don't see the value in keeping an empty clip.

Q. Let me ask you this: Did you specifically ask him if he had a loaded weapon on September 5th when he's alleged

to have committed that robbery?

A. I did not ask that specific --

Q. Did you specifically ask him did he have a loaded weapon on September 15th when he's alleged to have committed that robbery?

A. I did not.

Q. Okay. And your job to get the truth, right?

A. Yes.

Q. Okay. My apologies. Just looking for one -- one thing.

(Pause.)

In the storage locker did you find a real gun?

A. No.

Q. Find any ammunition?

A. No.

Q. Find any holsters?

A. No.

Q. Find any magazines?

A. I believe only of the reading kind. None related to firearms.

Q. Find anybody's Social Security cards?

A. I believe -- oh, Social Security cards. I don't know if Mr. Dean's Social Security card was in there, so I don't believe so, no.

Q. Find any -- other than Mr. Dean, did you find

anybody's driver's license?

A. No.

Q. Find anything that might be called a replica of an explosive device?

A. No.

Q. Did you find a ski mask?

A. We found a black shirt that was configured in a manner that we believed was used as a masking device, but not a ski mask in and of itself.

Q. Other than that extension cord we see there, did you find any wiring?

A. I did not find any of his wiring.

Q. Did you find anything that you would call a bomb?

A. No.

Q. Did you find a grenade?

A. Did not find a grenade.

Q. Did you find a rocket having a propellant charge of more than four ounces?

A. I did not find any sort of rocket, four ounces, two ounces. No rockets.

Q. Find anything having an explosive or an incendiary charge of more than a quarter ounce?

A. No.

Q. There's a few others I'll leave alone.

MR. DAY: I don't have any further questions.

Thank you.

THE COURT: About how long redirect do you have? Just roughly?

MS. PLANK: Probably 15 minutes.

THE COURT: Anybody need a break before we do that?

Yes?

Okay. All right. We're going to take about a ten-minute break.

So, ladies and gentlemen, if you could leave your notebooks here, we'll send you back to the jury room for a short break, then we'll come back and finish.

(Jurors exit courtroom at 10:52 a.m.)

THE COURT: You may step down, sir.

Okay. And based on what you've seen so far, do you plan to put on any witnesses after you finish with your redirect?

MS. PLANK: Just one.

THE COURT: Who's that going to be?

MS. PLANK: The investigator (indiscernible.)

THE COURT: All right. Okay. So we --

MS. PLANK: (Indiscernible.)

THE COURT: Okay. Unless -- I suppose unless there's a stipulation.

MR. DAY: I missed that last part.

MS. PLANK: I said Detective Ober is going to called (indiscernible) one jail call and one statement that Mr. Dean and Mr. Lathrop were confirmably in the same area.

MR. DAY: (Indiscernible.)

THE CLERK: (Indiscernible) stay on the record?

THE COURT: Yes. Just a moment.

(Indiscernible background conversation.)

MS. PLANK: I was going to put him on after.

THE COURT: Is he here?

MS. PLANK: He's in the building.

THE COURT: Right. Okay. All right.

MS. PLANK: He might be outside.

THE COURT: And, Mr. Dean, do you need a break?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. The other question -- you know, we're going to finish this next examination, you know, probably by about 11:30 or so. I'm going to then be needing the lawyers to go through some legal issues.

Are you planning -- do you want to stay for that? You're welcome to. I just wanted to give you the option.

THE DEFENDANT: Your Honor, I'll stay for it.

THE COURT: Okay. Yeah, that's fine.

All right. Okay.

So if you want to let the jurors -- what about the -- was the second bathroom repaired?

THE CLERK: Yes. Yes.

THE COURT: What do you think would be faster, leave him? Or walk back?

Yeah, short walk.

Okay. So we're going to keep everybody else here.

(Recess taken from 10:55 a.m. to 11:05 a.m.)

THE COURT: You may begin.

MS. PLANK: Thank you.

REDIRECT EXAMINATION

BY MS. PLANK:

Q. Detective, you testified on cross-examination that you did not find any incendiary or bomb components in your search of Mr. Dean's storage locker. Is that accurate?

A. That is accurate.

Q. Did Mr. Dean himself explain why it was that you did not find any bomb components?

A. Yes, he did.

Q. What did he tell you exactly?

It's a little cut up on the audio.

A. He told me that -- well, he told me two things. The first thing was he told me that he had it in another storage unit that I would never find. And the other thing he told me is that those -- those items were in the Willamette River. Everything was in the Willamette River.

Q. Did Mr. Dean, during his questioning, actually tell you that several of the items that he considered to be highly inculpatory, really bad evidence against him, when he was done using them, he broke them up and threw them away?

A. Yes.

Q. Did he actually tell you in other parts in that interview that he had thrown a lot of evidence into the Willamette?

A. Yes.

Q. A question was posed by Defense regarding the description that victims gave of the bomb and whether they described it as box?

A. Correct.

Q. Did the victims actually specifically say that whatever he had held out as a bomb was contained inside another plastic bag?

A. Yes.

Q. So they -- they saw a plastic bag containing something that Mr. Dean told them it was a bomb?

A. I would take it further. They saw a bag that contained -- that contained an item which had a bomb in it.

Q. So whether or not it was a pipe or a box -- I mean, what they described was an object in a bag?

A. Correct.

Q. And because it was in a bag -- is that one of the

reasons that you thought it's probably just something he's pretending is a bomb?

A. Yes.

Q. And was it actually Mr. Dean who corrected that idea on your part?

A. Absolutely.

Q. Mr. Dean's moving business. Did you actually have a fairly lengthy conversation with Mr. Dean about his moving business?

A. Yes, I did.

Q. You had at one point mentioned that there was a description of 65 employees. Did you actually do some background investigation of that moving business?

A. Yes, I did.

Q. In reality, did you find it looked like there was really only one other stable employee whose name you were able to obtain?

A. There were two that --

Q. Two?

A. -- I -- whose names that I was able to obtain.

Q. Those two other individuals whose names you were able to actually confirm as being associated with that moving business, do they match the skin tone, height, and build of the robber we see in the surveillance the way that Mr. Dean does?

A. Not at all.

Q. And in your investigation of this moving business, did you form the opinion that it actually appeared that Mr. Dean wasn't actively moving very much at all during the time period of these robberies?

A. That's correct.

Q. Did Mr. Dean himself make a statement to you during the interview that he was -- his moving business was making zero money?

A. That is correct. He did tell me that his moving business was not profitable, and he was barely staying afloat.

Q. And that one of the ways he was making money was by robbing motels?

A. Yes.

Q. Speaking about the interrogation, you admitted that one of your goals is to try and create a case that's strong enough that it won't ever go to trial.

A. That's my goal in every case that I have, yes.

Q. Do you personally as an investigator have any control over whether or not a trial is eventually held?

A. I have no control whatsoever.

Q. You also stated that you wanted to gather the truth. Is that why you try to avoid leading questions?

A. Yes.

Q. Can you kind of elaborate what the problem is with using leading questions?

A. The problem with using leading questions is you are -- well, one, I can -- I can be accused of coercing the person talking to me on the other side and spoon feeding them the, quote, right answer or the answer I want to hear.

In reality, when I'm looking for a response to a question, I just -- I want -- I want facts. And I want -- I'll take as many facts as I can. And, again, I compare those facts from the statement made to me with the fact -- the other facts that I have -- I've learned from my investigation.

Q. Is that why -- just using some examples of things we heard -- you use questions like "What tools did you use during these robberies?" as opposed to "Hey, did you use a gun and a bomb?"

A. Correct.

Q. And did you wait for Mr. Dean himself to then volunteer, "Oh, yeah, I used a gun and a bomb"?

A. Yes.

Q. And specific to this particular investigation, were there actually a couple points during the interrogation where you had given Mr. Dean what I'm going to call sort of an out, a less inculpatory explanation, and he corrected you, such as the bomb. You know, "That was a fake bomb, though,

right?" "No, no."

A. That is correct. That happened in that conversation.

Q. You testified that Mr. Dean, very early on in the interview, asked for a lawyer. Did you take any statements from Mr. Dean after he said "I would like to speak to a lawyer"?

