

No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING WARDEN, PETITIONER

v.

ERVINE DAVENPORT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX - VOLUME III OF III

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TABLE OF CONTENTS
VOLUME I OF III

Relevant Docket Entries

Relevant Docket Entries from the
Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC..... 1–2

Relevant Docket Entries from the
Michigan Court of Appeals
Docket No. 287767..... 2

Relevant Docket Entries from the
Michigan Supreme Court
Docket No. 141832..... 2

Relevant Docket Entries from the
Michigan Court of Appeals
Docket No. 306868..... 2

Relevant Docket Entries from the
Michigan Supreme Court
Docket No. 146652..... 2

Relevant Docket Entries from the
United States District Court
for the Western District of Michigan
Docket No. 1:14-cv-01012-JTN-SJB..... 3

Relevant Docket Entries from the
United States Court of Appeals
for the Sixth Circuit
Docket No. 17-2267..... 3–4

Transcripts and Orders in Chronological Order

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume I
Pages 19 to 24, 113 to 114
July 8, 2008.....5–14

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume II
Pages 356, 394 to 429; 445 to 491
July 9, 2008.....15–111

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume III
Pages 518 to 532; 536 to 559;
627 to 670; 712 to 737
July 10, 2008.....112–248

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume IV
Pages 763 to 845
July 11, 2008.....249–344

VOLUME II OF III

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume V
Pages 857 to 931; 960 to 988
July 15, 2008.....345–469

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume VI
Pages 1001 to 1153
July 16, 2008.....470–657

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Jury Trial – Volume VII
Pages 1193 to 1196, 1199, 1224 to 1225
July 17, 2008.....658–666

VOLUME III OF III

Michigan Court of Appeals
Case No. 287767
Order (Per Curiam)
Dated August 5, 2010.....667–680

Michigan Court of Appeals
Case No. 287767
Order (Gleicher, J. (concurring))
Dated August 5, 2010.....681–686

Michigan Supreme Court
Case No. 141832
Order
Dated March 9, 2011.....687–688

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Evidentiary Hearing – Volume I
All pages (1-125)
June 24, 2011.....689–833

Ninth Circuit Court for the County of Kalamazoo
Docket No. C07-0165FC
Evidentiary Hearing – Volume II of II
All pages (1-22)
July 29, 2011.....834–859

Ninth Circuit Court of Kalamazoo
Docket No. C07-0165FC
Opinion after Remand
Dated October 20, 2011.....860–863

The following opinions and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Michigan Court of Appeals
Case No. 306868
Opinion
Issued December 13, 2012..... 95a–100a

Michigan Supreme Court
Case No. 146652
Order
Issued July 3, 2013 93a–94a

United States District Court
Western District of Michigan
Case No. 1:14-cv-1012
Report and Recommendation
Issued November 7, 2016 78a–92a

United States District Court
Western District of Michigan
Case No. 1:14-cv-1012
Opinion and Order
Issued September 26, 2017..... 71a–76a

United States District Court
Western District of Michigan
Case No. 1:14-cv-1012
Judgment
Issued September 26, 2017..... 77a

United States Court of Appeals
for the Sixth Circuit
Case No. 17-2267
Opinion
Issued June 30, 2020 1a–69a

United States Court of Appeals
for the Sixth Circuit
Case No. 17-2267
Judgment
Issued June 30, 2020 70a

United States Court of Appeals
for the Sixth Circuit
Case No. 17-2267,
Order Denying Petition for Rehearing En Banc
Issued September 15, 2020..... 101a–137a

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 5, 2010

v

No. 287767
Kalamazoo Circuit Court
LC No. 2007-000165-FC

ERVINE LEE DAVENPORT,
Defendant-Appellant.

Before: STEPHENS, P.J., and GLEICHER and M. J.
KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder. MCL 750.316. The trial court sentenced defendant to life in prison without the possibility of parole. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first contends that he was denied his due process rights when the trial court required him to wear shackles during the trial. Although defendant's trial counsel requested that defendant's right hand be freed to enable him to write notes, defendant's trial counsel did not otherwise object to defendant being shackled. Therefore, this issue was not

properly preserved before the trial court. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Generally, a defendant has a due process right to be free of shackles or handcuffs during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this right is not absolute; a trial court may order a defendant to be restrained where it “is necessary to prevent escape, injury to persons in the courtroom or to maintain order.” *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Although a trial court may order a defendant to be restrained during trial, it is well settled that a trial court may not do so as a matter of routine. See *Deck v Missouri*, 544 US 622, 627; 125 S Ct 2007; 161 L Ed2d 953 (2005) (“Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so.”). And it is not sufficient that a law enforcement officer has expressed a preference for the use of restraints. *People v Banks*, 249 Mich App 247, 258; 642 NW2d 351 (2002). Instead, before a trial court can order a defendant to be restrained, it must make specific findings—on the record and supported by record evidence—that justify restraining the particular defendant. *Deck*, 544 US at 632 (noting that trial courts must take into account the circumstances of the particular case before ordering a defendant to be restrained). In this case, the trial court failed to make any findings on the record—let alone findings that were supported by record evidence that warranted such an extreme precaution.

Therefore, the trial court plainly erred. See *Dunn*, 446 Mich at 425.

Although it was error for the trial court to order defendant to be restrained without making the requisite findings, in order to warrant relief, defendant must still show that this error prejudiced his trial. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Typically, a defendant will show prejudice by demonstrating that his restraints were visible to the jury. *Id.* at 36-37; see also *Deck*, 544 US at 635 (stating that shackling is inherently prejudicial and, for that reason, a defendant need not demonstrate actual prejudice in order to warrant relief where the defendant's restraints were visible to the jury).

Here, the trial court took precautions to ensure that the jury did not see the restraints: the trial court had a curtain placed around the defense table, instructed the parties on the procedures for standing, and had the shackles removed before defendant walked to the witness stand. Despite these procedures, defendant argues that the jury must have seen that his left hand was shackled on the basis of a video from the trial that purportedly shows that his wrist shackle was visible. The video does show a visible cuff around defendant's wrist. However, it is also clear that the video was recorded from a height. And there is no record evidence that the video accurately portrays the view from the position of the jurors. Because the video does not appear to portray the view from the jury box, we cannot conclude that the jurors actually saw the restraint on defendant's left wrist. Defendant has not shown that his restraints were visible to the

jury and, for that reason, has not met his burden of showing prejudice. *Horn*, 279 Mich App at 37.

Even if we were to conclude that defendant demonstrated that his restraints were visible to the jury, this would not by itself warrant relief. Where a trial court orders a defendant to be visibly shackled without adequate justification, the error is still subject to harmless error review. *Deck*, 544 US 635. In order to be considered harmless, the prosecution must normally “prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’” *Id.*, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967); see also *Lakin v Stine*, 431 F3d 959, 966 (CA 6, 2005) (applying the harmless beyond a reasonable doubt standard to a shackling error and concluding that the error did not warrant relief because the error was harmless in light of the overwhelming evidence against the defendant). However, where—as is the case here—the constitutional error is unpreserved, the defendant bears the burden of proving that the shackling error prejudiced his trial. *Carines*, 460 Mich at 764; see also *United States v Miller*, 531 F3d 340, 346 (CA 6, 2008) (examining defendant’s unpreserved claim that he was improperly restrained for plain error).

After carefully reviewing the evidence adduced at trial in light of the shackling error, we conclude that defendant has not demonstrated prejudice. Defendant’s right hand was free throughout the trial and the jury saw defendant walk to the witness stand without restraints. Moreover, the trial court declined the prosecutor’s request to have defendant shackled again

after he testified. Thus, to the extent that the jury might have seen defendant's restraints, the exposure was quite limited. Given the substantial evidence of defendant's guilt, we conclude that any error in shackling defendant was harmless. See *Carines*, 460 Mich at 763-764. For the same reason, we cannot conclude that defendant's trial counsel's failure to properly object to defendant's shackles constitutes the ineffective assistance of counsel warranting relief. Defendant has failed to demonstrate that any deficiency in this regard prejudiced his trial. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) ("To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.").

Next, defendant contends that he was denied his constitutional right to a speedy trial. This Court reviews a defendant's claim of deprivation of speedy trial rights by balancing factors set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). See *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). The following four factors are relevant to determining whether a defendant has been denied the right to a speedy trial: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id.* Where a delay is less than 18 months, the defendant bears the burden of showing prejudice. *Id.* at 262.

In this case, defendant agrees that the delay was approximately 16 months and that he has the burden to show prejudice. *Id.* In examining the reasons for the delay, we note that many delays were the result of scheduling and docket issues, which weigh against the

prosecutor but are given a neutral tint. *Id.* at 263. The remainder of delays—slightly more than six months—are attributable to defendant. On this record, we conclude that the reasons for the delay and the length of the delay do not weigh in favor of concluding that defendant was denied his right to a speedy trial. *Id.* We also do not agree that defendant suffered prejudice as a result of the delays.

Defendant argues that he was prejudiced by this delay given that “a critical defense witness” died. Defendant states that the witness would have testified that, immediately following the victim’s death, she treated the wounds that defendant received when the victim attacked him with a box cutter. On appeal, defendant does not provide details regarding this testimony and how it might have affected his trial. Further, defendant failed to mention the witness during his interview with police and failed to produce the jacket he claimed was cut when the victim stabbed him. Police officers also found the box cutter the victim allegedly used inside a tool bag in the trunk of the vehicle defendant drove and there was no evidence of blood on it. Finally, the medical examiner testified that the victim’s injuries were not consistent with defendant’s testimony. Given the totality of the circumstances, we conclude that defendant was not deprived of his right to a speedy trial. See *Williams*, 475 Mich at 261-265.

Next, defendant contends that there was insufficient evidence to show that he acted with premeditation and deliberation. This Court reviews a challenge to the sufficiency of the evidence *de novo*. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we must examine the evidence presented at trial in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

In order to prove premeditation, the prosecution must present evidence that there was some time span between the defendant's initial homicidal intent and the defendant's act that caused the victim's death. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (quotations omitted). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.* (citations omitted). Circumstantial evidence may constitute satisfactory proof of premeditation and deliberation. See *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008).

In this case, there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant acted with deliberation and premeditation. The medical examiner testified that the victim's injuries were consistent with pressure being applied to both sides of her throat and that it takes approximately 30 seconds to choke a person to unconsciousness and another four to five minutes to strangle a person to death. A rational juror could conclude that defendant had time to take a second look at his actions during the time between the victim's unconsciousness and death. *Gonzalez*, 468 Mich at 641 (noting that "[m]anual strangulation can be used as

evidence that a defendant had an opportunity to take a ‘second look.’”). Thus, there was sufficient evidence from which a reasonable jury could have found the requisite premeditation beyond a reasonable doubt. *Id.*

Next, defendant argues that the trial court abused its discretion when it denied in part his motion to suppress incriminating statements he made during a custodial interrogation. Specifically, defendant argues that he was not properly advised of his rights and that the police officers should have ceased questioning him after he requested an attorney. Based on these violations, he contends that the trial court should have suppressed all his statements rather than just a portion of the statements.

This Court reviews de novo a trial court’s decision to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We review a trial court’s factual findings for clear error. *Id.* Review of a trial court’s decision concerning whether a statement was involuntary requires this Court to conduct an independent analysis of the record to determine whether the trial court’s ruling was clearly erroneous. *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988). This Court gives “deference to the trial court’s findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor.” *Id.* (quotations omitted).

After defendant’s arrest, several police officers interrogated defendant during a span of more than eight hours. Before the interrogation, a police officer advised defendant of his right to remain silent and have an attorney. A short time into the interview,

defendant stated: “[i]f I need to talk to a lawyer about this to find out what—what I need to do, then that’s what I need to do. But I am not just going to—it’s just crazy.” The interrogating officer, Detective Brian Beauchamp, responded by stating “right” and the interrogation continued for an extensive amount of time wherein defendant admitted to helping dispose of the victim’s body, but denied killing the victim. Beauchamp transcribed defendant’s version of events and asked defendant to sign the statement. Defendant refused and stated: “Okay. I can’t talk to a lawyer first before I sign this stuff, man?” and “I need some legal advice.” Beauchamp then terminated the interrogation and left the interview room. Thereafter, Captain Jim Mallery, entered the interview room and informed defendant he would return to the Kalamazoo County Jail. Mallery left and returned with a cigarette lighter that defendant had been promised, and as Mallery turned to leave the room, defendant stated “[s]o what am I getting charged with?” Mallery again advised defendant of his rights and interrogated defendant for several more hours, during which defendant confessed to killing the victim but stated that he did so in self-defense.

Before trial, defendant moved to suppress the statements made to Beauchamp and Mallery, arguing that he was denied his right to counsel and that his statements were involuntary. The trial court granted in part and denied in part defendant’s motion to suppress. The trial court found that defendant did not make an unequivocal request for an attorney when he stated “[i]f I need to talk to a lawyer ... then that’s what I need to do”, however, the court found that defendant invoked his right to counsel when he refused

Beauchamp's request to sign his first statement. The trial court suppressed the statements from that point until defendant reinitiated contact with Mallery. The trial court also found that defendant's statements were knowingly and voluntarily made.

Police must inform a suspect in custody that he has the right to remain silent and the right to have an attorney present before being questioned. *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). To invoke the right to counsel, an accused must make a statement that can, "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994) (quotation omitted). An ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," is insufficient. *Id.* Once a suspect invokes his right to counsel, police must cease all interrogation until counsel has been made available unless the suspect initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). An accused "initiates" further communication with law enforcement when he makes a statement that evinces a "willingness and a desire for a generalized discussion about the investigation" that could "reasonably have been interpreted by the officer as relating generally to the investigation." *Oregon v Bradshaw*, 462 US 1039, 1045-1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983). However, statements that are merely "a necessary inquiry arising out of the incidents of the custodial relationship" do not amount to an initiation of further

communication with police for purposes of restarting interrogation. *Id.*

The trial court did not err when it determined that defendant did not invoke his right to counsel near the beginning of the interrogation when he stated: “[i]f I need to talk to a lawyer about this to find out what—what I need to do, then that’s what I need to do. But I am not just going to—it’s just crazy.” This statement was not an unequivocal request for an attorney and a reasonable officer would understand that defendant only “might” be invoking or considering his right to counsel. See *Davis*, 512 US at 461-462 (holding that the defendant’s statement that “maybe I should talk to a lawyer” was not an unequivocal request for counsel).

Similarly, the trial court did not err when it concluded that defendant reinitiated contact with Mallery when he asked “[s]o what am I being charged with?” In this case, Mallery entered the interview room and informed defendant that he would be transported back to jail and asked if defendant wanted a “light.” These statements did not amount to “initiation” of further communication with defendant for purposes of *Miranda* because they simply related to the routine incidents of the custodial relationship and did not relate to the criminal investigation. See *Bradshaw*, 462 US at 1045. After Mallery lit defendant’s cigarette and turned to leave the room, defendant asked him “[s]o what am I being charged with.” This statement evinced a “willingness and a desire for a generalized discussion about the investigation” that Mallery could “reasonably have ... interpreted ... as relating generally to the investigation. *Id.* at 1046; see

also *id.* at 1041-1044 (stating that the question “[w]ell, what is going to happen to me now?” initiated contact with police for purposes of *Miranda*). After defendant initiated contact, Mallery properly advised defendant of his rights; defendant’s argument to the contrary lacks merit.

In addition, the trial court did not err when it determined that defendant’s statement to the police was voluntary. *Cipriano*, 431 Mich at 339. An involuntary statement made by a defendant introduced in a criminal trial for any purpose violates that defendant’s due process rights. *Id.* at 331. The determination whether a statement was voluntary “should be whether, considering the totality of all the surrounding circumstances, the confession is ‘the product of an essentially free and unconstrained choice by its maker’ or whether the accused’s ‘will has been overborne and his capacity for self determination critically impaired.’” *Id.* at 333-334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In making this determination a trial court should consider:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill

health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

The presence or absence of one factor is not dispositive. *Id.* Instead, whether a statement is voluntary depends on the totality of the circumstances surrounding the statement. *Id.*

In this case, the record indicates that, at the time of the interrogation, defendant was a 41-year-old man with an 11th grade education who had numerous prior contacts with police. While the interrogation lasted nearly nine hours, our Supreme Court has held that a statement given in similar circumstances was voluntary. See *People v Sexton (After Remand)*, 461 Mich 746, 748-750, 754; 609 NW2d 822 (2000). And, although defendant was held for several days before his interrogation, he was held on other charges, and delay alone is insufficient to find defendant was coerced. *Cipriano*, 431 Mich at 339. Both Beauchamp and Mallery properly advised defendant of his constitutional rights and defendant waived those rights and agreed to participate in the interview. Beauchamp testified that defendant was given access to a restroom. And, the record supports that defendant was provided cigarettes and something to drink. Beauchamp and Mallery also testified that they took breaks during the interrogation. Defendant was not under the influence of drugs or any other intoxicants, he did not appear tired, and did not ask to stop the interrogation. He also did not indicate that he could not continue or that

he was uncomfortable or sleepy. Defendant did not require immediate medical care and he was not threatened or promised anything. On this record, the trial court did not clearly err in determining that defendant's statements were voluntarily made. *Akins*, 259 Mich App at 563.

Finally, defendant contends that he was denied the effective assistance of trial counsel. Defendant does not provide any analysis as to how his counsel was ineffective and he cites nothing in the record to support his argument. Therefore, he has abandoned this claim of error on appeal. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 5, 2010

v

No. 287767
Kalamazoo Circuit Court
LC No. 2007-000165-FC

ERVINE LEE DAVENPORT,
Defendant-Appellant.

Before: STEPHENS, P.J., and GLEICHER and M. J.
KELLY, JJ.

GLEICHER, J. (*concurring*).

I concur in the result reached by the majority, but write separately to elaborate my view of the manner in which the unfounded shackling of defendant during trial, and defense counsel's failure to object to the shackling, qualify as harmless errors.

Explicitly clear due process principles prohibit routine shackling of criminal defendants. "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). More than a decade

before the United States Supreme Court decided *Deck*, the Michigan Supreme Court declared, “The rule is well-established in this and other jurisdictions that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order.” *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994) (footnote omitted).

The record in this case reveals that the trial court shackled defendant pursuant to a “policy.” On the first day of trial, outside the jury’s presence, defense counsel stated:

The other thing is I understand the Court’s policy regarding the shackles. However, it’s important that [defendant] and I have an opportunity to communicate back and forth, and generally we use a... method where he would write notes back and forth. I would ask that any handcuffs during trial be removed prior to the jury entering, giving us an opportunity to write back and forth freely.

