

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)	CASE NO.
LEWIS LEROY MCINTYRE, JR.)	
)	
Relator)	
)	ORIGINAL ACTION IN
v.)	PROHIBITION, MANDAMUS,
)	AND PROCEDENDO
SUMMIT COUNTY)	
COURT OF COMMON PLEAS, et al)	
)	
Respondents)	

APPENDIX VOLUME 4 OF 7: TRIAL TRANSCRIPT VOLUME 2 OF 2

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LEWIS LEROY MCINTYRE, JR.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,) CASE NO. 91-01135
) CA NO. 15308
 Plaintiff,)
)
 vs.) TRANSCRIPT OF PROCEEDINGS
) (Volume II of I
)
 LEROY McINTYRE,)
)
 Defendant.)

DEANA TRIENSKI
JAN 22 1991
CLERK OF COURTS

APPEARANCES:

MAUREEN HARDY, Assistant Summit County Prosecutor,
On behalf of the State of Ohio.

VINCENT R. MODUGNO, Attorney at Law
On behalf of the Defendant.

BE IT REMEMBERED, that upon the hearing of the
above-entitled matter in the Court of Common Pleas,
Summit County, Ohio, before the Honorable William H.
Victor, Judge, sitting by assignment, commencing on
August 8, 1991, the following proceedings were had,
being a Transcript of Proceedings:

Thomas G. Lazar
Official Court Reporter
Summit County Courthouse
Akron, Ohio 44308

(2) Vol T.O.D.
17095

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
Galen Thompson	27	43	
Lori Richardson	68	74	77
Denise Harrison	79	90	
Robert Taylor	93	104	
Ray Gent	106	113	
Gary Shadie	114	121	
Theresa Johnson	130		
Robert Apley	142	160	
John Lewis	179	187	

Motion for continuance, page 125
 Motion for mistrial, page 140, 246, 372

State rests, page 188
 Defense rests, page 189
 Rule 29 motion, page 220

Closing statement by the State, page 191 and 214
 Closing statement by the Defense, page 202

Court's charge, page 220
 Verdict, page 248
 Sentencing, page 381

1 9:00 a.m. Monday, August 12, 1991

2 P R O C E E D I N G S

3 (Whereupon, the following proceedings were
4 had out of the presence of the jury.)

5 THE COURT: What do you want to put on
6 the record?

7 MR. MODUGNO: Please the Court, Your
8 Honor, when the trial was continued on Friday I
9 indicated to the Court that I would like -- I
10 realize I sat back down, but I would like to
11 continue at least some cross-examination of
12 Detective Apley, particularly concerning follow-up
13 questions regarding drug activity and the
14 subsequent shooting.

15 THE COURT: I will let you do that.

16 MS. HARD: I would note for the record
17 my objection to that line of questioning. Before
18 the trial we had a motion in limine and defense and
19 myself sat down and discussed some of the issues in
20 the motion in limine. One of those issues, in
21 fact, being the subsequent shooting of the
22 defendant, Leroy McIntyre.

23 It was agreed by defense counsel prior to
24 trial that there would not be any discussion or
25 exploration into the subsequent shooting of the

1 defendant, as well as the issue pertaining to the
2 alleged drug activity that occurred in the area of
3 the shooting at 1027 Marion Place.

4 THE COURT: I realize that, but I'm
5 going to let him testify, cross-examine anyway.

6 MR. MODUGNO: Thank you.

7 MS. HARDY: Alternatively, the State
8 would move that the State call Detective Apley as
9 their witness.

10 THE COURT: I would overrule that.

11 MR. MODUGNO: Another matter. I would
12 would note my continuing objection to the
13 continuance of this trial and the Court's
14 overruling my motion for a mistrial for the reasons
15 previously stated.

16 I don't know if the Court has had an
17 opportunities to review the psycho-diagnostic
18 report in the file, but Mr. McIntyre was treated
19 for eight months for mental illness while he was
20 egregiously incarcerated. I think that report
21 indicated that he is capable of impetuous activity,
22 sometimes very irrational activity.

23 I believe he is currently engaged in
24 impetuous and irrational activity which make it's
25 impossible for me to adequately defend him based

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upon his actions and apparent demeanor.

THE COURT: Okay. I would overrule that.

MR. MODUGNO: Thirdly, Your Honor, I will start by saying I would indicate for the record that I have been unable to locate the alibi witness and, of course, that was first brought up on voir dire by the prosecution, which I may have mentioned had she not. She certainly did bring it up.

At this point, I cannot locate her. The sheriff's department has been unable to serve her. She is not present in court. I have been at her apartment, spoken with her neighbors. She was aware that she was going to be testifying either on Friday or Monday. She had my home phone number. She assured me she was going to be testifying.

I did question her at length on the 31st of July. Present with me and listening to all that conversation was a gentleman from my office by the name of Thomas Mullen. I don't think there is any doubt she is unavailable, but that the declarant is unavailable.

There is a little bit of a problem with some of the exceptions, but I would ask the Court to consider that and also to consider the fact that it

1 might be more prejudicial than less prejudicial to
2 not permit her testimony to be related. In fact,
3 it was listened to by an officer of the court who I
4 think will be --

5 THE COURT: I didn't get that last
6 part.

7 MR. MODUGNO: If it doesn't fall under
8 any of the exceptions, that it should be permitted
9 just on the basis that to not permit it would be
10 highly prejudicial at this point given the fact he
11 is not present.

12 THE COURT: I don't think so.

13 MR. MODUGNO: That is a no?

14 MS. HARDY: I think that's a no.

15 Your Honor, Detective Apley has asked if, in
16 fact, he is going to be questioned about the
17 shooting of the defendant, Leroy McIntyre, which he
18 was not aware he was even going to be questioned
19 about, if he could have the opportunity to run next
20 door and get his paper work pertaining to the
21 incident.

22 THE COURT: This is sometime later?

23 MS. HARDY: Months after.

24 THE COURT: I wouldn't permit him to go
25 into that.

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MS. HARDY: So Attorney Modugno, to clarify, is not permitted to go into the shooting of the defendant, Leroy McIntyre, so we are clear?.

THE COURT: If I understand, it occurred several months after.

MR. MODUGNO: Yes.

THE COURT: After this.

MS. HARDY: Yes.

THE COURT: I think that is only reasonable.

MS. HARDY: That is a yes, he can explore it, or, no, he cannot?

THE COURT: No, he cannot explore it.

MR. MODUGNO: I would ask if I could continue to cross-examine for the reason that there were a few other questions that I think needed to be asked.

Quite frankly, Your Honor, Friday morning I cannot deny that I was somewhat taken aback by the events, thrown off one's game somewhat.

MS. HARDY: Your Honor, I believe that Attorney Modugno did question Detective Apley about this issue.

THE COURT: I will let you cross-examine the officer with reference to the

1 alleged drug activity at that particular place. We
2 are not going to talk about any shooting six months
3 later.

4 MR. MODUGNO: Thank you.

5 THE COURT: Whether he knows anything
6 about drug activity.

7 MR. MODUGNO: I have a few questions that
8 I should have asked.

9 MS. HARDY: I take it we will be
10 recalling Detective Apley before I will be calling
11 Officer John Lewis?

12 MR. MODUGNO: That would be fine, Your
13 Honor.

14 (Whereupon, the following proceedings were
15 had in the presence of the jury.)

16 THE COURT: Good morning, ladies and
17 gentlemen.

18 You may proceed on behalf of the defendant.

19 MR. MODUGNO: Thank you, Your Honor.
20 Recalling Detective Apley for cross-examination.

21 THE COURT: If you will resume the
22 witness chair, please, sir.

23 - - -

- 1 A. Correct.
- 2 Q. That would have been a Monday, I suppose?
- 3 A. I believe so, yes.
- 4 Q. Sunday morning is when it happened?
- 5 A. Yes. He was arrested the next day, the 31st.
- 6 Q. At the time he was arrested, both the incident at
7 1027 Marion Place and 680 Bellevue had been
8 investigated; is that right, Detective?
- 9 A. Yes.
- 10 Q. But he was only charged with the incident at 1027
11 Marion Place; is that correct?
- 12 A. Yes.
- 13 Q. As a matter of fact, he was never actually arrested
14 and charged with the incident at 680 Bellevue;
15 isn't that correct?
- 16 MS. HARDY: Objection.
- 17 THE COURT: He may answer.
- 18 A. Not through like many court as far as a complaint.
- 19 Q. He was indicted?
- 20 A. He was indicted through the Summit County Grand
21 Jury.
- 22 Q. Months later?
- 23 A. I don't--
- 24 MS. HARDY: Objection.
- 25 THE COURT: Overruled.

1 A. I don't believe it was months, no. I would say it
2 was weeks.

3 Q. So you did have an opportunity in investigating
4 this matter to also investigate the incident at 680
5 Bellevue; is that correct?

6 A. I went over the reports. I went with Detective
7 Gent. Basically, he was the detective that was
8 assigned to the incident, the crime at 680
9 Bellevue. I conferred with Prosecutor Sharon Long.
10 I also talked to her about several other incidents
11 that was brought up.

12 Q. Detective Apley, you were familiar then with the
13 witnesses in both of these incidents, correct?

14 A. As far as names, yes.

15 Q. You were familiar with what their representations
16 were going to be; is that correct, what statements
17 they had made?

18 A. What they had stated to Detective Gent, correct.

19 Q. You were familiar with the reports, the
20 confidential police reports, that were prepared
21 regarding 680 Bellevue, that incident?

22 A. I read them. Like I said, I just went over with
23 Detective Gent what was stated.

24 Q. Right. You were aware that Theresa Johnson had not
25 identified anyone; is that correct?

1 A. Correct.

2 Q. As a matter of fact, the first time you ever heard
3 her do so was in this court on Friday morning,
4 wasn't it?

5 A. Yes.

6 Q. Which was a surprise to you, I suppose?

7 A. Somewhat, yes.

8 Q. You were down at the scene at 680 Bellevue? You
9 went to the scene of that incident, didn't you, at
10 some point in time?

11 A. On what date?

12 Q. I don't know what date, but did you ever go down
13 there?

14 A. Yes, I did. I went there once to show Theresa
15 Johnson photographs of the car, like I stated
16 earlier last week,

17 Q. Did she show you where 667 Bellevue was?

18 A. No, she did not.

19 Q. That would have been -- are you familiar with the
20 fact she claimed to be across and up the street at
21 the time of this incident?

22 A. From what I heard when she testified last week,
23 yes.

24 Q. She was showing you pictures of the car that she
25 said she saw from the porch across the street?

1 A. I was showing her pictures of a car that she
2 identified as being the car she saw that morning of
3 the 30th.

4 Q. You indicated previously that you went to 1027
5 Marion Place and you actually stepped off and
6 measured the distance from the front porch to the
7 curb; is that correct?

8 A. I paced it off, correct.

9 Q. Then you actually measured?

10 A. At a later date I went out with a tape measure and
11 measured it, correct.

12 Q. Did you also do that down at Bellevue, measure the
13 distance from 667 Bellevue to 680 Bellevue?

14 A. I couldn't because the house was no longer there.

15 Q. It was not there, but the lot was there?

16 A. There is an empty lot with grass and straw. There
17 is no house there at 680 Bellevue.

18 Q. You did not attempt to find out what that distance
19 was and how far away the car was when she allegedly
20 identified it?

21 A. Like I said, the address at 680 Bellevue I could not
22 because there is no house there.

23 Q. The day that you showed her these pictures, she
24 claimed to identify that vehicle; is that correct?

25 A. She identified that vehicle, correct.

1 Q. But on that same day she did not identify the
2 occupants; is that correct?

3 A. I did not ask her. There was no mention about the
4 occupants. I had conversation with Prosecutor Long
5 and basically I took the photographs of the car out
6 there for her to identify, if she could.

7 Q. But she didn't volunteer that day as she did Friday
8 in court?

9 A. She didn't volunteer?

10 Q. She didn't volunteer the information as to who she
11 claimed was getting out of that vehicle?

12 A. She was not asked it. The only thing I did was
13 show her the photographs.

14 Q. Do you know who Ant was? Do you have any idea who
15 Ant might have been?

16 A. I have no idea.

17 Q. Based on your experience as a detective with the
18 Akron Police Department, do you believe that crack
19 cocaine was involved in the break-in at 680
20 Bellevue?

21 MS. HARDY: Objection.

22 THE COURT: He may answer.

23 A. I have no idea. I have no idea what was involved.
24 I know there was a robbery that was involved that
25 night at 680 Bellevue, but as far as -- the only

1 thing that was taken was money. I have no
2 knowledge that crack was involved or anything at
3 680 Bellevue.

4 Q. You are familiar somewhat with the cocaine epidemic
5 in Akron as a police officer?

6 A. Correct.

7 Q. As a police officer, you have had a lot of
8 experience in questioning witnesses, haven't you?

9 A. Yes, I have.

10 Q. I'm going to guess. I presume maybe at some point
11 in your career you have arrested people for driving
12 under the influence of alcohol, for example?

13 A. If they come in contact with me or -- I think I had
14 one last year and one the year before, correct.

15 Q. So you do have some experience in questioning
16 people, for example, determining whether they are
17 sober or not when they are answering questions for
18 you?

19 A. Correct.

20 Q. Because obviously their reliability could be
21 affected?

22 A. Yes.

23 Q. By their state of mind.

24 You had the opportunity here to listen to
25 the testimony of Lori Richardson, I believe it was

1 on Thursday afternoon?

2 A. Yes.

3 Q. You were sitting right here. You saw her walk to
4 the witness stand. I presume you noticed that she
5 was stumbling and hesitant?

6 MS. HARDY: Objection.

7 THE COURT: I'm going to sustain the
8 objection to that question.

9 MR. MODUGNO No further questions.
10 Thank you, Detective.

11 MS. HARDY: Nothing further.

12 THE COURT: Thank you, sir. You may
13 step down.

14 (Whereupon, the witness was excused.)