A. No, I did not.

Q. Did you recontact Mr. Dean or did Mr. Dean recontact you?

A. Mr. Dean recontacted me.

Q. And were the first words out of his mouth, "I can see you're a good man. I want to clear my conscience. I'm tired of running"?

A. Yes.

Q. Throughout the rest of the interview, did you tell Mr. Dean about six other times, "Look, you don't have to talk to me"?

A. Yes.

Q. And what was Mr. Dean's response when you said that?

A. That he wanted to continue to talk.

Q. Did Mr. Dean express at various points during the interview genuine, you know, remorse?

A. Yes.

Q. The smoke break that defense counsel described, were you and Mr. Dean talking about all kinds of things that didn't even necessarily relate to this investigation?

A. Yes.

Q. Did you talk about what types of tequilas you like to drink?

A. Yes.

Q. Were there even points during the interview where Mr. Dean and investigators were kind of laughing together?

A. Yes.

Q. And was every single piece of your interaction with Mr. Dean recorded and turned or to the State and Defense counsel?

A. Yes, it was.

Q. Mr. Dean's comment that, you know, he'd thought about maybe having the police kill him that day as opposed to being taken into custody. As part of a larger context of that portion of the interview, did Mr. Dean state that in a context of "I want to kill myself right now," or was it more in a context of "I know everything I've done has caught up with me right now"?

A. It was definitely the latter context. It was not made as a statement -- a suicidal statement where I felt this need to have him evaluated by -- if anything, it was a statement of remorse.

Q. Defense counsel asked you if Mr. Dean was engaged in any illegal activity at the time he was arrested. You stated no.

At the time that Mr. Dean was arrested would it be fair to say that he was engaging in actions that were consistent with somebody who was obviously trying to lose the police?

A. Yes.

Q. And did Mr. Dean, in fact, effectively lose his police tail a few times?

A. Yes, he did.

Q. And did you discuss that with him during the interview?

A. I did.

Q. And did Mr. Dean state that he knew the police were following him and he was trying to shake them?

A. Yes.

Q. Fair to say you did not find that white Halloween mask?

A. I did not find the white Halloween mask.

Q. Did Mr. Dean explain why it was you did not find that white Halloween mask?

A. Yes, he told me he tore it up and threw it away in the garbage.

Q. Talking specifically about the firearm. Did Mr.

Dean make a statement which was "Early on I was using a real 9 mm handgun"?

A. Yes.

Q. And that September 5th, 2013, robbery, was that literally the first robbery?

A. Yes.

Q. No real gun was found?

A. That is correct.

Q. Why did Mr. Dean say no real gun was found?

A. Mr. Dean told me that the real gun was with someone else, and Mr. Dean declined to tell me who that real gun was with.

Q. Did Mr. Dean very specifically during the interview tell you that when he was in possession of that real firearm early on, he always carried a loaded clip with it?

A. Yes.

Q. Now, the type of handgun that Mr. Dean described that he'd been in possession of, would that type of handgun take a clip?

A. Yes.

Q. Is that what would essentially constitute the handgun being loaded, was having a clip with it?

A. Yes.

Q. Would you agree that someone who, like myself,

doesn't know much about firearms, that the most obvious difference between your real 9 mm handgun and this fake gun, the most obvious difference is the barrel length, if you were to look at it?

A. Yes.

Q. But the real handgun has a barrel that's about that much longer?

A. Yeah. It might be a little bit less, but yeah.

Q. I was sitting further back than everyone else. I'm sure everyone here saw it, but the real handgun has a longer barrel length?

A. That is correct.

Q. Now, looking at that, State's Exhibit 66.

Would you also take a look at the handgun that is shown in the surveillance videos.

This being the surveillance from the Silver Cloud?

A. That is, yes.

Q. And granted, it's not crystal clear.

But does that gun in Mr. Dean's hand appear to have a longer barrel than what's admitted as State's 66, the fake gun found in the storage locker?

A. Yes.

Q. And the Gresham surveillance, even worse quality, admittedly. But does that, just based on where Mr. Dean's hand is on the trigger, does that also appear to have a

longer barrel length than the fake firearm found in the storage locker, State's Exhibit 66?

A. Yes.

Q. Throughout your interview with Mr. Dean, did he ever tell you anything that was obviously a lie?

A. No.

Q. Did he tell you many details throughout the interview that were actually confirmable truths?

A. Yes.

Q. Based on the way he was acting or the context in which it was described, did you believe, when Mr. Dean was describing how he had created those explosive devices, did you believe that what he was describing was an accurate representation of a real bomb that he had used in these robberies?

A. Yes, I did.

Q. And based on Mr. Dean's unwillingness to tell you the location of that firearm, did you believe, coupled with the surveillance videos and his statements about the clip and the description of the firearm, that Mr. Dean had been in possession of a real loaded firearm at the time he'd committed those robberies?

A. Yes.

MS. PLANK: I have no further questions, Your Honor.

THE COURT: Thank you, sir. You may take your microphone off and step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Please call your next witness.

MS. PLANK: Your Honor, the State's next witness will be investigator Steve Ober.

THE COURT: Thank you.

STEVE OBER,

called as a witness by the State,

having been duly sworn, testified as follows:

THE WITNESS: I do.

THE CLERK: State your name and spell it.

THE WITNESS: Steve, S-T-E-V-E, Ober, O-B-E-R.

DIRECT EXAMINATION

BY MS. PLANK:

Q. Mr. Ober, how are you employed?

A. I am an investigator with the Multnomah County District Attorney's office.

Q. Have you at various points done some minor work in conjunction with the robbery cases against Mr. Ernest Dean?

A. I have.

Q. Have you also within the past four months been

of a firearm.

Count 15 is Robbery in the First Degree. Same date, same victim. Question is with a firearm. And then even though you may have answered it already, if you find the defendant guilty, you also have to answer the specific question: Did the defendant use or threaten the use of a firearm?

Count 16 is identical to Count 15 except instead of a firearm, it's the explosive device, but you still must answer the question about firearm if the defendant is found guilty of that charge.

Count 17, the last count, is Robbery in the Second Degree as to Mr. Ocheltree on September 15th. No questions as to that one.

It's a long verdict form. There's a lot of things to go through, but that's what you need to do.

So at this point in time I think it's realistic to think we're going to get the State's opening argument in. Probably that's all.

So we're going to do our best to -- and also if five o'clock comes and you're not finished, we'll pause and you'll finish it in the morning.

MS. PLANK: Understood, Your Honor.

THE COURT: You have your microphone all set?

MS. PLANK: Thank you very much.

Ladies and gentlemen, I'm sure you've heard more in the last four days than you ever cared to about what the term "serial robber" means, what it is, or how the police determine when they think they have one.

You heard from the detective it's defined by law enforcement as someone who commits multiple robberies using the same modus operandi, MO.

This set of events that you all heard about is a serial robbery. Mr. Dean, seated before you, is the face of a serial robber.

A serial robber is someone who picks specific targets. In this case, it was motels that, as you heard, were far away from police stations, and, in this particular case, were operated by only one clerk at night, no security outside. Places like the Silver Cloud and the Holiday Inn in Gresham.

You heard that there was detailed planning that went into these events. You saw evidence of some of that. Binoculars, even still all the way in February, sitting in Mr. Dean's car. Gloves so no fingerprints would be left. Zip ties that were preloaded so that Mr. Dean could get in and get out as fast as he could when he committed one of these offenses. A hat so that these witnesses wouldn't be able to identify anything. All the way down to the color and texture of his hair.

Careful execution. You heard the time of day. It wasn't just randomly picked at night. It had to be at least 3:00 in the morning, because Mr. Dean wanted to avoid the possibility of running into anybody that was coming home from the bars at 2:00, 2:30 in the morning. You heard him specifically say, "I always hit them between 3:00 and 4:00 in the morning."

The movement directly back to the lock boxes. You heard Mr. Dean say, Hey, I like motels, because not only do they have a till, but they have these drop boxes. There's two keys. The clerk has one and the others are there, and they keep all the revenue from the banquets, the restaurants.

The lock boxes, the two-key system. You heard not just Ms. Fang, but Mr. Ocheltree describe that -- it sounds like all motels operate on the same system. Two keys have to be used to access these boxes.