No record findings justified shackling defendant. Neither the trial court nor counsel explained the basis for the shackling policy or the particular reasons supporting defendant’s shackling in this case.

The trial court’s shackling policy placed in serious jeopardy defendant’s right to a fair trial. The United States Supreme Court explained in *Deck* that visible shackling without cause impugns the integrity of a criminal trial, because it “undermines the presumption of innocence and the related fairness of the fact-finding process,” diminishes the accused’s right to

counsel, and “affronts ... the dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Id.* at 630-631 (internal quotation omitted). While no reasonable excuse exists for defense counsel’s failure to object to the shackling policy, I believe that the trial court bears equal responsibility for safeguarding the presumption of innocence and the integrity of a criminal trial. Indisputably, the trial court’s decision to shackle defendant constituted plain error.

Defense counsel’s neglect to object to the shackling contributed to the critical gap in the record concerning the visibility of the shackling and abetted the trial court’s denial of defendant’s due process rights.¹ “[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant’s claim of ineffective assistance of counsel includes two components: “First, the defendant must

¹ Defendant presented to this Court a video record of the trial. As the majority acknowledges, defendant’s wrist shackle is clearly visible on the video. The majority observes that “there is no record evidence that the video accurately portrays the view from the position of the jurors.” *Ante* at 3. However, because defense counsel failed to object to the shackling, the record before this Court contains no accurate information about the jury’s sight lines. Given the record before us, it is simply impossible to determine with any degree of reasonable certainty whether the jurors could observe defendant’s shackled wrist. In my view, this Court should refrain from speculation with regard to video camera angles and the location of the jury box.

show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664.

Defense counsel's failure to effectively object to the shackling fell below an objective standard of reasonableness. In the absence of any substantiation that defendant posed a security risk to courtroom personnel, I can conceive of no tactical reason for defense counsel's lack of objection to the shackling. Counsel's failure to object also converted this Court's review from the harmless error standard, under which the prosecution bears the burden of proving beyond a reasonable doubt that the shackling did not contribute to the verdict, to that of plain error, under which defendant must demonstrate a reasonable probability that a more favorable result would have obtained had the court not shackled him. Thus, counsel's silence in the face of unjustified shackling affected a "double whammy"; defendant remained shackled and he forfeited stringent appellate review of this due process violation.

The majority concludes that "[g]iven the substantial evidence of defendant's guilt, we conclude that any error in shackling defendant was harmless." *Ante*

at 4. Because the error was plain and affected defendant's substantial rights, the proper inquiries about the impact of the shackling become whether it (1) "affected the outcome of the lower court proceedings," and (2) either "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *People v Borgne*, 483 Mich 178, 196-197; 768 NW2d 290, reh granted in part 485 Mich 868 (2009). With respect to defense counsel's ineffective assistance, this Court must determine whether, but for counsel's error, a reasonable probability exists that the result of the proceedings would have differed.

Defendant claimed self-defense. He testified that while he drove the victim home, the victim threatened him with a box cutter and swung it into defendant's right arm. Defendant admitted that he grabbed the victim and pushed her back, pinning her against the passenger side of the vehicle, but denied that he intended to hurt her. The pathologist who performed an autopsy on the victim rebutted defendant's testimony by explaining that the victim's neck injury appeared inconsistent "with a broad force placed across" the victim's neck, but consistent with "choking." Forensic testing of the box cutter did not reveal any blood. If visible to the jury, the shackles served to emphasize defendant's violent character and to rebut his claim that he acted in self-defense. However, because the record remains unclear as to whether any jurors saw the shackles, and because substantial evidence supported the jury's rejection of defendant's self-defense claim, he has failed to establish that the shackles affected the outcome of his trial.

On the basis of the same “substantial evidence of defendant’s guilt,” the majority holds that defendant did not satisfy the prejudice component of the *Strickland* test. *Ante* at 4. In my view, an analysis under *Strickland* yields a closer result. The prosecution alleged that defendant committed a violent crime, while defendant claimed that he protected himself from an attack by the intoxicated victim wielding a box cutter. As this Court observed in *People v Baskin*, 145 Mich App 526, 546; 378 NW2d 535 (1985),² “This is a situation where actions speak louder than words. The mere shackling of the defendant in this case impinged upon defendant’s credibility by indicating that defendant was not to be trusted and prejudiced his right to a fair trial.” But the record here lacks any evidence tending to affirmatively demonstrate that the jurors saw the shackles. Furthermore, the pathologist’s testimony and the physical evidence completely refuted defendant’s claim that he merely staved off the victim’s attack. Because defendant has not established a reasonable probability that, but for counsel’s errors, the result of his trial would have differed, I agree that his conviction should stand affirmed.

/s/ Elizabeth L. Gleicher

² Superseded by statute on other grounds as noted in *People v O’Quinn*, 185 Mich App 40, 44- 45; 460 NW2d 264 (1990), overruled in *People v Koonce*, 466 Mich 515, 522-523; 648 NW2d 153 (2002).

Order

March 9, 2011

141832

**Michigan Supreme Court
Lansing, Michigan**

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 141832
COA: 287767
Kalamazoo CC:
2007-000165-FC

ERVINE LEE DAVENPORT,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the August 5, 2010 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE the Court of Appeals order denying the defendant's motion to remand for an evidentiary hearing. The defendant should have been permitted to

develop the record on the issue of whether his shackling during trial prejudiced his defense. See *Rhoden v Rowland*, 10 F3d 1457, 1460 (CA 9, 1993). We also REVERSE the Court of Appeals determination that the defendant did not preserve the issue of whether his shackling during trial constituted a due process violation, because defense counsel requested that both of defendant's hands be unshackled to avoid the prejudice that would result if the jury saw the shackles, and the circuit court denied her request. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999); trial transcript Volume I, p 113. If it is determined that the jury saw the defendant's shackles, the circuit court shall determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant. *Deck v Missouri*, 544 US 622, 635; 125 S Ct 2007; 161 L Ed 2d 953 (2005). We REMAND this case to the circuit court for further proceedings consistent with this order. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 9, 2011 Corbin R. Davis
Clerk

STATE OF MICHIGAN
9th JUDICIAL CIRCUIT COURT
TRIAL DIVISION
FOR THE COUNTY OF KALAMAZOO

PEOPLE OF THE STATE OF MICHIGAN,
v Case No.:C2007-0165FC
ERVINE LEE DAVENPORT.
Defendant.

EVIDENTIARY HEARING - VOLUME I OF II
BEFORE THE HONORABLE
PAMELA LIGHTVOET, CIRCUIT JUDGE
Kalamazoo, Michigan – Friday, June 24, 2011

APPEARANCES:

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[Page 2]

TABLE OF CONTENTS**WITNESSES:****KALI ROSEBOOM**

| | |
|-----------------------------|----|
| Examination by Ms. Bruinsma | 13 |
| Examination by Ms. Meinberg | 17 |

HANNAH DECAMP

| | |
|-------------------------------------|----|
| Examination by Ms. Bruinsma | 23 |
| Examination by Ms. Meinberg | 28 |
| Further examination by Ms. Bruinsma | 32 |
| Further examination by Ms. Meinberg | 33 |

ROBERT JANKORD

| | |
|-------------------------------------|----|
| Examination by Ms. Bruinsma | 35 |
| Examination by Ms. Meinberg | 40 |
| Further examination by Ms. Bruinsma | 44 |

BRADLEY LEWIS

| | |
|-----------------------------|----|
| Examination by Ms. Bruinsma | 46 |
| Examination by Ms. Meinberg | 53 |

JENNIFER PADGETT

| | |
|-------------------------------------|----|
| Examination by Ms. Bruinsma | 58 |
| Examination by Ms. Meinberg | 63 |
| Further examination by Ms. Bruinsma | 66 |
| Further examination by Ms. Meinberg | 71 |

THOMAS RUZICK

| | |
|-------------------------------------|----|
| Examination by Ms. Bruinsma | 74 |
| Examination by Ms. Meinberg | 76 |
| Further examination by Ms. Bruinsma | 78 |

JAMES VANDERVEEN

| | |
|-------------------------------------|----|
| Examination by Ms. Bruinsma | 79 |
| Examination by Ms. Meinberg | 87 |
| Further examination by Ms. Bruinsma | 90 |

THOMAS VANDERMEULEN

| | |
|-----------------------------|----|
| Examination by Ms. Bruinsma | 93 |
| Examination by Ms. Meinberg | 95 |

MICHAEL WHATELY

| | |
|-----------------------------|-----|
| Examination by Ms. Bruinsma | 97 |
| Examination by Ms. Meinberg | 103 |

| <u>EXHIBITS</u> | <u>Identified</u> | <u>Admitted</u> |
|-----------------|-------------------|-----------------|
|-----------------|-------------------|-----------------|

None

[Page 3]

Kalamazoo, Michigan

Friday, June 24, 2011 at 9:11 a.m.

COURT CLERK: The court calls the matter of People versus Ervine Lee Davenport, case number C07-0165FC.

Parties, please state appearances for the record.

MS. BRUINSMA: Good morning, your Honor, Cheri Bruinsma appearing on behalf of the People.

MS. MEINBERG: Good morning, Susan Meinberg from the State Appellate Defender Office on behalf of Mr. Davenport.

THE COURT: Mr. Davenport is here also.

Counsel, we are here on remand, there is an issue we need to address with regards to the fact that during the trial Mr. Davenport did have a belly chain and his left wrist was connected to the chain. We left his right wrist open for notes and contact with his attorney and so forth during the trial -- and also ankle chains, correct, Counsel?

MS. MEINBERG: That's correct.

THE COURT: And so it has been remanded back to us. Nothing has been placed on the record with regards to the reasons for that, aside from a comment by the Prosecuting Attorney, and I'll get to that in a moment.

So, the issue for the Court right now is whether or not any of the jurors saw any shackles or chains or

[Page 4]

whatnot and whether, depending on what is said -- well, that is the issue right now and we'll move on to the next issue if need be.

We've discussed this, just briefly, in chambers. And I did indicate that I was going to place a few things, comments, on the record and I addressed those with Counsel beforehand, so that you are aware of that. And -- so let me just start by doing that and then I'll turn it over to you Counsel for brief arguments.

You both have submitted some memorandums with regards to this evidentiary hearing; I've reviewed those and we discussed kind of the procedure.

We have subpoenaed the jurors on this case and they are upstairs. Some of them are here and the rest of them will hopefully be checking in and we know that we had issues with a few of them and the Court excused them for the day and we will bring them back, if need be, depending on where we are at. But I think that there are three of them that we have -- that are not coming today; the rest of them should be here.

But let me just say this, I explained to Counsel that my general procedure during trials is when things are discussed in chambers -- I usually take notes and I have a list with me that I then bring out to the bench just to make sure that things are covered.

[Page 5]

I apologize because in this case, obviously, the reasons for the Court's decision were not placed on the record. It is three years later; I certainly don't remember the specifics of the conversation that was had in chambers with Counsel and neither of you were present at the trial, so it wasn't you that I had the conversation with. And certainly if we need to get information from the attorneys, then we can do that later if need be.

I do have a specific recollection that we did discuss whether or not Mr. Davenport should remain in shackles, I guess, during the trial. I don't, certainly, remember all of the specifics of that conversation. It is referenced in the transcript that there was some

concern by; the Sheriff's about a comment made by Mr. Davenport to them and they took that as a threat. That information was passed on to us and I do remember that and that is why it came up in chambers.

And based on that -- I know that we also had discussion about Mr. Davenport's size and the way that the prosecuting attorney was alleging the victim was killed in this case. There was some concern about that.

We -- and that is all I remember about what was discussed and why the Court took the action that it did. And I'll just indicate that it is not something standard that the Court does. If there is an issue or there is a

[Page 6]

security issue or some concern, then the Court makes that decision. That is just a broad statement, not related to this case in general; but I will say that.

And I know that, like -- as I indicated before, Counsel -- defense counsel made a request to let Mr. Davenport be able to write notes to him so that he could be involved with his defense and we allowed that. So, I will state that also.

And -- obviously the record at trial is the record at trial, so I am just indicating my recall three years later, again. And I -- another thing that I told Counsel was that when the Court of Appeals opinion came out and I read the opinion, I do have a specific recollection of thinking, I can't believe we didn't put that on the record. We didn't, obviously, from -- and I will say that I have not reviewed the entirety of the record; Counsel

certainly has, I can tell, from the briefs, so I will say that.

But that is the only thing that I remember with regards to the case, so that is all I can say about that issue.

With that, I am going to turn it over to Ms. Bruinsma first for any arguments, comments, before we start bringing the jurors down.

MS. BRUINSMA: Your Honor, the only thing that I

[Page 7]

would like to have addressed on the record is just the issue with respect to questioning the jurors and the extent of the questioning.

We both filed memorandum on this case; I did do a supplemental one just on the issue of the extent of the questioning of the jurors and I think that it is appropriate, given the issues in the case and the Court's ultimate determination to ask the jurors if they did -- indeed did see the Defendant in shackles and/or leg chains, and whether that affected their verdict. I cited the case law that I believe supports allowing that questioning in my supplemental response and I would -- I would ask that the Court do allow that questioning.

Certainly if the Court of Appeals or subsequent court were to decide that that was not appropriate, they could disregard that, but I think that it makes sense to ask that question given the issues and to

prevent any further need for evidentiary hearing down the road. So, I would ask that the Court allow those questions.

MS. MEINBERG: Your Honor, first of all, for the record and I hate to be ironic, but I am going to need Mr. Davenport's assistance during this hearing. If he could have his right hand unshackled.

THE COURT: That's fine.

MS. MEINBERG: That would be great; he can take

[Page 8]

notes.

As for the extent of the questioning, I would just refer this Court to the Michigan Supreme Court order in this case that says that we are here for a determination as to whether the jurors saw the shackles. And then it says that this Court shall make a determination about whether the Prosecutor has met its burden.

Also, when you look at Deck versus Missouri, the only issue -- shackling is different than extraneous influences on a jury. Shackles is held to a different standard.

And if you look at Deck, which is a 2005 case, the only issue is whether the shackles were visible. Deck doesn't say anything about that we have to remand it back to decide if the jurors, you know, talked about the shackles; whether it affected their verdict. I am not

sure that any juror is going to get on the stand and admit that, yes, it affected their verdict.

And if you look at Budzyn, which is the case cited by the Prosecutor, that deals with general extraneous influences. And it talks about the threshold requirement of the defendant and then how that burden, if it is met, flips to the prosecutor to show -- um -- whether the error was harmless beyond a reasonable doubt.

And the Supreme Court in Budzyn, tells you that

[Page 9]

the only two ways that the prosecutor can meet that burden is to show that the extraneous evidence was duplicative of what was admitted at trial, that can make it harmless; or if evidence of guilt was overwhelming. They didn't -- they don't say anything about the jurors have to come in and say we talked about it or it made a difference, it affected the verdict.

Now definitely Ms. Bruinsma is right, there were jurors that came in, in the case she cited, who made those statements on the record, but it is not part of the burden. So, we would object to the Court opening it up in that manner.

THE COURT: I indicated -- we discussed this in chambers also Counsel, that I was going to allow the jurors to be questioned with regards to whether or not it came up in their deliberations and whether or not it affected their verdict in any way.

The Court is -- my reading of this -- the opinion from the Supreme Court is that the Court is to determine:

Number one, whether the Jury saw the Defendant's shackles and we have -- everyone has been cooperative. We have subpoenaed all of the jurors so we can ask them if they have a recollection of that. And if so, what the recollection is, number one.

The next step, if one of the jurors indicates

[Page 10]

that yes, they did see handcuffs or shackles, the Court also has to decide, as you indicated, whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict. I wasn't in the room deliberating, certainly, so I think that some of the best evidence that we can get on that issue is asking the jurors themselves.

We have subpoenaed the jurors and taken time out of their busy schedules to be here today and certainly I don't want to have to bring them back again to go to that next step if need be. So, they are here -- I think that it is appropriate given the requirements that the Court needs to decide or potentially needs to decide to ask them those questions. So, I will allow those questions.

We discussed this. Also, procedure wise and I indicated that it is the Prosecuting Attorney's burden, so I am going to let Ms. Bruinsma ask the questions, but I -- I don't expect that it is going to be too long for each juror, but I will allow questioning on:

Number one, do they have a recall as to whether or not they saw shackles or chains or handcuffs and what that recollection is -- they have --

If they remember whether or not there was any discussion about that among the jurors at any point and again, what their recollection is and whether or not that

[Page 11]

influenced their decision or verdict in any way.

So, I will allow those questions to be asked.

Anything else that we need to address, then, Counsel, before we bring the jurors down?

MS. BRUINSMA: I don't believe so, your Honor.

MS. MEINBERG: Your Honor, the shackles.

THE COURT: He does need to -- yeah, if you could just remove his right hand there, yes.

All right.

Also with regards to the procedure, I -- my law clerk, Aaron Van Langevelde, is going to be bringing two jurors down from upstairs at a time. And we did let him know that they are going to be placed under oath; we are going to ask them questions we will have them state their name -- and we are going to ask them questions about an issue that arose during the trial. So, they will be informed about that.

My understanding is that the first juror that comes has a family member who is in critical condition, so we are going to get that juror in and out of here.

So, we will do it that way.

And those of you in the courtroom. Just a reminder that if you have a cell phone or an electronic device to make sure that it is turned off. If it goes off, I will take it until the end of the day. So, double check

[Page 12]

that, there are signs everywhere. Just a reminder.

Ma'am, come right over here. Before you have a seat, I am going to have you raise your right hand. I am going to place you under oath.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MS. ROSEBOOM: I do.

THE COURT: Please have a seat. I am going to have you state and spell your first and last name. Before I do that, I am just going to let you know that you need to make sure that you speak right in the end of that microphone. If you go to either side, sometimes our recording system does not pick up. So, first of all, I'll let you state your first and last name and spell it please, for the record.

THE WITNESS: Kali Roseboom, R -- or -- K-a-l-i R-o-s-e-b as in boy-o-o-m.

THE COURT: We are going to go through some questions about the trial. I realize that it was three years ago now, back in 2008. If you do not remember something, please let us know that, if you can't answer the question.

THE WITNESS: Okay.