15 THE COURT: Call your next witness,
16 please.

17 MS. HARDY: The State would call
18 Officer John Lewis.

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1 A. Yes, I was. I was working a uniform patrol car on
2 the west side of Akron.

3 Q. And what shift were you working that day, if you
4 recall?

5 A. 6:30 a.m. to 2:30 p.m.

6 Q. Officer Lewis, I would like to direct your
7 attention to December 30th, approximately 8:30 in
8 the morning. On that date, did you have occasion
9 to locate an automobile that was suspected in the
10 shooting of Galen Thompson?

11 A. Yes, I did.

12 Q. Can you tell us how you became involved in looking
13 for this automobile?

14 A. Detectives had given some information that there
15 was a shooting that day or evening and it involved
16 an Oldsmobile, older Olds, a dark gray over a
17 lighter gray Cutlass, and to ask me to watch and
18 see if I could find a car matching that
19 description.

20 Q. Did you locate that vehicle?

21 A. Yes, I did, at 745 Edgewood Avenue, in the rear in
22 a parking lot.

23 Q. Can you describe to the jury the car that you found
24 at the rear of 745 Edgewood Avenue?

25 A. It was a two-tone gray, dark gray over a light

1 gray, two-door, a red or maroon-ish interior, and
2 it had a 30-tag in the window and I believe it had
3 a Rolling Acres Dodge thing on the back bumper
4 where the license plate should be, and there were
5 two shotgun shells inside the vehicle.

6 Q. Where were those shotgun shells located?

7 A. They were in the center console. I could observe
8 them from the outside. They were in the center
9 console of the vehicle just where the hump is.

10 Q. Officer Lewis, you indicated that this car was a
11 two-tone gray Cutlass, being a darker gray with a
12 lighter gray. Can you indicate to the jury where
13 on this car was the darker gray located?

14 A. There was dark gray on the hood and on the top of
15 the coach compartment. You could see the gray on
16 it. It was definitely a two-tone gray.

17 Q. Officer Lewis, you indicated that you located this
18 car at the rear of 745 Edgewood. Can you tell us
19 whether or not 745 Edgewood is a home or an
20 apartment?

21 A. That is AMHA housing. There is several apartments
22 in the area.

23 Q. Did you have the opportunity to determine who the
24 car was registered to?

25 A. It belonged to a Wanda Jones.

1 Q. Officer Lewis, what, if anything, did you do with
2 the shotgun shells that you located inside this
3 two-door gray Cutlass?

4 A. First I called a traffic unit and had them
5 photograph the shotgun shells in my presence for
6 evidence, then I took the shotgun shells to ID and
7 and ID dusted the shotgun shells for fingerprints
8 with negative results.

9 Q. Were those shotgun shells subsequently tagged into
10 evidence?

11 A. Yes, ma'am, they were.

12 Q. Who tagged those into evidence?

13 A. I did that.

14 (Whereupon, State's Exhibits 8 was marked
15 for identification.)

16 BY MS. HARDY:

17 Q. I'm handing you what has been marked for
18 identification purposes as State's Exhibit No. 8.
19 Could you look at that exhibit and tell us what it
20 is?

21 A. This is my evidence envelope with my writing on it
22 and the contents is a small bag and here you have
23 two Winchester Super X No. 6 shotgun shells.

24 Q. Are those shells in substantially the same
25 condition as they were when you retrieved them from

1 the Oldsmobile Cutlass on December 30th, 1990?

2 A. Yes, they are.

3 Q. You indicated that photographs were taken of the
4 car. Were you present when those photographs were
5 taken, sir?

6 A. Yes, I was. I called the Traffic Bureau, Officer
7 Biasella, to do that for me.

8 (Whereupon, State's Exhibit No. 9 was marked
9 for identification.)

10 BY MS. HARDY:

11 Q. Handing you what has been marked for identification
12 purposes as State's Exhibits 3, 5, 6 and 9, I would
13 ask you if you can look at those, please, and if
14 you can identify those?

15 A. Okay. This first picture is a picture of the
16 console of the '79 Oldsmobile. If you look, you
17 can see the two shotgun shells in the console right
18 here. Unfortunately, our equipment is probably not
19 that good to get a good enough picture, but you can
20 see the shells there.

21 Right here is a picture of the Oldsmobile.
22 If you look at the Oldsmobile, you can see the line
23 right across here indicating the two-tone gray, the
24 darker gray being on the top. Just look at the
25 line and you will see it.

1 This is a picture of the same vehicle with
2 the red interior on it and the doors opened to show
3 the interior and the back of the car and it's by
4 the AMHA housing. Unfortunately, it's sort of
5 washed out. I don't think you could see the
6 Rolling Acres thing on that one.

7 Here is another one of the vehicle. You
8 have the 30-day tag in the back and you can see
9 that quite readily. You can also see the Rolling
10 Acres license on the back of it also. It's by the
11 AMHA housing in the parking lot, just how I found
12 it.

13 This is a front view of the same vehicle
14 with the windshield wipers half up on it.

15 Q. Officer Lewis, you indicated that this automobile
16 was registered to a woman by the name of Wanda
17 Jones. Did you have the opportunity to interview
18 Wanda Jones?

19 A. Yes, I did.

20 Q. When did that occur and how did that occur?

21 A. The following day I was working the same uniform
22 car. The first thing I did, I looked to see if
23 that Olds had been moved that we had just seen the
24 pictures of. The car wasn't there. It had been
25 taken by somebody and I assumed it was on the road

1 and I was watching for it.

2 Around 1:30 that day I saw it around Copley
3 and Edgewood going in a westerly direction and I
4 stopped it on Beachwood there. It was Wanda Jones
5 driving and she had two other persons with her.
6 One was a Hollis. We had a bench warrant for him.
7 I forget who the other young lady was.

8 Q. Did you have the opportunity at that point to
9 interview and speak with and question Wanda Jones?

10 A. Yes, I did. I talked to Mrs. Jones and through my
11 investigation she directed me to go to 545 Euclid.
12 As a matter of fact, she went with me and pointed
13 out the house.

14 Q. Why were you directed to 545 Euclid?

15 A. Basically, through the investigation I found out
16 that is where the cars were being transferred at
17 and that is where Leroy McIntyre was at one time.

18 Q. Did you have the opportunity to go to 545 Euclid?

19 A. Yes, I did.

20 Q. What happened when you got there, Officer Lewis?

21 A. I talked to Mrs. Leech and she invited me into her
22 house, and at that time I observed Leroy McIntyre
23 sitting in a chair and at that time I informed him
24 that there was a warrant for his arrest.

25 Q. Did you subsequently then arrest him at that point?

1 A. Yes, I did.

2 Q. Officer Lewis, you indicated that there were
3 shotgun shells that were located inside of the
4 automobile. I believe you indicated the type of
5 shotgun shells that those were. Would you explain
6 that for us? What type of shotgun shells were
7 those?

8 A. I believe they were Winchester Western, the same
9 brand, same company.

10 Q. Are you familiar with shotgun shells and how they
11 operate, sir?

12 A. Oh, yes. I am an avid hunter, shooter, S.W.A.T.
13 Team, et cetera.

14 Q. Can you tell the jury what happens with respect to
15 those shotgun shells when that is fired from a
16 shotgun?

17 A. Okay. What you do, you get yourself a pattern of
18 pellets that go out. Like a No. 6 shot -- that is
19 the size of the shot. That is sort of like what is
20 used for small game, rabbits and what have you. As
21 that shell is fired, when it leaves the barrel the
22 pattern of all these pellets will expand to a
23 bigger portion.

24 Q. Kind of a scatter pattern?

25 A. Into a scatter pattern, to a rounder pattern.

1 MS. HARDY: Nothing further.

2 THE COURT: You may cross-examine.

3 CROSS-EXAMINATION

4 BY MR. MODUGNO:

5 Q. Officer Lewis, you indicated that this vehicle when
6 you observed it was in the back. Was there any
7 navy blue paint on that vehicle anywhere?

8 A. I don't recall any navy blue paint on the vehicle.

9 Q. Was there any white paint on that vehicle?

10 A. Counselor, I can't remember if there was.

11 Q. The pictures you saw, it's not white?

12 A. No.

13 Q. Gray two-tone.

14 You indicate that the shotgun shells were
15 dusted for fingerprints; is that correct?

16 A. Yes, they were.

17 Q. The rest of the car, however, was not dusted for
18 prints at that time?

19 A. No.

20 Q. Never was, right?

21 A. I don't know.

22 Q. That next day when you saw Wanda Jones and you
23 pulled her over, she directed you to 545 Euclid; is
24 that right?

25 A. Yes, sir.

1 Q. This Margaret Leech -- her name is actually
2 Margaret Leech Howard, isn't it?

3 A. Yes. She has two names, yes. I think she just got
4 married. If I recall the conversation, she had
5 just got married and became Mrs. Leech.

6 Q. She is actually the mother of Tyrone Howard, isn't
7 that correct?

8 A. Yes, sir.

9 Q. Mr. McIntyre was totally cooperative with you when
10 you attempted to arrest him, wasn't he?

11 A. Yes, he was.

12 Q. Did you talk to Lori Richardson as a result of your
13 investigation?

14 A. No, I did not.

15 MR. MODUGNO: Thank you. No further
16 questions.

17 MS. HARDY: Nothing further.

18 THE COURT: Thank you, sir. You may
19 step down.

20 (Whereupon, the witness was excused.)

21 THE COURT: Call your next witness,
22 please.

23 MS. HARDY: Your Honor, at this time
24 the State would, rest subject to the admission of
25 the exhibits.

1 THE COURT: Any objections to any of
2 the exhibits?

3 MS. HARDY: Your Honor, for the record,
4 we have previously stipulated that the medical
5 records of Galen Thompson will be admitted as well.
6 I would be moving to admit those.

7 MR. MODUGNO: I have no objection to any
8 of the evidence, Your Honor.

9 THE COURT: All right.

10 MR. MODUGNO: The exhibits, Your Honor.
11 Excuse me.

12 THE COURT: You may proceed on behalf
13 of the defendant, Mr. Modugno.

14 MR. MODUGNO: Defense rests, Your Honor.

15 THE COURT: How much time do you want
16 for argument?

17 MS. HARDY: Your Honor, the State would
18 ask for a half hour. Whether or not the State will
19 use all that time, I'm not sure. But to insure
20 that I have enough time, I would ask for a half
21 hour.

22 MR. MODUGNO: I have no problem with
23 that, Your Honor.

24 THE COURT: All right. Ladies and
25 gentlemen, you have heard the evidence in this case

1 now and once again the lawyers will have an
2 opportunity to talk with you.

3 As I said at the beginning, their statements
4 are important and ask that give their statements
5 proper attention, but again I want to say to you
6 that what the lawyers say is not evidence and you
7 must not consider it or their statements as
8 evidence.

9 You may proceed on behalf of State and I
10 will let you know when you have two minutes left.

11 MS. HARDY: If you could let me know at
12 approximately 25 minutes and I could save five for
13 rebuttal, please.

14 THE COURT: Yes.

15 Let me tell this to the jury. I have
16 allowed each side a half hour. Whether they use a
17 half hour or not is up to them. The State will
18 have two opportunities to address you. Miss Hardy
19 will be opening the argument, to be followed by
20 defense counsel, and then Ms. Hardy will conclude
21 She will have not more than ten minutes to
22 conclude.

23 I will let you know at the end of 18
24 minutes.

25 MS. HARDY: That's fine, Your Honor.

1 Thank you.

2 May it please the Court, counsel, members of
3 the jury.

4 On December 30th, 1990 the defendant, Leroy
5 McIntyre, shot Galen Thompson in the back. He then
6 got into that '79 gray Oldsmobile Cutlass and went
7 to 680 Bellevue. When there, he, along with an
8 unknown black male, forced their way into that
9 house. He forced Denise Harrison and Robert Taylor
10 into that upstairs bedroom and he took money from
11 Denise Harrison and threatened to kill Robert
12 Taylor and Denise Harrison and before he left he
13 fired a shot in that bedroom.

14 Members of the jury, at the beginning of
15 this case I promised you that the State would prove
16 beyond a reasonable doubt that the defendant, Leroy
17 McIntyre, is guilty of these crimes charged. I
18 believe the State has met its burden in this case
19 and proved to you beyond a reasonable doubt the
20 defendant is guilty, and the State of Ohio readily
21 accepts its burden of proof or I wouldn't be here
22 today presenting this case to you.

23 In reaching your decision, it's important to
24 focus on what this burden of proof means, what
25 beyond a reasonable doubt is. Shortly the Judge

1 will be instructing you on beyond a reasonable
2 doubt. He is going to tell you that it's doubt
3 based upon your reason and your common sense, and I
4 call upon you to use that reason and common sense
5 in making your decision in this case.

6 Beyond a reasonable doubt is not beyond any
7 doubt. It's not beyond any mere possible doubt.
8 It's a doubt based on your reason and your common
9 sense. It's the same burden of proof that has been
10 around in criminal cases for hundreds of years.
11 It's the same burden of proof in Ohio as it in
12 California, as it is in Florida. I think the State
13 has more than met it burden of proof in this case.

14 At the beginning of this case, during voir
15 dire, you also made some promises to me. I asked
16 you about whether or not you would be able to
17 decide this case based upon the facts and the
18 evidence presented and not go into the jury room
19 and speculate as to what, if any, possible
20 punishment this Court may impose upon the
21 defendant.

22 I'm calling upon you at this point to hold
23 to that promise and decide this case based on the
24 evidence and the facts presented and not what, if
25 any, punishment this Court may impose.