Tying people up in the back so that no patron would happen to come in and see what was going on. On the offhand chance that somebody staying in one of these motels came in through the door at 3:00 in the morning, they weren't going to see that there was a robbery in progress.

Tying people up in the back room.

Immediately entering with a gun drawn and a bomb in hand. You can see the proximity and you'll, I'm sure, watch the video, Mr. Dean and how he enters that front door,

weapon already drawn. Weapon already drawn.

In this particular case, careful planning did prevent apprehension for a while. Mr. Dean had sufficient time to leave the scene of both of these robberies. He had strategically parked vehicles about a block away. If you recall his own statement was: That way there would be no make of car that anybody could connect me with, and the only information they would have is that I just strolled away from the scene.

He completely covered all parts of his body so that nobody could identify him.

Wearing gloves means no fingerprints. Very little chance of DNA.

Tying the victims up not only made it such that they couldn't resist, but it also made it so that it would delay their calling 9-1-1. They had to at least get their hands free before they could do anything.

He had a gun and a bomb to prevent any victim from fighting back, but there is never such thing as a perfect crime. And Mr. Dean did make missteps that eventually led to his apprehension and us being in court before you folks.

1) He picked a target that was too unique. You heard the detective say maybe one or two robberies at a motel out of 1,300 a year. They're unique.

2) He used a weapon combination that the detective

said he's never seen before, a gun and a bomb. They knew right away this was the same person.

He wore the same clothing. If you look at those photos, even though the one from Gresham is admittedly blurry, you can see it's the same hat that he's got on.

One of the biggest missteps, leaving two of the unused zip ties behind in that Gresham robbery. Because those ties hadn't been placed on victims, they hadn't been overwhelmed with the victim's DNA. That left trace amounts of DNA that could be tested by the lab and could be connected ultimately to Mr. Ernest Dean.

The final misstep -- large misstep being keeping what I'll refer to as the robbery kit. The bags in the storage locker that contained the hat, the shirt, the blue-pocketed pants, the zip ties -- some of them already preloaded into cuff formation. The fake gun, the black shoes.

Let's talk about the evidence in this case. The DNA. And you heard about touch DNA. You heard all the law enforcement officers say: Hey, look when I submitted this stuff, I didn't have any expectation that there would be any testable amounts of a suspect's DNA, but we had no leads. We had nothing. We submitted it to the lab sort of as a Hail Mary. That's what you do when you've got nothing."

Robbery No. 1, Portland, 9-5-2013. Two sets of

used zip ties that were both cut up. These ties were unfortunately thrown in the trash.

What's of note here is that even the victim's DNA on one of those ties doesn't show up in a level that's a detectable form.

There are some minor untestable profiles that are seen. It could be Mr. Dean.

Robbery No. 2, the Gresham robbery on September 15th, 2013, one of the sets of used zip ties -- remember there was only one victim, so only one set of used zip ties -- comes back to the victim only. Now, we know somebody put them there. It shows you some of the limitations of DNA science.

But what's important -- and as Chrystal Bell stated, is actually -- you know, makes sense -- is that they were able to get DNA off of the unused zip ties. They were able to get them off the unused zip ties because they hadn't been overwhelmed by other people's -- the victim's DNA.

These unused zip ties, one was a Mr. Dean cannot be excluded, but one of them was a true match -- a 1 in 10 billion match to Mr. Ernest Dean.

Now, the physical evidence -- the binoculars, the tools -- like I said, the two robbery kits containing all these items that were inside, that's additional physical evidence that you'll have photos and the items themselves if

you choose to pull them out of the bags and look at them.

This is a piece of important physical evidence that I'd encourage you to take a look at. You heard the detective testify that there were several pieces of cell phones in that storage locker. I assure you Defense counsel is going to argue to you that these were not real bombs.

Recall the question was asked on cross-examination: Did you find any incendiary pieces? The question was never asked on cross-examination: Did you find any of the pieces consistent with the fabrication of those bombs? such as the detonation device that Mr. Dean described, which was a cell phone component.

Physical evidence -- this is from the Silver Cloud. Here's the hat found in Mr. Dean's storage locker, which Mr. Dean stated was his.

Here's the entire get-up -- again, the Silver Cloud -- the hat, the shirt, the blue pants, all located in the same bag together in Mr. Dean's storage locker. Even the gloves was located in that storage locker.

Again, the Gresham robbery -- clarity's not as good. The hat. What appears to be the same shirt. Blue latex gloves. You can see that these pants, although dark in color, are lighter shades on the top. They look consistent with those same dark blue pants. And black shoes.

Again, an argument can be made, "Hey, how would

you know that those are the same black shoes that were used in the robbery? Well, somebody consider that these black shoes were in that same bag with all of the other robbery kit and robbery items.

The physical evidence. The zip ties at the Silver Cloud and those preloaded zip ties that were found at the Holiday Inn look just like the zip ties that were located in Mr. Dean's storage locker.

Bomb making components. Again, tools, super glue. But the thing of most importance I'd like to call your attention to, the broken apart cell phones and multiple cell phones.

Again, I suspect Defense is going to argue that's a fake gun. No gun was found. Everyone agrees, no gun was ever found. I submit to you that this firearm seen in these photos is not the pellet gun that was located later in February. And I believe that you'll be able to tell it's not when you get it back in the jury room and have a chance to handle it yourself, because I believe you will determine that the barrel of that gun is much shorter than that seen in these photos.

The confession. The admission to both the Silver Cloud and the Holiday Inn robberies, but not just a confession, a confession that contained intimate details: Following the *Oregonian* man in. Not just following him in,

but saying "I knew that was the first stop and he delivers papers later." These are items -- this is intimate knowledge that would only be gathered by following Ronald Skidmore around on his route.

Going through the lock boxes, describing the two keys that's required to get into them.

That little detail about "Hey, I took the *Oregonian* man's wallet out, but then I put it back." You heard Mr. Skidmore say that very same thing.

Using a white Halloween mask. You listen to the interview you hear the detectives keep calling it a hockey mask. Ronald Skidmore that said, "No, it looked like a Halloween mask." *Scream 3*, I think, is how he described it.

It was Mr. Dean himself in his statement that said, "Yeah, it was a Halloween mask. I got it at the Dollar Store."

The Holiday Inn. Fewer details, but still (indiscernible) has got going through the lock boxes. And remember he said, "I prefer the Holiday Inns that have the $164 suites," which is exactly what the Holiday Inn in Gresham is.

The Kidnapping in the Second Degree. We'll got through the specific charges now.

Keep in mind, you'll get all of this in writing. The judge has just read it to you. But let's talk about

these elements as they apply to the evidence in this case.

1) that the act occurred in Multnomah County. That's not disputed.

2) that the act occurred on or about September 5th for the Silver Cloud, or the 15th for the Holiday Inn. Again, these are not disputed.

3) that Ernest Dean, without consent or legal authority, took Judy Fang, Ronald Skidmore, and Daniel Ocheltree from one place to another; and that he had the intent, when doing so, to interfere substantially with their personal liberty.

THE COURT: Counsel, I want to -- what is it you're showing the jury now? Are you showing the instructions that I have? Or a different version?

MS. PLANK: This is with just all of the victims' names put together.

THE COURT: Okay. These are not the instructions. I want to make sure you understand that, ladies and gentlemen. That's not the way they're written. And, you know, I don't know if they're tracking word-for-word. These are for illustration purposes. You are bound by my instructions. I haven't seen those. So it's always risky to (indiscernible) that part.

MS. PLANK: Well -- and, ladies and gentlemen, the elements here will track the statutory language. What's

different is I've combined all of the victims' names to the for the sake of brevity on the slide.

The taking from one place to another. The State must prove that the victims were taken from places that are different. Taking someone from the corner of this room to right there is not sufficient for a kidnap, admittedly. But I submit to you taking someone, even if it's only a few feet, from a place where you can be seen by a public person or anyone walking by, to a place where you're hidden, like behind the counter of a motel, that is a substantially different place.

Mr. Ronald Skidmore, he was taken -- admittedly, not very far. But he was taken from a place where he was free to walk around, out in the public area of the lobby, to back behind that counter. It's significant that Mr. Skidmore told you, As soon as I got back behind the counter, I thought it was, quote, curtains for me.

Ms. Judy Fang, she was taken a distance back to those back managers offices, back to a spot where, again, no one could see her.

