

2000

Utah v. Pedro Arballo : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Arballo*, No. 2000292 (Utah Court of Appeals, 2000).

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH /

Plaintiff/Respondent /

vs. / Case No 2000292-CA

PEDRO ARBALLO /

Priority # 2

Defendant/Appellant /

BRIEF OF APPELLANT

This appeal is from the Defendant's conviction by a jury empaneled by the Honorable Stanton M. Taylor, of three counts of aggravated robbery in violation of Section 76-6-302 U.C.A. The Defendant alleges that comments made by the Trial Judge during jury selection process prejudiced the entire prospective jury.

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FILED

AUG 31 2000

COURT OF APPEALS

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Plaintiff/Respondent	/	
vs	/	Case No 2000292-CA
PEDRO ARBALLO	/	Judge_____
Defendant/Appellant	/	Priority No 2

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a conviction by a jury empaneled by the Honorable Stanton M. Taylor of three counts of aggravated robbery in violation of Section 76-6-302 U. C. A. The basis of the Defendant's appeal is that the Trial Judge prejudiced all members of the prospective jury when he made comments regarding one prospective juror's prior jury service, which comments denied the Defendant a trial before an impartial jury.

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The notice of appeal was filed with the Court on the 30th Day of March, 2000. The Jurisdiction of this Court is conferred pursuant to U.C.A. Sec 78-2-2(3)(I).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Did the Trial Judge deny the Defendant a trial before an impartial jury, by making certain comments to all potential jurors during the jury selection process?

STANDARD OF
REVIEW

The question of whether the Court committed reversible error when it denied the Defendant the right to a trial before an impartial jury as guaranteed by the United States and Utah Constitutions when the trial judge made prejudicial comments to prospective jurors is a legal question, which the Court reviews for correctness. State v. Dixon 560 P 2d 318 (1977)

STATEMENT OF THE CASE

The Defendant was charged by information with three counts of aggravated robbery. The Defendant pled not guilty to three counts and was tried before a jury on the 15th and 16th of February, 2000 before a jury empaneled by the Honorable Stanton M. Taylor. The jury found the Defendant guilty of each of the three

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counts of aggravated robbery and on March 20, 2000 the Defendant was sentenced to serve three concurrent terms of five years to life at the Utah State Prison, with a sentence of one year on the gun enhancement, to be served consecutive to the three terms.

The Trial Judge in questioning prospective jurors asked if any of them had prior jury service. One potential juror answered that he served on a jury twelve years ago in Phoenix. The potential juror stated that the case involved murder, robbery and rape. The potential juror stated that they ended up in a hung jury. The Judge then inquired what the vote was and the potential juror replied that 11 voted guilty and one voted not guilty. The Judge then stated "It must have been Archie Bunker's wife, Edith. Counsel for the Defendant stated "not necessarily" The Judge then replied "Not necessarily. That – well, that a good point, Mr. Gravis" There was no further comment or action by the trial judge. The comments were made in the presence of all potential jurors and therefore prejudiced the entire jury panel, making it impossible for the Defendant to receive a trial before an impartial jury.

STATEMENT OF FACTS

By information that Defendant was charged with three separate counts of

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aggravated robbery. (T. volume I p. 8) On the 15th of February, 2000 the Honorable Stanton M. Taylor empaneled the jury to try the case. (T. Jury Voir Dire p 1) As part of the jury voir dire the Trial Judge entered into the following dialog with prospective juror, Mr. Jackson in response to the Judge's question as to who had served on prior juries:

Mr. Jackson: Yes

The Court: And about how long ago was that?

Mr. Jackson: It was about 12 years ago. I lived in Phoenix. The case was a triple murder, robbery, rape.

The Court: Kind of a grim kind of case, huh?

Mr. Jackson: Yes, and it lasted quite a long time.

The Court: Pardon me?

Mr. Jackson: The trial was about three weeks in length.

The Court: I see. Do you recall whether the defendant was guilty or not?

Mr. Jackson: We ended in a hung jury.

The Court: I see. So they got to go back and do it again?

Mr. Jackson: Yes.

The Court: I see. All right. Would you mind telling us how you voted?

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Mr. Jackson: Would that matter?

The Court: It – it really doesn't. It's just kind of a curiosity thing.

Mr. Jackson: Guilty.

The Court: Okay. You felt like he was guilty and some other people - -

Mr. Jackson: There were 12 and it was 11 guilty and 1 not guilty.

The Court: I see. It must have been Archie Bunker's wife, Edith.

Mr. Gravis: Not necessarily

The Court: Not necessarily. That - - well, that's a good point, Mr. Gravis.

(T Jury Voir Dire February 15, 2000 pg's 12-13)

Mr. Jackson was not selected to hear the case, but those jurors selected to hear the case all heard the exchange between the Trial Judge and Mr. Jackson. (T. Vol I p 5) suggesting that if a juror did not vote for convictions then they were a "ding bat".