1 I would like to take this opportunity on
2 behalf of the State of Ohio to thank you for your
3 time and your attention and your patience
4 throughout this case. I know we have been going
5 through this trial for three days and we have had
6 some delays waiting for witnesses who were
7 unavailable to testify, and I appreciate your
8 understanding and your patience.

9 Although my job is almost over, your job is
10 just beginning and I would like to give you some
11 things to focus on in reaching your decision.

12 The Judge will be instructing you with
13 respect to the law and I believe that the Judge
14 will be instructing you with respect to felonious
15 assault; that before you can find the defendant
16 guilty, you must find that the State proved beyond
17 a reasonable doubt that on or about December 30th,
18 1990 the defendant, in Summit County, Ohio, the
19 defendant knowingly caused or attempted to cause
20 physical harm to Galen Thompson.

21 The Judge will also be instructing you with
22 respect to the incident involving 680 Bellevue and
23 the felonious assault that occurred there with
24 respect to Robert Taylor and Denise Harrison.

25 The State must show that the crime occurred

1 on December 30th, in Summit County, Ohio. Remember
2 the testimony of Galen Thompson. He told you that
3 he was shot on December 30th, 1990, and Detective
4 Apley and Galen Thompson and Officer Shadie all
5 told you that 1027 Marion Place is located in
6 Summit County, Ohio.

7 The State must then show that the defendant
8 caused physical harm to Galen Thompson. You heard
9 Galen Thompson come in here and testify that he was
10 struck with these shotgun pellets. He was taken to
11 Akron Children's Hospital and he was treated there
12 and to this day he still has shotgun pellets
13 embedded in his body.

14 I believe the State has shown there was
15 physical harm to Galen Thompson. You will have the
16 opportunity to see the medical records which
17 reflect that physical harm.

18 The State must also show that there was a
19 deadly weapon involved. We have heard a lot of
20 testimony in this case about this sawed-off pump
21 shotgun and Galen described that shotgun to you. I
22 don't think there is any question that there was a
23 deadly weapon involved.

24 The Judge will tell that you a deadly weapon
25 is any instrument or device capable of inflicting

1 death. Members of the jury, I submit to you that a
2 saw-off pump shotgun is certainly capable of
3 inflicting death. So, we have a deadly weapon
4 involved here.

5 The State must also show that the defendant
6 acted knowingly. The Judge will tell you that that
7 means that the defendant had a specific intention
8 to cause a certain result.

9 Members of the jury, when that defendant got
10 out of that '79 gray Olds Cutlass in front of 1027
11 Marion Place and he was carrying that sawed-off
12 pump shotgun, believe you me, he had a specific
13 intention to cause a certain result, and when he
14 started off after Galen Thompson and he ordered him
15 to drop it or give up his valuables and he pumped
16 that shotgun and fired a shot at Galen Thompson,
17 members of the jury, he had a specific intent to
18 cause a certain result.

19 The State of Ohio must then show that the
20 defendant was the person who fired this shot at
21 Galen Thompson. Galen Thompson came in here and he
22 told you he knew who Leroy McIntyre was. He
23 recognized him from the neighborhood. He knew his
24 street name was Tyson.

25 From the time those patrol officers first

1 arrived at 199 West Crosier, he told them, "Hey, I
2 know who shot me. It was Tyson." He was even able
3 to describe to the police officers that the
4 defendant had tattoos on him.

5 The defense would like you to believe that
6 Galen Thompson couldn't have possibly observed who
7 it was, that it was dark, that there was ski masks
8 involved and so forth.

9 Members of the jury, you will see the
10 photographs of Marion Place. Detective Apley told
11 you that it's a narrow, two-lane road. It wasn't
12 pitch-dark that night. There was a street light
13 there with its arm hung over into the street.

14 Galen recognized the driver of that car from
15 the time that driver drove up, and those ski masks
16 weren't on when the defendant pulled up in the car.
17 Galen told you that he was able to recognize the
18 driver as Leroy McIntyre.

19 With respect to the 680 Bellevue incident,
20 the State again must show that the defendant
21 knowingly caused physical harm to Robert Taylor
22 and/or Denise Harrison.

23 Denise and Robert Taylor told you that two
24 ski-masked men forced their way into the house.
25 They each were carrying -- one was carrying a

1 handgun and the other one had a shotgun. They put
2 those guns to their head and they threatened them.
3 They said, "Give me the money or I'm going to kill
4 you."

5 Remember, Robert Taylor told you they told
6 him, "I'm going to count to five and you're going
7 to die unless you tell us where this Ant is and you
8 hand over the money." Members of the jury, that is
9 attempting to cause physical harm.

10 But there is even more evidence of
11 attempting to cause physical harm. Remember,
12 Denise Harrison told you that before they left a
13 shot was fired. Luckily, it missed her; but,
14 nonetheless, a shot was fired. Robert Taylor heard
15 that shot, Theresa Johnson heard that shot. That
16 was attempting to cause physical harm.

17 Again, the State must show that the
18 defendant was the perpetrator of this crime.
19 Members of the jury, there is other evidence which
20 shows the defendant is the person who committed not
21 only the crime at 680 Bellevue, but he committed
22 the crime at 1027 Marion Place.

23 Let's not forget the testimony of Lori
24 Richardson. Lori Richardson came in here
25 reluctantly. I had to subpoena her; but,

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nonetheless, she came in here.

She told you on the night of December 30th, 1990 she was at 545 Euclid Avenue and defendant came over and he asked to borrow that '79 Olds Cutlass from her, and he told her, "I'm going out to get some money and I will only be gone about 15 to 20 minutes," and he gave her \$10 for lending her that car and he told her, "When I come back I will give you some more money."

Lori Richardson told you that the defendant didn't come back in 15 or 20 minutes. The defendant did not come back until about 1:30 the following day.

Lori Richardson told you that when she got that car from Wanda Jones there weren't any shotgun shells in it and when she loaned that car to the defendant, Leroy McIntyre, there weren't any shotgun shells in it, and you just heard officer John Lewis tell you that he located that car around 8:30 in the morning on Sunday, December 30th.

Remember that the incident at 680 Bellevue occurred around four o'clock a.m. So, four hours after these shootings the suspect's vehicle is found, and lo and behold there are shotgun shells inside this car. You are going to have the

1 opportunity to see those shotgun shells.

2 Where was the car loaned to the defendant?
3 At 545 Euclid Avenue. Officer Lewis tells us he
4 went to 545 Euclid Avenue. And who did he find
5 there? The defendant, Leroy McIntyre. At the same
6 place where that '79 gray Olds Cutlass had been
7 loaned to him the night before just minutes before
8 the shooting occurred at 1027 Marion Place.

9 The Judge will also be instructing you with
10 respect to the aggravated burglary. I think that
11 is pretty much undisputed. The State must show
12 that the defendant, by force, stealth or deception,
13 trespassed in an occupied structure with the intent
14 to commit a theft offense or a felony, and while
15 doing so he had a deadly weapon on or about his
16 person.

17 I believe the Judge is also going to
18 instruct you that you can also find the defendant
19 guilty of aggravated burglary if you find that 680
20 Bellevue was an occupied structure; that it was the
21 temporary or permanent habitation of someone where
22 at that time someone was likely to be present.

23 Members of the jury, Robert Taylor and
24 Denise Harrison told you -- I'm sorry. Theresa
25 Johnson told you that they were living at 680

1 Bellevue at that time. No question that that was
2 an occupied structure and people were present at
3 the time this crime occurred, and there was a theft
4 offense when Denise Harrison's \$200 and food stamps
5 were taken from her at gunpoint and a felonious
6 assault occurred there as well. A shot was fired
7 and a felonious assault occurred. So, either way
8 you analyze it, the defendant is guilty of the
9 aggravated burglary at 680 Bellevue.

10 And let's not forget Theresa Johnson. She
11 came in and she described the car that she saw pull
12 up beyond 680 Bellevue. It pulled up a couple
13 houses past 680 Bellevue and she was a couple
14 houses up the street at 667.

15 She described that car to Detective Gent.
16 She told you it was two-door gray Cutlass or Monte
17 Carlo type vehicle with a red interior and she was
18 able to see that when the dome light of that car
19 went on and that she recognized the occupants of
20 that car.

21 She recognized the defendant, Leroy
22 McIntyre. She described him as a husky, well-built
23 black male. She described the other male as a
24 tall, thin black male, and when they got out of the
25 car they each were carrying weapons and they went

1 up onto the porch of 680 Bellevue and they went
2 inside that house.

3 The Judge will also instruct you relative to
4 the firearm specification and if you find the
5 defendant guilty of these crimes, you then must go
6 on and consider whether or not the defendant had a
7 firearm on or about his person at the time of these
8 crimes.

9 Members of the jury, I submit to you that if
10 you find that Leroy McIntyre committed these
11 crimes, you must also find that he had a firearm on
12 or about his person. We know he did because he
13 shot Galen Thompson. He then went to 680 Bellevue
14 and threatened Denise Harrison and Robert Taylor
15 with a gun and fired a shot before he left.

16 Members of the jury, this crime didn't turn
17 out quite the way that defendant, Leroy McIntyre,
18 expected. He didn't expect on December 30th, 1990
19 that he would pick on witnesses who recognized him
20 from the neighborhood, who knew who he was. He
21 didn't expect that these people would be able to
22 see him before he got that ski mask on.

23 Finally, members of the jury, the defendant,
24 Leroy McIntyre, never expected that these witnesses
25 would have the courage and the conviction to come

1 in here and point the finger at Leroy McIntyre,
2 Baby Mike Tyson. But, members of the jury, those
3 witnesses did have the courage and the conviction
4 to come in here and identify the defendant, and I
5 call upon you to have that same courage and
6 conviction and find the defendant guilty as
7 charged.

8 Thank you.

9 THE COURT: Mr. Modugno.

10 MR. MODUGNO: Thank you, Your Honor.

11 Ladies and gentlemen, I would also thank you
12 for your patience and I would thank you for your
13 attentiveness. I have noted that you have all paid
14 attention very closely and very carefully to the
15 testimony that you have heard on that witness
16 stand.

17 You made me same promises. You made some
18 promises when we began this trial. You promised
19 that you would put all prejudices aside, that you
20 would look at the facts that you heard from that
21 witness stand and from the exhibits that were
22 presented.

23 You promised me that you would not be
24 prejudiced in this case if Leroy McIntyre did not
25 testify at his trial. He obviously has not

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testified. He obviously is not here and I think that you now have the herculean task of placing that aside also because that is not evidence in this case.

The evidence is the evidence that you heard from that witness stand and you must commit yourself to the evidence that has been presented as evidence in this case.

The prosecutor mentioned and I mentioned an alibi witness. Obviously, that person has not appeared in this court for whatever reasons. Again, that testimony has not been presented one way or the other. Therefore, the fact that it was not presented cannot be considered by you in any way when you make your decision. You again promised to commit yourself to the testimony that you have heard from the witness stand.

You also promised us all, including the Court, that you would follow the law in the State of Ohio as you consider the facts that you heard. The Judge will instruct you on reasonable doubt. He already has. He is going to do that in much more detail.

Lastly, I would like to thank all of you for your attentiveness. I would like to apologize if I

1 have done anything to offend anyone here. That is
2 not evidence in this case. If I have done anything
3 to make you like me or dislike like me, that is not
4 evidence in this case. If the prosecutor has done
5 anything to make you like her or dislike her, that
6 is not evidence in this case.

7 This is not a personality contest. It is
8 about the facts and the evidence that has been
9 presented to you up there.

10 The prosecutor has summarized some of this
11 evidence for you. I think that you need to look a
12 little harder, a little behind the scenes here, to
13 get a real taste and flavor for what went on that
14 evening.

15 Let's start with the Galen Thompson. Galen
16 Thompson leaves home at something like one a.m.
17 He's home with his 16-year-old cousin at one in the
18 morning. Nobody else is home. He is not at his
19 house which was his grandmother's house, which
20 apparently had the gas shut off or something like
21 that.

22 He was hungry. He was going to get some
23 cold cuts. He goes out with a huge jacket on, a
24 cold evening, at one o'clock in the morning. He
25 cuts across to his buddy Jason's, who is 21 or 22,

1 Jason Holly's house. Jason and his sister are
2 living in this house on Marion Place. She is not
3 home.

4 Jason is standing on the front porch with
5 Galen's friend Darren, but Galen doesn't know
6 Darren's last name. It's one o'clock in the
7 morning and it's cold. He believes that the heat
8 was probably on.

9 That these young men decide to visit on the
10 front porch for two hours and 45 minutes. Galen
11 has on his big heavy jacket and his gold chain and
12 his gold bracelet.

13 He is standing out there. In what? I
14 believe you heard it's a known area of drug
15 activity. I don't think there should be any doubt
16 in your mind that these young men were not just
17 visiting on that porch.

18 Why else would we know that? We know that
19 because whoever pulls up apparently is known to
20 these -- at least to Jason. There is a familiar
21 conversation. "Jason, come here."

22 "No. You come here."

23 And the next thing we know, people are out
24 of the vehicle with ski masks on and we here "Drop
25 it." "Drop it" means anything of value. Whatever

1 was going on, there was much more involved than a
2 simple attempt to rob someone or shoot someone

3 There was something else undermining this
4 whole incident and I don't think it takes much
5 imagination to fill in the blanks to know what is
6 involved here is something involving drugs. That
7 is exactly what was involved.

8 Two hours and 45 minutes on a cold porch,
9 but no one else came by. Two hours and 45 minutes
10 on a porch, but he was wide awake that night, his
11 senses were 100 percent. Why? Because he sleeps
12 late every day until three or four, he supposed, a
13 16-year-old ninth grader. Maybe that is why,
14 because he doesn't go to bed at night, he's a night
15 person.

16 I think he agreed that he's a night person
17 because he works at night. That is what he is
18 doing out there, his job. I suppose Saturday
19 night, Sunday morning is probably a boom time for
20 whatever business was going on.