And, finally, Mr. Ocheltree, he was also taken back to a spot, back in the back offices, where no one could see him.

Again, Mr. Skidmore taken from the doors to behind the counter. Ms. Fang taken into this back office. And

Mr. Ocheltree taken from this front desk, all the way back to this back office.

It's obvious that it was with the intent to interfere with their liberty, because they were zip tied. They couldn't move their hands if they wanted to.

Remember these statements: "Did you want to go back there?" asked to Ms. Fang. "No," she said.

Question: Can the outside public see you at all when you're back there?

"No," said Judy Fang.

Mr. Skidmore, "I thought it was curtains for me when he put me back there."

Question posed to Mr. Ocheltree, "What did you think was going to happen when you went to the back room?"

His response: "Well, I knew he already had the money, so I assumed it wasn't anything good."

Mr. Ocheltree, "I was begging for my life, telling me -- telling him I had kids who needed a dad."

Burglary. Again, it's not disputed that the act occurred in Multnomah County or that the act occurred on September 5th. What also has to be proven is that Mr. Dean entered or remained unlawfully in the premises described as the Silver Cloud in, located at that address on NW Vaughn Street. This premises was closed to the public. Those doors are locked. You have to use a remote to access it. Even the

police said they had to be let in. You can see in the video that Ms. Fang has to literally hold the remote up and hold it while the deliveryman comes in.

Now, the fact that Mr. Dean had no lawful right of entry, well, that should be self-evident by the mere fact that he had to sneak into the building. If he had another way, if he was a patron and had a key, he wouldn't be creeping up behind the deliveryman. Basically tricking his way into the building.

The way he snuck in, that's no different than having broke the door in. That is an unlawful entry.

That the premises was a building -- it's obviously a building.

At the time of entering or remaining that he had the intent to commit the crime of theft. Well, obviously the man that entered there had the intent to commit the crime of theft.

And, finally, while affecting entry into that building, or in the immediate flight therefrom, that Ernest Dean threatened or used a dangerous weapon. Again, threatened. Just the threat of a gun or bomb is sufficient.

Robbery in the First Degree. Again, the date and the venue is not contested or really even the fact that the individual who went in was there to commit theft. What's at issue is was it Mr. Dean that entered. And when he entered

that he threatened the use of physical force on Judy Fang, Ronald Skidmore and Mr. Ocheltree. Well, yes. He held the gun up, said he had a bomb. That is an obvious implied threat that if they don't comply with whatever he's ordering them to do, that there will be serious consequences for them. Mr. Ocheltree highlighted that by describing that he thought he was going to die.

The intent was to perform -- pardon me -- to prevent or overcome resistance. Again, the victims were rendered physically incapable of resisting. Even had they not been, they were too scared to resist. You heard Ms. Fang say she wouldn't even turn her head and look at the bomb. I mean, she was terrified.

That Mr. Dean was armed with a deadly weapon. Now, there's a set of charges where the State has alleged that the deadly weapon is a firearm. This, I suspect, will be the most contested element of this charge by Defense.

A firearm must be loaded to be deadly weapon. You may use all inferences to determine whether or not that gun was loaded or not. Mr. Dean stated he used a real gun and that he always carried a loaded clip.

Yes, no firearm was recovered, but Mr. Dean wasn't apprehended and that storage locker wasn't searched until February of 2014. These events occurred in September of 2013.

Mr. Dean's statement was that, yes, he'd used a real gun, and that he always carried a clip.

Now, keep in mind Mr. Ocheltree even specifically said, "I know guns. That was a real gun."

The second set of Robbery in the First Degree, as near as the first -- the difference being, though, that the deadly weapon alleged in this case is not a firearm; it's an explosive device. Again, the same argument will be applied. The State must prove that that was a real bomb.

Mr. Dean stated the bombs were real to more than one person. You heard from the detectives and you hear it from Mr. Lathrop. More importantly, though, Mr. Dean gave details about how he constructed that bomb that were consistent to both the detective and Mr. Lathrop, but, furthermore, the type of details that underlie the making of a real, actual, functional bomb. You heard the detective say everything he described, that is totally capable and consistent with how someone would make a real bomb.

Robbery in the Second Degree. The most major difference with that charge from the Robbery in the First Degree is that in this case it's only alleged that Mr. Dean had a purported weapon. So if you don't believe that that firearm was real, if you don't believe that that bomb was real, if you believe he was just pretending to have a gun or pretending to have a bomb, then Mr. Dean is guilty of Robbery

in the Second Degree.

Here are some of the things I wanted to highlight for you, though. If for some reason you believe the gun was fake but the bomb was real, Mr. Dean, then, is still guilty of the set of charges for Robbery in the First Degree pertaining to the bomb, and then would be guilty of the set of charges for Robbery in the Second Degree pertaining to the implied use of a fake gun.

The same holds true for the reverse. If you believed it was a real gun and a fake bomb, he would then be guilty of Robbery in the First Degree for the real gun and Robbery in the Second Degree for the fake bomb.

Felon in possession of a firearm. Again, there's been a stipulation for the conviction portion. The State still must prove, though, that Mr. Dean had in his possession a firearm. There's a little bit of a different twist with this charge for the robbery counts -- the ones that allege the use of a firearm, the firearm has to be loaded, because it has to be a deadly weapon.

For the charge of felon in possession of a firearm, though, there's no requirement that the firearm be loaded. Just simply that it be an actual firearm as it's defined.

Unlawful possession of a destructive device. Again, the two dates are alleged are two incident dates. And

the bomb is defined as an explosive device. What I'd like to point out to you, though, is that there's no requirement that the explosive charge must be of any magnitude for it to be a bomb.

You know, really the million dollar questions of the case. I suspect this is what we'll spend the majority of time arguing. Was the gun real? Was it loaded?

Mr. Dean told detectives he had been in possession of a real 9 mm handgun prior to his arrest. He said the same thing to Mr. Lathrop. He stated he'd used the real gun in earlier robberies. Keep in mind, September 5th, as the detective stated, that was the first robbery. He stated he had two loaded clips and always had one loaded whenever he carried the gun around.

Mr. Dean, at one point in the interview, if you'll recall or choose to listen to it again back in the deliberation room, he stated that he'd been studying other robbers. He'd been studying the ways other robbers had gotten caught. One of the things he said is that he had studied a bank robbery in Lake Oswego where somebody had used a fake gun and that a hero from the community took him down. If you'll recall, Mr. Dean's statement was "I wasn't going to let that shit happen to me." A clear implication that Mr. Dean was not going to be caught without a real firearm.

It also doesn't make sense that somebody willing

to carry a bomb to ensure that there's no resistance wouldn't also carry a loaded firearm.

Mr. Ocheltree stated that the pellet gun was not the gun that was used against him. I know it's been a while ago, but the exhibit that was shown to Mr. Ocheltree where he said, "That's not what was used against me," that was State's Exhibit 18. That is the photo of the pellet gun. He was very clear. "No, that is not what I saw that day."

The most obvious difference between the pellet gun and the real gun is the barrel length. Mr. Ocheltree volunteered on his own that the difference between that pellet gun and what he saw that day was that what he saw that day had a longer barrel.

Now, Defense would want you to believe that because the State can't produce the firearm or the bomb that it can't be proven that they are real. Beyond a reasonable doubt does not mean beyond all doubt. By the same logic, if I can't show it to you, if you can't hold it, it must not be real -- by that logic, all a defendant would ever have to do would be destroy the evidence and the State would never be able to prove a crime. Ever. That's not what the law requires. It's beyond a reasonable doubt, not beyond all doubt.

Mr. Ocheltree says he knows guns. He said what he saw was a real gun. Mr. Dean says he used a real gun. Why

would you assume it was anything but a real gun?

Mr. Dean described a completely functional bomb and then went on to say "There's a reason why I have a bomb, because I know nobody's going to mess with a guy with a bomb, and if I need to, if things get really bad, if I need an exit strategy, I can detonate that bomb." I mean, he even describes the act of detonating it, which would only be applicable to a real functional bomb.

Again, doubt based on common sense and reason.

Circumstantial evidence is weighed the same as direct evidence. Just because I can't produce something to you doesn't mean it didn't exist. Mr. Dean said it existed. The video shows these items existed. Mr. Lathrop says it existed. Why would Mr. Dean lie to the detectives?