In this case each of the three victims of the alleged aggravated robbery testified that they went to Cindy Weese's apartment at 827 23rd Street, Ogden, Utah for the purpose of submitting a bid for a roofing job. Prior to traveling to

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Cindy Weese's apartment, two of the victims, Mark Braunberger and Gary Green cashed their payroll checks at the Key Bank branch at 2nd and Washington Blvd in Ogden, Utah. Upon arriving at Cindy Weese's apartment they met Cindy Weese in her bedroom because Cindy Weese had surgery on her foot. (T. Vol I pg's 17-26)

While Mr, Braunberger and Mr. Green were in the bedroom with Ms. Weese the door to the bedroom came open and the Defendant stood in the door with a gun. Mr. Braunberger and Mr. Green testified that the Defendant robbed their money at gunpoint. (T. Vol I p. 26-27)

Detective Gent of the Ogden City Police Department testified that the Defendant informed him, by way of a confession, that he went to the apartment of Cindy Weese to sell her drugs. Mr. Braunberger and Mr. Green asked the Defendant the cost of drugs, and paid him the money that he received in exchange for drugs. The Defendant denied ever having a gun on his presence during this transaction. (T Vol I pg's 119-121)

The Jury found the Defendant guilty of three counts of aggravated robbery.
(T Vol II pg's 37-40)

SUMMARY OF ARGUMENT

The Trial Court denied the Defendant the right to a trial before an impartial

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jury. When in questioning all prospective jurors, the Judge made a suggestive comment by stating that a juror who did not vote for conviction must have been Archie Bunker's wife, Edith. This was said in response to one jurors revelation that he had previously served on a jury in a complicated case in Arizona, where the trial ended in a hung jury, because one juror voted to find the Defendant not guilty. The derogatory comments by the Trial Judge well have convinced prospective jurors that they should vote guilty. This possibility prevented part or all of the jury from finding the Defendant not guilty because they would then be labeled as an "Edith Bunker".

ARGUMENT

THE COURT DENIED THE DEFENDANT THE RIGHT TO A TRIAL BEFORE AN IMPARTIAL JURY, WHERE IN QUESTIONING PROSPECTIVE JURORS HE MADE A DEROGATORY COMMENT ABOUT A JUROR IN A PRIOR TRIAL WHO VOTED TO FIND THE DEFENDANT NOT GUILTY.

The Constitution of Utah, Article I, Section 12, guarantees the defendant in a criminal case the right to a trial by an impartial jury. State v. Bailey 605 P 2d 765 at Page 767 (Utah 1980) Impartiality has been defined by the Utah Supreme Court as a "mental attitude of appropriate indifference." State v. Brooks, 563 P. 2d 799, 802 (Utah 1977) Section 77-30-18(2) defines " actual bias as the existence of a

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state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality" State v Brooks 631 P 2d 878, 883 (Utah 1981)

This Court in the case of State v Baker 884 P2d 1280 at 1281 (Utah App 1994) stated: "However, the exercise of the trial court's discretion in selecting a fair and impartial jury must be viewed in light of the fact it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another."

The Trial Court in questioning all prospective jurors as a group as to whether they had served in prior jurors asked prospective juror, Mr. Jackson if he had served on a previous jury. In answer to the question Mr. Jackson answered that he served on a jury in Phoenix, Arizona a number of years ago. (T Jury Voir Dire p 12) The prospective juror in response to the Judge's questioning stated that the case was a triple murder, robbery and rape, which lasted three weeks. The next question asked by the Judge was whether the defendant was guilty or not? In answer the prospective juror indicated it ended up in a hung jury. Then the Judge asked as to how the juror voted. The prospective juror then asked "would it matter"

The Judge replied it "it really doesn't. Its just kind of a curiosity thing" The prospective juror replied "Guilty". The Judge stated "you felt like he was guilty and

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some other people- -". The reply of the prospective juror was there were 12 and it was 11 guilty and 1 not guilty. The then advice of the Trial Judge was "I see. It must have been Archie Bunker's wife, Edith."

Counsel for the Defendant stated "Not necessarily". The Judge replied: "Not necessarily. That - - well, that's a good point, Mr. Gravis". (T. Jury Voir Dire p 13) The Archie Bunker comments of the trial judge were heard by all the jurors, including those who sat as jurors in trying the Defendant's case and who subsequently found him guilty of three counts of aggravated robbery. It is impossible to know what effect the Judge's facetious comment had on the jury. Jurors are expected to rely on the Trial Judge and possibly did think it might be wrong to hang the jury or vote not guilty.

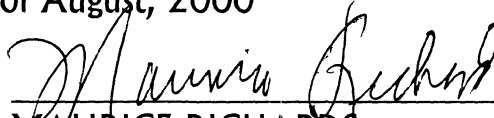
The effect of the Trial Judge's comment could well have been that any juror who desired to vote contrary to the vote of the majority of the jurors would be considered in a Edith Bunker, Ding bat juror. It is possible that this suggestion biased some jurors or the total jury against the Defendant. This denied the Defendant a constitutional right in a trial in a criminal case to have an unbiased jury as guaranteed by The Utah Constitution, Article I, Section 12.

CONCLUSION

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The Court must reverse the finding that the Defendant was guilty of three counts of aggravated robbery due to the comments of the Trial Judge in the jury voir dire the suggestion that any juror who voted contrary to the vote of the majority would be considered an Edith Bunker. The term and its suggestion were clearly derogatory. These comments denied the Defendant a trial before an impartial jury as guaranteed in Article I, Section 12 of the Utah Constitution.

DATED this 30 of August, 2000



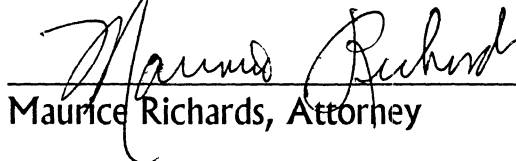
MAURICE RICHARDS

Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellant was posted in the United States mail, postage prepaid, on this ____ day of August, 2000 and addressed to:

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Salt Lake City, Utah 84114-0854


Maurice Richards, Attorney

1 (WHEREUPON, the prospective jurors being sworn, voir
2 dire of the jury panel is held, as follows:)

3 **THE COURT:** Thank you.