21 A vehicle rolls up. His first description
22 of it to the police is it's white, then later that
23 changes. How much later, I'm not quite sure, but
24 at some point, suddenly it's a gray Cutlass instead
25 of a white one. Although instead of dark and

1 light, it's navy blue maybe or black and gray.

2 So, we are getting these different colors.
3 There's a big difference between white, gray and
4 navy blue.

5 What did he really see? There's a street
6 light. The street light wasn't bright enough to
7 tell the difference between gray and navy blue, but
8 it was bright enough for him to claim that he sees
9 somebody's face past another individual, who is
10 apparently a pretty good size guy who has a hood
11 wrapped around him.

12 Here is a car. Imagine you are on that
13 porch at 2:45 in the morning and you are looking
14 there and you are standing with your two friends
15 doing whatever you have been doing for the last two
16 hours and 45 minutes.

17 Now, as I recall his testimony, he said, "We
18 said it must be Leroy," or, "We think it's Leroy,"
19 or words to that effect. I asked him what "we"
20 means. He said, "Jason."

21 We have heard a lot about Jason but have not
22 seen him. There is no way that he could have
23 physically seen -- even if this person didn't
24 already have a ski mask on, that he could have
25 actually known or seen his face. He just couldn't

1 have. He physically could not have.

2 This guy exits the vehicle with a ski mask
3 on. I mean, physically, try to imagine the length
4 of time it was in all this, and he said this whole
5 thing was boom-boom-boom and they are running, then
6 he gets shot. Okay. He goes back home and from
7 there starts testifying.

8 Where is Jason? This apparent
9 identification could not have happened. He could
10 not have seen this face. You have to limit
11 yourself to what he could have physically seen.

12 I think his testimony indicates that he
13 really wasn't sure. Not only was he not sure, he
14 was mouthing something he heard from someone else,
15 something that is not testimony or evidence in this
16 case.

17 680 Bellevue. Two unfortunate people are
18 present in that home that night. I believe that
19 Denise Harrison at one point even said she wasn't
20 sure if they were black or white, and I think that
21 Robert Taylor originally started saying under the
22 prosecutor saying, "Weren't they black?" "Oh, yes,
23 there was a little black showing. Were they males
24 or females? He wasn't sure. He was sure of this.
25 He did not know who they were.

1 The shotgun. It's a sawed-off shotgun in
2 the first incident. Denise Harrison tells the
3 police when they take a statement from her that
4 it's a long-barreled shotgun. Now we have a long-
5 barreled shotgun and we have a sawed-off shotgun.
6 Which is it?

7 These individuals had no idea who these two
8 people were. You even get a different description.
9 He said two long coats and you get a description
10 from Galen of a shorter coat, leather coat. You
11 get a different description here also, facts that
12 do not make sense when you analyze them.

13 Then you've got Theresa Johnson.
14 Apparently, from December 30th, 1990 until the 9th
15 of August, 1991, she didn't know who busted in this
16 house where she was living with Robert Taylor. Did
17 she ever tell Robert Taylor? He is threatened with
18 a violent death by two individuals that he doesn't
19 know, but this woman that he lived with never
20 discussed it with him.

21 So, you have to ask yourself about her,
22 whether she was lying then or she is lying now. I
23 don't see how, based on that, that you can give
24 very much weight at all to her testimony.

25 Also, she is at 667. By the way, it's 3:45

1 in the morning and she apparently is, I don't know,
2 17 or 18 years old and at 3:45 in the morning she
3 is not with Robert Taylor and her aunt. She is
4 across the street doing whatever people do at 3:45
5 on a Sunday morning with some other guy named
6 Richard.

7 I don't know. She comes out, she sees a car
8 which is up the street. It's not even next to her.
9 It's up the street. Don't tell me she went up
10 there to look at their faces. She hears a shot
11 inside her house and only then does she run to get
12 the police.

13 How long did all that take? I don't know
14 How long was she standing outside waiting to see
15 what was going on at her house? I find that
16 interesting. Apparently, it took five or ten
17 minutes, according to Robert Taylor, for all this
18 to occur. So, what is she doing for five or ten
19 minutes, standing around outside having a good
20 time?

11
21 That boggles my mind because the normal
22 reaction to a human being that would see that would
23 be to instantly call the police, who I guarantee
24 you are not very far away from that Bellevue
25 neighborhood at any time. They are never too far

1 away. The police station is not far away from that
2 neighborhood. It's only a couple miles.

3 So, I want you to ask yourself whether she
4 was lying then or now, or whether she doesn't
5 really know.

6 And what did she actually say? She says
7 this guy Tyrone, who is this tall, thin guy, gets
8 out with a shotgun from the driver's seat. I don't
9 think she ever said if they had masks on or not.
10 She said she recognized them.

11 The people inside say they both have masks
12 on when they enter and they just burst through the
13 door. You know, she is up the street, but she did
14 say that this guy was supposedly Tyrone that had
15 the shotgun.

16 And the other guy, I don't think she said he
17 was well-built. I thought she referred to one at
18 one point as a short guy. The short guy comes out
19 with a blue pistol in his hand. who she vaguely
20 says she knows from the neighborhood, and in the
21 dark and at 3:45 in the morning while she is
22 standing around for five or ten minutes waiting for
23 her boyfriend or aunt to get shot to death.

24 That is interesting. That is very
25 interesting to me because it goes against every

1 human reaction of someone telling the truth. It
2 doesn't make sense.

3 What you have here in this case is dope,
4 dope and more dope. That is just what we have
5 here. You watched this Lori Richardson stumble her
6 way up to the witness stand. At least I did. If
7 she wasn't stoned, I don't know somebody that was
8 stoned. That is what she looked like to me.

9 I don't know how stoned she was when the
10 police questioned her regarding this car that she
11 stated Tyrone also was in. Tyrone, her boyfriend's
12 bother. That is who Tyrone is.

13 The car is gone. Let's think about the car
14 and the kind of lifestyles we are dealing with
15 here. Wanda Jones just gives her car to this drug
16 addict. This drug addict just gives the car to
17 someone else, gives someone else's car to someone
18 else. That is interesting.

19 So here you have cars being passed around on
20 a Saturday night, Sunday morning. "Here is the
21 car. Here is the car, man. I'm done. You take
22 it. No, you take it." Who knows how many people
23 were in that car and who knows if that car even was
24 the same car that was at both scenes. Sure doesn't
25 sound like the one that Galen Thompson saw.

1 I think you have to ask yourself about that
2 also. Carefully analyze what these people said
3 when they took that stand because if you add it all
4 together, none of it makes sense, not a bit of it.

5 The girl couldn't have seen anything and the
6 way she acted shows that she didn't. She is
7 reacting to fear, but apparently not of her
8 boyfriend being killed. That is a little bit too
9 hard to believe.

10 No, there has not been enough evidence
11 presented here to convict Leroy McIntyre of either
12 one of those crimes, neither one of these
13 incidents. The fact is, he was never identified.
14 It was someone else's imagination who never
15 testified here, and the other identification is so
16 unbelievable at the last minute that it must be
17 extremely suspect.

18 I don't know what the really story is here.
19 I don't think any of us know or ever are going to
20 know what the true story is in this case because
21 some of these people knew each other. How many of
22 them knew each other, who knows.

23 What is going on here is some kind of
24 underworld activity involving who knows who and for
25 what reasons. Who knows why anyone in this case,

1 what their real motives are, who they are trying to
2 get or not get by their testimony, but something is
3 going on here.

4 I don't think we found out what it is and I
5 don't think that you can find beyond a reasonable
6 doubt that Leroy McIntyre committed any of these
7 crimes.

8 I thank you for your patience.

9 THE COURT: Ms. Hardy.

10 MS. HARDY: Thank you, Your Honor.

11 Members of the jury, I think defense at this
12 point is grasping. We are trying to twist this all
13 around through innuendo that that is all drug
14 related, that Galen Thompson somehow in a warped
15 way of logic deserves to be shot because he happens
16 to have the misfortune of living in a drug
17 neighborhood, because he lives in a bad part of
18 town, because he happens to be standing on the
19 porch and it's late in the morning.

20 Members of the jury, there has been no
21 evidence that Galen Thompson or any of these
22 witnesses is involved in any type of drug activity.
23 This is not some sort of a vigilante society where
24 people, because there are standing in the wrong
25 place at the wrong time, they deserve to be shot in

12

1 the back with a sawed-off pump shotgun. That is
2 not the way our system of justice works, members of
3 the jury.

4 The defense wants you to believe that Galen
5 Thompson is hanging out with the wrong people at
6 the wrong time because it's late at night. Members
7 of the jury, December 30th, 1990, it's early Sunday
8 morning. If you recall December 30th from your
9 days of being a student, it's Christmas vacation.
10 So maybe he sleeps in late and gets up late or
11 stays up late and gets up late, but that does not
12 mean that Galen Thompson deserves to be shot in the
13 back.

14 I don't know, but to me Galen seems pretty
15 certain of what he saw when he came in here and he
16 testified. He didn't have any hesitation or doubt
17 in pointing to the defendant and saying, "That is
18 the person who shot me." There was no hesitation
19 on his part.

20 You are going to have the opportunity to see
21 the photographs of 1027 Marion Place. Detective
22 Apley told you it's only approximately 22 feet from
23 the porch to the curb. It's not some huge
24 insurmountable distance.

25 Remember, Galen Thompson recognized the

1 defendant, he seen him before. And, yes, there may
2 be different descriptions as to the clothing that
3 was being worn, but, members of the jury, I submit
4 to you that if you know who somebody is, you would
5 be able to recognize him at a later date.

6 Just as if any of you you saw me again
7 later. You may all describe me differently. Some
8 of you may say I have brown hair, some of you may
9 describe me as short, some may say I have a big
10 mouth, but you would all recognize me if you saw me
11 again.

12 And that is what happened here because these
13 witnesses knew who the defendant, Leroy McIntyre,
14 was and when they saw him again they recognized
15 him.

16 Theresa Johnson. Yes, it's true she did not
17 tell Detective Gent the night of the shooting that
18 she recognized who these people were and she told
19 you why she didn't do that. She was frightened,
20 she was scared. She knew he was known as Tyson.
21 He was known in the neighborhood as Tyson.

22 Members of the jury, I submit to you it's a
23 little strange that 680 Bellevue has since been
24 burned to the ground. It's a little strange that
25 1027 Marion Place has since been gutted by fire.

1 Are these witnesses frightened? You bet,
2 absolutely, because they know what the defendant,
3 Leroy McIntyre, is capable of.

4 I recall the defense attorney in his
5 statement indicating to you that you would hear
6 evidence about this alibi witness, this Towanda
7 Toles who lived at 748 Edgewood, which I think is
8 also interesting.

9 Where is the car found?

10 MR. MODUGNO: Objection, Your Honor.

11 THE COURT: You may proceed.

12 You will remember that what counsel says, as
13 I indicated to you before, is not evidence and you
14 will not consider it as evidence.

15 MS. HARDY: Officer John Lewis told you
16 that that car was found at 745 Edgewood.

17 And, members of the jury, we didn't hear any
18 evidence about alibi because there was no alibi,
19 because the defendant was present at 1027 Marion
20 Place and he was present at 680 Bellevue and the
21 defendant committed these crimes.

22 Members of the jury, the State has brought
23 to you more than enough evidence to convict the
24 defendant, Leroy McIntyre, of these crimes. What
25 possible motive could these people have had to come

1 in here and have to confront the defendant and
2 point to him and identify him as the person they
3 saw. They have nothing to gain by coming in here
4 and lying.

5 Theresa Johnson doesn't have anything to
6 gain. For God sake, she is afraid of this guy.
7 None of these people wanted to come in here, but
8 they did and they came in here and they told the
9 truth and they told you what they saw that night.

10 The defendant was present at 1027 Marion
11 Place. He shot Galen Thompson. He went into 680
12 Bellevue, he took money from Denise Harrison, he
13 threatened Denise Harrison and Robert Taylor and he
14 fired a shot before he left. The defendant is
15 guilty, guilty, guilty.

16 Thank you.

17 THE COURT: Ladies and gentlemen, we
18 will recess for about 15 minutes. Please keep in
19 mind the previous admonition I have given to you
20 and don't talk to anybody about it or permit anyone
21 to talk to you about it.

22 (Whereupon, the jury was excused.)

23 (Whereupon, State's Exhibit 10 was marked
24 for identification.)

25 MS. HARDY: At this time, the State of

13

1 Ohio would move to amend the indictment as it
2 pertains to the secret supplemental.

3 THE COURT: It's not on the record.

4 MS. HARDY: We have to do it on the
5 record. It pertains to secret supplemental one,
6 that being one count of felonious assault. The
7 State would move to amend the indictment to read
8 that the defendant did knowingly attempt -- cause
9 or attempt to cause physical harm to Robert Taylor
10 and/or Denise Harrison.

11 The State is moving to make that amendment
12 pursuant to the authority provided to this court by
13 State vs. Owens, 51 Ohio App. 2d, 132, a Ninth
14 District Court of Appeals case, which holds that an
15 amendment to an indictment which changes the name
16 of the victim changes neither the name nor the
17 identity of the crime charged.

18 THE COURT: Now, what is that number on
19 Bellevue?

20 MS. HARDY: 680.

21 THE COURT: Not 686?

22 MS. HARDY: No. 680.

23 The State would also move to admit State's
24 Exhibit No. 10, Galen Thompson's medical records,
25 into evidence.

1 THE COURT: Where are they?

2 MS. HARDY: They are certified copies
3 that would come in pursuant to 2317.42.

4 MR. MODUGNO: I would indicate for the
5 record, Your Honor, that I would oppose the motion
6 to amend.

7 THE COURT: Yes. Your objection is
8 overruled.

9 MR. MODUGNO: Note my continuing
10 objection to that amendment.

11 I'd move for a defense verdict.

12 THE COURT: It's overruled.

13 (Whereupon, a recess was taken.)