Mr. Dean gives accurate statements about everything else. Even random things. When he's describing other robbers he's been studying, which almost sounds grandiose in the audio recording -- when he's describing all these other robbers that he knows (indiscernible) he's been studying. When we ask the detective he confirmed "No, actually those are real people. Those are real cases he's talking about."

Mr. Dean, furthermore, as you heard from the detective, gave several statements about wanting to clear his conscience. These were very thoughtful, very planned-out

robberies. There was a real reason for that bomb. I mean, Mr. Dean knows that if he tells somebody "This is a bomb. I've got a bomb. I'm the only one that can keep it from detonating" -- if you'll recall, the victims said he made comments like "The bomb's going to go off in three minutes unless I defuse it." If the victims believe that only he can defuse this bomb, well, then they have to not stop him from what he's doing.

Everything Mr. Dean stated to the detectives matched. It's an odd case wherein I'm submitting to you folks that Mr. Dean's statements, they're the truth. You heard the tenor of his voice. It's your -- your job as a juror to determine whether somebody's being honest or not. The details of what he said match. The details of things outside these robberies matched. You heard the tenor of his voice and you heard the context of the conversation.

There's only one reasonable explanation for Mr. Dean's DNA being on those flex cuffs, the statements of the guns that were used were real guns, and that the one he had is gone now, the statements about a real bomb, his knowledge of how to build a bomb, all the items located in his storage locker, that detailed confession -- pardon me, the detailed confession and his admission to Mr. Lathrop, there's only one reasonable explanation for all of that, and that's he's guilty of these charges.

There's no self-interest in stating that it was a real gun. There's no self-interest in stating it was a real bomb. Those statements were made in a moment of remorse and a moment of clarity by Mr. Dean and a moment of trying to, in his own words, get this off his chest.

We know these events happened. We have the video. We know it was Mr. Dean from his statements, his DNA, the items found in his locker. Furthermore, we know that these things are accurate. There are things to corroborate his statements that these items were real. Mr. Ocheltree's view of that firearm corroborates Mr. Dean's statement that it was a real gun. The details that Mr. Dean gave about a bomb that are capable of making a real bomb, those corroborate his statements that it was a real bomb.

At the end of all this when you take time to go through the exhibits, review the statements of Mr. Dean, your notes, you will find that Mr. Dean is guilty of all charges as pled.

Thank you.

THE COURT: Thank you, Counsel.

Okay. It's about 18 minutes to 5:00.

Mr. Day, is there anything that's worth starting to you?

MR. DAY: I think it would be best just to start in the morning, Your Honor.

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FILED December 28, 2015 03:52 PM
Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. ERNEST LEE DEAN, aka Earnest Lee Dean, Defendant-Appellant.	Multnomah County Circuit Court Case No. 140230828 CA A158364

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable Henry Kantor, Judge

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APPELLANT'S BRIEF

Section A

STATEMENT OF THE CASE

Nature of the Proceeding

This brief is filed pursuant to ORAP 5.90 and *State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991). This appeal involves defendant's convictions for three counts of first-degree robbery (ORS 164.415), three counts of second-degree robbery (ORS 164.405), three counts of second-degree kidnapping (ORS 163.225), two counts of felon in possession of a weapon (ORS 166.270), two counts of unlawful possession of a destructive device (ORS 166.382), and first-degree burglary (ORS 164.225). Defendant was charged by indictment. ER 1-4.

Nature of the Judgment

Defendant was tried by a jury and found guilty on all counts.

The trial court merged three of defendant's robbery convictions, and sentenced defendant to a total term of 300 months in prison. ER 5-21.

Jurisdiction

This court has jurisdiction pursuant to ORS 138.040.

Notice of Appeal

Defendant timely filed notice of appeal on December 10, 2014, from the judgment entered in Multnomah County Circuit Court on November 10, 2014.

Summary of Facts

On September 5, 2013, defendant followed Ronald Skidmore, the newspaper delivery man, into the Silver Cloud Inn in Portland, wearing a mask, pointing what appeared to be a gun, and carrying what he represented to be a bomb. Tr 219-20, 222. The Inn was locked because of the early hour, but defendant managed to get in when Judy Fang, a hotel employee, opened the door to allow Skidmore in. Tr 219-20. Defendant zip-tied Skidmore, and made Fang give him the cash out of the cash drawer and various safes. Tr 222, 224. He took Fang's purse, zip-tied her in the manager's office, and left. Tr 226.

At 3:00 a.m., on September 15, 2013, defendant walked into the lobby of the Holiday Inn in Gresham wearing a ski mask, pointed what appeared to be a gun at Daniel Ocheltree, a night clerk, and said "I have a bomb and you're going to die." Tr 259-60. Ocheltree, who was familiar with guns, believed defendant had a "Luger" pistol, which he both observed and felt when defendant pressed it against his head. Tr 263-64. Defendant told Ocheltree to "give me the money." Tr 260. Ocheltree gave defendant the money to which he had access. Tr 264. Defendant took Ocheltree to the "back office," zip-tied

him, set the "bomb" next to his face and told him he had three minutes to escape before it blew up. Defendant left with the bomb, but without Ocheltree noticing that he took it. Tr 266-67.

Significant Motions

Defendant moved to suppress the statements he made to interrogating officers, and a hearing was held on the motion. Following the state's presentation of evidence, defendant argued that his confession was not voluntary. Tr 172. The trial court did not find as fact that any officer engaged in unlawful conduct regarding their discussions with defendant. Instead, the trial court found that the officers provided *Miranda* warnings multiple times, and that after defendant requested the assistance of counsel, they did not question him further until after he requested that they do so, at which time they re-warned him. Tr 185-87. The trial court also found that defendant was mentally capable and not suffering from any apparent substance abuse or mental deficiencies at the time that he waived his rights. Tr 185. Finally, the court noted that the officers were "manipulative without question" when they made him wait 20 minutes for a cigarette, but that, under the circumstances, that conduct was insufficient to render his statements involuntary. Tr 185, 87.

Defendant moved for judgment of acquittal after the state presented its evidence. Tr 562. The trial court found that there was sufficient evidence to

permit jury consideration of the charges and denied the motion. Tr 563. Defendant re-raised the motion, arguing that there was no corroboration of certain of defendant's admissions and, therefore, insufficient evidence that he used a deadly weapon. Tr 614. The trial court again denied the motion, finding that there was evidence from which the jury could find that defendant's statements were corroborated. Tr 614.

CONCLUSION

Counsel submits Section A in compliance with all the requirements articulated in ORAP 5.90 and *State v. Balfour*, 311 Or at 451-52. Counsel has thoroughly reviewed the record and "discussed the case with trial counsel and client." *See* ORAP 5.90(1)(a)(iii). However, counsel has not identified any arguably meritorious issue on appeal.

Counsel has supplied client with copies of pertinent trial court records and applicable appellate court rules and provided client a reasonable opportunity to "raise any issue" in a Section B portion of the brief. *Balfour*, 311 Or at 452. However, client has not identified any claim of error for inclusion in the brief. Consequently, this brief is "comprised solely of Section A." *Id.*

Respectfully submitted,

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Signed
By David Ferry at 2:44 pm, Dec 28, 2015

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APP - 136

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Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. ERNEST LEE DEAN, aka Earnest Lee Dean, Defendant-Appellant.	Multnomah County Circuit Court Case No. 140230828 CA A158364

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable Henry Kantor, Judge

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State v. Kull, 298 Or. 38, 688 P.2d 1327 (1984)

State v. Ireland. Or. App. 264, 500 P.2d 12231(1972)

State v. Williams, 11 Or. App. 255. 500 P.2d 722 (1972)

State v. Dyson, 292 Or. 26, 636 P.2d 961 (1981)

State v. York, 291 Or 535, 632 P.2d 1261 (1981)

State v. Girad, 106 Or. App. 463, 808 P.2d 363 (1991)

State v. Dyer, 16 Or. App. 247, 514 P.2d 363 (1974)

State of Oregon v. Seeger 4 Ore. 336, 479 P.2d 240 (1971)

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ORS 135.815

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ORS 135. 865

QUESTIONS PRESENTED

I

Whether the appellant was prejudice by the conduct or remark of the prosecutor and whether it had a influence on the jury.