THE COURT: I am going to turn it over to the

[Page 13]

Prosecuting Attorney first to ask you some questions. The Defense Attorney might have some follow up questions. The attorneys are different than the ones at trial. I don't know if you remember that or recognize them, but you are not going to recognize them because they are different.

But I am just going to turn it over to them; we just have some questions about an issue that arose during the trial. All right.

THE WITNESS: Okay.

THE COURT: Ms. Bruinsma.

MS. BRUINSMA: Thank you, your Honor.

KALI ROSEBOOM

**Called to testify at 9:27 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Ms. Roseboom.

A Good morning.

Q Do you recall being a juror on this case?

A I do.

Q And this is the Ervine Davenport case?

A Yes.

Q Okay.

And has anybody discussed with you the reason that you are here today?

A No.

[Page 14]

Q Okay.

During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Is there anything about his appearance in court that stands out in your mind?

A He was dressed really nice. The first day he was wearing his prison suit and then the rest of the time he was dressed nice.

Q Is there anything else about his appearance that stands out in your mind?

A No.

Q Anything about how the Defendant presented himself in court stand out in your mind?

A No, he was just sitting there.

Q Do -- did you notice during the course of the trial whether the Defendant was restrained in any way?

A No, because he was always sitting when we came in.

Q Did you ever see the Defendant wearing handcuffs or any restraints on his hands?

A Um, no.

Q During any part of the trial?

A I think maybe the first day when we were doing the jury selection when he was wearing the orange thing; but I don't remember any other time.

[Page 15]

Q And so -- do you recall what it was that you saw?

A On the first day?

Q Yes.

A He was wearing the orange jumpsuit thing on the first day of the jury selection and I think that he was handcuffed. I don't -- I don't recall exactly. But the rest of the time he was just looking normal.

Q So you don't recall any -- any time for his hands being restrained other than that first day?

A No.

THE COURT: Let me just back up.

No, you don't recall or no --

THE WITNESS: I don't recall him ever being handcuffed afterwards --

THE COURT: Okay.

THE WITNESS: -- or any other day.

MS. BRUINSMA: Okay.

BY MS. BRUINSMA:

Q How long, if you recall, did you -- were you able to see the handcuffs?

A I was in the front row right by him on the first day when they were doing the selection and stuff and I only saw him once. And I was one of the first people called up and I didn't see him any other time, I didn't know if he wore them for the rest of the day or not or what was going on

[Page 16]

there.

Q Did seeing the handcuffs make you think anything in particular?

A No.

Q Okay.

Did it make you -- did it have any significance at all to you?

A No, because I just thought that he was just coming from the county wherever he was staying during the trial.

Q Did you assume that to be a routine type of thing?

A Yeah.

Q And did you ever discuss the fact that you saw the handcuffs with any of the other jurors?

A No.

Q Okay.

Was it something that came up during the course of deliberations at all?

A No.

Q Did viewing the Defendant in handcuffs affect your verdict in the case?

A No, I thought that the first day that it was just routine and then I didn't see them any other time, so I didn't think that he was.

Q Did it make you any more inclined to find him guilty?

A No.

[Page 17]

Q Did you see whether the Defendant's legs were restrained in any way?

A No, I didn't, he was always sitting.

Q Do you recall if any any of the other jurors mentioned that fact to you during the course of the case?

A No, the only time that we talked about it was, obviously, when we were deliberating and nobody mentioned anything.

Q Let me just clarify a second. The only time that you talked about it --

A The case.

Q -- you mean the case?

A Yes. I'm sorry.

Q All right.

And to your recollection, the fact that there was, handcuffs was not something that was ever discussed?

A No.

Q You decided the case based on the evidence that you heard at trial?

A Yes. We all did our -- we all wrote down everything and we spoke it over and that is how we decided the verdict.

MS. BRUINSMA: I don't have any further questions.

THE COURT: Counsel.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning.

[Page 18]

A Good morning.

Q Thank you so much for coming.

Do you remember Mr. Davenport testified during trial?

A Yes.

Q And do you remember that the Jury had to go out in the hallway before he testified?

A I don't -- I don't know for sure; but probably.

Q Okay.

And do you remember --

A We went out in the hall a lot.

Q Okay.

And do you remember when you came back in, Mr. Davenport went from being on the -- at the counsel table, he was sitting in the witness chair when you came back in the courtroom?

A Yes.

Q Did -- did you figure out why you had to go out in the hallway?

A No.

Q Okay.

A We had to go out in the hallway a lot.

Q Okay.

And when the Jury took stand and stretch breaks, did you ever look over at the defense table and see a

[Page 19]

Q handcuff on his wrist?

A No.

Q Which seat were you --

A I was number four.

Q Number four.

I'm sorry, I am not from this district, where - where is number four?

THE COURT: Actually -- just -- Counsel, let me just indicate. There would have been 14 jurors. There would have been another chair there which we bring in if there is 14, not 13.

So, that would be -- actually, no --

THE WITNESS: It was one, two, three and then I was four.

THE COURT: Our number system was backwards. We used to start from there and now we are starting from here.

So, she is front row and then fourth row (sic) from that far end, right?

THE WITNESS: Yes.

THE COURT: The fourth chair from the far end?

MS. MEINBERG: Okay, great.

BY MS. MEINBERG:

Q So you said that you saw the cuffs on the first day?

A Yes.

Q And did you notice the deputy standing behind him?

[Page 20]

A I think so; there were a lot of deputies standing around.

Q And what did -- what did you think that meant?
Did you think that he might be dangerous?

A No, I just thought that was routine; I have never
done jury duty before.

Q Okay.

And during voir dire, you were sitting in the
first row?

A Yes.

Q And you said that you saw the cuffs on the first
day?

A I think so, yes.

Q And during voir dire, were you one of the jurors
that went up to the bench and talked to the Judge
about any problem that you had with serving?

A No, I did not have a problem at the time, so --

Q Okay.

Did any of the alternate jurors or anyone else
in the -- in the pool, in the beginning, talk about
the shackles --

A No.

Q Or the cuffs.

Okay.

Did you see anyone else in the courtroom shackled?

A No.

[Page 21]

MS. MEINBERG: Thank you.

THE WITNESS: You're welcome.

THE COURT: Anything further, Counsel.

MS. BRUINSMA: No follow up questions, your Honor.

THE COURT: Let me just clarify for the record.

You pointed, when you were asked a question about coming in with the initial pool and that you were seated in the front row and then you pointed in this direction.

THE WITNESS: Yes.

THE COURT: So if you are looking out at the court in the back of the court, you were sitting on the right side in the front row?

THE WITNESS: Correct.

THE COURT: There is a gentleman in a gray suit sitting down in the very front row there, in front of the double doors that go to the back of the courtroom. Were you sitting where he is or in the row behind him?

THE WITNESS: I was behind the double doors in the row behind him.

THE COURT: So, the first row behind the double swinging doors there.

THE WITNESS: Yes.

THE COURT: Okay.

I appreciate that. Any follow up, Counsel, based on the Court's questions?

[Page 22]

MS. BRUINSMA: No, your Honor.

MS. MEINBERG: No, your Honor.

THE COURT: All right.

Thank you, ma'am.

THE WITNESS: Thank you.

THE COURT: You are excused; you can leave for the day. We appreciate your time. Please don't discuss the testimony with anyone.

THE WITNESS: Okay.

THE COURT: I assume that you are not going to have contact with jurors, but I don't know.

THE WITNESS: No.

THE COURT: So, anyone who has been subpoenaed, don't discuss this with them.

THE WITNESS: Okay.

THE COURT: Thank you, ma'am.

THE WITNESS: Thank you, so much.

(At 9:35 a.m., witness excused)

THE COURT: The next witness should be coming in shortly.

Before you have a seat ma'am, please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

[Page 23]

MS. DECAMP: Yes.

THE COURT: Please have a seat ma'am.

I am going to have you state your full name, first and last name, and spell it in a moment. But before I do that, just make sure that you speak right into the end of that microphone. If you move to either side, sometimes our recording system doesn't pick up and it is hard for folks to hear.

So, please state and spell your first and last name, if you would, ma'am.

THE WITNESS: Hannah Decamp. H-a-n-n-a-h D-e-c-a-m-p.

HANNAH DECAMP

**Called to testify at 9:35 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

THE COURT: We are going to ask you questions about an issue that arose during the trial. If you don't remember please feel free to let us know that; I don't want you to guess at anything.

I am going to turn it over to Ms. Bruinsma in a moment, she is with the Prosecuting Attorney's Office. The attorneys are different than the attorneys that were present during the trial, so -- just so that you are aware of that. I don't know if you have any recollection of what the attorneys looked like; but I'll go ahead and turn it

[Page 24]

over to Ms. Bruinsma, she'll have some questions for you.

MS. BRUINSMA: Thank you, your Honor.

BY MS. BRUINSMA:

Q Good morning Ms. Decamp.

Do you recall being a juror on this case?

A Yes.

Q And this would be the Ervine Davenport case, correct?

A Yep.

Q Has anyone discussed the reason that you are here today with you?

A No.

Q Okay.

During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Do you recall anything about his appearance? Is there anything that stands out in your mind?

A No.

Q Do you recall how he was dressed at trial?

A Nice, I think he had nice clothes on, I feel like.

Q Do you remember anything in particular that he was wearing?

A Khaki's and a button up shirt, I feel like.

Q Is there anything about how he presented himself during the course of the trial that stands out in your mind?

A No.

[Page 25]

Q Do you -- did you notice during the trial whether the Defendant was restrained in any way?

A No.

Q Did you ever specifically see the Defendant wearing handcuffs during the trial?

A Not that I remember.

Q All right.

And during the voir dire process as well, when you were being -- when they were selecting the Jury, do you recall seeing the Defendant in handcuffs at all?

A No.

Q What about seeing the Defendant in leg shackles?

A I don't remember -- I don't --

Q You don't recall seeing anything like that?

A I remember him standing up, but I don't remember if he had leg shackles on or not.

Q Okay.

And when he stood up, do you recall seeing anything like handcuffs on him?

A I don't remember, no.

Q Okay.

Is there anything else about the Defendant's appearance during the course of the trial that stands out in your mind?

A No.

[Page 26]

Q During the course of the deliberations, did anybody mention to you or do you recall it being discussed that the Defendant was wearing any type of restraints?

A I remember like when we first started, we came in and we sat down and he had to go right back out and then he was different -- dressed different when we came back in.

Q But when the jurors were discussing things in the room by -- themselves

A Oh, no.

Q -- did anybody ever mention that fact?

A No.

Q Was it something that came up during your discussions at all?

A Yeah, just upstairs, I think -- I don't know.

Q That the Defendant was wearing handcuffs?

A That we had to go out because he had to change.

Q Clothing or --

A Change --

Q -- what was your understanding?

A -- his clothes.

Q Was that something then that you discussed as a group?

A Like --

Q The jurors?

A Yeah. Yeah.

Q Okay.

[Page 27]

So you discussed the fact that you had to go out of the courtroom?

A Right.

Q And did you -- was it specifically discussed that the Defendant was wearing handcuffs?

A No.

Q Was it discussed that he was wearing leg irons or leg shackles?

A No, I think that he was in an orange -- like an orange --

THE COURT: I need you to speak up just a little bit, if you would.

THE WITNESS: I think that he was in an orange suit and then had to change into nice clothes.

BY MS. BRUINSMA:

Q Okay.

And do you recall what the -- what the discussion was then about --

A No.

Q Okay.

A I just remember us having to leave for that.

Q And you remember the jurors having to leave the courtroom, you -- were you told that was because the way he was dressed or that was something that you presumed?

A I guess that I presumed that.

Q Okay.

[Page 28]

And was that something that was discussed with the other jurors?

A That day, yeah.

Q Do you recall what was discussed specifically?

A I mean, I think that we just said that was -- I don't know, it was just like an observation.

Q Okay.

A It wasn't --

Q Oh, we had to in the hall, oh, he must be changing his clothes or something like that.

A Like later that day.

Q Okay.

MS. BRUINSMA: I don't have any further questions from this witness.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning. Thank you, so much for coming.

When you -- on the first day of trial when you first came in, in a big jury pool, can you tell me where you were sitting in the gallery? Do you remember?

A No, I don't remember.

Q Because you sat in the gallery the first day and part of the second day, but you don't remember either day where you were sitting?

A The first day, I feel like I was sitting third or fourth on

[Page 29]

that side.

Q On the right side where the gentleman in the gray is?

A Mmm hmm, but like farther back.

Q Farther back.

A And I think the whole second day I was up here.

Q Okay, second day you were in the jury box?

A Yes.

Q And what do you remember what seat you were sitting in, in the jury box?

A No.

Q Okay.

And so when you were -- during the voir dire when they were picking the jury and you were sitting in the gallery, do you ever remember looking at Mr. Davenport sitting at counsel table?

A Yeah, I mean, I'm sure I did.

Q Did you remember seeing any belly chains or a chain around his waist, especially when his lawyer got up to stand here? Did you notice anything when he was sitting in the chair that was around his waist?

A I don't remember.

Q Okay.

It has been three years since the trial. You are having a hard time remembering details?

A Yes.

[Page 30]

Q So, it is possible that you did see it, but you just don't remember?

A Yep.

Q Okay.

And when you were in the jury box and you stood -- took a stand stretch break or walked in and out, do you ever remember looking over at Mr. Davenport and seeing a handcuff on his wrist?

A No.

Q Okay.

When he turned to look at that screen behind him, do you ever remember seeing a handcuff on his wrist?

A No.

Q No you didn't see it or no, you don't recall?

A I don't remember.

Q Okay.

Did you ever hear the sound of chains clanking or anything you thought that might be handcuffs or foot restraints or leg restraints?

A No.

Q Okay.

You say that you remember having to leave the courtroom for maybe -- what you presumed was change in clothes; do you remember -- right before Mr. Davenport took the stand and testified, the Jury went out in the hallway,

[Page 31]

do you remember that?

A Mmm hmm.

THE COURT: Was that a yes?

THE WITNESS: Yes.

BY MS. MEINBERG:

Q And then you were out there briefly. When you came back in, do you remember that Mr. Davenport was now sitting in the witness stand?

A Yes.

Q And did you ever guess as to why that was that you had to go out in the hallway?

A I didn't. I just remember somebody saying that he had changed.

Q His clothes?

A Right.

Q Okay.

A And I don't even know if that is right, honestly; I don't remember.

Q Okay.

And did you notice every day when the Jury walked in and walked out, the Def -- Mr. Davenport and the lawyers, didn't stand up? Did you ever guess why that was?

A No.

MS. MEINBERG: I have nothing further, thank you.

MS. BRUINSMA: Just a couple of follow up

[Page 32]

questions, your Honor.

**FURTHER EXAMINATION BY THE
PROSECUTION**

BY MS. BRUINSMA:

Q Ms. Decamp, when you were deliberating on the case, did you decide the case based on the evidence that was presented?

A Mmm hmm, yes.

Q And when you were deliberating, do you recall anybody mentioning handcuffs or shackles or anything like that?

A No.

MS. BRUINSMA: No other questions.

THE COURT: Just so I am clear, Ms. Decamp, as you sit here today, you don't ever remember seeing Mr. Davenport in handcuffs or shackles; or you don't have a memory of that one way or the other?

THE WITNESS: I don't have a memory of that one way or the other. Like I remember seeing him, but I don't remember if he had handcuffs or not.

THE COURT: Do you have any memory of anyone bringing up, during deliberations, whether he was shackled or had handcuffs? Did anyone discuss that that you remember?

THE WITNESS: No.

THE COURT: I don't have any further questions, Counsel, any questions based on the Court's line of questioning, Ms. Bruinsma?

[Page 33]

MS. BRUINSMA: No, your Honor.

THE COURT: Ms. Meinberg?

MS. MEINBERG: I have just one.

THE COURT: Yes, go ahead.

FURTHER EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Okay, so, forgive me, I'm confused. You don't remember whether or not it was brought during deliberations or no it wasn't mentioned during deliberations?

A I honestly don't think it was mentioned. I mean, I remember everything that we discussed was always the evidence.

Q Okay.

So when somebody made a mention about the clothes or having to go out for the clothes, that wasn't during deliberations, that was just during the course of --

A Right.

Q -- talking --

A Right.

Q And you are not guessing, though, about deliberations --

A Right.

Q -- you do or don't have a memory?

Q I remember that -- I don't remember talking about handcuffs or shackles.

MS. MEINBERG: Okay, thank you.

[Page 34]

THE COURT: Thank you, ma'am.

Anything further Ms. Bruinsma?

MS. BRUINSMA: No, your Honor.

THE COURT: You may step down.

Please do not discuss your testimony here, what the issues that were that we asked you questions about with anyone else. Okay.

THE WITNESS: Okay.

THE COURT: Thank you.

(At 9:47 a.m., witness excused)

THE COURT: Before you have a seat, sir, please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. JANKORD: Yes ma'am.

THE COURT: Please have a seat.

I am just going to let you know that you need to speak right in the end of that microphone. If you move to either side, then the recording system might not pick up what you are saying, so be careful of that.

MR. JANKORD: Okay.

THE COURT: I am going to ask you -- the attorneys are going to ask you some questions in a moment,

I might add a couple, but before we do that, please state

[Page 35]

and spell your first and last names.

THE WITNESS: Robert Jankord, J-a-n-k-o-r-d.

THE COURT: And Robert is spelled, R-o-b

THE WITNESS: R-o-b-e-r-t, yes, sorry.

THE COURT: Go ahead.

I guess that I should indicate. The attorneys are different than those than the attorneys that were handling the case, but they are going to have some questions for you. So, I'll turn it over to Counsel.

ROBERT JANKORD

**Called to testify at 9:48 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Mr. Jankord.

A Good morning.

Q Do you recall being a juror on this case?

A Yes ma' am.

Q And that is the Ervine Davenport case, correct?

A Yes ma' am.

Q And has anyone discussed with you the reason you are here today?

A No ma'am.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

[Page 36]

Q Is there anything about his appearance in court that stands out in your mind?

A Not that I can recall.

Q The trial was about three years ago, is that correct?

A Yes.

Q Okay.

Is there anything about how the Defendant presented himself in court that stands out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the trial?

A Um, I think that he had an orange jumpsuit on at one point when it first began and then later we

came back into the courtroom and he was wearing a dress shirt and I believe dress pants; I couldn't tell you what color they were, though.

Q Okay.

Did the orange jumpsuit have any significance to you?

A No, just meant that he was in the custody of the police or the jail or whatever.

Q And did you notice if he was restrained in any way?