14 THE COURT: Please be seated.

15 Well, folks, you have heard the evidence in
16 this case and what the lawyers had to say. Now it
17 becomes my function to tell you what I think the
18 law is in this case which you must accept as I give
19 it to you, regardless of what you think the law is
20 or what it ought to be.

21 In any case there are two parts: the facts
22 and the law. It's my job to tell you what I think
23 the law is. It's your job to determine what the
24 facts are from all of the evidence in the light of
25 these instructions that I am about to give you.

1 Now, this case was started, as I indicated
2 to you at the beginning, by an indictment, these
3 sheets of paper. The Grand Jury heard some
4 testimony about this incident and they returned
5 charges against him: felonious assault, attempted
6 felonious assault and aggravated burglary.

7 Now, to the charges, the three charges
8 contained in this indictment, the defendant has
9 entered a plea of not guilty and he thereby denies
10 each of those charges.

11 Now, I said to you before, and I repeat it
12 once more, that this indictment is not any evidence
13 against this defendant, it's not to be considered
14 by you as evidence, and it in no way reflects upon
15 the guilt or the innocence of this defendant. That
16 is for to you determine. This is only the formal
17 means whereby this case is brought before you
18 ladies and gentlemen for trial.

19 I think I told you at the outset that this
20 defendant, Leroy McIntyre, when he came into this
21 court and throughout this trial, under our system
22 of law is presumed innocent and not guilty of any
23 offense, not one of the three charges contained in
24 this indictment, until such time as the State of
25 Ohio proves each and every essential element of the

1 crime charged by proof beyond a reasonable doubt.

2 If as to any element of any one of the three
3 charges the State has failed to prove that element
4 by proof beyond a reasonable doubt, it's your sworn
5 duty to acquit the defendant of that particular
6 offense.

7 By the same token, if the State of Ohio
8 proves by proof beyond a reasonable doubt -- and
9 they have the burden. If they have proved each and
10 every element of each of the crimes charged, then
11 with respect to that particular crime, it's your
12 sworn duty to find the defendant guilty of the
13 offense of which the State of Ohio has sustained
14 its burden of proof.

15 Now, what do I mean by reasonable doubt.
16 Well, reasonable doubt is present when the jurors,
17 after they have carefully compared and considered
18 all of the evidence, cannot say that they are
19 firmly convinced of the truth of the charge.

20 Reasonable doubt is a doubt based upon
21 reason and common sense. It is not a mere possible
22 doubt because everything which relate to human
23 affairs or depends upon moral evidence is open to
24 some possible or imaginary doubt. Proof beyond a
25 reasonable doubt is proof of such character that an

1 ordinary person, an ordinary person, would be
2 willing to rely and to act upon it in the most
3 important of his own affairs.

4 So, once again, if the State fails to prove
5 what they are obligated to prove by proof beyond a
6 reasonable doubt as to that charge, you must find
7 the defendant not guilty. If the State sustains
8 the burden of proof with respect to any one of the
9 charges, or all of the charges, then it's your
10 sworn duty to find the defendant guilty of that
11 charge or those charges.

12 Now, I said that you must determine the
13 facts in this case from the evidence in the light
14 of these instructions.

15 What do I mean by evidence. Well, very
16 simply, it's the sworn oral testimony which came to
17 you from the witness stand and the exhibits which
18 the Court admitted into evidence that you will have
19 with you in the jury room, which includes, in
20 addition to those statements that have been
21 testified to, the hospital records of Galen
22 Thompson which the lawyers have agreed should be
23 admitted into evidence and which you will have with
24 you in your jury room.

25 But the evidence is the sworn testimony, the

1 exhibits and all of the logical inferences that
2 follow there from.

3 As I said, it does not include the
4 indictment and it does not include the arguments of
5 counsel. Also, you will not consider the question
6 of punishment in making a determination of guilt or
7 innocence.

8 During the course of the trial the lawyers
9 would object from time to time. Sometimes the
10 objections were overruled, sometimes they were
11 sustained. Where an objection was sustained, you
12 will draw no inference as to what the answer to
13 that question might have been. That was simply a
14 matter of law that you are not concerned with and
15 you will make no effort to speculate as to what the
16 answer might be.

17 Now, in determining what the facts are, you
18 have got to weigh the testimony of all the
19 witnesses who testified in this case and give their
20 testimony such weight as you feel that their
21 testimony is entitled to receive.

22 How do you do that? Well, the lawyers and
23 the law, so to say, the law, actually, over the
24 course of time has used some standards which it has
25 felt will assist any jury in weighing the testimony

1 of the various witnesses who testified in this
2 case.

3 How do you do that? Well, you saw all of
4 them testify. You may you consider the witness'
5 demeanor on the stand; his manner of testifying; is
6 he or she interested in the outcome of this case;
7 was the witness frank and candid with you or not;
8 was the witness biased and prejudiced; did the
9 witness have the means of knowing and observing the
10 things concerning which he or she testified; and,
11 if so, what about the accuracy or the correctness
12 of the witness' memory at the time he or she took
13 the stand; and I want to say to you that for good
14 cause shown, you may believe or you may disbelieve
15 all or any part of the testimony of any witness who
16 testified in this particular case.

17 Now, one other thing I want to mention. The
18 defendant didn't testify in this case. He is not
19 required to testify. As a matter of fact, he has a
20 constitutional right not to testify and the fact
21 that the defendant did not testify in this case
22 must not be considered by you for any purpose
23 whatsoever.

24 Well, let's take up now the charges that
25 have been filed against this defendant.

1 In the first count here the defendant is
2 charged with the felonious assault upon one Galen
3 L. Thompson on or about the 30th day of December,
4 1990 in Summit County, Ohio, and further it's
5 charged in the count that the felonious assault,
6 there was a deadly weapon used in the course of
7 that act.

8 The second charge is directly related to the
9 first one in which the Grand Jury charges that on
10 or about that date, the 30th day of December 1990,
11 in Summit County, Ohio, that the defendant, Leroy
12 McIntyre, attempted to physically assault Robert
13 Taylor and Denise Harrison with a deadly weapon,
14 and that he also is charged with having a firearm
15 specification; namely, that the attempted felonious
16 assault was carried out with a deadly weapon.

17 The third charge is that on the 30th day of
18 December, 1990, in Summit County, Ohio, this
19 defendant, Leroy McIntyre, trespassed -- I will
20 define these terms for you in a minute --
21 trespassed in 680 Bellevue Avenue, an occupied
22 structure, and that he had a deadly weapon when he
23 entered in that house and that he entered by force
24 and that it was an occupied structure, at which
25 time it is alleged that Robert Taylor and/or

1 Theresa Johnson were present or likely to be
2 present. Of course, that charge also contains
3 therein a specification that that act was committed
4 while the Defendant McIntyre had on or about his
5 person a firearm.

6 Okay. Let's take up first the felonious
7 assault. What is felonious assault? Felonious
8 assault is simply knowingly causing physical harm
9 to another by means of a deadly weapon.

10 In order to convict in the first count with
11 reference to felonious assault on Galen Thompson,
12 you must find beyond a reasonable doubt that on or
13 about the 30th day of December, 1990, and in Summit
14 County, Ohio, the defendant knowingly, one, caused
15 physical harm to Galen Thompson by means of a
16 deadly weapon.

15

17 Now, there are some terms here we've got to
18 talk about for a moment.

19 What do we mean by "knowingly"? A person
20 acts knowingly when he is aware that his conduct
21 will probably cause a certain result and that he is
22 aware of the existence of all the facts and
23 circumstances pertaining thereto, and that
24 knowledge must be gained and is determined from all
25 the facts and circumstances in evidence.

1 You will determine whether there existed in
2 the mind of the Defendant McIntyre that his acts
3 would cause or result in physical harm to Galen
4 Thompson.

5 I used the term "cause." I think you know
6 what cause is, but let me define it. It's an act
7 which in the natural and continuous sequence
8 directly produces the jury and physical harm and
9 without which it would not have occurred. Cause
10 occurs when the injury or physical harm is the
11 natural and foreseeable result of the act.

12 "Physical harm" means any injury, regardless
13 of its gravity or its duration.

14 Deadly weapon. What is a deadly weapon?
15 Well, it's any device capable of inflicting death
16 and designed for use as a weapon or possessed and
17 used as a weapon. A shotgun is a deadly weapon.

18 Now, if the State has proven by proof beyond
19 a reasonable doubt that on or about the 30th day of
20 December, 1990, in Summit County, Ohio, that the
21 Defendant McIntyre knowingly caused physical harm
22 to Galen Thompson by means of a deadly weapon, it's
23 your sworn duty to find the defendant guilty of
24 that offense. If the State of Ohio has failed to
25 prove that offense by proof beyond a reasonable

1 doubt, it's your sworn duty to acquit.

2 Now, the next count with reference to
3 attempt. In that count the State simply claims
4 that on or about that same date, in Summit County,
5 Ohio, that the defendant attempted to inflict
6 physical harm upon Robert Taylor and Denise
7 Harrison. All the elements actually are the same
8 except that the act did not actually culminate in
9 physical harm to those people but that an attempt
10 was made to do it.

11 And what do I mean by a criminal attempt? A
12 criminal attempt is where one purposely does any
13 act constituting a substantial step in the course
14 of conduct which is planned to culminate in that
15 person's commission of the actual crime, namely,
16 felonious assault.

17 To constitute a substantial step, the
18 conduct must be strongly corroborative of the
19 actor's criminal purpose.

20 Now, did the state prove by proof beyond a
21 reasonable doubt that on that date, in Summit
22 County, Ohio, the Defendant McIntyre by his actions
23 at 680 Bellevue attempt to inflict physical harm
24 upon Robert Taylor and Denise Harrison. If he did,
25 you so find by proof beyond a reasonable doubt,

1 it's your sworn duty to find him guilty of that
2 offense. If they haven't proved it by proof beyond
3 a reasonable doubt, why, it's your sworn duty to
4 acquit the defendant of that charge.

5 Now, the last charge is aggravated burglary.
6 What are the essential elements of the offense of
7 aggravated burglary?

8 In that case you must find by proof beyond a
9 reasonable doubt that on December the 30th, 1990,
10 the Defendant McIntyre by force trespassed in an
11 occupied structure with the purpose to obtain
12 property owned by another without that person's
13 consent and to deprive that person of that
14 property, and that at that time the Defendant
15 McIntyre had a deadly weapon on or about his person
16 and the occupied structure was the permanent or
17 temporary habitation or residence of another in
18 which at the time any person was present or likely
19 to be present.

20 Force. Force means any violence used by any
21 means upon or against any person or thing to gain
22 entrance.

23 Trespass. Any entrance knowingly made in
24 the dwelling of another without that person's
25 consent is a trespass and is unlawful.

1 Knowingly means that the person was aware of
2 what he was doing and his lack of authority to do
3 so.

4 I have already defined the term "deadly
5 weapon" to you. It's the same for purposes of the
6 offense of aggravated burglary.

7 Purpose. A person acts purposely when it is
8 his specific intention to cause a certain result.
9 It must be established that at the time in question
10 there was present in the mind of the defendant the
11 intent to obtain property owned by someone on that
12 premises without that person's consent. To act
13 purposely is to act intentionally.

14 Deprive simply means to withhold property of
15 another permanently or for a period to appropriate
16 a substantial part of the things obtained to the
17 person's own use. Owner is one who owns or who
18 has the right or possession or control of property.

19 If the State has proved all the essential
20 elements of that offense, you must find the
21 defendant guilty of the offense of aggravated
22 burglary. If the State has failed to prove any one
23 of the essential elements of the offense, then,
24 likewise, it's your sworn duty to acquit the
25 defendant of the offense of aggravated burglary.

16

1 Now, this is a criminal case and it takes
2 all 12 of your members to arrive at a verdict.
3 Verdicts in criminal cases must be unanimous,
4 whether they are for guilty or for not guilty.

5 Only the 12 of you will deliberate. At the
6 conclusion of the Court's charge Mr. Weiss and Mr.
7 Montowski may be excused.

8 I'm going to read the verdict forms to you
9 in the order in which they are in the indictment.
10 This is an indictment for felonious assault
11 relative to Galen Thompson.

12 "We the jury in this case being duly
13 impaneled and sworn to well and truly try and true
14 deliverance make between the State of Ohio and the
15 defendant, Leroy McIntyre, do find the
16 Defendant..." then there is blank line in which you
17 will insert the word "guilty" or the words "not
18 guilty" according to your findings "...of the
19 offense of felonious assault."

20 Then right underneath that, "We further find
21 that Leroy McIntyre..." and you insert the word
22 "did" or the words "did not" "...have a firearm on
23 or about his person or under his control while
24 committing the said felonious assault."

25 Then on the back there is room for the

1 signatures of those agreeing. All 12 of you must
2 agree upon a verdict.

3 "And we do so render our verdict upon the
4 concurrence of 12 members of said jury. Each of us
5 said jurors concurring in said verdict signs his
6 name hereto this blank day of 1991."

7 The next one is an indictment for attempted
8 felonious assault.

9 "We the jury in this case being duly
10 impaneled and sworn to well and truly try and true
11 deliverance make between the State of Ohio and the
12 defendant, Leroy McIntyre, do find the
13 defendant..." and there is a blank line to insert
14 either the word "guilty" or the words "not guilty"
15 "...of the offense of attempted felonious assault."
16 That pertains to Robert Taylor and Denise Harrison.

17 "We further find that Leroy McIntyre did or
18 did not have firearm on or about his person or
19 under his control while committing the said
20 attempted felonious assault."

21 Remember, it's attempted felonious assault
22 And the words "Robert Taylor" and "Denise Harrison"
23 are above so there is no question about. On the
24 back are signature lines for all 12 of your
25 members.