4 Now, the -- the initial questions are kind of
5 impersonal, we'll kind of -- kind of go through those in a
6 hurry. And, in fact, let me suggest to you that I -- that
7 I'm not even going to require a response. What I'm going to
8 do is ask a question, and if your response is appropriate,
9 then you don't have to say anything. If there's a problem,
10 then indicate that there's a problem.

11 Just as an example, the first question is: Are -- are
12 you all citizens of the United States? Now, if you're a
13 citizen of the United States, please feel free just to kind
14 of sit there and stare at me. Or if you'd rather look at
15 somebody else, I guess that's okay. On the other hand, if
16 there's some question about your citizenship or some
17 problem, then you should indicate there's a problem. Okay?

18 Are you all citizens of the United States?

19 (No response)

20 **THE COURT:** Are you all at least 18 years of age?

21 (No response)

22 **THE COURT:** Do you all read, write, and understand
23 the English language?

24 (No response)

25 **THE COURT:** You know, it occurs to me that if you

1 Not in this building, but in the old one.

2 THE COURT: The old courthouse.

3 MR. CORRA: The old courthouse.

4 THE COURT: Yeah.

5 MR. CORRA: I think you were on that.

6 THE COURT: You think I was the judge on the case?

7 MR. CORRA: You were the judge on that case.

8 THE COURT: Oh. Well, that's nice. It's nice to

9 see you --

10 MR. CORRA: It was a couple of years ago.

11 THE COURT: Nice to see you back. Do you recall

12 what kind of a case it was?

13 MR. CORRA: It was a robbery.

14 THE COURT: It was a robbery case.

15 MR. CORRA: Uh-huh.

16 THE COURT: I see. Do you recall whether the

17 defendant was guilty or not guilty?

18 MR. CORRA: We found the defendant not guilty.

19 THE COURT: Not guilty. Okay. All right. Anybody

20 else over here? And then we've got Mr. Jackson?

21 MR. JACKSON: Yes.

22 THE COURT: And about how long ago was that?

23 MR. JACKSON: It was about 12 years ago. I lived

24 in Phoenix. The case was a triple murder, robbery, rape.

25 THE COURT: Kind of a grim kind of case, huh?

1 MR. JACKSON: Yes, and it lasted quite a long time.

2 THE COURT: Pardon me?

3 MR. JACKSON: The trial was about three weeks in
4 length.

5 THE COURT: I see. Do you recall whether the
6 defendant was guilty or not?

7 MR. JACKSON: We ended in a hung jury.

8 THE COURT: I see. So they got to go back and do
9 it again?

10 MR. JACKSON: Yes.

11 THE COURT: I see. All right. Would you mind
12 telling us how you voted?

13 MR. JACKSON: Would that matter?

14 THE COURT: It -- it really doesn't. It's just
15 kind of a curiosity thing.

16 MR. JACKSON: Guilty.

17 THE COURT: Okay. You felt like he was guilty and
18 some other people --

19 MR. JACKSON: There were 12 and it was 11 guilty
20 and 1 not guilty.

21 THE COURT: I see. It must have been Archie
22 Bunker's wife, Edith.

23 MR. GRAVIS: Not necessarily.

24 THE COURT: Not necessarily. That -- well, that's
25 a good point, Mr. Gravis.

1 **THE COURT:** Okay. Anything else?

2 **MS. NEIDER:** Not from the State, Judge.

3 **THE COURT:** All right.

4 **MR. GRAVIS:** Not at this time, Your Honor.

5 **THE COURT:** We're in recess until the jury returns.

6 (WHEREUPON, at this time there's a recess, after which
7 proceedings resume out of the hearing of the jury, as
8 follows:)

9 **THE COURT:** I understand they've arrived at a
10 verdict.

11 **THE BAILIFF:** Yes, sir.

12 **THE COURT:** Let's bring them back.

13 (WHEREUPON, at this time the jury returns to the
14 courtroom, after which proceedings resume as follows:)

15 **THE COURT:** I understand that you've arrived at a
16 verdict; is that correct?

17 **MR. FENDRICK:** Yes.

18 **THE COURT:** Who is the foreperson? Mr. Fendrick?

19 **MR. FENDRICK:** Uh-huh.

20 **THE COURT:** If you'd hand the verdict to the
21 bailiff, please.

22 (Verdict tendered to the Court.)

23 **THE COURT:** Thank you.

24 On Count I: We, the jury empaneled to try the issues
25 in the above-entitled matter, do hereby find the defendant

1 guilty of count I, aggravated robbery, a first degree
2 felony.

3 Signed by the foreperson.

4 Count II: We do hereby find the defendant guilty of
5 count II, aggravated robbery, a first degree felony.

6 And count III, once again, guilty of count III,
7 aggravated robbery.

8 We really appreciate the efforts that you've made. We
9 know that you've been attentive, that you've listened
10 carefully to the evidence, and that you've arrived at a --
11 at an appropriate verdict.

12 We recognize the fact that this has not been an easy
13 duty for you. The one -- the one thing that kind of
14 reoccurs when I have an opportunity of visiting with jurors
15 after the case is an expression that I'm -- that I'm glad I
16 had an opportunity of being a juror, but I wouldn't want to
17 do it again. That's almost invariably how people feel.