II

Whether the prosecutor stated facts not in evidence or comment on facts calculated to prejudice the jury.

III

Whether the prosecutors remarks went beyond the scope of any admission made by defense counsel and were not based on the evidence produced at trial.

PRESERVATION OF ERROR

§ 1. At the close of the trial appellant moved for a judgment of acquittal on all counts. However, in making that motion court appointed counsel did not advance the argument that is now made on appeal. Appellant request that this court address the argument of this Pro Se Supplemental Brief as MANIFEST CONSTITUTIONAL ERROR.

STATEMENT OF THE CASE

§ 2. This Pro Se Supplemental Brief is filed pursuant to ORAP Rule 5.92 this is a criminal appeal in which appellant challenges the trial courts denial of his motion for judgment of acquittal. In Multnomah County Circuit Court case number 140230828 (CA A158364) The state charged appellant by indictment of three counts of first-degree robbery (ORS 164.415), three counts of second-degree robbery (ORS 164.405), three counts of second degree kidnapping (ORS 163.225), two counts of felon in possession of weapon(ORS 166.270), two counts of unlawful possession of destructive device (ORS166.382), and first degree burglary. The appellant plead not guilty on all counts and was tried by a jury and found guilty on all counts.

JURISDICTION

This court has jurisdiction pursuant to ORS 138.040

STANDARD OF REVIEW

§ 3. The standard of review of the trial courts decision to allow improper argument is abuse of discretion **TR 587** the discretion of a trial court is broad as pertains to the control of the argument of counsel in both the penalty and guilt phase of a criminal case. There is no abuse of discretion unless the effect of the prosecutors remark is to deny a defendant a fair trial.

APPLICATION OF LIMITATION

§ 4. Certain limitations apply and these limitation may be grounded in statute, state and federal constitution, or canons of professional responsibility. Both prosecution and defense are restricted by such limitations. The main Issue is the attack on the defendant credibility *see* State of Oregon v. Treit 29 Ore. 461 , 564 P.2d 708, (1977) Ore. App Lexis 2372.

ARGUMENT AND AUTHORITIES

I. Oregon law recognizes that state prosecutors may not refer to items of evidence outside the record of the trial.

II. Due Process Obligations in addition to statutory discovery due process requires that the prosecution disclose to the defense any exculpatory material in its possession.

§ 5. Due process obligation is constitutional in nature and predates and takes precedence over any statutory rule. In Brady v. Maryland, 373 U.S. 83 (1963) the defendant was found guilty of first-degree murder and sentenced to death. After his unsuccessful appeal defense counsel learned that the prosecution had a statement in its possession in which a codefendant confessed to the murder.

§ 6. Counsel had request inspection of all statements, but this confession was not disclosed. The Supreme Court affirmed defendants successful Post-Conviction Relief Petition. Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of good faith or bad faith in the prosecution.

STATUTORY DISCLOSURE BY THE STATE

§ 7. ORS 135.815 covers the prosecutor's required disclosure to the defense. The statute is very specific. All written or recorded statements or memorandum of any oral statements must be disclosed. State v. Johnson, 26 Or. App. 651, 554 P.2d 624, rev. denied 276 Or. 555 1976. The State must also disclose any books, papers, documents, photographs or tangible objects (a) which the district attorney intends to offer in evidence at the trial; or (b) which were obtained from or belong to the defendant.. ORS 135.815(4)

§ 8. In State v. Kull, 298 Or. 38, 688 P.2d 1327 1984, the prosecution had a convenience store security videotape of the defendants eight-hour shift which it proposed to use at her trial for theft. The defense moved for a copy of the tape at the defendant's expense, and the prosecution did not object. Because the tape was produced by an unusual process, no copy was made, and the defense renewed its motion. After several delays the trial judge ordered a copy of the tape to be produced by a certain time, and ruled that the original tape would be excluded if the state failed to comply. The copy was not made available, the original tape was excluded, and the Oregon Supreme Court Affirmed.

§ 9. The prosecution must disclose the criminal conviction record of all witness the state intends to call at trial, and any criminal conviction of the defendant that would affect the defendants criminal history under the sentencing guideline. The district attorney must make a good faith effort to find the criminal record. Several early cases dealt with this problem. State v. Ireland, Or. App. 264, 500 P.2d 12231 (1972), reversed a conviction for failure to obtain and provide a detailed criminal record of a key prosecution witness. State v. Williams, 11 Or. App. 255, 500 P.2d 722 (1972) reversed a conviction because the prosecutor failed to make available information about the victims criminal record, which was received by the prosecutor after defense counsel had examined the states file.

SANCTIONS FOR VIOLATION

§ 10. Upon learning that either party has failed to disclose under the statutes, the court may order the violating party to permit the witness to testify, or to receive in evidence the material not disclosed, or enter such other order as it considers appropriate. ORS 135.865. The nature of criminal trials means that in some situations, an item of evidence or a witness will be discovered on the eve of trial, or sometimes during trial. To determine whether to impose a sanction prejudice to the other party is the central concern. State v. Dyson, 292 Or.26, 636 P.2d 961 (1981).

SANCTIONS AGAINST THE STATE

§ 11. If the trial court does not impose a sanction, the appellate court will reverse a conviction only when the defendant can make a showing of prejudice. State v. York, 291 Or 535,632 P.2d 1261 (1981) State v. Johnson, 44 Or. App. 421, 606 P2d 640, rev. denied 289 Or. 1 (1980)Where the appellate court is uncertain, the case will be remanded with instructions to make a determination of prejudice. State v. Girard, 106 Or. App. 463, 808 P.2d 1017 (1991) Dismissal of the states case is permitted, for violations by the state in cases involving non-compliance with court rules and court directives.

APPLICATION OF AUTHORITY TO FACTS

§ 12. The prosecutor is permitted to comment on the evidence and draw all legitimate inferences provided the limits of professional duty and proprietary not crossed. Improper closing argument of the prosecutor referring to the appellant as a serial robber **TR 587**, appeals to the prejudice of the jury, by injecting broader issues, constitute a violation of the Fourteenth Amendment, Due Process. It was improper for the prosecuting attorney to characterize the appellant as a serial robber to the jurors when the appellant had no opportunity to challenge it through cross-examination or presentation of opposing evidence.

INCORRECT STATEMENT OF LAW

§ 13. If arguments concerning the law are permitted by the judge, the prosecutors statements must be correct. The instruction on the law are to be given by the court and nothing added to it or taken away, nor should there be permitted another version of those instructions of the law presented to the jury. Erroneous statement of applicable law may be cause for reversal., *see State v. Dyer, 16 Or. App. 247, 514 P.2d 363 (1974) In some instances a curative instruction is not sufficient.* **TR 595**

CONCLUSION

§ 14. In State of Oregon v. Seeger 4 Ore. App. 336; 479 P.2d 240; (1971) Ore. App. Lexis 900 The Court of Appeals of Oregon held that failure of the court to take affirmative action, either by instructing the jury to disregard the remark or by denial of the motion for mistrial was PREJUDICIAL ERROR. The rational of the Seeger Court determined the conduct and remark of the prosecutor as degenerate abuse because the prosecutors statement was an attack upon the character of the defendant at a time when the defendants character was not an issue. **TR 587,** The reasoning of the Seeger case compels the same result in this case at bar. For the reason set out above appellant respectfully request that the judgment of the trial court be reversed.

(Signature) _____ Date 2 / 10 /2016

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. ERNEST LEE DEAN, aka Earnest Lee Dean, Defendant-Appellant.	Multnomah County Circuit Court No. 140230828 CA A158364

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable HENRY KANTOR, Judge

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

The state accepts defendant's statement of the case as adequate for review, but supplements the facts in the argument below.[1]

Summary of Argument

Defendant appeals from convictions for multiple counts of first-degree robbery, second-degree robbery, second-degree kidnapping, being a felon in possession of a firearm, unlawful possession of a destructive device, and first-degree burglary. In a *pro se Balfour* "Section B" brief, defendant appears to make two arguments, neither of which provides a basis for reversal.