A Well yes, actually. When we -- when when we first came into the room, I did notice that his hands were restrained.

[Page 37]

Q When you say when you first came into the room, can you describe what you are referring to?

A When we first took our seats in the jury box.

Q The jury box being up here by the witness stand or in the back of the courtroom when you first came in?

A I didn't notice anything until I sat down in my chair -- until I called by the prosecutor -- I forget what his name was -- Stuart, I think was his first name.

Q So it was during the voir dire process when he -- when Mr. Fenton was questioning you, that you noticed that?

A Right, he would -- the Defendant was doodling with something and I noticed that one of his hands was cuffed, but --

Q Approximate -- where were you seated in the jury box itself?

A It was towards the end; I can't tell you for sure. I think that it was in the back row. I can't tell you with 100 percent certainty; it was three years ago, so I apologize for that.

Q Okay.

Now, did seeing the handcuff, did that have any significance to you?

A No, it just meant that he was on trial and that he was currently in custody of the County.

Q Do you recall approximately how long of a time period it

[Page 38]

was that you were able to view the handcuff?

A No, I didn't time it. It wasn't -- to me it was of no significance. I didn't even pay attention to it.

Q Did the fact that the Defendant was wearing handcuffs influence you in any way?

A Not at all.

Q Um, did the jurors ever discuss the fact that the Defendant was wearing handcuffs?

A Not that I can recall.

Q Did viewing the Defendant in handcuffs affect your verdict at all?

A No, not at all.

Q Did the handcuffs make you more inclined to find the Defendant guilty?

A No. No.

Q Did you base your verdict on the evidence that you heard?

A Absolutely.

Q And during the course of deliberations, was that a subject that was discussed, the handcuffs?

A Not at all.

Q Now, did you notice whether the Defendant's legs were shackled?

A I don't recall that; I'm not sure.

Q Okay.

You have no recollection at this point of whether

[Page 39]

that was something that you saw or not?

THE COURT: That would be the ankle or leg shackles?

BY MS. BRUINSMA:

Q The ankle, yes, the leg shackles?

A No, I don't remember that. I mean, it is possible that at the time I saw it -- I mean, it was three years ago, so I don't really have a good memory about that, that far back.

Q Would -- would seeing the Defendant in leg shackles have any significance to you?

A No, it just to me an extra measure of security for the people and family and stuff in the courtroom.

Q Would it influence you in any way?

A No, not at all.

Q Okay.

And was that something that the jurors ever discussed, the leg shackles, specifically?

A Not that I was ever a part of or can recall hearing, no.

Q Okay.

Would that have been something that would affect your verdict?

A Not my verdict, no.

Q Okay.

Again, you based your verdict on the evidence that was presented?

[Page 40]

A Yes ma' am.

Q What about the orange jumpsuit, did that have any impact on you whatsoever?

A No, not at all.

Q Okay.

I don't have any further questions.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning, thank you so much for coming.

Can you spell your last name for me?

A Yes, J-a-n-k-o-r-d.

Q Uh, thank you.

The first day of trial and part of the second when they were picking the jurors, can you tell me where you were sitting in the gallery; do you remember?

A I was sitting in the one, two -- the second from the back on the right side --

Q The right side behind the gentleman in the gray?

A Not quite as far as over as he is; more towards the end, closer to the middle.

Q Okay.

A But in the second row back there.

Q And when they were picking the Jury and you were sitting back there, did you ever look up at Mr. Davenport and see a

[Page 41]

belly chain around his waist?

A Oh yeah, I did notice because his hands -- his hands were cuffed to it.

Q Okay.

And you said that you saw the cuff from the jury box?

A Right, only when he was, you know, -- he has his hands like this, doodling.

Q And how many times did you see it from the jury box?

A I didn't count, maybe twice -- I don't know. I don't have an exact count, sorry.

Q Okay.

And when he -- when they were showing things on the screen behind Mr. Davenport and he turned, did you see any restraints at that point?

A Not that I was paying attention to.

Q And you said when you were sitting in the jury box, you think you were in the back row but you don't remember where; is that correct?

A I was more towards the end -- actually I think I was in the front row. It was --

Q Front row?

A Yeah, it was either -- it was towards the end, though --honestly I can't remember. But I know that it was towards the end --

[Page 42]

Q You are talking about the right-hand side as I look at the jury box, that --

A Yes ma' am.

Q -- end?

A Yes ma' am.

THE COURT: Further away from the witness box where you are seated?

THE WITNESS: Right.

BY MS. MEINBERG:

Q And when you looked at Mr. Davenport, did you notice that he had limited movement at the table?

A Only when he had his hands up on his legal pad that he was drawing on.

Q Okay.

And when the Jury stood up to take a break, did you were you able to look over at Mr. Davenport -- did you see his handcuff at that point also?

A I don't recall what we were doing -- what I was looking at when we stood up to take breaks. But I mean, I did notice that he had been shackled at one point with his hands. That is pretty much what I can recall.

Q And did you see that every day or you just saw it twice during the entire trial; do you remember?

A I think it was just right at the very beginning during the like -- when they were picking the Jury and that type of

[Page 43]

stuff. Other than that, I am not -- I don't really recall him being handcuffed or anything a whole lot during the trial.

Q Okay.

And -- you noticed that he was shackled and - did you see the deputies in the courtroom during the trial?

A Absolutely.

Q And what did you think the purpose was for him to be shackled and to have depts in the courtroom?

A Security.

Q Did you think that he might be dangerous?

A Absolutely.

Q Did you think that he might be violent?

A I didn't have any knowledge of whether he may be violent.

Q Did you feel safer that he was -- that he was restrained?

A Not necessarily that he was restrained; there was plenty of officers in the room. I wasn't too worried about my safety.

Q And you realized that he was charged with first degree murder, right?

A Yes.

Q Did any of the alternate jurors or any of the jurors in the juror pool, did they ever discuss seeing the cuffs or the restraints?

A No ma'am.

[Page 44]

MS. MEINBERG: I have nothing further.

THE WITNESS: Thank you.

THE COURT: Anything further, Counsel?

MS. BRUINSMA: Yes, your Honor.

**FURTHER EXAMINATION BY THE
PROSECUTION**

BY MS. BRUINSMA:

Q You indicated that you did notice, at one point, that he had the belly chain and that his hands were cuffed to that. At what point was it that you noticed that?

A You know, I don't really recall at what point it was that I noticed that. Like I said, I just noticed that his hands were really close together because he was trying to draw on his legal pad. I couldn't tell you exactly what part of the process that was at.

Q Okay.

Did the -- did the subject of the belly chains come up at any point during deliberations?

A No ma' am.

Q Did seeing him in the belly chains make -- affect your verdict in any way?

A Not at all.

Q Now you indicated that you presumed that the restraints that were used were a security measure?

A Right.

Q Did you think that was anything unusual?

[Page 45]

A No, not at all.

Q Did you -- you indicated that it -- you thought that it might mean that the Defendant was dangerous. Do you presume that was just because of the nature of the case?

A Absolutely.

Q Nothing specific to him?

A No, not at all.

Q Would you assume that most defendants would wear those types of restraints in a courtroom?

A If charged with murder, I would assume, yes.

Q And again, any of the restraints that you viewed, did they have any affect on your verdict whatsoever?

A No ma' am.

Q Did you decide the case based on the evidence?

A Absolutely.

MS. BRUINSMA: I don't have any further questions.

THE COURT: Anything further Ms. Meinberg?

MS. MEINBERG: Nothing, thank you.

THE COURT: Thank you, sir. We appreciate your time and coming back here. Please don't discuss your testimony with any of the other jurors and you are excused.

THE WITNESS: Thank you.

(At 9: 59 a.m., witness excused)

THE COURT: Before you have a seat sir, raise

[Page 46]

your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. LEWIS: I do.

THE COURT: Please have a seat. In a moment, I am going to ask you to state and spell your name, but before I do that -- just so that you know, the attorneys are obviously different than the attorneys that were present during the trial. They are going to have some questions to you -- for you about an issue or issues that arose during the trial. If you don't know something, please make sure that you let us know; we don't want you to guess at anything.

Okay.

THE WITNESS: Okay.

THE COURT: Please -- you have to speak right in the end of that microphone. If you move to either side, then sometimes our recording system doesn't pick up so well.

So, please state and spell your first and last name for the record if you would, sir.

THE WITNESS: Bradley Lewis, B-r-a-d-l-e-y L-e-w-i-s.

THE COURT: Counsel.

[Page 47]

BRADLEY LEWIS

**Called to testify at 10:01 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Mr. Lewis.

A Good morning.

Q Do you recall being a juror in the Ervine Davenport case?

A Yes I do.

Q And has anyone discussed with you the reason that you are here today?

A No, they have not.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Is there anything about his appearance in court that stands out in your mind?

A No.

Q Anything about how he presented himself stand out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the trial?

A Not to my recollection.

Q Did you --

THE COURT: I'm sorry, I missed it -- not to your

[Page 48]

recollection?

THE WITNESS: Correct.

THE COURT: Go ahead.

BY MS. BRUINSMA:

Q Don't recall how he was dressed at this point?

A Um, no -- it was about three years ago, so it is kind of hard to recall.

Q Did you notice whether the Defendant was restrained in any way?

A I do not remember noticing it. I remember a couple of days in, another juror noticed it and pointed it out.

Q I'm sorry, say that again?

A Another juror noticed it and pointed it out.

Q What exactly was said, do you recall?

A Just -- him saying, oh it looks like he is handcuffed.

Q Do you recall at what point in the trial that comment was made?

A I believe that it was a couple of days in, but I'm not sure.

Q Do you recall where you were when the comment was made?

A I believe that we were actually in the box.

Q In the box.

So you are referring to the jury box inside the courtroom?

A Correct.

[Page 49]

Q And this -- do you recall whether this was during the trial or if there was a break at the time or when the comment was made?

A I do not remember.

Q Okay.

When -- do you recall who it was that mentioned that?

A No, I can't think of it.

Q When that juror mentioned that, did he or she just mention that to you?

A I believe that it was said to a couple of the jurors sitting right next to me.

Q Okay.

And what, if anything, did you do at that point?

A Nothing. I just noticed it and then they came back to talking -- the lawyers.

Q Okay.

So you did notice, after that comment being made, that he was wearing a restraint?

A Yes.

Q And specifically was it a handcuff or -- did you notice anything else?

A Not to my recollection. I just remember that he was restrained.

Q And at what part of his body was it that you noticed was

[Page 50]

restrained?

A I can't think of it off the top of my head. I just remember the comment being made.

Q Okay.

Did -- did that have any significance to you, the Defendant being restrained?

A No.

Q Did you presume that defendants are typically restrained in a courtroom setting?

A I just assumed.

Q That that was just kind of a standard--

A Yes.

Q -- procedure?

A Correct.

Q Okay.

Did you think that there was any special reason that the Defendant would be wearing them?

A No, just that he was in court.

Q Was it anything that you really gave much more attention to other than just making note of it?

A No.

Q And again, do you recall at what point in the trial that took place?

A No, I do not remember.

Q Okay.

[Page 51]

Do you relo -- recall how long of a period it was that you would have noticed that?

A Not to my recollection.

Q Okay.

Did -- other than the discussion that you just described for us in the jury box, did the jurors discuss the Defendant wearing handcuffs when deliberating?

A No.

Q Was it a topic that came up in the jury room at all?

A I believe they discussed it for a minute or two once we got back that day, but nothing after that.

Q Okay.

And what would the discussion have been, do you know?

A No.

Q Was it something that was discussed with the -- all of the jurors as a whole?

A No. It was just a couple of people mentioning it.

Q Okay.

Did that issue affect your verdict at all?

A No.

Q Did it make you more inclined to find the Defendant guilty?

A No.

Q Did it make you think anything about the Defendant in general as a person?

[Page 52]

A No.

Q Okay.

And during the deliberations was that a topic that was discussed?

A No.

Q When you -- when you were -- during the course of deliberations, did you discuss the evidence that was presented -- during the trial?

A Yes.

Q Is that what your verdict was ultimately based on, was the evidence?

A Yes.

Q Okay.

Now, did you -- do you specifically remember the Defendant wearing anything around his waist, a belly chain?

A Not to my recollection.

Q And do you recall anybody making comment about that?

A Not about a belly chain, no.

Q Okay.

And what about any leg shackles. Did you see whether the Defendant's legs were shackled or restrained?

A Not to my recollection.

Q And did anybody make a comment to you regarding that, the leg shackles?

A Not specifically leg shackles, no.

[Page 53]

Q When you say not specifically, are you referring back to what we just discussed a minute ago, the handcuff restraints?

A Yes.

Q And that is the only comment that you recall?

A Yes.

Q Okay.

Do you recall whether the Defendant was wearing an orange jumpsuit at any point during the trial?

A I can't recall.

Q Okay.

I don't have any further questions.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning.

A Good morning.

Q Thank you, so much for coming.

During the first and part of the second day when they picked the Jury, can you tell me where you were sitting in the gallery?

A Um, I believe that I was on that side --

Q On the right-hand side behind the officer?

A Correct.

Q Do you remember whether it was towards the front or the

[Page 54]

back?

A I believe it was the second or third row.

Q From the front?

A From the front.

Q Okay.

And at any point during picking the Jury, did you look up at Mr. Davenport and see a belly chain around his waist at that time?

A It is possible, but I don't remember.

Q Okay.

And when you were sitting in the jury box, do you remember where you were sitting in the jury box?

A I was in the second seat in the front.

Q On this end from the right?

A Correct.

Q Okay.

THE COURT: Again, further away from the witness box.

THE WITNESS: Yes.

THE COURT: At the end --

THE WITNESS: At the far end.

THE COURT: Okay.

THE WITNESS: Correct.

BY MS. MEINBERG:

Q And when there was that discussion in the jury box, was it

[Page 55]

during one of those stand up and stretch breaks -- was it just during a lull in the action?

A I believe it was just a lull in the action. I can't remember exactly who it was, but one of the jurors had leaned over and I heard them mention it.

Q So you think that it was a juror that was sitting behind you?

A Behind or to my right.

Q Okay.

THE COURT: I am just going to jump in and clarify.

Did someone mention that to you while you were sitting in the jury box, is that what your testimony is?

THE WITNESS: Correct.

THE COURT: Okay, thank you. Go ahead, Counsel.

BY MS. MEINBERG:

Q And then at that point, you told the Prosecutor that you looked over and saw that he was, indeed, shackled?

A Correct.

Q Okay.

And did you ever hear any sound of chains clanking or anything that might suggest that he had something on his legs?

A Not to my recollection.

Q Okay.

[Page 56]

And you knew that Mr. Davenport was charged with first degree murder, correct?

A Correct.

Q And did you notice the deputies in the courtroom during the trial?

A Yes I did.

Q And you noticed that he was restrained?

A Correct.

Q What did you think that meant? Did you think that he might be dangerous?

A I just assumed that it was part of the procedure.

Q Okay.

Did you think that he had done something wrong?

A I assumed that he was being charged with something wrong.

Q Did you see anyone else in the courtroom shackled?

A No.

Q Okay.

Did any of the alternate jurors or any of the other jurors sitting in the gallery during voir dire, did any one of those jurors mention his shackles?

A No.

Q Thank you, very much.

A No problem.

THE COURT: Anything further, Counsel?

MS. BRUINSMA: No, your Honor.

[Page 57]

THE COURT: Thank you, sir. I am going to go ahead and excuse you. Please don't discuss this testimony with any of the other jurors; but we appreciate your time.

THE WITNESS: Thank you.

(At 10:11 a.m., witness excused)

THE COURT: Before you have a seat ma'am, raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MS. PADGETT: I do.

THE COURT: Please have a seat.

When you respond, you need to make sure that you speak close to the microphone and right in the end. If you move to either side, sometimes our recording system doesn't pick up.

THE WITNESS: Okay.

THE COURT: The attorneys are going to have some questions for you; the attorneys are different than the attorneys who were present during the trial.

THE WITNESS: Okay.

THE COURT: Just so that is clear.

If you don't understand something or don't remember something, would you please make sure that you tell us, we don't want you to guess at anything. Okay.

[Page 58]

THE WITNESS: Okay.

THE COURT: With that, please state and spell both your first and last name, ma'am.

THE WITNESS: Jennifer Padgett, J-e-n-n-i-f-e-r. Padgett is, P-a-d-g-e-t-t.

JENNIFER PADGETT

**Called to testify at 10:12 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Ms. Padgett.

A Good morning.

Q Thank you for being here this morning.

Do you recall being a juror in the Ervine Dav-
enport case?

A Yes.

Q And has anyone discussed with you the reason that you are here today?

A A little bit. We were trying to guess in the witness room, but nothing --

Q Okay.

Nobody has made any specific comments to you?

A No.

Q Okay.

During the trial, do you recall the Defendant being present in the courtroom?

[Page 59]

A Yes.

Q Is there anything about the Defendant's appearance in court that stands out in your mind?

A No.

Q Is there anything about how the Defendant presented himself in court that stands out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the trial?

A I think that when we first came in, before we were selected, I think that he had on jail, orange jumpsuit. And then after that, he had on a suit -- a shirt and tie.

Q Did that jail orange suit have any significance to you?

A No. I mean, I knew why we were here and I assumed that is where he was.

Q Okay.

You would presume that with a murder charge that the Defendant would likely be in custody?

A Right.

Q Okay.

And that is not something that you found unusual or surprising?

A No.

Q Okay.

Do you -- did you notice whether the Defendant

[Page 60]

was restrained in any way during the trial?

A No. I -- when we -- another juror had mentioned something about that and that is why there was a screen or a -- what do you call those things -- a

curtain, I guess that -- before that, it didn't even really factor in -- I just didn't think about it.

Q When that was mentioned to you, at what point in the trial did that occur?

A I -- I really don't know. It was probably in the middle of it at some point, just conversation, lunch time.

Q Okay.

And you -- you recall it being at lunch that this occurred?

A Or jury room -- I don't really remember.

Q Okay.

The comment that was made, did it cause you to then notice whether the Defendant was restrained in the courtroom?

A No, it really didn't factor in to it.

Q Okay.

Do you specifically remember whether you viewed the Defendant wearing handcuffs?

A No.

Q You do not remember or you did not see it?

A I didn't -- I don't recall seeing it.

[Page 61]

Q Okay.

Would it have surprised you for the Defendant to be wearing handcuffs?

A While in the courtroom?

Q Yes.

A No, I guess not. I --

Q Okay.

A I think that it would be uncomfortable.