18 I hope that you will go away from this experience
19 with -- with the feeling and a knowledge that in spite of
20 the fact that this is a cumbersome system, that it is a
21 system that works, that is an appropriate way of arriving at
22 resolution of -- of conflicts. There's not a perfect system
23 because we're all human, but -- but in the realm of human
24 experience, we've discovered that this is -- this is only
25 the -- this is the only really fair way of -- of dealing

1 with conflicts. You can go away feeling that you have
2 appropriately responded and done your duty as citizens. And
3 we are indeed grateful to you.

4 You are excused with the thanks of the Court.

5 MR. GRAVIS: Your Honor, before the jury leaves --

6 THE COURT: Yes? Oh, yeah, I guess you want to
7 poll the jury.

8 MR. GRAVIS: -- I would like to have the jury
9 polled.

10 THE COURT: Yeah, I think that's a good idea.

11 Mr. Hoskins, do these verdict sheets reflect your
12 verdict?

13 MR. HOSKINS: Yes.

14 THE COURT: Mr. Carter?

15 MR. CARTER: Yes.

16 THE COURT: Mr. Corra?

17 MR. CORRA: Yes.

18 THE COURT: Mr. Kendell?

19 MR. KENDELL: Yes.

20 THE COURT: Mr. Fendrick?

21 MR. FENDRICK: Yes.

22 THE COURT: Ms. Krebs?

23 MS. KREBS: Yes.

24 THE COURT: And Mr. Bingham?

25 MR. BINGHAM: Yes.

1 **THE COURT:** And -- and Ms. Brewer?

2 **MS. BREWER:** Yes.

3 **THE COURT:** Thank you very much. You are excused.
4 Thank you.

5 Court would like the benefit of report from Adult
6 Probation and Parole. Any objection to that?

7 **MR. GRAVIS:** No, Your Honor.

8 **THE COURT:** All right. We'll refer the matter then
9 to the office of Adult Probation and Parole for the purpose
10 of presentence investigation report. They will probably
11 need -- what will they need, about four or five weeks?

12 **THE CLERK:** Yeah, March 20th would probably be
13 good.

14 **THE COURT:** Pardon me?

15 **THE CLERK:** March 20th.

16 **THE COURT:** Let's see, is that where we were
17 setting the 13th? Yeah.

18 **THE CLERK:** Uh-huh.

19 **THE COURT:** Would March 20th work for you,
20 Mr. Gravis?

21 **MR. GRAVIS:** That would be good, yes, Your Honor.

22 **THE COURT:** Is that agreeable with the State?

23 **MS. NEIDER:** Yes, Judge. In addition, Judge, we
24 had attached a misdemeanor case to trail behind this.

25 **THE COURT:** Oh, yeah, we do --

1 sworn by the clerk and voir dire of the jury panel is held.
2 There being no challenges for cause, proceedings resume as
3 follows:)

4 **THE COURT:** Okay. The -- the eight people who will
5 be called upon to render a verdict in this case are as
6 follows: Alan G. Hoskins, Spencer D. Carter, Fred J. Corra,
7 Shane Kendell, Kyle Fendrick, Valerie Krebs, Joshua Bingham,
8 and Carol Brewer.

9 Does that reflect your notes as well, Counsel?

10 **MR. GRAVIS:** Yes, Your Honor.

11 **MS. NEIDER:** Yes, Judge.

12 **THE COURT:** Okay. Now, if your name was not
13 called, I -- I feel really bad and can only encourage you to
14 either stick around and watch or go spend your magnificent
15 compensation and -- and -- well, magnificent compensation.
16 I -- I am embarrassed by that amount of compensation, but
17 it's, I guess, like I said before, part of the rent we pay.

18 But we are appreciative of your having been here, and
19 you are excused with the thanks of the court. So if you
20 need to leave, you may -- you may be excused, if your name
21 was not called.

22 We'd like Mr. Hoskins, if you would, to sit in the
23 first seat, Mr. Carter in the second seat, Mr. Corra in the
24 third seat, Mr. Kendell in the fourth seat, Mr. Fendrick in
25 the first seat on the front row, Ms. Krebs in the second

1 seat on the front row, Mr. Bingham the third, and Ms. Brewer
2 in the fourth seat.

3 Now, before you get too comfortable, we would like you
4 to stand, raise your right hands, and be sworn as jurors in
5 this case.

6 (WHEREUPON, at this time the clerk swears the jury
7 panel.)

8 **THE COURT:** Thank you. Now, if you'd like to
9 spread out so that there's seats between you -- I kind of
10 like my space -- and if you'd like to do that, that's
11 perfectly okay.

12 Did counsel have an opportunity of looking over the
13 initial instructions?

14 **MR. GRAVIS:** I have, Your Honor. They appear to be
15 stock instructions.

16 **THE COURT:** Okay. They are -- they are just
17 stocks.

18 **MS. NEIDER:** No objection to them, Judge.

19 **THE COURT:** All right. Would you like to -- to
20 give the jurors each a -- we've -- I'm going to give some
21 preliminary instructions about -- about the trial. We've
22 provided one for each two of you, so maybe you'll want to
23 sit close enough that you can kind of look -- look off the
24 same copy. If you'd like to read along, you may. If you'd
25 like to just listen, that would be fine. Once again, these

1 are the instructions to the jury, the preliminary
2 instructions.