1 The last form is indictment for aggravated
2 burglary.

3 "We the jury in this case being duly
4 impaneled and sworn to well and truly try and true
5 deliverance make between the State of Ohio the
6 Defendant, Leroy McIntyre, do find the
7 defendant..." blank line, "guilty or not guilty,"
8 you will insert according to your findings "...of
9 the offense of aggravated burglary."

10 "We further find that Leroy McIntyre did or
11 did not..." according to your findings "...have
12 firearm on or about his person or under his control
13 while committing the said felonious assault." And
14 then on the back again the signature lines for your
15 signature.

16 You will have with you in the jury room the
17 exhibits which the Court has admitted into
18 evidence.

19 Your first business in the jury room is to
20 select a foreman. That is a gender neutral word,
21 and the form is either a man or a woman selected
22 to preside over your deliberations in the jury room
23 and has no more power than any of the rest of you,
24 but is selected to control the deliberations, I
25 guess, to see that everybody gets a chance to speak

1 his peace and to discuss the opinions of all of
2 you. That is what these are, jury deliberations.

3 Maybe some of you are going to walk into the
4 jury room already convinced of what you want to do.
5 Listen to the opinions of the others and then
6 determine whether or not your first-formed opinions
7 were accurate or not accurate, correct or
8 incorrect. That is the function of jury
9 deliberations.

10 If during the course of your deliberations
11 you have a question, write the question out. I
12 will take it up with the lawyers. If the lawyers
13 say that it can be answered, I will inform you of
14 the answer. If the law does not permit me to
15 answer it, I will inform you of that fact.

16 When you have arrived at a verdict you will
17 be returned to the courtroom and we will accept
18 your verdict.

19 Now, if you have not arrived at a verdict or
20 verdicts by, of course, the noon hour, we will
21 recess for the noon hour and resume deliberations
22 after the noon hour.

23 I'm going to ask you to return to the jury
24 room. I know that the lawyers have carefully
25 listened to what I have said and I know that on

1 occasions such as this the judge has sometimes an
2 occasion to misspeak, either say something that he
3 should not have said or not said something which he
4 ought to have said, and I'm sure that if I have
5 done that the lawyers have noted that and will
6 bring that to my attention, but that must be done
7 in your absence and not in your presence.

8 However, if there is some changes to be
9 made, I will be back with Tom here and we will make
10 the necessary corrections for you on the record.

11 Okay. You may follow Mr. Wellemeyer into
12 the jury room.

13 (Whereupon, the jury was excused to commence
14 deliberations.)

15 THE COURT: Anything you want to put on
16 the record?

17 MS. HARDY: I don't have anything, Your
18 Honor.

19 Do all three verdict forms have the firearm
20 specification? The last form, I think you referred
21 to it at the end as felonious assault. I think you
22 meant to say the aggravated burglary. That was my
23 only question.

24 MR. MODUGNO: I don't have anything. I
25 have no problem with the charge.

1 THE COURT: All right.

2 12 noon, Monday, August 12, 1991

3 (Whereupon, the following proceedings were
4 had in the jury room.)

5 THE COURT: Cease your deliberations.
6 Don't talk about the case outside. Wait until you
7 all get back. When all 12 of you have gotten back
8 at 1:15 -- if you get back before, why, you start
9 in. You need not come into court.

10 A JUROR: Am I allowed to ask a
11 question that has been bugging all of us?

12 THE COURT: Write the question out and
13 we will talk about it after lunch, and then I will
14 bring you in the courtroom. I think I know what it
15 is, but write it out and then I will get the
16 lawyers to discuss it with them and bring you back.
17 You are excused.

18 (Whereupon, the noon recess was taken.)

19 - - -

20 1:15 p.m., Monday, August 12, 1991

21 - - -

22 (Whereupon, the following proceedings were
23 had out of the presence of the jury.)

24 THE COURT: The jury has submitted two
25 questions. The first one is, "What happened to the

1 defendant?" The second is, "What happened to the
2 guns?"

3 Off the record.

4 (Whereupon, discussion off the record.)

5 - - -

6 (Whereupon, the following proceedings were
7 had in the presence of the jury.)

8 THE COURT: Please be seated.

9 The jurors have submitted two questions to
10 the Court, first of which is, "What happened to the
11 defendant?"

12 That is a matter that for purposes of your
13 deliberations is not relevant and you will not
14 consider it or speculate as to why he is not here.

15 Question No. 2, "What happened to the guns?"

16 As I indicated to you, the case is
17 determined upon the evidence. The evidence
18 consisted in this case of the sworn oral testimony,
19 the exhibits which were admitted in evidence. That
20 is the evidence upon which will you consider and
21 decide this case.

22 Does that answer your question?

23 Thank you. You may return to the jury room.

24 (Whereupon, the jury resumed deliberations.)

25 - - -

1 2:20 p.m., Monday, August 12, 1991

2 (Whereupon, the following proceedings were
3 had in the presence of the jury.)

4 THE COURT: Are you the foreman, Mr.
5 Fisher?

6 Question is: "Explain the second charge,
7 attempted felonious assault."

8 Okay. I will try.

9 The first charge was felonious assault and I
10 defined that as knowingly causing physical harm to
11 another by means of a deadly weapon. Then I
12 defined "knowingly" and "cause" and so forth and so
13 on.

14 In the other count with reference to Denise
15 Harrison and Robert Taylor the charge is attempted
16 felonious assault. The essential elements of that
17 offense are that the Defendant McIntyre knowingly
18 engaged in conduct which had it been successful
19 would have resulted in the commission of the
20 offense of felonious assault.

21 Does that make it any clearer?

22 I will say it one more time.

23 Felonious assault is knowingly causing
24 physical harm to another. That charge refers to
25 Galen Thompson. The State must prove that the

1 defendant knowingly caused physical harm to Galen
2 Thompson.

3 Now, in the other charge of attempt with
4 reference to Denise Harrison and Robert Taylor, the
5 essential elements of the case which the State of
6 Ohio must prove beyond a reasonable doubt is that
7 McIntyre engaged in conduct which if it had been
8 successful would have resulted in the offense of
9 felonious assault as far as Robert Taylor and
10 Denise Harrison were concerned.

11 In the one case the act was considered as
12 having been consummated and in the other case an
13 attempt to consummate the act without it having been
14 consummated, and the State must prove that by proof
15 beyond a reasonable doubt.

16 Does that make it any clearer?

17 Okay. Thank you.

18 (Whereupon, the jury resumed deliberations.)

19 - - -

20 3:00 p.m., Monday, August 12, 1991

21 (Whereupon, the following proceedings were
22 had in the jury room.)

23 THE COURT: Let's take the afternoon
24 break now.

25 JUROR FISHER: Let me ask you a question

1 They can't get this attempted felonious assault.

2 THE COURT: Write whatever you have.
3 We will take a 10 or 15 minute break. Cease your
4 deliberations. Don't talk about it outside of the
5 the jury room. We will see you back in about 10 or
6 15 minutes.

7 (Whereupon, a recess was taken.)

8 - - -

9 (Whereupon, the following proceedings were
10 had out of the presence of the jury.)

11 THE COURT: Yes. You are agreeing to
12 what I'm going to read?

13 MS. HARDY: We have come to the
14 agreement on the question the jury asked with
15 respect to defining attempted felonious assault.

16 THE COURT: Bring them in.

17 (Whereupon, the following proceedings were
18 had in the presence of the jury.)

19 THE COURT: Please be seated.

20 The last question submitted by the jury is,
21 "Please use an analogy if possible. Define
22 attempted felonious assault."

23 Well, let me try it this way.

24 Felonious assault is defined as no person
25 shall knowingly cause or attempt to cause physical

1 harm to another by means of a deadly weapon. If
2 you find the defendant caused or attempted to cause
3 physical harm to another by means of a deadly
4 weapon, then you must find the defendant guilty of
5 felonious assault. If you fail to find the
6 defendant caused or attempted to cause physical
7 harm to another by means of a deadly weapon, you
8 must find the defendant not guilty of felonious
9 assault, and I have previously defined the terms
10 "cause" and "attempt to cause" physical harm to
11 another.

12 So, causing physical harm to another and
13 attempting to cause physical harm to another, if
14 established by the State by the proof by beyond a
15 reasonable doubt, the defendant is guilty of the
16 offense of felonious assault.

17 Now, I think on the one verdict form -- you
18 have one for felonious assault with reference to
19 Galen Thompson and one with attempted felonious
20 assault. That may be confusing. They are both
21 felonious assault if one causes or attempts to
22 cause.

23 Now, one other thing. You will consider
24 each one of these verdict forms separately and
25 distinct from the other one. I hope that is of

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some assistance. You may return to the jury room.
(Whereupon, the jury resumed deliberations.)

- - -

4:00 a.m., Monday, August 12, 1991

(Whereupon, the following proceedings were had in the presence of the jury.)

THE COURT: Please be seated.

I take it that you have not arrived at a verdict or verdicts, and it's time to recess for the day. Do you feel that if you were given some more time this afternoon that you might conclude your deliberations, or would you prefer to come back tomorrow morning?

JUROR FISHER: I would prefer to come back tomorrow morning.

THE COURT: Prefer to come back tomorrow morning.

Have you arrived at any verdicts?

JUROR FISHER: No, sir.

THE COURT: No verdicts.

JUROR FISHER: None.

THE COURT: Thank you. We will see you tomorrow morning. Keep in mind the previous admonitions I have given to you.

(Whereupon, the proceedings were adjourned,

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to reconvene at 9:00 a.m., Tuesday, August 13,
1991.)

1 10:30 a.m., Tuesday, August 13, 1991

2 P R O C E E D I N G S

3 (Whereupon, the following proceedings were
4 had out of the presence of the jury.)

5 MS. HARDY: We are here on State of
6 Ohio versus Leroy McIntyre, Case 91-01-0135.

7 This is the second day of the jury
8 deliberations. The jury has indicated that they
9 are are hung on the third count of felonious
10 assault. I believe that they do have two verdicts
11 on the first two counts.

12 The State would indicate for the record that
13 at this time the State would request that the
14 instructions be reread to the jury with respect to
15 felonious assault and attempt and that the jury
16 continue deliberating on the third count.

17 THE COURT: Anything further? Anything
18 from you?

19 MR. MODUGNO: Not on this matter, but on
20 the other matter.

21 THE COURT: Go ahead.

22 MR. MODUGNO: If it please the Court,
23 Your Honor, I would indicate for the record that
24 yesterday, at approximately 20 after 11, after the
25 jury had been charged and I exited the court, my

1 alibi witness, Towanda Toles, was present in court.

2 I talked with her. She indicated to me she
3 had some confusion about when she was due in court.
4 Apparently, it was her birthday over the weekend
5 and she had been partying a little bit. At any
6 rate, she was there and available, ready, willing
7 and able to testify as to the defendant's presence
8 with her at the time.

9 THE COURT: Now, that was after the
10 jury had been charged and they were on their way to
11 the jury room.

12 MR. MODUGNO: That's correct, Your Honor.
13 And I would move at this time for a mistrial. I
14 think it's highly prejudicial that a jury not hear
15 from an alibi witness when it's a key piece of
16 evidence in the case.

17 I tried desperately to get her earlier. She
18 was never actually served a subpoena. There was
19 confusion and I would request at this time a
20 mistrial or, in the alternative, some other relief.

21 THE COURT: Overruled.

22 (Whereupon, the following proceedings were
23 had in the presence of the jury.)

24 THE COURT: Now, ladies and gentlemen,
25 as I understand it, you have not been able to agree

1 upon the count of felonious assault which pertains
2 to the attempted infliction of physical harm or the
3 weapon; is that correct?

4 JUROR FISHER: That is correct, Your
5 Honor.

6 THE COURT: And you have, as I
7 understand it, reached a decision on two counts,
8 the other two counts. I don't want you to tell me
9 what they are, but you have?

10 JUROR FISHER: That is correct.

11 THE COURT: All right. Now, do you
12 think that further deliberations would be of any
13 value as far as the count on which you have not
14 been able to agree?

15 JUROR FISHER: Right now we are at six-six
16 on the attempted felonious assault. They don't
17 understand that there was felonious and attempt.
18 You said that was the same, didn't you, so long as
19 the deadly weapon was used?

20 THE COURT: Yes. But you are --

21 JUROR FISHER: They were confused about
22 the gun, attempted felonious assault.

23 THE COURT: Well, in any event, I
24 realize, apparently, there is some confusion.

25 Now, do you feel that further deliberations

1 would be of any value as far as that count is
2 concerned?

3 How many think further deliberations would
4 be of some value? Hold up your hand.

5 How many feel that further deliberations
6 would be of no value? Hold up your hand.

7 Very well. Mr. Wellemeyer, the Court will
8 accept the jury's indication that apparently it's
9 overwhelming that further deliberations as far as
10 that count is concerned would be of no value, so
11 the Court will accept the verdicts that you have
12 arrived at.

13 "State of Ohio versus Leroy McIntyre,
14 indictment for felonious assault, in violation of
15 Revised Code Section 2903.11(A)(2) with reference
16 to Galen Thompson.

17 "We the jury in this case being duly
18 impaneled and sworn to well and truly try and true
19 deliverance make between the State of Ohio and the
20 defendant, Leroy McIntyre, do find the defendant
21 guilty of the offense of felonious assault.

22 "We further find that Leroy L. McIntyre did
23 have a firearm on or about his person or under his
24 control while committing the said felonious
25 assault, and we do so render our verdict upon the

1 concurrence of 12 members of said jury, each of us
2 said jurors concurring in said verdict signs his
3 name hereto this 13th day of August, 1991." And 12
4 signatures appear on the verdict.

5 Ladies and gentlemen, is this your verdict?

6 JUROR FISHER: Yes, it is.

7 THE COURT: All right.

8 "Indictment for aggravated burglary. State
9 of Ohio vs. Leroy McIntyre.