Q When the juror mentioned that to you, did it have any significance to you, the fact that he would have been wearing handcuffs?

A No.

Q Did the fact that the Defendant wearing handcuffs influence you at all?

A No.

Q You indicated that there was one juror that brought that up with respect -- was it specifically with respect to handcuffs then?

A He just said that he was restrained.

Q Okay.

A And did I notice it and I didn't even know, no.

Q All right.

Was that anything that was discussed amongst all of the jurors?

A I don't think so; I just remember that one comment.

[Page 62]

Q Was that issue, restraints or handcuffs, discussed during deliberations?

A No, not that I recall.

Q Was the fact that the Defendant was wearing handcuffs or restraints -- did that make you more inclined to find him guilty?

A No. The facts of the case did that.

Q So when you were in deliberations, did you rely on the evidence that was presented to reach your verdict?

A Absolutely.

Q Did you specifically notice whether the Defendant's legs were shackled?

A No.

Q And was that an issue that was brought to your attention by anyone?

A No.

Q Did you notice whether the Defendant was wearing a belly chain that the handcuffs would have been attached to?

A I don't -- I don't recall.

Q And was that anything that was specifically mentioned to you?

A No.

Q Was that anything that you recall being discussed by the jurors during deliberations?

A No.

[Page 63]

Q Would any of those restraints make you more inclined to find the Defendant guilty?

A No.

Q You based your verdict on the evidence that you heard?

A Yes.

MS. BRUINSMA: I don't have any other questions.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning.

A Good morning.

Q Thank you so much for coming.

When the Jury was picked the first day and part of the second day, can you tell me where in the gallery you were sitting?

A Where was I sitting back here?

Q Yes.

A Uh, I think that I was over -- a couple of rows back on this side, I think.

Q On the left side?

A Yes.

Q Okay.

And in the jury box, do you recall where you were sitting?

A Right here.

[Page 64]

Q Front row.

A Front row.

Q The very end seat?

A Mmm hmm.

Q And was there another seat to your right?

A Oh, maybe I wasn't -- I was right here somewhere.

Q Okay.

A I was here. Yeah.

Q So, when they were picking the Jury, did you ever look over at Mr. Davenport? Could you see whether his wrists were shackled at that point?

Q Um, he was much like he was today. He is taking notes. I never noticed that he was restrained.

Q Okay.

Do you see the handcuff on his wrist now?

A Uh, yes I can.

Q Okay.

A But I did not notice that before. No, he was just -- I noticed that he was taking notes.

Q And were you -- were you ever one of the jurors that had to approach the bench and talk to the Judge about any special problem in serving?

A No.

Q And when the Jury stood up to take its breaks, did you -since you were at this end, near the witness stand, did you

[Page 65]

ever look over and notice that he had a handcuff on his arm at that point?

A No, I never noticed it.

Q And even when he turned around to look at the screen behind him, you didn't notice it at that point?

A No.

Q Okay.

Did you ever hear a clanking noise of chains, possibly on his feet?

A No.

Q And you knew that he was charged with first degree murder, correct?

A Yes.

Q And during trial, did you see the deputies in the courtroom?

A Yes, I did notice them.

Q And after the juror's comment, did -- did you think that he might be dangerous?

A Uh, well I -- I assumed that they were here for our protection, but -- for everyone's protection. But I did not feel threatened by him, no.

Q Okay.

Did you see anyone else shackled in the courtroom?

A I think that there were some witnesses that came in that

[Page 66]

might have been -- I'm trying to remember, it was a while ago.

Q And so since you were seated at this end here by the witness stand, were you worried about your safety with regard to those witnesses?

A I do recall one witness who made me a little nervous, but -- but I was very glad that there was a deputy right there.

Q There was a deputy right there?

A Absolutely.

MS. MEINBERG: Thank you.

MS. BRUINSMA: Just a quick follow up.

**FURTHER EXAMINATION BY THE
PROSECUTION**

BY MS. BRUINSMA:

Q Deputies in the courtroom, did you presume that was pretty standard practice for a trial?

A Yes I did.

Q You didn't think that was anything unusual to you on that?

A No.

Q Okay.

MS. BRUINSMA: No other questions.

THE COURT: I have a question.

Do you recall which juror it was that mentioned that the Defendant was restrained or that Mr. Davenport was restrained or where they were seated? That is two questions.

[Page 67]

THE WITNESS: Right.

THE COURT: That's not fair.

THE WITNESS: I know. I am trying to remember. It just seemed like it was -- I remember one saying, well aren't you nervous -- does it make you nervous at all that we have all of these guards or whatever and I said no, I am feeling alright about it.

And they said, well he is restrained and I said, okay. Really, I didn't notice that and they said, that is why there is a curtain there so it doesn't influence what we think.

It was kind of that they were aware of the process; it was not like they necessarily saw anything, it was

just -- I think that it was an assumption that that is why it was there.

THE COURT: The curtain, is that what you are --

THE WITNESS: Yeah, the black curtain.

THE COURT: And you are talking about the black curtain around the table?

THE WITNESS: Right. Right, the skirting, I guess.

THE COURT: Do you recall where you were at when that conversation took place? I don't know if you were seated in the box or if it was during a break or the lunch hour. If you don't remember, then that is fine, but

[Page 68]

THE WITNESS: I don't remember. I just -- I kind of remembered it, just was kind of like, oh, alright then.

THE COURT: Was everyone around or just a few of you during the conversation --

THE WITNESS: I don't remember --

THE COURT: -- do you recall.

THE WITNESS: I don't. I'm sorry.

THE COURT: Did the conversation take place during deliberations?

THE WITNESS: No, it seemed like it was maybe right towards the beginning.

THE COURT: Do you ever recall any conversation during deliberations or anyone mentioning anything about the Defendant being restrained or cuffed or there being chains of any sort?

THE WITNESS: No.

Now, the only thing that I do recall is something about when he testified that they were sure -- there were more guards because he wasn't.

THE COURT: Did somebody make that comment to you or was that an observation?

THE WITNESS: I really -- I -- would really not notice those kinds of things, so I am guessing that somebody probably said something. But it wasn't -- it never really factored in to it to me. I was sitting

[Page 69]

probably the closest of everyone and I think that is why the comment was made was something about, when he actually testified, did that make me nervous and I said, not -- actually I made the comment to me, he actually looks like a big teddy bear, I said, no he doesn't make me nervous.

THE COURT: Do -- what you just discussed then, the comment about there being more guards, maybe, in the courtroom when he testified --

THE WITNESS: Mmm hmm.

THE COURT: Was that during deliberations or was that made some other time, do you know?

THE WITNESS: I think that was probably about the same time that he testified, you know.

THE COURT: Just so that we are clear.

THE WITNESS: No.

THE COURT: Again, I don't want you to guess. If you don't know, let us know. When you say probably, that always concerns us -- do you know if that occurred in deliberations or some other time and if you don't know, let us know. Or when --

THE WITNESS: To my recollection, none of that happened in the deliberations because we were pretty focused -- we were actually really focused on the evidence and what was -- we tried to keep out what we thought was --

[Page 70]

our interpretations. We did want interpretations, we wanted just the evidence and so we were trying to focus on that. So, I really don't think there was any point where we even mentioned -- I don't think -- I am trying to remember.

But it seems to me, and I know that is probably not a good descriptor, but it was just, you know, a little conversation or a little comment that didn't really weigh on my mind.

THE COURT: And just so -- you don't recall who made any of those -- those comments. It sounds like there were a couple of comments to that affect.

THE WITNESS: I -- um -- if I had to guess

THE COURT: I don't want you to guess.

THE WITNESS: I know.

THE COURT: Okay.

THE WITNESS: I won't.

THE COURT: If you don't know, then that is fine.

THE WITNESS: I don't. I didn't have conversations with many of our -- here and there. But there were just a couple that I was more linked to than the others because of the proximity, so --

THE COURT: Where they were seated.

THE WITNESS: Right.

THE COURT: So --

[Page 71]

THE WITNESS: Yeah.

THE COURT: I have asked a lot of questions, so I am going to give the attorneys another opportunity to follow up with anything.

MS. BRUINSMA: Just a couple of things, your Honor, thank you.

BY MS. BRUINSMA:

Q Ms. Padgett, the conversation about the table skirt, just so that I understand, is it your testimony that was not during deliberations?

A No, it was not during deliberations.

Q Okay.

It was at some point other during the trial and it was just -- was it a fairly brief comment then?

A Yes.

Q And once you heard that comment, did that make you think anything in particular about the Defendant himself?

A No. I -- the charges -- the evidence, all the testimony that is what made me think of what I needed to think or make the decision that I need to make. That didn't really influence me.

Q So the issue about the table skirt and the Defendant being restrained, that was not something that impacted your verdict?

A So, I just figured it was procedure.

[Page 72]

MS. BRUINSMA: No other questions.

Thank you.

THE COURT: Ms. Meinberg.

FURTHER EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Just briefly, just so I understand. There were two separate conversations; one was about the skirt and one was about how close you were when he was testifying?

A Yes.

Q Okay.

Was it more than two discussions or --

A No. No.

Q -- just --

A They were just more like flippant remarks. It wasn't like a lengthy, let's discuss --

Q Okay.

And if you recall, when Mr. Davenport did take the stand, the Jury had to go out in the hallway for a minute?

A Mmm hmm.

Q And then when you came back in he was sitting in the witness stand. Did you guess

THE COURT: Hang on just a second. Yes you recall that?

THE WITNESS: Yes, I recall that.

[Page 73]

THE COURT: Go ahead.

BY MS. MEINBERG:

Q Where there any -- did you think anything or was there any discussion -- oh yeah, they had to take his cuffs off so that he could get up there?

A I think that is when the -- yeah, I think that is when the comment came about. And I don't think that it happened before his testimony; I think it was right after. That is why we had to go out because they needed to move him.

MS. MEINBERG: Okay. Thank you.

THE COURT: Anything further?

MS. BRUINSMA: No, your Honor. Thank you.

THE COURT: We appreciate your time here today ma'am. I am going to go ahead and excuse you. Please don't discuss your testimony with any of the other jurors. Again, we appreciate your time and sorry we had to bring you back.

THE WITNESS: Okay. Thanks.

(At 10:30 a.m., witness excused)

THE COURT: Right over here sir. Before you have a seat, please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. RUZICK: I do.

[Page 74]

THE COURT: Please have a seat sir.

I am going to ask you to state and spell your first and last name; but before you do that, a reminder that you need to speak right into the end of that microphone. If you move to either side, our recording system doesn't pick you up as well and sometimes it is hard to hear.

The -- I am going to turn it over to the attorneys. The attorneys are different than the attorneys that were present during the trial and when we go through this process of asking you questions, if you don't remember something, please don't guess. Just let us know that you don't remember, we realize that the trial was over years ago.

So, please state and spell your first and last name for the record.

THE WITNESS: Thomas Ruzick. T-h-o-m-a-s R-u-z-i-c-k.

THE COURT: Ms. Bruinsma.

THOMAS RUZICK

Called to testify at 10:31 a.m.;
testified as follows;

EXAMINATION BY THE PROSECUTION

BY MS . BRUINSMA:

Q Good morning, Mr. Ruzick, is it?

A Correct.

[Page 75]

Q Do you recall being a juror on the Ervine Davenport case?

A Yes.

Q Has anybody discussed you the reason that you are here today?

A No.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Is there anything about his appearance in court that stands out in your mind?

A No.

Q Anything about how he presented himself stand out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the trial?

A Uh, if I -- if I believe correctly, he was wearing different clothes at different times. I remember him wearing a tie -- that is about all I can remember.

Q Did you notice whether the Defendant was restrained in any way during the trial?

A No.

THE COURT: No he wasn't or no you don't remember?

THE WITNESS: Uh --

[Page 76]

THE COURT: I just want to clarify the answers.

THE WITNESS: No, I don't remember him being restrained.

BY MS. BRUINSMA:

Q Did you -- do you remember -- I asked that. Did you see if the Defendant was wearing handcuffs during the trial?

A No.

Q Did anybody -- any of the other jurors mention to you that the Defendant was restrained?

A No.

Q Did you notice whether the Defendant's legs were shackled during the course of the trial?

A No.

Q Do you recall whether the Defendant was wearing an orange jump suit at any point during the trial?

A Now as I recall, I believe that he was always dressed in civilian clothes, I guess you would call it.

MS. BRUINSMA: I don't have any other questions. Thank you.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning. Thank you for coming

When you first came into the courtroom on the first day and they were picking the Jury, do you remember

[Page 77]

where in the back rows you were sitting?

A I believe that I was on this side.

Q The left side --

A Yes.

Q -- directly behind me.

A Yes.

Q And when you were in the jury box, do you remember which seat you were in?

A I believe that I was front row, I can't remember which seat, but I believe it was front row.

Q And at any point when you were sitting in the back, did you ever look over at Mr. Davenport and see a handcuff on his -- on his wrist?

A No.

Q And at any point when you took a stand and stretch break or when you came in and out of the box, did you ever look over and see a handcuff on his wrist?

A No.

Q What about when he turned around to look at the screen behind him?

A Nope.

Q Did you notice that he had limited movement at the table? Did you notice that his left hand never moved?

A No.

Q Okay.

[Page 78]

And did you hear anything like chains clanking that might suggest that something was on his feet?

A No.

MS. MEINBERG: Great. Thank you. I have nothing else.

MS. BRUINSMA: I have no additional questions, your Honor.

THE COURT: Do you ever recall any other juror, at any point, bringing up or pointing out that the Defendant was restrained in any way?

THE WITNESS: No.

THE COURT: Did that ever come up during deliberations, to your recollection?

THE WITNESS: No, not to my recollection, no.

THE COURT: I don't have any further questions.

Any follow up questions?

**FURTHER EXAMINATION BY THE
PROSECUTION**

BY MS. BRUINSMA:

Q Was the verdict based on the evidence that you heard?

A Yes.

MS. BRUINSMA: No other questions.

MS. MEINBERG: No other questions.

THE COURT: Thank you, sir. We appreciate your time. Sorry to have had to brought you back in. Please don't discuss your testimony with any of the other jurors

[Page 79]

that have been subpoenaed.

Thank you, sir.

(At 10:36 a.m., witness excused)

THE COURT: Before you have a seat sir, raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. VANDERVEEN: Yes.

THE COURT: Please have a seat sir.

I am going to have you state and spell your first and last name in a moment. Before I do that, make sure that when you respond that you speak right into the end of the microphone. If you move to either side, sometimes our recording system doesn't pick up as well and it is difficult to hear your answer.

The attorneys are different than the attorneys that were present during trial, as you may have noticed. They are going to ask you some questions. I may have a couple of questions.

If you don't remember something or you don't recall something, please make sure that you tell us, we don't want you to guess at anything.

So, please state and spell your first and last name for the record, sir.

[Page 80]

THE WITNESS: James VanderVeen, J-a-m-e-s V-a-n-d-e-r-V-e-e-n.

THE COURT: Go ahead.

MS. BRUINSMA; Thank you, your Honor.

JAMES VANDERVEEN

**Called to testify at 10:38 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Mr. Vanderveen.

A Good morning.

Q Do you recall being a juror in the Ervine Davenport case?

A Yes I do.

Q And has anyone discussed with you the reason that you are to testify here today?

A No, they have not.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Can you speak louder, please?

Q I sure can.

During the trial, do you recall the Defendant being present in the courtroom?

A Sure.

Q Is there anything about the Defendant's appearance in -- when he was in court that stands out in your mind?

A In the two week period, I'd say no.

[Page 81]

Q Do you recall what the Defendant was wearing during the course of the trial?

A Maybe somewhat, I could tell somewhat, but I don't know if you want to know that or not. I can kind of guess. Maybe the first time I might have seen him in an orange suit and then a short time after street clothes. I think most of the time street clothes. To be honest, I don't recall 100 percent.

Q Did the orange suit have any significance to you?

A No. Well other than he was incarcerated.

Q Okay.

A I mean --

Q Did you find that unusual for a murder case that the Defendant would be incarcerated?

A No.

Q Did you notice whether the Defendant was restrained in any way during the trial?

A You know, it is possible that first day and whether I actually saw it or remember some of the other jurors discussing it -- we are talking three years ago. But maybe he had some handcuff type things on or ankle bracelets. I recall that might have been that way, but you are talking three years ago.

Q I understand. It is obviously like you said, it has been three years, so is it difficult to remember every

[Page 82]

detail?

A Well I am sure that every detail -- I remember a number of things, but every detail I may not remember exactly.

Q Okay.

Now, you indicate -- it is difficult for you to remember whether it was something you saw or you heard another juror mention. Was there discussion among the jurors about handcuffs?

A I don't know if there was discussion. It might have been -- if there was discussion, it might have been something like, you know, I saw handcuff or

something on him. I—it seems as though he may have had them on, I might have saw them. I am a little fuzzy on that.

Q Okay.

Do you recall at what point during the trial this would have been, that a comment was made?

A No I don't.

Q Was the fact that the Defendant was wearing handcuffs have any significance to you?

A None.

Q Would you presume that defendants typically wear handcuffs during the course of a trial?

A Since I didn't do this every day, I didn't think that it was unusual.

Q Did the fact that the Defendant was wearing handcuffs

[Page 83]

influence you at all as a juror?

A No.

Q You indicated that there was some comments made by other jurors about the handcuffs. Was there discussion about that?

A No, I think -- you know, my guess would be that everyone of us, this was the first time that we had

gone through this type of situation and it is unusual to see that. You are seeing it first hand and you are seeing it as opposed to seeing it on TV or seeing it in real.

Q So while it wasn't something you thought unusual for a courtroom, you are not necessarily used to a courtroom setting and so it was something that was commented on. Is that fair to say?

A I would be guessing so, but that was probably the nature of it.

Q Um, did -- did the comments about handcuffs influence your verdict at all?

A If he did, indeed, have handcuffs on, it was only for a, I think, the first few minutes that I might have saw him; so I would say no, that it didn't influence.

Q Do you recall the handcuffs being discussed by the jurors during deliberations?

A No.

Q Did you notice whether the Defendant was wearing belly

[Page 84]

chains that the handcuffs would have been hooked to?

A You are asking me, did I notice that?

Q Yes. Did you see that?

A I believe that I might have seen that.

Q Do you recall at what point during the trial?

A Well the only time, if I did see anything, was during the first few minutes or the first few hours of the whole process.

Q During voir dire when they were selecting the Jury?