3 (WHEREUPON, at this time the Court begins to read the
4 preliminary instructions to the jury.)

5 THE COURT: Instruction number two should be
6 deleted because we haven't included anything on that.

7 MR. GRAVIS: We do have some stipulations though,
8 Your Honor.

9 THE COURT: Well, we'll do that as we go along. I
10 think that would be a better way of dealing with it.

11 So number two starts out "after the evidence has been
12 heard."

13 (WHEREUPON, at this time the Court continues reading
14 the preliminary instructions to the jury.)

15 THE COURT: Are you prepared to proceed,
16 Ms. Neider?

17 MS. NEIDER: Yes, Judge, I am.

18 THE COURT: You may proceed.

19 MS. NEIDER: Thank you.

20 THE COURT: Yeah, why don't we get the -- if you'll
21 hand those back to the bailiff, please. And just by way of
22 instruction, you'll have my copy to take back into the jury
23 room when you begin your deliberations so you'll have a -- a
24 copy to use.

25 Go ahead.

1 **MS. NEIDER:** Thanks, Judge.

2 I know we've been here all morning already and now we
3 finally get to the meat and potatoes of what's going on.

4 Now these are opening statements. I'll make one, Mr.
5 Gravis will make one, in anticipation of what evidence we
6 intend to put on, if any, and what exactly we expect to
7 happen today. And I just want to tell you a little bit
8 about the facts and the allegations in -- in the
9 informations that the judge has read to you.

10 There are three counts -- three separate counts of
11 aggravated robbery. On November 19th at an address at 827
12 23rd Street on a Friday, it was about 5 o'clock, Mark
13 Braunberger and Gary Green had been working that day. They
14 worked as roofers and they worked together. They had been
15 on the same crew and had gotten paid.

16 At about 10 or 13 minutes before 5 o'clock, they were
17 at the bank, at Key Bank at Five Points out on Harrisville
18 Road. They cashed their checks and met their boss there,
19 got paid, and decided on the way home -- Mark was driving,
20 giving Gary a ride home -- that they would stop at Cindy
21 Weese's house and they would give her a bid on a job.

22 They knew Cindy. Gary knew Cindy first because he knew
23 the person who delivered her paper. They'd had a
24 conversation, and Mark and Gary had done some roofing work
25 for her on a prior occasion. They knew she had some other

1 work maybe they could do for her, and they decided that
2 Friday afternoon to stop and to see if they could give her a
3 bid, if they could line up the work, what they were going to
4 do.

5 They went to Cindy's house. Cindy had had surgery on
6 her foot and she had had some bones fused together in her
7 foot and she was laid up in her bedroom. They went into her
8 house. Knocked on the door, were let in, went back into her
9 bedroom where she was lying on her bed trying to keep her
10 foot elevated.

11 While they were standing in her bedroom talking to her
12 about things -- and they will tell you it was probably
13 between about two and five minutes that they were in there
14 and that they were talking with her, the door to the bedroom
15 flew the rest of the way open. It wasn't completely closed,
16 but it flew open and standing there with a handgun, a .38
17 handgun, was the defendant, Mr. Arballo.

18 That he pointed the gun first at Mr. Braunberger, and
19 immediately told them -- meaning he and Mr. Green, who were
20 still standing -- to get down. And he proceeded to yell
21 quite a few things at them, was in quite an agitated
22 state -- they considered -- very excited, and they were very
23 concerned about what he was doing.

24 He pointed the gun directly at Mr. Braunberger,
25 although he's a little bit taller than Mr. Arballo. He at

1 one point got down on his knees as he was instructed to do.
2 Mr. Arballo held the gun to his head. He also held the gun
3 to Mr. Green's head and he also held the gun to Cindy
4 Weese's head.

5 Told them to empty their pockets and to put everything
6 that they had on the bed, and that if there was even one
7 dollar left in their pockets, he would search them or his
8 friends would search them and he would kill them if they
9 didn't give them all of the money that was in their pockets.

10 Mr. Braunberger and Mr. Green both have cash in their
11 pockets from their paychecks that they have just cashed.
12 They had over about 550 -- somewhere between 560 and \$575 in
13 their pockets. That money, Mr. Arballo took. He didn't
14 take any money from Cindy Weese; she didn't have any with
15 her there. And he didn't take any -- she didn't have any to
16 give him at that point.

17 Mr. Arballo continued to yell at them, making threats
18 towards them. He also told Cindy Weese -- before he left,
19 he handed her a piece of paper with a phone number on it and
20 he said: If you want any drugs, you buy them from me, ask
21 for Junior. And it had a phone number on it.

22 Mr. Arballo is an admitted drug dealer and was there to
23 stake a claim and to stake some territory on what he
24 considered that area.

25 It's important for you to know that Cindy Weese also

1 used drugs and that Cindy Weese also dealt drugs, and the
2 State doesn't hide that from you. Cindy Weese is in prison
3 now and since this time has been committed to prison because
4 of some probation violations and some new convictions that
5 occurred after this situation occurred.

6 She knew Mr. Arballo and had previously purchased drugs
7 from him, and she will tell you that it had been over a year
8 since she had purchased drugs from him. Didn't have an
9 ongoing relationship with him, but she knew him. In fact,
10 he'd been in her home earlier that day. He had come to her
11 home; he was welcome there for social reasons. And she will
12 even acknowledge to you that -- that there were other people
13 that used drug frequently in her home. She will tell you
14 she was not dealing at that point, but this was his way of
15 telling her where she could find her resources, and if she
16 needed methamphetamine, if she was going to sell
17 methamphetamine, she was to buy it from him.