First, he contends that a "manifest constitutional error" occurred when the prosecutor referred to defendant in closing argument—without objection—as a "serial robber." Because defendant did not object, the question on review is whether the trial court plainly erred by failing *sua sponte* to strike the

---

[1] The statement of the case referred to here is that contained in the "Section A" brief submitted on December 28, 2105, as authorized by *State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991), and ORAP 5.90. Defendant subsequently filed a *pro se* supplemental "Section B" brief, on February 17, 2016. After defendant filed that brief, this court granted defendant's motion to remove court-appointed appellate counsel and proceed *pro se*, on May 12. It does not appear that defendant has filed any additional briefing. The state assumes that defendant's February 17 *pro se* supplemental brief remains defendant's sole brief on appeal, and responds to the arguments contained in that brief.

prosecutor's statement. But the trial court did not err at all, let alone plainly err, because the prosecutor's comment was proper. A detective earlier testified (also without objection) about investigations of "serial robbery"—cases in which suspects employ similar methodology to commit multiple robberies—and that defendant's robberies met that definition. Because the prosecutor's argument merely referred to unchallenged evidence in the record, and because, at the very least, no error was obvious, the trial court did not plainly err by "failing" *sua sponte* to strike it. Moreover, any error was harmless, because the unchallenged evidence of defendant's guilt—including DNA evidence and a recorded confession—was overwhelming.

Second, defendant argues that the prosecutor misstated the law in closing argument. The prosecutor used a "slide" to illustrate the elements of second-degree kidnapping for the jury, on which the names of all of the victims were consolidated in the victim-element of a single, illustrative count. The trial court clarified for the jury that the prosecutor's slide was merely illustrative and that the elements of each count of kidnapping were set forth separately in the jury instructions. The prosecutor agreed on the record and clarified for the jury that the slide was intended only for the sake of "brevity." Defendant did not object to the slide or the court's spontaneous cautionary instruction, or move for a mistrial.

On review, defendant does not explain how either the prosecutor's illustrative slide or the trial court's cautionary instruction amounts to error, let alone plain error. Regardless, because it was not improper for the prosecutor to use the slide to illustrate the elements of kidnapping—and because any error was cured by the court's instruction and prosecutor's clarification—defendant's claim does not qualify for plain error review.

ANSWER TO FIRST ASSIGNMENT OF ERROR2

The trial court did not commit plain error by failing *sua sponte* to strike the prosecutor's argument that defendant was a "serial robber."

Preservation of Error

Defendant concedes that this claim is unpreserved. Supp App Br 1.

Standard of Review

Whether a trial court plainly errs by failing *sua sponte* to strike a prosecutor's argument is a question of law. *See State v. Montez*, 309 Or 564, 601-02, 789 P2d 1352 (1990) (reviewing for legal error).

---

[2] Defendant does not separately state assignments of error in conformance with ORAP 5.45(2). Nor does his list of "Questions Presented" necessarily coincide with the actual legal arguments or authority presented in his brief. Supp App Br 1. The state attempts to distill assignments of error from defendant's brief here.

ARGUMENT

Defendant assigns error to the prosecutor's comment in closing argument that defendant was a "serial robber." Supp App Br 1, 4; Tr 587. But because defendant did not object to that comment, the question on appeal is not whether the prosecutor's argument was improper, but whether the trial court plainly erred by failing *sua sponte* to strike it—and, if it did, whether this court should exercise its discretion to review the error. *See State v. Ramirez-Estrada*, 260 Or App 312, 316, 317 P3d 322 (2013), *rev den*, 355 Or 317 (2014) (explaining that because trial court makes no ruling in absence of objection, any error on appeal must lie in court's failure to take action spontaneously). Because defendant's argument is unsupported by sufficient analysis or citation to authority, and because the trial court did not err at all, let alone plainly err—and because any error was, in any event, harmless—this court should deny plain error review.

A. Defendant has not provided this court with adequate argument or analysis.

As an initial matter, defendant's claim of error is not sufficiently briefed or argued. For example, defendant provides a three-page summary of the state's *Brady* disclosure obligations, but neither alleges a *Brady* violation nor explains how *Brady* applies to this case. Supp App Br 2-4. Indeed, there are only three statements or sections—spread haphazardly throughout defendant's brief—that appear to relate to his claim.

The first of these is a section-heading that reads, "Oregon law recognizes that state prosecutors may not refer to items of evidence outside the record of the trial." Supp App Br 2.

The second is a paragraph entitled, "Application of Authority to Facts," which reads in total:

> § 12. The prosecutor is permitted to comment on the evidence and draw all legitimate inferences provided the limits of professional duty and proprietary [*sic*] not crossed. Improper closing argument of the prosecutor referring to the appellant as a serial robber, **TR 587**, appeals to the prejudice of the jury, by injecting broader issues, constitute [*sic*] a violation of the Fourteenth Amendment, Due Process [*sic*]. It was improper for the prosecuting attorney to characterize the appellant as a serial robber to the jurors when the appellant had no opportunity to challenge it through cross-examination or presentation of opposing evidence.

Supp App Br 4 (emphasis in original)

The third is defendant's "Conclusion:"

> § 14. In State of Oregon v. Seeger 4 Ore. App. 336; 479 P.2d 240; (1971) Ore. App. Lexis 900 [*sic*] The [*sic*] Court of Appeals of Oregon held that failure of the court to take affirmative action, either by instructing the jury to disregard the remark or by denial of the motion for mistrial was PREJUDICIAL ERROR. The rational of the Seeger Court [*sic*] determined [*sic*] the conduct and remark of the prosecutor as degenerate abuse [*sic*] because the prosecutors [*sic*] statement was an attack upon the character of the defendant at a time when the defendants [*sic*] character was not an issue. **TR 587**, [*sic*] The reasoning of the Seeger [*sic*] case compels the same result in this case at bar [*sic*]. For the reason set out above appellant respectfully requests that the judgment of the trial court be reversed.

Supp App Br 5 (emphasis in original).

Thus, defendant's argument appears to be predicated on three assertions: (1) the prosecutor referred to evidence outside the record; (2) the prosecutor's argument inflamed the passions or prejudices of the jury in violation of defendant's Fourteenth Amendment due process rights; and (3) defendant had no opportunity to challenge the prosecutor's argument through cross-examination or presentation of contrary evidence. Defendant does not adequately brief any of those issues.

The first is a section-heading, devoid of any accompanying argument, authority, or analysis. Supp App Br 2. The second is a conclusory assertion that cites the Fourteenth Amendment, but no other authority, and contains no analysis of *how* the prosecutor's argument improperly influenced the jury. *See State v. Amaya*, 336 Or 616, 634 n 6, 89 P.3d 1163 (2004) (declining to reach undeveloped federal constitutional arguments). And while defendant cites *State v. Seeger*, 4 Or App 336, 479 P2d 240 (1971), in his conclusion, he makes no effort to explain how that case applies here. In *Seeger*, the prosecutor attacked the defendant's character by claiming, in front of the jury, that the defendant's decision—to waive opening statement—was a "tactic" designed to help him "make up a story" in response to the state's evidence. *Id.* at 337, 339. Here, in contrast, the prosecutor's argument that defendant was a "serial robber" was nothing more than a reference to extensive, unchallenged evidence in the record. *See* Tr at 402-09 (testimony of Detective Hawkinson, explaining the

application of concept of "serial robbery" to the investigation of defendant's crimes).

Thus, defendant's claims fail because he has not provided this court with sufficient argument or analysis. Neither the state nor this court should make or develop defendant's arguments for him when defendant has not done so himself. *See* ORAP 5.45(4)(c) ("The court may decline to consider any assignment of error that requires the court to search the record to find the error"); *Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to as clarified on recons*, 187 Or App 472 (2003) (court will not speculate about what a party's unamplified argument might be); *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*, 168 Or App 466, 488, 7 P3d 594 (2000), *rev den*, 332 Or 137 (2001) (court "decline[s] to go in search of a substantive argument" where party "sets forth no meaningful analysis"). Because defendant has failed to present a supporting argument, this court should reject defendant's first claim of error without any further analysis.

B. This case does not qualify for plain error review because the trial court did not err at all, let alone plainly err.

Even if this court is inclined to consider defendant's unamplified argument, defendant's argument fails because the trial court did not err at all, let alone plainly err.