A Oh boy -- I don't recall whether I could have seen that from out there in the seating area back there or not. So, whether I had to say I seen that, I probably would have saw it here if -- I don't know. I can't answer that question with surety.

THE COURT: Let me just jump in -- your recollection is that you don't remember when you saw it, but it was at the beginning of the trial; is that what you are telling us?

THE WITNESS: I believe that is what I remember.

THE COURT: All right.

Then let me also ask a question too, because -- I think that you were asked a question and the question was something in the affect that you indicated that there were comments or conversations about the restraints. And I just want to clarify.

[Page 85]

First of all, do you remember whether -- do you remember whether someone made a comment or

conversation about any type of restraints whether they wore leg or ankle restraints or belly restraints or handcuffs -- first of all, let me ask you that. Do you remember whether a comment was made by any other juror?

THE WITNESS: I believe that there was a comment, but I don't remember any conversation taking place about it. They just, did you see handcuffs, type of deal.

THE COURT: All right.

Let me ask you the next question. Do you remember whether there was more than one comment made or don't you know one way or the other?

THE WITNESS: Say that again, please.

THE COURT: Do you remember if there was more than one comment made?

THE WITNESS: There was little comment made. I just remember a comment or so, it wasn't continuous or ongoing, no.

THE COURT: Do you remember which juror made the comment?

THE WITNESS: No.

THE COURT: All right.

I'm sorry, go ahead Ms. Bruinsma.

MS. BRUINSMA: Thank you, your Honor.

[Page 86]

BY MS. BRUINSMA:

Q Do you recall whether you saw that -- whether the Defendant's legs were shackled?

A You are asking me if I thought I saw that?

Q Do you remember seeing that?

A That his legs were?

Q His legs being shackled.

A I believe that I did, but I am not going to bet my life on it. I don't know. I thought he was, but today there is a curtain there, so how I would have, I don't remember.

Q If his legs were shackled, would that have any significance to you?

A No.

Q Would that have affected your verdict at all?

A No.

Q Was that something, the leg shackles, that was discussed by the jurors?

A Not discussed that I recall, no.

Q Do you recall any comments being made?

THE COURT: About the leg shackles?

BY MS. BRUINSMA:

Q About the leg shackles?

A It is possible that something was commented on maybe when we were walking down the aisle that he had shackles on or that kind of thing. That is pretty much it. There was no

[Page 87]

discussion that I recall taking place to that.

Q Would the fact that the Defendant had leg shackles on, had handcuffs on, had a belly chain on mean anything to you?

A In what way?

Q As far as your verdict? Did that affect your verdict?

A No.

Q Was your verdict based on the evidence that you heard in court?

A That is correct.

Q Do you recall any discussion during deliberations about leg shackles?

A I don't recall any discussion taking place at that time.

Q Do you recall any discussion during deliberations about handcuffs?

A I don't recall any discussion taking place about handcuffs.

Q Do you recall any discussion during deliberations about belly chains?

A No I do not.

Q To your recollection, the deliberations were based solely on the evidence that was presented?

Q That would be correct.

MS. BRUINSMA: I have no other questions.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

[Page 88]

Q Good morning.

A Good morning.

Q Thank you so much for coming in.

Now when the Jury was being picked, do you remember where you were sitting in the gallery?

A Yeah, I believe over here -- on my left side towards the back there.

Q All right.

And there were actually three sessions, the morning, the afternoon and a second day?

A I was going to say, I didn't think that it took place on the first day, that is correct.

Q Did you always sit in the same spot?

A I don't recall, but not necessarily.

Q Okay.

When they were picking the Jury, did you ever look over at Mr. Davenport and see the belly chains during voir dire?

A When they were picking the Jury?

Q Yes.

A That is when maybe I seen it from back there. I am not sure, I'd have to go back and look at this point right now, to be honest.

Q Okay.

And when you were sitting in the box, can you

[Page 89]

tell me where you were in the box?

A Yeah, I believe that I was in the back row in the -- second or third chair from your right.

Q Okay.

At the far end, the second or third chair?

A Yeah, I was towards the middle or right side of that upper row.

Q And at any point, did you hear the clanking of chains that might also indicate that he had something on his legs?

A I don't recall that happening, no.

Q And did you notice that there were deputies in the courtroom?

A I do recall that.

Q Do you recall how many deputies?

A It seems like there was one at a door and maybe one sitting over there and maybe one in the back. Seems like there was at least two, possibly three.

Q Okay.

And you knew that Mr. Davenport was charged with murder one, right?

A Yes I did.

Q And given that you saw the restraints at some portions of the trial, did you think that he might be dangerous?

A Well I would assume that, yes.

Q Okay.

[Page 90]

Did you think that he had done something wrong and that is why he was shackled?

A Well it was a murder trial, correct?

Q Yes.

Okay.

Did you see anyone else shackled in the courtroom?

A Not that I recall.

Q Did you feel safer, as a juror, knowing that he was shackled?

MS. BRUINSMA: Your Honor, I guess that I would object to that question. I don't know that it is really relevant to the questions that we are looking --

THE COURT: I'll allow it.

MS. MEINBERG: Thank you.

THE WITNESS: Allow what, an answer?

THE COURT: You can answer.

THE WITNESS: State your question again, please.

BY MS. MEINBERG:

Q Did you feel safer knowing that Mr. Davenport was charged with murder one and knowing that he was shackled?

A I wasn't fearful, but would I have been safer? Yeah.

MS. MEINBERG: Thank very much.

THE COURT: Any further questions.

MS. BRUINSMA: Just a couple of questions.

[Page 91]

**FURTHER EXAMINATION BY THE
PROSECUTION**

BY MS. BRUINSMA:

Q Just a second ago you indicated that you made some assumptions that the Defendant was dangerous. Is that based on the fact that he was charged with murder?

A I would think so, yes.

Q Did the fact that he was shackled impact that assumption?

A State that again, please.

Q The fact that Mr. Davenport was shackled, did that -- did that alone make you think that he was a dangerous person?

A You know, I don't know if it would necessarily make him more dangerous, maybe that was protocol. I guess I would have thought that was protocol.

Q So you wouldn't think it unusual for somebody in the course of a trial to be restrained?

A I wouldn't think so, no, not for -- not for the type of crime you are talking, no.

Q And again, the fact that there was any restraint used on Mr. Davenport, did that influence your verdict in any way?

A No, it did not.

MS. BRUINSMA: No other questions.

THE COURT: Anything further, Counsel?

MS. MEINBERG: Nothing, Judge. Thank you.

THE COURT: We appreciate your time. We are sorry that we had to bring you back in for this. I am

[Page 92]

going to go ahead and excuse you. Just make sure that you don't speak with anyone -- any of the other jurors about your testimony.

THE WITNESS: No.

THE COURT: Thank you, sir.

THE WITNESS: Yep.

(At 10:53 a.m., witness excused)

THE COURT: Before you have a seat sir, please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. VANDERMEULEN: Yes.

THE COURT: Please have a seat sir.

I am going to ask you to state and spell your first and last name in a moment. But before I do that, just a couple of things.

Make sure that you speak right into the end of that microphone. If you move to either side, sometimes the recording equipment doesn't pick it up so well and the microphone doesn't pick it up and it is difficult to hear. So, just so that you know that.

We are going to ask you some questions. If you don't remember something, please just make sure that you let us know; we don't want you to guess at something.

[Page 93]

THE WITNESS: Mmm hmm.

THE COURT: And you might notice that the attorneys are different than the attorneys that were present during the trial; I'll just point that out.

With that, please state and spell both your first and last name, sir.

THE WITNESS: Thomas VanderMeulen, T-h-o-m-a-s V-a-n-d-e-r-M-e-u-l-e-n.

THE COURT: Ms. Bruinsma.

THOMAS VANDERMEULEN

**Called to testify at 10:55 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, Mr. VanderMeulen. Do you recall being a juror on the Ervine Davenport case?

A Yes.

Q Has anybody discussed the reason that you are here today?

A No.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Is there anything about his appearance in court that stands out in your mind?

A Pardon.

Q Is there anything about the Defendant's appearance, when he

[Page 94]

was in court, that stands out in your mind?

A No.

Q Is there anything about how the Defendant presented himself that stands out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the course of the trial?

A No.

Q Do you recall if the Defendant was restrained in any way during the trial?

A No.

Q Did you see whether the Defendant was wearing handcuffs during the trial?

A No.

Q Do you recall any other jurors mentioning handcuffs?

A No.

Q Did you see whether the Defendant was wearing a belly chain that would have been hooked to the handcuffs during the trial?

A No.

Q Do you recall any other jurors mentioning belly chains?

A No.

Q Did you see whether the Defendant was wearing leg shackles during the trial?

A No.

[Page 95]

Q Do you recall any juror mentioning leg shackles?

A No.

Q Did the issue of restraints come up at all during deliberations?

A No.

Q Do you recall there being any comments at all with regard to restraints?

A No.

MS. BRUINSMA: I don't have any other questions.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning.

A Good morning.

Q Thank you very much for coming in.

When they were picking the Jury on the first and part of the second day, can you tell me where you sitting in the back?

A Um, it would have been the second row on the right hand.

Q On the right-hand side behind the officer?

A Yes.

Q Did you ever look over at Mr. Davenport, especially when his lawyer was up here, did you ever see belly chains when he was sitting in the chair?

A No.

Q Where in the jury box were you sitting if you recall?

[Page 96]

A Um, about the third row in the back -- third chair in the back.

Q Third chair in the back, the second row?

A Mmm hmm.

THE COURT: Yes?

THE WITNESS: Yes. I'm sorry.

MS. MEINBERG: Thank you. I have nothing further.

THE COURT: Anything further?

MS. BRUINSMA: No follow up, your Honor.

THE COURT: Thank you, sir. We appreciate your time. Please don't discuss your testimony with any of the other jurors, but you are excused.

THE WITNESS: Thank you.

(At 10:57 a.m., witness excused)

THE COURT: We have one more.

Before you have a seat sir, raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. WHATELY: I do.

THE COURT: Please have a seat sir.

We have some questions that we want to ask you. But before we get into that, just a reminder or just to let

[Page 97]

you know. You need to speak right into the end of that microphone. If you speak -- if you turn to either side, sometimes the recording system doesn't pick it up and it is difficult to hear in this court. So, sometimes the microphone won't pick it up. That is number one.

Number two, the attorneys are going to have some questions. If you don't know or don't remember something, please let us know; we don't want you guessing at anything. We realize that the trial was a number of years ago, so just let us know that.

The attorneys are, obviously, different than those attorneys that were present at the trial, you may have observed that, but I'll turn it over to them in a second.

First, I need you to state and spell both your first and last name for the record, please.

THE WITNESS: Michael Whately. M-i-c-h-a-e-l W-h-a-t-e-l-y.

MS. BRUINSMA: Thank you, your Honor.

MICHAEL WHATELY

**Called to testify at 10:59 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, is it Whately?

A Yes ma' am.

[Page 98]

Q Good morning, thanks for being here.

Do you recall being a juror in the Ervine Dav-
enport case?

A Yes ma'am.

Q Has anyone discussed the reason that you have been asked to court today?

A No ma'am.

Q During the trial, was the Defendant present in the courtroom?

A Yes ma' am.

Q Was there anything about his appearance that stands out in your mind?

A He is a big guy, but --

Q Is there anything about how he presented himself that stands out in your mind?

A No ma'am.

Q Do you recall what the Defendant was wearing during the trial?

A Well it depended on the day.

Q Did he change clothes during the course of the trial?

A Yes.

Q Are there any -- anything that he was wearing that stands out in your mind?

A Well he started out in the orange jump suit and then he changed into dress pants, shirt and tie.

[Page 99]

Q All right.

A Then there was the one day when they were showing the scar on his arm, he just had a T-shirt on.

Q Was there anything about the orange jump suit that had significance to you?

A No.

Q Did it mean anything at all to you?

A Well just wearing the orange jump suit just meant that he was a County -- to me he was a person that was in the County Jail.

Q Not anything that you found to be unusual given it was a murder charge?

A No.

Q Okay.

Did you notice whether the Defendant was restrained in any way?

A Yes I did.

Q What did you notice?

A He had something on his feet.

Q Do you know what was on his feet?

A Well it looked like shackles from what I could see.

Q When did you observe this?

A Near the beginning.

THE COURT: I missed it, during the end or --

THE WITNESS: Near the beginning.

[Page 100]

THE COURT: -- end, okay.

BY MS. BRUINSMA:

Q Near the beginning, would that have been during voir dire when the Jury was being selected?

A Yeah, it was more there. I don't recall him being restrained -- having restraints on his feet or anything like the second day or after that.

Q So it was the first day?

A Yes.

Q And where were you in the courtroom when you saw that?

A I am trying to recall. I don't recall if I was sitting back there or if I was in the jury stand.

Q When you say back there, you are referring to the back gallery portion of the courtroom?

A Yeah, before they did the jury selection.

Q Before you would have been placed in the jury box up front?

A Yes.

Q Okay.

And seeing the leg shackles, did that have any significance to you?

A No, just -- I mean, no, it did not. I am used to seeing incarcerated people in -- shackled.

Q When you say that you are used to that; have you been around the courtroom before?

A Not the courtroom, no. One of my previous jobs, I was a

[Page 101]

communications technician and I did a lot of two-way radio work for public safety, the police and fire. And often times I would have to go into the jails to work. So, I would see people shackled in various ways, so it didn't bother me, no.

Q Um, how long of a time period was it that you were able to see the leg shackles?

A Not very long.

Q A brief glimpse or longer than a glimpse?

A Well it was longer than a brief glimpse, yeah. It was -- pretty much -- from where I was sitting and I don't recall where I was sitting that the whole time that I was sitting there I could see the shackles on his feet.

Q Um, did seeing the shackles influence your verdict in any way?

A No.

Q Do you recall any of the other jurors mentioning the shackles, the leg shackles?

A No, none of the other jurors mentioned it to me. I think that I pointed it out to the juror sitting next to me.

Q Was there a discussion about it?

A Not really.

Q Just a comment.

A A comment.

Q Was there ever discussion during the deliberation process

[Page 102]

that the Defendant was wearing leg shackles?

A Not that I recall, no.

Q When the deliberations were going on was it the evidence that was discussed?

A Yes.

Q Was your verdict based on evidence that you heard?

A Yes.

Q Did seeing the Defendant in shackles influence your verdict in any way?

A No ma' am.

Q Now, did you also ever notice whether the Defendant was wearing handcuffs?

A I do recall one time, but I think it was either bringing him in or taking him out. I do recall handcuffs at one time. Exactly when, I don't recall when that was, but --

Q Did seeing handcuffs have particular significance to you?

A No ma'am.

Q Did you attribute any specific meaning to the fact that he was wearing a handcuff?

A Just that he was a County prisoner and --

Q Did you ever discuss -- let me rephrase that.

Did you ever mention to another juror about the handcuffs?

A Not that I recall no.

Q Do you recall there being discussion amongst the jurors

[Page 103]

about the handcuff -- about handcuffs?

A No, I don't.

Q Do you recall handcuffs being discussed during deliberations at all?

A No.

Q Do you recall whether the Defendant was wearing a belly chain around his waist that the handcuffs would have been attached to?

A I do not recall that, no.

Q Do you recall any other jurors mentioning belly chains?

A No.

Q Maybe not that particular term, but that he was restrained around the waist?

A I knew what you meant, yes.

Q And you don't recall any comments about that?

A No.

Q Was that anything that was raised during deliberations?

A No.

Q Were the deliberations focused on the evidence then?

A Yes ma' am.

Q And was your verdict based only on the evidence?

A Yes ma'am.

MS. BRUINSMA: I don't have any other questions.

THE COURT: Ms. Meinberg.

EXAMINATION BY THE DEFENSE

[Page 104]

BY MS. MEINBERG:

Q Good morning.

A Good morning.

Q Thank you very much for coming in.

So you don't -- when they were picking the Jury, they did it the first day and the second day. Do you recall on any of those occasions where you were sitting in the back?

A I sat in the back closer to the window, like -- I think the third one from the back.

Q Third from the back?

A Second or third from the back, yes.

Q Okay.

And do you remember where in the jury box you were sitting?

A One of these two chairs. I was in the front row.

Q The front row.

Okay.

Near the witness stand, but you don't remember which seat exactly?

A No.

Q Do you remember the Defendant, Mr. Davenport, taking the stand and testifying?

A Yes.

Q Do you remember right before then the Jury had to go out in

[Page 105]

the hallway?

A Yes.

Q And do you remember when you came back in that he had gone from counsel table up to the witness stand?

A Yes.

Q And did you ever guess as to why you had to go out in the hallway?

A No, not really.

Q Given that you were sitting close to the witness stand, relatively, close, did you have any safety concerns when he was up there testifying?

A No.

Q Did you realize when he was up there testifying that he was not handcuffed?

A No.

Q No, you did not realize it.

A I did not realize that, no.

Q Was there a deputy standing next to him when he was testifying?

A There was -- I think that there was a deputy right here, but I don't remember for sure.

Q Did that make you feel safer that a deputy was standing right there?

A It didn't have any --

Q You realized that Mr. Davenport was charged with first

[Page 106]

degree murder?

A Yes ma' am.

Q And during the course of the trial, did you see deputies in the courtroom?

A Yes.

Q Do you know how many?

A There was at least three, I think, at all times or more.

Q And you testified that you realized that he was shackled at the legs and the wrist?

A I did see that.

Q Did --

A But not all the time.

Q Did you think that he might be dangerous?

A Based on the charges he could be dangerous, but I didn't think that he would do something in here.

Q And is that because you saw the deputies and the shackles?

A More the deputies.

MS. MEINBERG: I have nothing further.

Thank you.

THE COURT: Any further questions, Counsel?

MS. BRUINSMA: No further questions, your Honor.

Thank you.

THE COURT: Thank you, sir, we appreciate your time.

I am going to excuse you. Please just don't

[Page 107]

discuss your testimony with any of the other jurors, but we appreciate your time. Sorry to have to bring you back here again, sir. Have a good day.

THE WITNESS: Thank you.

(At 11:11 a.m., witness excused)

THE COURT: Counsel, will you approach?

(At 11:12 a.m., bench conference)

THE COURT: We are still on the record, but I guess what I am going to ask you both to do is since he is here, go sit at various places in the jury box. I think that it is clear from the testimony that you can probably see. But I would just like everyone's agreement on the record that you can see the cuffs depending on where you are sitting.