18 Cindy Weese, like I said, she is at the prison and she
19 will be accompanied -- she's in custody. You'll see her in
20 jail clothes and she'll be shackled today, and she will
21 testify about what happened on that date.

22 At the end of that experience -- well -- and also as
23 part of the evidence, Mr. Braunberger and Mr. Green and
24 Ms. Weese will all testify that they could tell that the gun
25 was loaded. It was a revolver, they could see the caps, and

DIRECT EXAMINATION

BY MS. NEIDER:

Q. Mark, will you state your full name for the record?

A. Mark Andrew Braunberger.

Q. Okay. Mark, what city do you live in?

A. Warren.

Q. Okay. And where do you work?

A. Quality Roofing.

Q. Okay. And are you -- what are your duties at Quality Roofing?

A. I'm the crew supervisor.

Q. Okay. And is Gary Green a member of your crew?

A. He is.

Q. Okay. How long have you known Gary?

A. Since -- his stepdad worked for me before him and I met him when he come to work.

Q. Okay.

A. In about, I believe, August.

Q. Okay. And being his crew supervisor, do you actually work out in the field or out on jobs with him frequently?

A. I do. Daily.

Q. Okay. Do you know Cindy Weese?

A. I do.

Q. How do you know Cindy?

A. I went to measure a roof for her and done a little bit

1 of work there, and returned to measure -- to get information
2 on another one, another roof.

3 Q. Okay. Do you know or do you remember how you were first
4 introduced to her?

5 A. Yeah. Gary asked me if I wanted to do a -- do a carport
6 re-cover, and I told him yeah. So he knew her and that's --
7 he introduced me to her.

8 Q. Okay. How long ago was it that you first met Cindy?

9 A. I'd say probably right around the beginning of November.

10 Q. Okay. And when do you think you first did the carport
11 cover for her?

12 A. Probably right shortly after I went over the first time.
13 I think it would have been probably three days after I went
14 and measured it and gave her a price on it.

15 Q. Okay. And did you -- who did you do that job with?

16 A. Gary.

17 Q. Okay. And did you do that through Quality Roofing or
18 did you do that on an independent basis?

19 A. No, I did that on my own.

20 Q. Okay. Prior to November 19th, had you had any other
21 contact with Cindy Weese outside of this responsibility or
22 this job opportunity?

23 A. No, I hadn't.

24 Q. Okay. Were you working on November 19th of 1999?

25 A. I was.

1 Q. Okay. Do you remember where you worked that day?

2 A. I do. I worked out in Plain City.

3 Q. Okay. Who did you work with that day?

4 A. I worked with Gary Green and the owner of the company

5 was there a couple of times that day.

6 Q. Okay. How late did you work in the afternoon that day?

7 A. I think we left there about 4:30 -- 4:25 to 4:30 to get

8 up to the bank and meet Layne.

9 Q. Okay. How -- how are you normally paid or what

10 procedure do you normally go through to get paid by Quality

11 Roofing?

12 A. Usually we meet with Layne on every single Friday and he

13 writes us a check for the week.

14 Q. Okay. And did he do that on November 19th?

15 A. Yes, he did.

16 Q. Okay. And where did he give you your check?

17 A. At Key Bank on 2nd and Washington.

18 Q. Okay. And who were you with at that point?

19 A. I had Gary with me.

20 Q. Okay. So the two of you met your boss at Key Bank?

21 A. Uh-huh. Yes.

22 Q. Okay. And did he -- did he give you your paycheck

23 there?

24 A. He did.

25 Q. Okay. And what did you do with it?

1 A. I took it inside the bank and cashed it.

2 Q. Okay. Do you have an account at Key Bank?

3 A. I don't.

4 Q. Okay. Why did you choose Key Bank to go cash it?

5 A. It's -- it's the bank that he writes the checks off.

6 It's the company's account is there.

7 Q. Okay. And is that common for you to cash your check at

8 Key Bank?

9 A. Yeah.

10 Q. Okay.

11 A. Uh-huh.

12 Q. Let me show you, Mark, what's been marked State's

13 Exhibit Number 1 and ask you if you recognize that?

14 A. Yeah, I do. That's my pay stub.

15 Q. Okay. Your pay stub from?

16 A. November 19th.

17 Q. Okay. And is it from Quality Roofing?

18 A. It is.

19 Q. Okay. How much did you get paid that day?

20 A. \$343.37.

21 Q. Is that a typical week's wages for you?

22 A. It was a little short.

23 Q. Okay. Did you have any other money with you besides

24 your paycheck that day?

25 A. Yes, I did.

1 Q. Do you know how much money?

2 A. Nineteen dollars.

3 Q. Okay. How do you know that you had \$19 with you that
4 day?

5 A. Because I had gotten a \$20 bill from my wife that
6 morning and stopped and got coffee on the way to work and
7 that was all I'd spent, so -- and coffee's about 89 cents so
8 I had \$19 left from that.