In order to preserve an error for review, a defendant must timely and specifically object below. *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000). Defendant concedes that he did not do so here. Supp App Br 1. Thus, defendant's claim is reviewable on appeal only if it qualifies as plain error, which requires that it be (1) an error law, (2) "obvious," that is, "not reasonably in dispute," and (3) apparent from the face of the record. *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990); ORAP 5.45(1). Defendant's argument does not meet those requirements.

As a threshold matter, defendant does not actually argue that the asserted error qualifies as "plain error," or articulate why it meets that standard. Defendant's failure to do so should preclude review here. As this court has explained, "it is incumbent upon the appellant to explain to us why an error satisfies the requisites of plain error and, further, why we should exercise our discretion to correct that error." *State v. Tilden*, 252 Or App 581, 589, 288 P3d 567 (2012). Defendant conducts no such analysis.

In any event, defendant's claim does not meet the criteria for plain error review. A detective testified (without objection) about the application of the concept of "serial robbery" to robbery investigations—cases in which robbers employ strikingly similar methodology to rob multiple victims over time. Tr 402-09. He further explained that the Portland area experiences approximately 1,100 – 1,300 reported robberies per year, and that, since he became a robbery

detective in 2009, defendant was the only suspect he was aware of to have committed multiple robberies employing both a gun and a bomb in each incident. Tr 407-09. Defendant does not challenge—or even acknowledge—that testimony on appeal.

Thus, defendant does not explain how the trial court had a duty *sua sponte* to strike the prosecutor's statement in closing argument, when that statement simply referred to unchallenged evidence in the record. At the very least, it is not obvious that the trial court had any such duty. Because the trial court did not err at all, let alone plainly err, this court should decline to consider defendant's argument.

C. Even if the trial court plainly erred, this court should not exercise discretion to review the error because any error was harmless.

Even if the prosecutor's argument was improper, and assuming that the trial court had a duty *sua sponte* to strike it, this court should not exercise its discretion to conduct plain error review because any error was harmless. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991) (court's discretion to review plain error must be exercised with "utmost caution).

Defendant's conclusory assertion that the prosecutor's argument violated his Fourteenth Amendment due process rights nominally implicates the federal harmless error test. Under that test, a federal constitutional error is harmless only if the court is "able to declare a belief that it was harmless beyond a

reasonable doubt." *Chapman v. California*, 386 US 18, 24, 87 S Ct 824, 828, 17 L Ed 2d 705 (1967). Here, in light of the overwhelming evidence of defendant's guilt, there is no reasonable likelihood that the prosecutor's argument affected the verdict. Accordingly, the trial court's asserted failure to strike that argument—under any standard—was harmless.

Defendant entered the Silver Cloud Inn in Portland at 3:30 a.m. on September 5, 2013, by sneaking in behind a deliveryman. Tr 216-220, 377-78. He was wearing dark clothing and a mask. Tr 220, 379. He had a gun in his hand and a bomb, which he showed to the hotel clerk. Tr 220, 378. He told the clerk and delivery man to lie down, tied up the deliveryman with plastic zip-ties, then forced the clerk to give him money from the cashier drawer and safes. Tr 222-25, 380. He then forced the clerk into a back room and tied her up with zip-ties, as well. Tr 226.

Defendant next entered the Holiday Inn in Gresham at about 3:00 a.m. on September 15, 2013, wearing black clothes and a mask. Tr 258-60. He pointed a gun at the clerk, stated that he had a bomb, and told the clerk that he was going to die. Tr 259. Defendant demanded "the money" and the clerk gave defendant the money from the till. Tr 260-61. Defendant then forced the clerk to give him additional money from the hotel restaurant till. Tr 264. He shoved the clerk to the ground, tied his hands with zip-ties, placed the pistol to the back of the clerk's head, attempted to remove his wallet, and put an object on the

ground which he described as a bomb. Tr 266-67. He told the clerk that the bomb would explode in three minutes. Tr 267. When the clerk looked up, defendant and the device were gone. Tr 268.

Defendant's DNA was found on a plastic zip-tie recovered from the scene of the Gresham robbery. Tr 304, 320-22. Forensic scientists were unable to verify or rule-out the presence of defendant's DNA on the zip-ties from the Portland robbery. Tr 306-07, 337, 342.

Portland Police Bureau detectives identified defendant as a suspect by consulting with "outside agencies." Tr 431. Police arrested defendant in February 2014. Tr 431-32. In a storage locker owned by defendant, police found a container of zip-ties. Tr 435. They also found clothing matching that worn by the suspect at both robberies, as shown by security footage. Tr 438-39, 445, 447.

When the police arrested defendant, he was *Mirandized* and said that he wanted to "clear his conscience." Tr 452-53. He then gave a recorded confession in which he admitted to the robberies and explained how he committed them. Tr 453-59; Ex 70. The confession was received into evidence and played for the jury. Tr 453-59; Ex 70.

Thus, because the unchallenged evidence overwhelmingly established defendant's guilt, there is no reasonable likelihood that the prosecutor's argument affected the verdict. This court should affirm.

ANSWER TO SECOND ASSIGNMENT OF ERROR

The prosecutor's visual aid, used to illustrate the elements of kidnapping in closing argument, does not constitute plain error that warrants reversal of defendant's convictions.

Preservation of Error

Defendant concedes that his claim is unpreserved. Supp App Br 1.

Standard of Review

Whether a trial court plainly errs by failing *sua sponte* to take affirmative steps to correct a prosecutor's improper argument is a question of law. *See State v. Dyer*, 16 Or App 247, 254-56, 514 P2d 363 (1973), *on reh'g*, 16 Or App 247 (1974) (analyzing for legal error, on review of a preserved claim).

ARGUMENT

Defendant appears to argue that the prosecutor misstated the law in closing argument, the trial court had a duty to correct the misstatement, and that "in some instances a curative instruction is not sufficient." Supp App Br 5. Defendant provides no analysis in support of his argument, and only cites a single page from the trial transcript. Supp App Br 5. For the same reasons noted above in the context of defendant's first assignment of error, his inadequately briefed and argued claim should be rejected. *See Oregon Trail Elec. Consumers Co-op, Inc.*, 168 Or App at 488 (refusing "to go in search of a

substantive argument" where party "sets forth no meaningful analysis"). Regardless, defendant's claim is unpreserved, and the court did not plainly err.

In closing argument, the prosecutor used a "slide" to illustrate the elements of second-degree kidnapping for the jury, on which the names of all of the victims were consolidated in the victim-element of a single, illustrative count. Tr 595. The trial court clarified for the jury that the prosecutor's slide was merely illustrative and that the elements of each count of kidnapping were set forth separately in the jury instructions. Tr 595. The prosecutor agreed and clarified for the jury that the slide was intended only for the sake of "brevity." Tr 596. Defendant did not object to the prosecutor's slide, the court's spontaneous curative instruction, or the prosecutor's clarification, or move for a mistrial.

Defendant does not explain how it was error for the prosecutor to use the slide for illustrative purposes. Nor does he explain how the trial court's curative instruction and prosecutor's clarification were insufficient to cure any error inherent in the slide. He certainly does not explain how any error here was "obvious." *Brown*, 310 Or at 355. Nor was it.

Further, even if the trial court plainly erred, plain error review is inappropriate because defendant could have objected to the trial court's curative instruction and requested any additional clarification for the jury that he saw fit. *See State v. Ashley*, 240 Or App 795, 800, 249 P3d 125, *rev den*, 350 Or 297

(2011) (noting that, even if the trial court plainly erred, this court would deny review because the error could easily have been corrected if brought to the trial court's attention). For all of those reasons, this court should decline to address defendant's unpreserved claim.

CONCLUSION

This court should affirm the trial court's judgment.

Respectfully submitted,

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No. 17-5343

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST LEE DEAN, aka EARNEST LEE DEAN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on November 20, 2017, in compliance with Rule 29, I mailed the brief of the State of Oregon, as respondent in the above-entitled case, by depositing 10 copies thereof in the United States Postal Service mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

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PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on November 20, 2017, three copies of the brief of the State of Oregon, as respondent in the above-entitled case were served upon Ernest Lee Dean, *pro se* petitioner, by mail delivery to the Snake River Correctional Institution, 777 Stanton Blvd., Ontario, OR 97914. I further certify that all parties required to be served have been served.

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