10 "We the jury in this case being duly
11 impaneled and sworn to well and truly try and true
12 deliverance make between the State of Ohio and the
13 defendant, Leroy L McIntyre, do find the defendant
14 guilty of the offense of aggravated burglary.

15 "We further find that Leroy L. McIntyre did
16 have a firearm on or about his person or under his
17 control while committing the said felonious
18 assault, and we do render our verdict upon the
19 concurrence of 12 members of said jury, each of us
20 said jurors concurring in said verdict signs his
21 name hereto this 13th day of August, 1991." And
22 again I see 12 signatures to that verdict form.

23 Ladies and gentlemen, is this your verdict?

24 JUROR FISHER: Yes.

25 THE COURT: Do you wish to have the

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jury polled?

MR. MODUGNO: Yes, Your Honor.

THE COURT: Very well. I will go to the indictment relative to felonious assault of Galen Thompson.

Miss Moore, is this your verdict?

JUROR MOORE: Yes.

THE COURT: Miss Kern, is this your verdict?

JUROR KERN: I'm sorry?

THE COURT: Is this your verdict?

JUROR KERN: Yes.

THE COURT: And your name escapes me.

JUROR PERKINS: Perkins.

THE COURT: Yes. Mr. Perkins, is this your verdict?

JUROR PERKINS: Yes.

THE COURT: Miss Simon, is this your verdict?

JUROR SIMON: Yes.

THE COURT: Mr. White, is this your verdict?

JUROR WHITE: Yes.

THE COURT: Mr. Snyder, is this your verdict?

1 JUROR SNYDER: Yes.
2 THE COURT: Mrs. Posatiere, is this
3 your verdict?
4 JUROR POSATIÈRE: Yes.
5 THE COURT: Mr. Zarle, is this your
6 verdict?
7 JUROR ZARLE: Yes.
8 THE COURT: Mr. Fisher, is this your
9 verdict?
10 JUROR FISHER: Yes.
11 THE COURT: Miss Fink, is this your
12 verdict?
13 JUROR FINK: Yes.
14 THE COURT: Mrs. Hurst, is this your
15 verdict?
16 JUROR FINK: Yes.
17 THE COURT: Miss Hill, is this your
18 verdict?
19 JUROR HILL: Yes.
20 THE COURT: All right.
21 Now we will go to the indictment relative to
22 aggravated burglary.
23 Miss Moore, is this your verdict?
24 JUROR MOORE: Yes.
25 THE COURT: Miss Kern, is this your

1 verdict?

2 JUROR KERN: Yes.

3 THE COURT: Mr. Perkins, is this your

4 verdict?

5 JUROR PERKINS: Yes.

6 THE COURT: Miss Simon, is this your

7 verdict?

8 JUROR SIMON: Yes.

9 THE COURT: Mr. White, is this your

10 verdict?

11 JUROR WHITE: Yes.

12 THE COURT: Mr. Snyder, is this your

13 verdict?

14 JUROR SNYDER: Yes.

15 THE COURT: Miss Posatiere, is this

16 your verdict?

17 JUROR POSATIÈRE: Yes.

18 THE COURT: Mr. Zarle, is this your

19 verdict?

20 JUROR ZARLE: Yes.

21 THE COURT: Mr. Fisher, this your

22 verdict?

23 JUROR FISHER: Yes.

24 THE COURT: Miss Fink, is this your

25 verdict?

1 JUROR FINK: Yes.

2 THE COURT: Miss Hurst, is this your
3 verdict?

4 JUROR HURST: Yes.

5 THE COURT: And, Mrs. Hill, is this
6 your verdict?

7 JUROR HILL: Yes.

8 THE COURT: Very well. The Court will
9 accept those verdict forms.

10 Now, off the record, for a minute.

11 (Whereupon, a discussion was held off the
12 record.)

13 THE COURT: I thank you and you may be
14 excused.

15 (Whereupon, the jury was excused.)

16 MS. HARDY: The jury has returned
17 verdicts in State of Ohio versus Leroy McIntyre.

18 THE COURT: Yes. We know that.

19 MS. HARDY: Count One relative to Galen
20 Thompson contained a prior aggravated felony
21 specification. The State of Ohio has a stipulated
22 copy of the defendant, Leroy McIntyre's, prior
23 aggravated felony conviction for one count of
24 robbery.

25 THE COURT: Have you examined it?

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MR. MODUGNO: I have examined it, Your Honor.

THE COURT: May I examine it, please?

The journal entry reads, "This day, to wit: The 21st day of June, 1985, now comes the prosecuting attorney..." He was found guilty by a jury of robbery as contained in count three of the indictment and sentence was pronounced. He was ordered imprisoned and confined to the Ohio State Reformatory at Mansfield for three to 15 years and the three-year minimum shall be a period of actual incarceration for the punishment of robbery, an aggravated felony of the second degree, and that's about it.

The case was heard apparently by Judge Fred Skok from Lake County who was sitting for Judge Glen B. Morgan, the Court of Common Pleas of Summit County.

Now, let me ask you, how do we know that Leroy McIntyre in Case No. 85-02-0171 is the Leroy McIntyre who was here today?

MS. HARDY: Well, Your Honor, if it please the Court, I can call an officer from the Akron Police Department, Bureau of Identification, if we get to such time. I believe the Court,

1 though, does have before it the stipulated copy of
2 the felony conviction and I am indicating to this
3 Court as an officer of the court that, as a matter
4 of fact, that is the same Leroy L. McIntyre who has
5 been tried in this particular case.

6 THE COURT: I will accept that.

7 MR. MODUGNO: Object for the record, Your
8 Honor.

9 THE COURT: All right.

10 MR. MODUGNO: Your Honor, if it please
11 the Court, at this time I would reiterate all of
12 the objections that have been noted previously. In
13 particular, the fact that the alibi witness was
14 here late yesterday and that she didn't testify.
15 This could have made a difference in this trial.

16 Again, I would ask at this point that the
17 Court find the defendant not guilty based on the
18 facts not being enough to convict.

19 THE COURT: I didn't get that.

20 MR. MODUGNO: Based on the facts
21 presented were not enough to convict the defendant.
22 Simply moving for a directed verdict.

23 THE COURT: I see. Well, the Court is
24 cognizant of all your objections and I shall
25 overrule the same.

1 MR. MODUGNO: In particular, his absence
2 and its prejudice, I believe, was demonstrated
3 somewhat in court this morning when I believe the
4 jurors were making smiles at each other when they
5 heard that he had absconded. I would just note
6 that for the record.

7 I think it appeared to me they may have
8 discussed this fact and it may have been a factor
9 in their deliberations.

10 THE COURT: Well, it wasn't the jury's
11 fault that he took off. But, anyway, that's
12 neither here nor there.

13 As I say, I'm cognizant of all your
14 objections and shall overrule them, and I find that
15 he has been convicted of a prior offense of
16 violence based upon the journal entry presented to
17 the Court, properly certified and counsel's
18 statement that this Leroy McIntyre noted in the
19 journal entry is the Leroy McIntyre who is the
20 defendant in this case.

21 If and when he has been apprehended -- and,
22 of course, we should issue a capias.

23 MS. HARDY: I believe it's been issued.

24 THE COURT: Why, then, the Court will
25 impose sentence.

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MR. MODUGNO: I have one further matter,
Your Honor.

THE COURT: Let me put on for the
record that the defendant, while he is not here,
counsel knows that he has the right of appeal and
I'm so instructing counsel, and he apparently was
indicated to be indigent and I assume he is still
indigent now, at least I would accept that, and I
will appoint you.

MR. MODUGNO: Your Honor, I would request
that another attorney be appointed on the appeal
for several reasons.

THE COURT: All right. Well, we don't
need to go into this, but I will see that that's
done, but Judge Spicer can handle that.

Off the record.

(Whereupon, a discussion was held off the
record.)

MS. HARDY: Just one thing I wanted to
clear up for the record, Your Honor.

You indicated that you found him guilty of
the prior crime of violence. I believe it's a
prior aggravated felony specification. I just want
to clear that up.

MR. MODUGNO: Your Honor, following up on

1 the appointment of counsel for his appeal, and I
2 don't have a law book in front of me -- quite
3 frankly, perhaps Your Honor knows as to whether or
4 not his appeal time is now running or not running
5 until he is sentenced.

6 THE COURT: It doesn't run until the
7 journal entry would go on.

8 (Whereupon court was adjourned.)
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1 9:00 a.m., Thursday, August 29, 1991

2 P R O C E E D I N G S

3 THE COURT: Please be seated.

4 Are you ready, Mr. Modugno?

5 MR. MODUGNO: Ready to proceed, Your
6 Honor.

7 THE COURT: You may proceed, Ms. Hardy.

8 MS. HARDY: Thank you, Your Honor.

9 May it please the Court, this is State of
10 Ohio versus Leroy McIntyre, Case No. 91-1-135. We
11 are here this morning for sentencing.

12 Previously, the defendant was found guilty
13 of one count of felonious assault, one count of
14 aggravated burglary and an accompanying firearm
15 specification for both counts.

16 At this time, the State of Ohio would like
17 to call Detective Robert Apley to the stand for
18 purposes of establishing the prior aggravated
19 felony specification.

20 THE COURT: Mr. Modugno, any comments
21 or anything?

22 MR. MODUGNO: No, Your Honor.

23 THE COURT: All right. Come forward,
24 please. You have been sworn, sir, and you are
25 still under oath.

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ROBERT EDWARD APLEY

a witness herein, called by the State of Ohio, being previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HARDY:

Q. Will you please state your name for the record?

A. Robert Edward Apley.

Q. Where are you employed, Detective Apley?

A. Akron Police Department, Detective Bureau.

Q. Are you familiar with the case of State of Ohio versus Leroy McIntyre, Case No. 91-1-135?

A. Yes, I am.

Q. Pursuant to your involvement in this case, did you have the opportunity to check the defendant's record in the Akron Police Department Identification Bureau?

A. Yes, I did.

(Whereupon, State's Exhibit 11 was marked for identification.)

BY MS. HARDY:

Q. Handing you what has been marked for identification purposes as State's Exhibit 11, I would like you to look at that, please, and ask you if you can

1 identify that for us?

2 A. Yes. It's a copy of the journal entry. It's from
3 1985 where Leroy McIntyre was sentenced on the 21st
4 of June, 1985 on a conviction of robbery.

5 Q. What was the case number in that journal entry?

6 A. CR 85-02-0171.

7 Q. When you went to the Identification Bureau and
8 checked Leroy McIntyre's record, was the person who
9 was found guilty in case number 91-1-135, the case
10 that we are in court today on, the same person who
11 was convicted in this journal entry you have before
12 you?

13 A. Correct, yes.

14 Q. I would like you to tell the Court how you verified
15 that, in fact, it was the same person?

16 A. Through social security number, date of birth and
17 also from ID photographs.

18 Q. Did you then compare the social security number,
19 the date of birth and mug shots that was contained
20 in that case, in the journal entry you have before
21 you, and the current case before this court?

22 A. Yes, I did.

23 Q. Is the person who was convicted of robbery in Case
24 No. 85-02-0171 present in this courtroom today?

25 A. Yes, he is.

1 Q. I would like you to please point him out and
2 describe where he is seated in this courtroom and
3 what he is wearing?

4 A. He is sitting back here, the second individual,
5 with the orange and black jail coveralls on.

6 Q. Who is that person?

7 A. Leroy McIntyre.

8 Q. Is the journal entry you have before you a
9 certified copy of that journal entry?

10 A. Yes, it is.

11 MS. HARDY: Nothing further, Your
12 Honor.

13 THE COURT: Mr. Modugno.

14 MR. MODUGNO: I would simply state for
15 the record my continuing objection, Your Honor, to
16 this matter going forward pursuant to my previous
17 objections to the trial going forward after Mr.
18 McIntyre was not here for the second day of trial,
19 all the various objections I made.

20 THE COURT: Of course, the statute not
21 only permits that to be done but, I guess, requires
22 that it be done. So I would have to overrule the
23 objection.

24 You may step down, sir.

25 (Whereupon, the witness was excused.)

1 THE COURT: Ms. Hardy.

2 MS. HARDY: At this time, Your Honor,
3 if the Court would find the defendant guilty of the
4 prior aggravated felony specification, the State
5 would just make its recommendation with respect to
6 sentencing in this case.

7 Your Honor, you have heard the facts and
8 circumstances of this case. I believe the Court is
9 well aware of the circumstances. As the Court
10 knows, on the second day of trial the defendant,
11 Leroy McIntyre, absconded, and while absconding and
12 fleeing from justice the defendant was subsequently
13 arrested and charged with a felonious assault
14 involving an individual by the name of Tyrone
15 Howard. The defendant allegedly slashed his throat
16 while fleeing from this trial.

17 I think these crimes were very serious, the
18 circumstances surrounding them were very serious.
19 The State would seek that this Court impose the
20 maximum sentences allowable under law and that the
21 sentences be served consecutively with each other.

22 THE COURT: Well, I find, of course,
23 that is the defendant in the case which we are now
24 present in court, that that individual is the same
25 individual shown in the journal entry which was

1 admitted into evidence as an exhibit in this case.

2 Now, I would like to have you for purposes
3 of the record inform the defendant of the statutory
4 requirements pertaining to the penalties to be
5 imposed in the case of felonious assault where it's
6 committed with a firearm and where there has been a
7 prior offense of violence and also what has been
8 provided with reference to the penalties for
9 aggravated burglary when that offense is committed
10 with a firearm.

11 MS. HARDY: Yes, Your Honor.

12 With respect to the felonious assault
13 conviction, there was a firearm specification which
14 the defendant was found guilty of. The defendant
15 can be sentenced to a mandatory three years on
16 that.