9 Q. Okay.

10 MS. NEIDER: Judge, the State would move to admit
11 State's Exhibit Number 1 at this point.

12 THE COURT: Objection?

13 MR. GRAVIS: No objection, Your Honor.

14 THE COURT: Received.

15 MS. NEIDER: Judge, at this point we also have, by
16 stipulation, a copy of the teller tape at Key Bank.
17 Mr. Gravis and I have discussed that, State's Exhibit
18 Number 2 -- Mr. Gravis also has a copy of it -- indicating
19 that a check was taken at Key Bank for the account of
20 Quality Roofing and was cashed for \$343.37.

21 THE COURT: For the -- or by way of explanation,
22 normally what they would do is bring in someone from Key
23 Bank who would testify to these things. But the attorneys
24 have agreed since that's not really an issue in this case
25 that they would allow the exhibit to come in to establish

1 that without the -- without the -- without going to the
2 bother of calling someone from Key Bank here.

3 Is that a fair statement?

4 **MR. GRAVIS:** That's correct, yes, Your Honor.

5 **THE COURT:** Okay.

6 **MS. NEIDER:** Judge --

7 **THE COURT:** It'll be -- the exhibit is received.

8 **MS. NEIDER:** Thank you, Judge.

9 Judge, the exhibit also indicates -- and I can publish
10 this to the jury -- that the check was cashed at 1647, time.

11 **THE COURT:** Okay.

12 **Q. (By Ms. Neider)** Mark, do you remember what time you
13 got to Key Bank?

14 **A.** It was about five minutes before I went into the bank.

15 **Q.** Okay. And what did you do before you went into the
16 bank?

17 **A.** I had talked to Layne, the owner of Quality Roofing.

18 **Q.** Okay. And do you know what time, approximately, you
19 went into the bank?

20 **A.** The dash on -- his clock said it was about 10 to.

21 **Q.** Okay.

22 **A.** So that's why I went ahead and hurried in.

23 **Q.** Okay. And did you do anything inside Key Bank besides
24 cash your paycheck?

25 **A.** Waited in a long line.

1 Q. Okay. Did you have any conversations with anybody about
2 what time it was while you were in the bank?

3 A. I -- I mentioned to one of the loan officers that I knew
4 some bankers that wouldn't be going home on time that day.

5 MR. GRAVIS: Your Honor, I don't see that this is
6 relevant. We're not arguing about the time. It's clearly
7 marked on the exhibit.

8 THE COURT: Okay. I think that's fair.

9 MS. NEIDER: Okay.

10 Q. (By Ms. Neider) How long were you in the bank, Mark?

11 A. Until probably close to when they closed.

12 Q. Okay. Was Gary in the bank with you?

13 A. Yes.

14 Q. And what was he doing in the bank?

15 A. He was cashing his paycheck, also.

16 Q. Okay. After you left the bank, where did you go?

17 A. I went over to Cindy's house.

18 Q. Okay. Do you know the address at Cindy's house?

19 A. I believe it's 823 23rd or 863.

20 Q. 827, does that sound right? On 23rd Street --

21 A. Uh-huh.

22 Q. -- is that right?

23 A. Yeah.

24 Q. And she lives in an apartment; is that right?

25 A. That's right.

1 Q. Do you know which number it is?

2 A. I believe number one.

3 Q. Okay. Do you know approximately how long it takes to
4 get from Key Bank that you've described to Cindy's house?

5 A. I do. It takes between nine and a half and ten and a
6 half minutes.

7 Q. Okay. How do you know that?

8 A. I went and drove it.

9 Q. Okay. And how many times did you drive it?

10 A. Three.

11 Q. Okay. And what were the times that you came up with?

12 A. Between 9 minutes and I believe 42 seconds, and 10
13 minutes and 30 seconds.

14 Q. Okay. So approximately what time did you arrive at
15 Cindy's house on November 19th?

16 A. I'd say probably between 5:00 and maybe five after.

17 Q. Okay. Why did you go to Cindy's on the 19th?

18 A. She'd called me to ask me if I'd be interested in doing
19 the back half of her mother's house, re-roofing it.

20 Q. Okay.

21 A. And so I -- and also I needed to measure the rest of the
22 storage sheds for the owner of the apartments.

23 Q. Okay. So there were two possible jobs that you were
24 going to measure for; is that right?

25 A. Yes, uh-huh.

1 Q. Okay. And who did -- who made the arrangements to meet
2 with Cindy at her house?

3 A. She had contacted me and I agreed to meet -- to just
4 stop by within the next couple of days.

5 Q. Okay. Did she know you were coming on that day?

6 A. No, I don't -- I don't remember -- I don't believe I had
7 mentioned I'd stop by that day specifically, no.

8 Q. Okay. Why did you choose to stop by on that day then?

9 A. I had to take Gary to his girlfriend's dad's instead of
10 to his own house and she lives within a couple of blocks
11 there, so I thought it would be good to just go ahead and
12 get it out of the way while I had help with me.

13 Q. Okay. When you went to Cindy's house, did you go in her
14 apartment?

15 A. I did.

16 Q. Okay. And who went -- who was with you?

17 A. Gary.

18 Q. Okay. Did you see anybody else in the apartment while
19 you were there?

20 A. This -- not besides Cindy I didn't.

21 Q. Okay. Where was Cindy in the apartment when you first
22 saw her?

23 A. I believe she was -- I believe she opened the door.

24 Q. Okay. And where did you go -- or did you go to a
25 specific location inside the apartment with her?

1 **A.** Yes. We went into her room. She had -- had to put her
2 foot up. She had just had surgery on it the day before that
3 I think.

4 **Q.** Okay. So when you say you went into her room, her
5 bedroom?