MS. BRUINSMA: (Inaudible, speaking too softly) that we need to do that because I think they can tell us what they saw or didn't see and we are kind of adding more speculation as to what may or may not have been visible.

THE COURT: Okay.

Let me do it this way. If you don't want to, you don't have to. But I am going to put my observations on the record because there has been a request -- by the Defense to bring in an expert. I don't think that is necessary.

I think that for economic reasons and for

[Page 108]

efficiency for time, I would hope that we could agree to it and that it why I am bringing this up and asking you to do that. I can't make you do that, but I would appreciate it if you would just sit and put your observations on the record.

MS. BRUINSMA: Okay.

MS. MEINBERG: Jury box and the back.

THE COURT: I'm sorry.

MS. MEINBERG: Jury box and the back.

THE COURT: That's fine too. Good point. I wasn't going to do that, but good point, given the testimony.

So, with that being said, any objections to doing that?

MS. BRUINSMA: I guess I don't have a specific objection to it.

THE COURT: Again, you don't have to do it, but it sounds like you are willing to do it.

MS. MEINBERG: Yes I will.

THE COURT: I think that it is appropriate under the circumstances. So, if you want to participate you can and if you don't want to, then I guess you don't have to.

MS. BRUINSMA: In that case, if I could just put my rationale on the record and --

THE COURT: You sure can.

[Page 109]

Okay.

(At 11:14 a.m., bench conference concluded)

THE COURT: All right.

Counsel, let's just-do it this way.

Those are the jurors that we had in today. There are three others and for various different reasons, I think that one of them had a preplanned vacation and I think that two had medical issues --

I'm wrong apparently.

One medical and two preplanned vacations per Ms. Johnson who has been speaking with them.

So, we were going to, depending on what happened today and whether we needed them to come back or not. I had excused them for the day, but told them they were still under subpoena and we would work with them another day if we could -- if we needed them.

And I am telling you right now, that based on the testimony, we need them. And so we will try to work with them and Counsel on another day to continue the hearing. I think that it is important to hear what their testimony and recollection is.

We also just had a conversation at the bench. There has been a request by the Defense for -- for

necessary expenditures or amount to be allotted to the Defense for an expert to testify, again, if necessary, with

[Page 110]

regards to the angle of the cameras and whether or not the jurors could see Mr. Davenport's handcuff or shackles or what not.

What I had asked Counsel to do is to just take a moment, since we have Mr. Davenport here, and since he has a cuff --

Do you have a belly shackle on right now, sir?

THE DEFENDANT: Yes.

THE COURT: Yes.

So, similar to what he would have had at the time of trial.

I don't know, does he have ankle shackles on too?

MS. MEINBERG: Yes.

THE COURT: So, I would just ask Counsel to observe Mr. Davenport from where he is at, both from the jury box and Ms. Meinberg made a good point too, from the -- from the galley just to see what observations they could make --

MS. BRUINSMA: And I guess --

THE COURT: -- with regards to the restraints.

MS. BRUINSMA: And if I could just make -- place my position on the record with respect to that.

THE COURT: Yes.

MS. BRUINSMA: I think that is not a necessary step to take because what we are looking at is whether the

[Page 111]

jurors were able to see him and that any determination is going to be made on what the jurors say and not any speculation about what may or may not been able to be viewed throughout the courtroom.

I understand the Court's position with respect to doing that and not wanting to bring in an expert, which I also think would be simply more speculation that it is what the jurors say and nothing more. But that is -- that is my position and objection to that. I just wanted to place that on the record and I understand the Court's ruling.

THE COURT: Okay.

Any objections to doing that Ms. Meinberg?

MS. MEINBERG: No, your Honor.

THE COURT: And we did discuss that objection at the bench and I indicated that because -- based on -- given the testimony that we did have some testimony that different jurors were able to see different restraints, I'll indicate that; and given the Defense's request to have an expert -- possibly have an expert come in and give angles and given expert testimony

with regards to what you could or couldn't see from the jury box or what not.

I indicated to Counsel that they have made that request and I would ask Counsel to just make these observations and see if we could all stipulate to one thing or another; so that I wouldn't necessarily have to address

[Page 112]

that issue or allow costs for that expenditure or to have an expert come in.

So, given that ruling, I think that Counsel is willing to do that, again, over your objections; I understand that.

So, with that, I would just ask that Counsel take a moment and then we will have a brief conversation and see if we can stipulate as to whether or not you can view the restraints -- and I will indicate, Counsel, I don't know whether the curtain -- we now have a black curtain up around the tables, that has been there a number of years now; but I don't know if it was there at the time of the trial. In looking at the photographs, I will say, honestly, it does not appear that the curtain was there. I don't know for sure, without going back and looking at the video; but I did make that observation when I was looking at the photographs. And I know that we had testimony from one juror -- I'll have to go back and look at my notes again, but I believe that there was one juror who indicated that he thought that he could see the ankle restraints from the jury box. Again, I'd have to go back and look at my notes -- I thought that is what he said -- and review

his testimony again on that issue. He may have referenced when he was seated back in the galley, but I thought that is what he said.

[Page 113]

So, with those comments, that is why I am asking Counsel to participate in doing this. We are still on the record and I'll let you just go have a seat in the jury box or take various seats from different perspectives. And we'll address a possible stipulation in a moment.

MS. BRUINSMA: Wow, there is not a lot of room up here.

THE COURT: There is not a lot of room.

And I guess that I'll also indicate that this not typical, but given the request and given the hearing, that is why I am asking you to do this. And I won't ask you to do jumping jacks or pushups or anything like that.

MS. MEINBERG: Thank you, Judge.

THE COURT: They are heavy doors.

Counsel, would you please approach?

(At 11:23 a.m., conference at the bench)

THE COURT: I don't know if you want to go off the record, this is still supposed to be recorded during a bench conference. But do you want to go off the record and discuss that or --

MS. BRUINSMA: What do you --

I don't care whether it is on the record or off the record.

THE COURT: Okay.

Okay.

[Page 114]

So, -- well then let me ask you. Were you able to observe -- I'll ask you first Ms. Bruinsma.

Were you able to observe the --

MS. BRUINSMA: Yeah, the -- yeah, depending on how he is positioned and where the jurors are and the --

THE COURT: And where you are seated.

MS. BRUINSMA: -- podium.

THE COURT: Right.

MS. BRUINSMA: You can -- there are areas of the courtroom --

THE COURT: That you can see.

MS. BRUINSMA: -- and the jury box where you can see.

THE COURT: Right.

MS. BRUINSMA: Same with the gallery, depending on who is sitting in front of you.

THE COURT: Right.

MS. BRUINSMA: All of those factors.

THE COURT: So we can stipulate to that then.

MS. MEINBERG: Yes.

THE COURT: Depending where you are seated and how he is positioned --

MS. MEINBERG: Well and I would also like to stipulate about the aisle because I noticed -- like when you were doing voir dire. If you called a juror and they

[Page 115]

walked up the aisle, you could see -- when his right leg was shackled, you could see the cuff dangling down and you could see the wrist shackle from the aisle.

THE COURT: So, again, depending on who is looking where --

MS. MEINBERG: Right.

THE COURT: And you can certainly indicate for the record. I appreciate that, so we can put that on the record then.

All right.

MS. BRUINSMA: Did we want to put anything on the record about the positions of the video cameras or do we not care about that at this point?

Just that they are not at the same vantage point that --

THE COURT: They (inaudible). I suppose that we could get a tape measure, but I could guess that we could stand -- how tall are you?

MS. BRUINSMA: Five-four.

THE COURT: Why don't you go stand and see if we can --

MS. MEINBERG: Oh, God, I am so bad at that.

THE COURT: Okay.

MS. MEINBERG: What is that, two feet above her head.

[Page 116]

THE COURT: I am going to say eight -- I think it is about three, maybe.

MS. MEINBERG: Okay.

THE COURT: So probably -- again, without measuring -- what would you say?

MS. BRUINSMA: I am very horrible with distances, but I --

THE COURT: I am going to say eight or nine feet.

MS. BRUINSMA: I would think that is a good estimate.

THE COURT: A fair estimate. Again, we could get a tape measure and we could -- I'll also explain where the camera is. I think that the camera probably has a

better angle, but you can certainly see and I think that is really the main issue.

MS. BRUINSMA: Right.

THE COURT: Okay.

(At 11:26 a.m., bench conference concluded)

THE COURT: All right.

Counsel, first of all let me say, I appreciate you participating in that exercise.

We have had some discussions and I think that everyone is in agreement -- and I will indicate to you too that I indicated to you in chambers earlier, that yesterday I did go to the jury box to see if -- what, maybe you could

[Page 117]

see at this end. I only stayed at this end. And I felt that you could probably -- you probably would have been able to see the cuffs depending on where Mr. Davenport was, his seat and so forth. It is one of the reasons why I asked you to see if we could just agree on something too.

And my understanding and I'll let you put anything further on the record, is that everyone is in agreement -- all attorneys are in agreement and the Court is in agreement, that depending on where you are at in the jury box and depending on the position of Mr. Davenport and he is a little bit back from the table now. I certainly think that would have been something that he probably would have done during the

trial is kind of moved up and back, you know, changed his position periodically during the trial. So, I think that he is in a reasonable position here. That depending on where you are at in the jury box, depending if you are standing or sitting and where Mr. Davenport is, that you can observe the handcuff at different places in the jury box I think. I will also indicate too that some of the pictures show that he had files in front of him, but again, those could very well have been moved during the trial.

So, I will state that for the record.

I did not get back to the galley, but I think that Counsel probably -- my understanding is that Counsel

[Page 118]

is going to indicate their observations from the galley and that there is an agreement, again, depending on where you are seated, standing, seated, possibly walking down the aisle, you might be able to see different restraints.

So, with that, I'll -- I'll turn it over to Ms. Bruinsma, first of all, with regards to whether or not that is an accurate statement of what we discussed and anything else that you want to add.

MS. BRUINSMA: Yes, thank you, your Honor.

That is accurate with respect to the back of the courtroom where the jurors would have been seated with voir dire. That depending on where you are sitting and who is sitting in front of you and how the Defendant's chair is positioned, where Defense Counsel

is positioned, where the deputy may have been positioned that there are locations in which you could possibly view the Defendant's handcuffs or belly chains through the side of the chair.

But again, as I indicated earlier, I believe the jurors' testimony is what will be controlling that.

THE COURT: Appreciate that.

Anything else, Ms. Meinberg?

MS. MEINBERG: Yes, your Honor.

He -- right now today he -- his right hand is unshackled and so the hand cuff is dangling down on the right side of his waist. And that side of the chair is

[Page 119]

open.

So yes, depending on if Ms. Eifler was sitting here or standing at the lectern, I noticed that from especially on the right-hand side of the galley, you can see the handcuff dangling and the left hand wrist shackle in every row except for the back row. I could not see it in the back row.

It was more difficult to see on the left-hand side, but there are some places where you could see.

And I noticed, especially walking up the aisle, you had a good view of both the dangling handcuff and the shackle on the left hand.

Do you also want to discuss the jury box?

THE COURT: If you have anything else that you want to indicate with regards to the jury box, go ahead.

MS. MEINBERG: Yes.

I noticed from every seat in the jury box, whether on the far end by the witness stand or the far end by the side of the lectern, depending, of course, whether someone is standing at the lectern, I could see the left wrist shackle. I couldn't see the belly chain, but I could see the left wrist shackle, whether I was standing or sitting.

But again, it depends on whether somebody is standing at the lectern and blocking some juror's views.

[Page 120]

But from every chair I could see it.

MS. BRUINSMA: Your Honor, just with respect to the jury box. I would agree that again, depending on how the Defendant was positioned and how the juror was positioned in the chair and where they are looking and where the podium is positioned or the attorney that is at the podium is positioned, there are spots within the jury box that a juror might be able to view the Defendant's wrist shackles.

I do believe that the record indicates that the black curtain was up during the trial and so from my view in the jury box, the leg shackles is not something that was able to be viewed with the curtain up.

But again, I think that it is going to be the testimony that is controlling.

THE COURT: And I appreciate that. I realize that we are specifically looking for something right now; but I think that those observations by Counsel seem to be consistent with what we have just heard from the jurors, some of them indicated they don't have a recollection of ever seeing it and others pointed out what they observed.

So, I appreciate that and given that exercise and your participation and what was indicated on the record, I am going to deny any request for any expert to have to come in to have to testify about angles and so forth.

[Page 121]

There is one other thing -- because I don't think that it is necessary. I think that everyone agrees that there are locations and depending on, you know sitting, standing or what is going on, files on the desk where Mr. Davenport is and what not that there are places that jurors could see the restraints.

With regards to the camera too, we also need to indicate that for the record.

We just wanted to make a record of the location of the camera or cameras and I'm -- there are -- I guess again for the record, where my bench is, Mr. Davenport would be seated to my right. There is an L-shaped table. There is a camera behind me and to the left, which is right almost above the witness stand, not quite, it is a little bit closer to the wall I'm sorry, the

doorway that the jurors come in and out of the court. But the cameras are higher up than what your general -- I guess what the average person's view would be from looking through their eyes. I think that Counsel, we agreed -- I indicated that we could certainly get a measure -- a tape measure out, but I think we are all in agreement that the cameras are located approximately eight to nine feet up from the floor. So, they are above where the height of the average -- any person that I am aware of. But that is the approximate height of the camera and again, they are a little bit

[Page 122]

closer to the bench, right around where the witness stand is. So, they are looking at Mr. Davenport at a different angle, but I think they show -- in viewing the photographs, the stills that were taken from that camera angle that were attached to the Defendant's memorandum, again, you can certainly see at various times I'm guessing that it is clearer in real life than what is shown in these photographs and I don't know how the video appears -- I have indicated to Counsel that I haven't looked at the video or the DVD yet for purposes of this hearing. I haven't given my opinion yet, we are not finished with the hearing yet.

But you can certainly see what appears to be a metal -- the handcuff. I would say that looking at the photographs, sometimes it looks like a bracelet -- it could be a bracelet, but I think that it is clearer probably in real life than is shown in the still photographs taken from the DVD.

So, -- but that camera angle is certainly higher up than where the jurors would be or what the jurors

would be looking at. So, I'll make that comment for the record too.

Counsel, is everyone in agreement that we estimated that it would be about eight or nine foot from the ground? Yes.

[Page 123]

MS. BRUINSMA: Yes, your Honor.

MS. MEINBERG: Yes, your Honor.

THE COURT: Alright, that is our best estimate on the height.

Um, --

MS. BRUINSMA: And that set, does it do anything?

THE COURT: There is another camera I don't think that that camera -- there are two other cameras in the court. One would be focused on the jury (sic) box, so when Mr. Davenport testified -- the witness box, sorry, that would have picked him up. He didn't have any restraints on when he testified, so I don't know that that is that relevant for purposes of the inquiry that -- the issue that we are here for today.

The other camera is, unfortunately, on the bench, so that is the camera that picks me up when I talk. So, those two cameras are I don't those are actually higher, but I don't think that really matters for our purposes.

So, those are back in the galley, they take a different view of the court.

Anything else that we need to cover -- at this point -- Counsel, I think that we spoke that we do need to bring the other jurors in so we will pick another day and continue the hearing and we will then figure out from there -- why don't we chat a moment or two about whether or not I

[Page 124]

am going to have written arguments or allow you to have written arguments given the fact that we, obviously, are going to have a delay. I'll probably do it that way and give you an opportunity to review everything again or have written -- or just have oral closings or arguments after that hearing.

But anything that we need to place on the record then before we adjourn?

MS. BRUINSMA: Not from the People, your Honor.

MS. MEINBERG: No, your Honor.

THE COURT: Okay.

With that then, the Court will recess and Counsel, I just need to chat with you a few minutes and we'll figure out some dates for the next -- the continuation hearing.

MS. BRUINSMA: Okay.

THE COURT: Court is in recess.

(At 12:37 a.m., court is in recess)

[Page 125]

STATE OF MICHIGAN)

COUNTY OF KALAMAZOO)

I certify that this transcript consisting of 125 pages is a complete, true, and correct transcript of volume I of the evidentiary hearing held in this case on June 24, 2011.

August 6, 2011

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STATE OF MICHIGAN
9th JUDICIAL CIRCUIT COURT
TRIAL DIVISION
FOR THE COUNTY OF KALAMAZOO

PEOPLE OF THE STATE OF MICHIGAN,
v Case No.:C2007-0165FC
ERVINE LEE DAVENPORT.
Defendant.

EVIDENTIARY HEARING - VOLUME II OF II
BEFORE THE HONORABLE
PAMELA LIGHTVOET, CIRCUIT JUDGE
Kalamazoo, Michigan – Friday, July 29, 2011

APPEARANCES:

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[Page 2]

TABLE OF CONTENTS**WITNESSES:****SARAH ENGSTER**

| | |
|--------------------------------|---|
| Examination by the Prosecution | 4 |
| Examination by the Defense | 6 |

MARK WEISHAAR

| | |
|--------------------------------|----|
| Examination by the Prosecution | 10 |
| Examination by the Defense | 12 |

SHAWN KUCERA

| | |
|--------------------------------|----|
| Examination by the Prosecution | 15 |
| Examination by the Defense | 17 |

| <u>EXHIBITS</u> | <u>Identified</u> | <u>Admitted</u> |
|------------------------|--------------------------|------------------------|
| None | | |

[Page 3]

Kalamazoo, Michigan

Friday, July 29, 2011 at 11:10 a.m.

COURT CLERK: The court calls the matter of the People versus Ervine Lee Davenport, case number C07-0165FC.

Parties, please state appearances for the record.

MS. BRUINSMA: Good morning, your Honor, Cheri Bruinsma appearing on behalf of the People.

MS. MEINBERG: Good morning, your Honor, Susan Meinberg from SADO on behalf of Mr. Davenport.

THE COURT: Mr. Davenport is here also.

Counsel, this is a continuation of the hearing -- evidentiary hearing that we had about a month ago and the three remaining jurors that we need to speak with are out in the hall.

Is there anything that we need to discuss before we bring the first one in?

MS. MEINBERG: Just one thing, Judge.

THE COURT: All right.

MS. MEINBERG: If you could have Mr. Davenport's right hand unshackled so he could take notes that would be great.

THE COURT: If you could do that, please, that would be great.

Are we all set then Counsel?

MS. MEINBERG: Yes, your Honor.

[Page 4]

THE COURT: Before you have seat ma'am, please raise you right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MS. ENGSTER: I do.

THE COURT: Please have a seat ma'am.

And before we begin -- we have some questions for you with regards to the jury service that you had a couple of years ago -- actually about three years ago now I think it was.

Just so you know, as we go through the process, the attorneys will ask you some questions, you do need to speak up and respond verbally; no mmm hmm and naw huhs and that type of thing. And if you would wait until they are done with their question before you give a response, even though you might kind of know where they are going with their questions. I might have some questions too.

So, before we do that, if you would please just state and spell your first and last name for the record.

THE WITNESS: Sarah Engster; S-a-r-a-h E-n-g-s-t-e-r.

MS. BRUINSMA: Thank you, your Honor.

SARAH ENGSTER

Called to testify at 11:12 a.m.;
testified as follows:

[Page 5]

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, thank you for being here.

Ma'am, do you recall being a juror on the Ervine Davenport case?

A Yes I do.

Q And has anyone discussed with you the reason that you are testifying today?

A No, not other than the paper that I received.

Q I'm sorry.

A Not other than the notice I received in the mail.

Q From the court.

A Right.

Q Okay.

Now, when you think back to the trial, is there anything about the Defendant's appearance in court that stands out in your mind?

A Not particularly, no.

Q Do you recall what the Defendant was wearing during the course of the trial?

A Not really.

Q Did you notice if the Defendant was restrained in any way?

A No.

Q Do you recall seeing whether the Defendant was wearing handcuffs of any kind?

[Page 6]

A No.

Q Do you recall seeing whether the Defendant was wearing any kind of leg shackles?

A No.

Q Do you recall any of the other jurors discussing whether the Defendant was restrained?

A No I don't.

Q Was the issue of the Defendant being restrained discussed at all during deliberations, to your recollection?

A No, I don't recall it.

MS. BRUINSMA: I don't have any further questions from this witness.

EXAMINATION BY THE DEFENSE

MS. MEINBERG:

Q Good morning, thank you for coming.

A Mmm hmm.

Q On the first and part of the second day when they were picking the Jury and you were sitting in these

back rows, do you remember where you were sitting on the first day or the second day?

A Oh boy, I believe that I was kind of right directly back from here.

Q On this side without windows?

A Yes.

Q And on the second day, were you sitting in a different

[Page 7]

place?

A Oh boy, you know, I have been called for jury duty since then, so I don't remember exactly where I was; I'm sorry.

Q That's okay.

And when you were picked to sit on the Jury, do you remember where in the box you were sitting?

A I was right here.

Q In the chair that is placed at the end, not even in the box?

A Yes.

Q In the back or in the first row?

A I believe I was in the back.

Q And during the course of the trial when you stood up and took stand and stretch breaks, did you ever look over at Mr. Davenport and notice anything on this wrist?

A Honestly, I don't remember seeing his hands.

Q And when you would come in and out of the courtroom, did you ever see his hands?

A No.

Q What about when he turned around and looked -- I guess that there was a screen behind him; did you ever notice then?

A No.

Q Is it that you don't recall or you know you didn't see --

A I don't recall.

Q And -- at some point during the trial Mr. Davenport

[Page 8]

testified. Do you remember having to go out in the hallway before he took the seat up there?

A Yes I do.

Q Did you ever hazard to guess as to why you had to go out into the hallway before he testified?

Q You know at the time I don't think that we realized that he was going to testify; we were escorted out and when we came back in, he was up here.

Q Okay.

A That is what I recall.

MS. MEINBERG: Great. Thank you; I have no further questions.

THE COURT: I just have one clarification.

When you were describing where you were seated. So you were seated in the back row, the end seat, which is the closest to the bench --

THE WITNESS: Yes.

THE COURT: -- the front of the courtroom as opposed to the back --

THE WITNESS: Yes.

THE COURT: -- of the courtroom. So, I just wanted to clarify that for the record.

Any other questions then, Counsel?

MS. BRUINSMA: No, your Honor.

MS. MEINBERG: No, your Honor.

[Page 9]

THE COURT: So she may be excused?

MS. BRUINSMA: No objection.

THE COURT: Thank you, we appreciate your time today.

THE WITNESS: Thank you.

THE COURT: Sorry to have to call you back and be careful of that step when you exit.

THE WITNESS: Thank you.

(At 11:16 a.m., witness excused)

THE COURT: Before you have a seat sir, please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. WEISHAAR: I do.

THE COURT: Please have a seat sir.

And before I have you state your name for the record, just so you are aware, we are going to ask you some questions about your experience as a juror during Mr. Davenport's trial.

When the attorneys ask you questions or if I ask you questions, we need a verbal response. Please remember not to give us an mmm hmm or naw huh or that type of response. We are recording everything and there might be a transcript later.

[Page 10]

Also, just make sure that you wait until the question is completed before you give your response.

With -- and make sure that you speak right in the end of that microphone, because if you move to either side sometimes it doesn't pick up your voice.

So, with that, please state and spell both your first and last name for the record, please.

THE WITNESS: Mark Weishaar, M-a-r-k W-e-i-s-h-a-a-r.

MARK WEISHAAR

**Called to testify at 11:17 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

Q Good morning, sir, thank you for being here.

A Do you recall being a juror in the Ervine Davenport case?

A Yes, I do.

Q And has anyone discussed with you the reason that you are here today?

A No.

Q During the trial, do you recall the Defendant being present in the courtroom?

A Yes.

Q Is there anything about his appearance that stands out in your mind?

[Page 11]

A No.

Q Is there anything about how the Defendant presented himself during the course of the trial that stands out in your mind?

A No.

Q Do you recall what the Defendant was wearing during the trial?

A I do not, other than the fact that -- at one point he took off a shirt and he had a T-shirt on when he was on the stand here.

Q Did you notice if the Defendant was restrained in any way during the trial?

A I do not recall that.

Q Did you ever specifically see whether the Defendant was wearing handcuffs?

A I do not recall he was wearing those.

Q Do you recall whether the Defendant was wearing any type of leg shackles?

A I do not.

Q Do you recall whether it was discussed during deliberations that the Defendant was wearing any kind of restraints?

A It -- it was not to the best of my knowledge.

Q And do you recall anybody pointing out handcuffs on the Defendant?

A No, in fact, I remember the Defendant writing with a small

[Page 12]

pencil, so I don't believe that he was in handcuffs of any sort.

MS. BRUINSMA: I don't have any further questions from this witness.

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning, thank you for coming in.

A Certainly.

Q During the first and part of the second day when they were picking the Jury and you were all sitting in the back benches, do you remember where you were sitting on the first day?

A I do not, but I recall I was the first person chosen; so I only sat for a very short time.

Q Okay.

And during any point sitting back in the benches, did you notice a handcuff hanging down from Mr. Davenport's waist?

A No.

Q And when you were sitting in the box, do you remember which seat you were in?

A I was in the first seat over there.

Q The front row or the second row?

A First row is my recollection.

Q And at any point during the stand and stretch breaks when

[Page 13]

you stood up in the box to stretch, did you ever look over at Mr. Davenport and notice a handcuff on his left hand?

A I never did note -- I did not notice leg or hand of any sort.

Q Okay.

And at -- at one point when Mr. Davenport took the stand and you all had to go out in the hallway -- do you remember doing that?

A I remember being dismissed in this manner.

Q And did you know why you had to go outside of the courtroom before he took the stand?

A I do not; but he did take his shirt off, as I indicated.

Q He took his shirt off.

MS. MEINBERG: Thank you. I have no further questions.

MS. BRUINSMA: Nothing further, your Honor.

THE COURT: And again, just for clarification.

When you indicated that you were seated -- when you were in the jury box, you were in the first row, first seat. That would be the seat that is closest to the back of the courtroom and furthest away from the bench?

THE WITNESS: That is correct.

THE COURT: Any further follow up questions, Counsel?

MS. BRUINSMA: No, your Honor.

[Page 14]

MS. MEINBERG: No, your Honor.

THE COURT: Any problems with him being excused from his subpoena?

MS. BRUINSMA: No objection.

MS. MEINBERG: No.

THE COURT: Thank you sir, we appreciate your time. Sorry to have to call you back in.

THE WITNESS: Thank you.

THE COURT: Have a good day.

(At 11:21 a.m., witness excused)

THE COURT: Before you have a seat sir, raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

MR. KUCERA: I do.

THE COURT: Please have a seat sir.

Before I have you state your name for the record, when you respond to questions with that particular microphone, you really need to speak right in the end of it. If you move to either side, sometimes the recording system doesn't pick up your voice.

We are going to be asking you some questions about when you served as a juror during Mr. Davenport's trial.

[Page 15]

Please give us a verbal response. Try not to respond with a mmm hmm or a naw huh, because we need a good transcript for later.

Also, please just make sure that you wait until the attorney or myself that we finish our question, even though you might know what the question is, but please just make sure that the question is finished before you give a response; again, that makes for a better transcript later on if needed.

THE WITNESS: Is this the mic. here too or this one?

THE COURT: That is the one that you are going to be speaking into -- yes, that is another microphone, but that one will pick up your voice.

THE WITNESS: Okay.

THE COURT: Go ahead.

MS. BRUINSMA: Thank you.

THE COURT: Oh, I'm sorry, you need to state and spell your first and last name for the record, sir.

THE WITNESS: Shawn Kucera, S-h-a-w-n K-u-c-e-r-a.

SHAWN KUCERA

**Called to testify at 11:23 a.m.;
testified as follows:**

EXAMINATION BY THE PROSECUTION

BY MS. BRUINSMA:

[Page 16]

Q Good morning, sir. Thank you for being here.

Do you recall being a juror on the Ervine Dav-
enport case?

A Yes.

Q And has anyone discussed with you the reason that
you are here for testimony today?

A No.

Q During the trial, do you recall the Defendant being
present in the courtroom?

A Yes.

Q Is there anything about his appearance that
stands out in your mind?

A Not really.

Q Do you recall what the Defendant was wearing
during the course of the trial?

A He seemed to be dressed nice, nicer than I was, I
think. I don't recall exactly what he was wearing,
but --

Q Nothing in particular stands out in your mind
about what he was wearing?

A No.

Q Do -- did you notice if the Defendant was restrained in any way during the trial?

A Myself I did not.

Q Did you see specifically if the Defendant was wearing handcuffs?

[Page 17]

A No.

Q Did you see if he was wearing any type of leg restraints or leg shackles?

A I don't recall.

Q Now you said, myself, I do not. Did you discuss or did somebody else discuss that with you?

A I remember there was -- when he came out to give his own testimony, we were all escorted out of the court and there was -- somebody mentioned that he might have been restrained and that is probably why we had moved out.

Q But other than that comment, was there any other discussion with the other jurors about the Defendant being restrained?

A No.

Q Was it ever mentioned in deliberations?

A No.

Q Okay.

And absent from that comment, you, yourself, did not see the Defendant's handcuffs?

A No. I recall seeing like witnesses come in, in chains and stuff; some of the witnesses I think were, but -

Q But you don't recall seeing any kind of restraints on the Defendant?

A No.

MS. BRUINSMA: I don't have any further questions.

THE COURT: Counsel.

[Page 18]

EXAMINATION BY THE DEFENSE

BY MS. MEINBERG:

Q Good morning, thank you for coming in.

A Good morning.

Q During the first and part of the second day when they were picking the Jury and you were sitting back in these rows, do you remember where you were sitting on the first day?

A Um, I was on this side, probably half way back.

Q The side without the windows?

A Yes.

Q Okay.

What about on the second day, were you still sitting in the back or were you sitting up in the box?

A When we were called to be --

Q When they were still -- sometimes the Jury was still being picked for part of the second day. Were you still sitting in the back for part of that day; do you remember?

A No, I only recall that being one day that we were picked.

Q And when you were called up to sit in the box, to sit on the Jury, do you remember where you were sitting in this jury box?

A I was sitting on the end.

Q Which end? Closest to this officer or closest to the bench?

A I was on the end by the door.

[Page 19]

Q By the door.

A By the door.

Q In the back or front?

A Yes, in the back.

Q In the back.

Okay.

When the jurors were allowed to stand up and stretch, did you ever look over at Mr. Davenport and see any handcuff on his wrist?

A I don't recall that.

Q Did you notice that he was only able to write with one hand during the course of the trial?

A I did notice that.

Q You did notice that.

Okay.

Did you notice how many deputies were in the courtroom during the trial?

A Um, I think that I saw at least two --

Q And you knew --

A It wasn't something that I was -- I wasn't taking inventory of all that.

Q Okay.

After Mr. Davenport finished testifying, did you notice that he didn't have restricted movement anymore?

A Yes, I mean, he walked in front of us all.

[Page 20]

MS. MEINBERG: I have no further questions.

THE WITNESS: Okay.

THE COURT: Let me just clarify again. You were seated in the back row on the end seat, near the side door-- the side of the courtroom, not the door near the front of the courtroom, correct?

THE WITNESS: Correct.

THE COURT: Any follow up questions?

MS. BRUINSMA: No, your Honor.

MS. MEINBERG: No, your Honor.

THE COURT: May the witness be excused then?

MS. BRUINSMA: No objection.

MS. MEINBERG: Yes.

THE COURT: We appreciate your time coming in today; you are excused.

THE WITNESS: Okay.

THE COURT: Be careful as you step down.

(At 11:28 a.m., witness steps down)

THE COURT: I can't see if the door shuts, so you have to let me know.

MS. BRUINSMA: Waiting for a crack. Okay, now.

THE COURT: Counsel, so we have now taken testimony of all of the jurors and I think that what we will do is that I will give you a certain amount of time just to file written responses then, since we had two

[Page 21]

different days. I'll give you an opportunity to review your notes and the transcript, if necessary.

I -- did either of you request the transcript from the last --

MS. BRUINSMA: No, that was something that Susan and I discussed this morning; because we both kind of recalled that -- we weren't sure if the Court was going to ask that it be prepared or if one of us was supposed to do that, so we wanted to clarify.

THE COURT: I think that I'll have both days prepared -- either way we are going to need it, no matter what happens.

So, I will let them know that that needs to be taken care of.

And so, I'll ask them to do that sooner than later.

And as soon as we get copies of the transcripts then, 30 days, is that enough time?

MS. BRUINSMA: Yes, your Honor.

THE COURT: Do you need that much time?

MS. MEINBERG: Twenty-one would be fine.

THE COURT: Do you want to do 21 days?

MS. BRUINSMA: That should work.

THE COURT: Okay, 21 days after the transcript is prepared -- filed in the court, then you need to get your

[Page 22]

closing -- written closing arguments in with regards to the hearing.

Is there anything else that we need to address then?

MS. BRUINSMA: I don't believe so, your Honor.

MS. MEINBERG: I don't believe so either, your Honor.

THE COURT: Okay.

All right, with that, court is in recess.

MS. BRUINSMA: Thank you.

MS. MEINBERG: Thank you, your Honor.

(At 11:29 a.m., court is in recess)

STATE OF MICHIGAN)

COUNTY OF KALAMAZOO)

I certify that this transcript consisting of 22 pages is a complete, true, and correct transcript of volume II of the evidentiary hearing held in this case on July 29, 2011.

August 6, 2011

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STATE OF MICHIGAN
NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

v

HON. PAMELA L.
LIGHTVOET P47677

FILE NO. C07-0165FC

ERVIN LEE DAVENPORT,
Defendant.

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**OPINION AFTER REMAND FROM THE
MICHIGAN SUPREME COURT**

At a session of said Court held in the City and County of Kalamazoo, Michigan on this 20 day of October, 2011;

HON. PAMELA L. LIGHTVOET,
CIRCUIT COURT JUDGE.

By an Order dated March 9, 2011, the Michigan Supreme Court remanded this case to determine whether the jury saw the Defendant's shackles during Trial. If this Court determines that the jury did see Defendant's shackles, the Supreme Court ordered this Court to determine whether the prosecution demonstrated beyond a reasonable doubt that the shackling error did not contribute to the verdict against Defendant.

In accordance with the Michigan Supreme Court's Order, this Court held an Evidentiary Hearing at which the twelve jurors who rendered the verdict were subpoenaed to testify. All twelve jurors reported and testified on either June 24, 2011 or June 29, 2011. Subsequently, the parties provided written closing arguments to the Court.

Prior to the hearing, defense counsel objected to questioning jurors about whether the shackles/restraints were discussed during deliberations. However, this Court ruled that such questions were necessary to address the issues raised by the Michigan Supreme Court and for which this Court was ordered to address on remand.

The Court listened to the testimony of the jurors and reviewed the parties' briefs. There is no question that, despite the precautions taken, many of the

jurors were able to observe Defendant's shackles/restraints during the trial.¹ This is clear from the testimony of the jurors and not disputed in the parties' briefs. Therefore, this Court must make a determination as to whether or not the prosecution demonstrated beyond a reasonable doubt that the fact that Defendant was shackled/restrained did not contribute to the jury's guilty verdict.

The Court finds that the Prosecution has met its burden. There was not one juror who testified the shackling issue affected their verdict. They testified the issue was not discussed during deliberations and they confirmed the verdict was based only on the evidence. The jurors who observed the handcuffs or shackles went on to testify that the procedure was not a surprise or unexpected. They understood it to be "routine", "part of the procedure", for "security", not unusual given the charge and/or not unusual in a murder trial.² There was no evidence/testimony that the shackles/restraints was significant to the jurors or made them more inclined to find the Defendant guilty.³ There was no testimony that indicated Defendant's shackles/restraints contributed to the guilty verdict. The Prosecution has met its burden on this issue through the testimony of the jurors.

¹ A number of jurors also recalled that Defendant initially wore an orange jumpsuit, so they knew he was in custody. He then changed his clothing. See Evidentiary Hearing - Volume I, No. 2007-0165FC, pp 36, 59, 98-99.

² See Evidentiary Hearing - Volume I, No. 2007-0165FC, pp 16, 36, 38, 45, 56, 59, 81.

³ *Id.* pp 20, 63, 82.

WHEREFORE, the Court finds beyond a reasonable doubt that the shackling of Defendant during the Trial did not affect the juror's verdict in this case.

IT IS SO ORDERED.

Date: October 20, 2011

Pamela L. Lighvoet

HON. PAMELA L. LIGHTVOET (P47677)

Circuit Court Judge

PROOF OF MAILING

The undersigned certifies that a copy of this Order was sent to the parties listed in the pleadings filed herein by mailing the same to them at their respective last known addresses with 1st class postage fully paid thereon, on 10/21/2011.

Cheryl L. Johnson

Cheryl L. Johnson

Judicial Aide to the Hon. Pamela L. Lightvoet