6 **A.** Yes.

7 **Q.** Okay. And where was she in her bedroom?

8 **A.** She went in and laid back on the bed.

9 **Q.** Okay. And what did you and Gary do at that point?

10 **A.** We followed her in and that was about it. Just had
11 barely walked in there.

12 **Q.** Okay. And had you had any discussion with her about the
13 jobs at that point?

14 **A.** I believe I was -- I had just started to ask her for the
15 address to her mom's place when everything else started to
16 happen.

17 **Q.** Okay. What happens next?

18 **A.** The door to her room come open and I turned around and
19 the defendant was there with a gun, and started telling us
20 that, you know, he was taxing us. And come into the room
21 and took -- took our money.

22 **Q.** Okay. When you say that the door came open, had the
23 door been closed?

24 **A.** Not entirely. It -- it had been pushed back a little
25 bit so there would be a little more room. Her bed's really

1 close to the door.

2 Q. Okay. And do you remember, were you -- where were you
3 standing in relation to the door?

4 A. I was standing right inside the door.

5 Q. Okay. So you would have been the first person to be
6 encountered --

7 A. Yes.

8 Q. -- by somebody coming through the door?

9 A. Yes.

10 Q. Okay. Where was Gary from there?

11 A. He was just right to my left.

12 Q. Okay. You saw somebody come through the door with a
13 gun; is that right?

14 A. Yes.

15 Q. Describe when you first saw the gun. Where was the gun
16 when you first saw it?

17 A. It was right in my face.

18 Q. Okay. It was drawn then?

19 A. Uh-huh.

20 Q. Okay. And did you see the person clearly that was
21 holding the gun?

22 A. I did.

23 Q. Okay. And do you see that person in the courtroom
24 today?

25 A. I do.

1 Q. Detective Gent, if I could have you read that paragraph
2 and -- with the understanding that the court reporter is
3 putting it all in. Do it so that she can follow you.

4 A. I walked in the back door with three other gentlemen,
5 walked straight to the living room because Cindy said wait
6 in the living room because she was busy. We just sat there
7 for a few moments and these other two guys walked out and
8 they looked like they were tweaking. One came back and
9 Cindy asked me to let them in. He just walked back into
10 Cindy's room to get his pipe. Boom, he shut the door then
11 he walked out the same way he came in. Cindy was still in
12 the room making us wait with the other guy. He had long
13 hair. It was in a ponytail. He said it was all right --
14 correction -- she said it was all right to talk to her now
15 so I asked if my friends could come in, but she said no. We
16 sat in there and bullshitted for about 10 minutes. We sat
17 there and she was -- basically was asking me for a blast. I
18 told her I'll give you a blast if you buy some of my
19 crystal. She asked if I had it on me, but I told her it was
20 in the car. But I did have a little crank on me and I
21 smoked it with the guy with the hair. While we were smoking
22 it the other guy started knocking at the back door. She got
23 up and went and let him in. Then she told me and the guy
24 with the hair to get out. They just sat in there, I don't
25 know what the hell they were doing. But then she opened the

1 door and called us in, and asked if you (sic) the stuff with
2 me. They asked for an eight ball. They asked me how much
3 it was first, and I told them \$375. She asked me if I had
4 the stuff and I said it was in the car and I had to go get
5 it. And I said, I can count -- and I said, can I count the
6 money and the two guys, they both pulled out a wad of cash.
7 I think they cashed a check. While they were counting the
8 money Cindy asked for the blast and I gave it to her. She
9 was getting it ready in a hurry. She had it in a little
10 thing with water in it. And I played with her and I spilled
11 it and had to give her more. I gave her more and asked to
12 see the money or my friends won't hand over the drugs to me.
13 So they gave me \$375 and then they thought about it and
14 said, give me an eight ball and a half a teener. So they
15 asked me how much it would be and I said 550. So they
16 handed over \$536. They looked at Cindy and she said it was
17 okay because it's Angel, I've known him for years. I took
18 the money, walked out of the room and shut the door behind
19 me. And as soon -- and as soon as I hit the living room I
20 said let's go, I got the money. So we all ran out the door
21 and jumped in the car and left.

22 There was another guy in the apartment at this time.
23 He was in the kitchen. He had a lot of tattoos, he wore
24 glasses, and he was white. I think he was one of her
25 boyfriends.

1 Q. And at that point you begin to ask him some follow-up
2 questions; is that right?

3 A. Yes.

4 Q. Did you ask him if there were other people with him?

5 A. I believe I did. He wouldn't tell me who they were.

6 Q. Okay. Did he tell you how many other people were with
7 him?

8 A. He said there was three.

9 Q. Okay. Did you ask him if he had a weapon or anyone else
10 had a weapon?

11 A. He said there was no weapon.

12 Q. Okay. Did you ask him if he used drugs in the apartment
13 with Cindy and her friends?

14 A. I'm going to have to check to make sure. Yeah, I asked
15 him if he'd used any drugs in the apartment with Cindy and
16 her friends; and he said yes, meth.

17 Q. Okay. And did you ask him about whether or not any of
18 his friends had gone in the bedroom with him?

19 A. I did, and he said no.

20 Q. Okay. Did you ask him if he'd ever sold drugs to Cindy
21 before?

22 A. He said several times.

23 Q. Okay. Did you ask him if he'd ever sold drugs to the
24 other two guys in the room?

25 A. He said not face-to-face, but I sell it to Cindy and she

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