17 With respect to the underlying charge of
18 felonious assault, it's an aggravated felony of the
19 second degree. With the Court having found the
20 defendant guilty of the prior aggravated felony
21 specification, the potential penalties for that is
22 a sentence of 8, 9, 10, 11, 12 to 15 years in the
23 Ohio State Penal System, with the 8 years being a
24 period of actual incarceration.

25 With respect to the conviction for

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aggravated burglary, it's an aggravated felony of the first degree. This Court can impose a sentence of 5, 6, 7, 8, 9, 10 to 25 years. There is also an accompanying firearm specification and the Court can impose a mandatory three-year actual incarceration to that charge.

THE COURT: Mr. Modugno.

MR. MODUGNO: Please the Court, Your Honor.

First of all, I would like to indicate my continuing objections and I would like to indicate for the Court, since it's been brought up, I think the Court needs to be edified that Mr. McIntyre has already been arraigned on a charge of failure to appear, and my understanding of reading that indictment is that occurred on or about the 8th day of August, the second day of his trial that we are here discussing this morning.

He has also been indicted and is to be arraigned on a charge of felonious assault, which I believe dates to the 14th, I believe. It talks about the 14th day of August, 1991.

For the record, Your Honor, I would indicate that as to the charge of failure to appear which relates to the second day of his trial here, in

1 fact, he was absent that day. A plea of not guilty
2 and not guilty by reason of insanity has been made.
3 There is still going to be a written motion put in
4 as to that charge, it's been reserved, and there
5 has been a competency evaluation ordered by this
6 Court and there will be an evaluation for the not
7 guilty by reason of insanity relating to the very
8 second day of trial.

9 Additionally, I anticipate later this
10 morning entering a similar plea to the felonious
11 assault charge which is only six days after this
12 event.

13 The rules mandate that this Court have the
14 competency of this defendant checked prior to
15 trial. That was done in this case and a report was
16 issued. The report which is part and parcel of
17 this case and part and parcel of the record in this
18 case --

19 THE COURT: He was found to be
20 competent.

21 MR. MODUGNO: He was found to be
22 competent on the day when that report was issued.
23 I would indicate to the Court that now his sanity
24 on that very day when he was missing is now in
25 question as well as his competency currently.

1 We are only talking about really days and
2 weeks from this incident. The Court has the
3 discretion to order a determination as to
4 competency after trial begins and for several
5 reasons I think that justice requires that in this
6 particular case that be ordered at this point in
7 time before this case goes any further as to his
8 competency on that day when he was no longer
9 sitting next to me and when I was forced to proceed
10 without a client, that we should hold this in
11 abeyance until such time as we get some evidence.

12 For one thing, I will indicate for the
13 record that I had some opportunity to speak to the
14 jurors after this incident and both Mr. McIntyre's
15 shooting in April and the fact that he was not
16 present for the last couple days of trial was
17 discussed, in fact, by the jurors and in their
18 deliberations. One of the jurors made the comment
19 to me, "Of course we considered his absence."

5
20 I believe from dealing with Mr. McIntyre in
21 attempting to prepare for trial, I think I
22 previously indicated to this Court some of the
23 problems I had just prior to the trial beginning in
24 communicating with my client. I think that that
25 deteriorated rapidly. I don't believe he

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understood the nature of what he did. I don't believe that his intention was to "flee the court" and I think we need a professional to analyze that.

We've got a trial here. The evidence took four or five hours, the prosecutor's evidence. He has the new charges facing him. I fail to see where justice would be harmed if there has to be a rehearing of those other charges along with the new charges. I mean, I just don't see where any justice would be harmed. In fact, I think Mr. McIntrye's rights would be seriously harmed if we were to proceed at this point in time to sentence him.

I'm not prepared this morning with a brief, Your Honor, but if time would be given, I think that perhaps there is some law. I know there has been other incidents in Summit County where situations have arisen in the courtroom that have resulted -- I don't have the case name today, but I know there is at least one a few years ago.

THE COURT: Well, of course, the statute provides -- and I'm reading from Revised Code Section 2945.37. It's in the supplement, the statute having been amended and the amended section having become effective July 1, 1989.

1 "In a criminal action in a court of common
2 pleas or municipal court, the court, prosecutor, or
3 defense may raise the issue of the defendant's
4 competence to stand trial. If the issue is raised
5 before trial, the court shall hold a hearing on the
6 issue as provided in this case. If the issue is
7 raised after trial has begun, the court shall hold
8 a hearing on the issue only for good cause shown."

9 The fact that the defendant left during the
10 trial of the case, during the process of the trial,
11 in and of itself doesn't seem to me to be
12 sufficient reason or showing of good cause, and
13 what other items that you mentioned, that you were
14 having a little difficulty in communicating with
15 him and so forth and so on prior to trial, doesn't
16 seem to me in and of itself sufficient
17 establishment of good cause to interrupt the trial
18 and to have a competency hearing at that time.

19 The statute goes on to say that, "Defendant
20 is presumed competent to stand trial, unless it is
21 proved by a preponderance of the evidence in a
22 hearing under this section that because of his
23 present mental condition he is incapable of
24 understanding the nature and objective of the
25 proceedings against him or of presently assisting

1 in his defense."

2 And the statute goes on to say that, "The
3 court shall not find the defendant incompetent to
4 stand trial solely because he is receiving or has
5 received treatment as a voluntary or involuntary
6 mentally ill patient or mentally retarded
7 resident," so forth and so on.

8 Certainly didn't seem to me on the basis of
9 what was raised and what you have indicated to the
10 Court and the fact that he left the case during the
11 trial that that would be sufficient to require a
12 competency hearing, but I can understand your --

13 MR. MODUGNO: If I might add a few other
14 points.

15 The psychological report or the evaluation
16 that was done that is part of the record of this
17 case does indicate that he has had severe
18 behavioral outbursts in the past and it documents
19 those outbursts.

20 I'm not a psychologist, but I think the fact
21 that he has now been charged with two other crimes
22 shortly after he left this courtroom, the fact I
23 hadn't even started my part of case, he was, for
24 all intents and purposes, deprived of that.

25 I would also indicate for the record, and I

1 think the Court is aware, that Towanda Toles, the
2 alibi witness, was present in the hallway of the
3 court after the jury was charged. She apparently
4 got here about 15 minutes prior to the jury
5 beginning deliberations.

6 I have had an opportunity to speak with her.
7 She indicated to me that her reason for getting
8 here late or for more or less hiding from you,
9 which she indicated she had, it was related to the
10 fact that she was arguing with Mr. McIntyre
11 regarding their relationship and had nothing to do
12 with what she had to say. She has stated in the
13 past and she continues to tell me that he was with
14 her at the time of these alleged incidents.

15 I would also indicate that we were subjected
16 to the testimony, and it's on the record, from a
17 witness after nine months of hearing, one,
18 testimony that she did not have any idea who those
19 people were that had ski masks on, suddenly in
20 court, apparently even to the surprise of the
21 prosecutor, suddenly testifies in court that
22 somebody that she said she knows from the
23 neighborhood, Leroy McIntyre, who she sees in the
24 dark from some hundred feet away or 200 feet away,
25 that she recognizes this man. She changes this

1 testimony and she is sitting on the witness stand
2 without even the benefit of looking at Mr.
3 McIntyre's face when she is saying it was the same
4 person.

5 When coupled with all these other factors,
6 it just seems to me, given the fact that apparently
7 there is going to be other trials in this case,
8 that it's unnecessary to go forward without at
9 least a hearing as to whether or not he may have
10 reached a point where I could not adequately
11 represent him, he could not adequately fathom what
12 he was doing, because after her testimony, of
13 course, I had the decision to make as to whether to
14 put him on the stand or not. He may well have also
15 taken the stand to let that jury judge his
16 truthfulness in this matter.

17 Given all of those facts, it just seems to
18 me that a competency evaluation at this time is
19 essential, or, in the alternative, a mistrial, Your
20 Honor, an opportunity for Mr. McIntyre's rights to
21 be protected to the fullest.

22 The prosecutor apparently believes they have
23 an ironclad case and I don't see how the State of
24 Ohio would be prejudiced by giving Mr. McIntyre a
25 fair hearing where he is present sitting here in

1 front of everyone with perhaps an opportunity to
2 testify and to have his alibi witness be heard.

3 These are serious allegations. As a matter
4 of fact, the prison times that are discussed here
5 for those charges are extremely long, I believe
6 comparable or in excess to those for murder and --

7 THE COURT: Not quite.

8 MR. MODUGNO: Not quite, but at the lower
9 end. So I would simply make all of those motions
10 and ask for an opportunity to be heard after he is
11 evaluated.

12 THE COURT: Well, I would overrule your
13 motion.

14 MR. MODUGNO: Thank you.

15 THE COURT: Stand up, please, Mr.
16 McIntyre.

17 Sir, is there anything that you wish to say
18 before the Court pronounces sentence in your case?

19 THE DEFENDANT: Yes, a couple things I want
20 to say.

21 THE COURT: I'm sorry?

22 THE DEFENDANT: Couple things I want to
23 say.

24 THE COURT: Okay.

25 THE DEFENDANT: Your Honor, I see everybody

1 in the courtroom and I see you and you represent
2 justice. The prosecutor, Attorney Modugno -- which
3 he did a good job defending me. The witnesses that
4 stood up against me at trial, months ago the same
5 witness who stood up here shot me five times at
6 point-blank range at 2:45 in the morning.

7 My leg was paralyzed. They told me I
8 wouldn't be able to fight no more. Every time I
9 hear a loud noise my nerves jump.

10 They say this is justified. This witness
11 right here, the detective would not arrest this
12 witness against me due to the fact that he was
13 testifying against me in this trial.

14 I went to the prosecutor's office several
15 times trying to get this guy arrested and the two
16 other guys that was in the car when they shot me
17 with an Uzi, a machine gun. They told me they
18 could not arrest none of the people that shot me
19 because they was investigating the case.

20 I tried to go to the prosecutor's office.
21 When I went down, they told me I couldn't file a
22 warrant because they was investigating the case.

23 These guys who are running around the
24 streets, dope dealers, shot me in a driveway on
25 Winton, not even a drug related area, at a

1 girlfriend's house of mine. In a driveway. Nobody
2 gets arrested.

3 Then this case I come in on, the guy said I
4 cut his throat. They arrested me just for what he
5 says about me. I've been shot five times with an
6 Uzi, the second time I got shot in a year, second
7 time in nine months. Nobody been arrested.

8 The first time I got shot I pressed charges,
9 went to preliminary, nobody gets arrested. Seems
10 like anybody could do anything to Leroy McIntyre in
11 the streets and get away with it, but if I try to
12 rebel, try to protect myself, you know, they want
13 to convict me and condemn me.

14 I got shot with an Uzi. I bought a .38, I
15 bought a gun. I carried a gun with me everywhere I
16 went just because of them people right here. But
17 this guy sitting on the stand, knowing that he shot
18 me five times with an Uzi, they convict me on his
19 testimony.

7
20 Just like the girl. Nine month ago she
21 said she didn't see who went in the house, who did
22 the crime, they just heard a gunshot from inside
23 the house. She changed her testimony. She said
24 she seen me going in the house.

25 This thing ain't justice. They say I'm a

1 monster, I threatened witnesses. I've been on the
2 streets for nine months, come to court every day.
3 Even when I left the courtroom, I had just cause to
4 leave.

5 I only had one witness in this case, which
6 was to Towanda Toles. I left the courtroom, didn't
7 know I was breaking any kind of law whatsoever. I
8 went to Canton, Ohio, tried to find her. Even when
9 I did find her on Saturday, which was her birthday,
10 I brought her to court Monday for her to testify
11 for me, but apparently she couldn't because the
12 jury deliberated, whatever. I didn't know.

13 I wasn't outside the courtroom, but I was in
14 this building. I dropped her off for her to
15 testify for me and they wouldn't allow it. I don't
16 think I was breaking any law by leaving the
17 courtroom. I didn't leave the State, I didn't
18 leave Akron, Ohio.

19 They picked me up. I was at a house. I was
20 not planning to leave, but these guys, every day
21 they sell dope and different things like that and
22 they gun me down and no one gets arrested
23 whatsoever.

24 And Attorney Modugno even went to the
25 Detective Bureau, asked them about the case, and

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the detectives said we didn't arrest nobody on the case. We went by the guy's house and left word for him to get in contact with us. He said he shot me, but this is what I face, justice.

If anybody been hurt in the case it's me. I've been shot twice, in the back twice, 9 mm. round in the legs, both legs, broken the bone, paralyzed my left leg. It's a miracle I can walk again. But I have to sit in front of the guy where he testified I shot him. I did not shoot him.

He gave three descriptions of the car. He said the car was white, the car was blue, it was black. If he can't describe a car, how could he see me in a car with a ski mask on, a big object like that, and he sat there and lied.

You all be arresting him again. They have already been arrested, but the criminal record -- juvenile record can't be put up in the courtroom here.

I'm trying to make a living, trying to box, getting ready to sign a contract with Tyson with Rick Giachetti in Cleveland. I can't train in the streets. Every time I hear a loud noise -- my nerves are shot.

If you feel this is justice, the only thing

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I can say is I can come back on appeal, hopefully that I can get an appeal, but like I said --

THE COURT: You are entitled to an appeal. I have appointed Mr. Modugno to handle the appeal. He indicated that he didn't wish to do that, but then he has changed his mind and he is going to handle the appeal. He shall be appointed to handle that.

THE DEFENDANT: From my understanding, Apley stated he don't care who did the crime as long as he shot somebody. I believe that was stated to my lawyer.

I have been to Lucasville, I have done my time, been home for two and a half years. Not too many people leave Lucasville, make it on the street for six months unless they got something on your mind.

Apparently I had something on my mind as far as my career in boxing to come back from gunshot wounds and pursue my career, not to come in court when the guy shot who shot me, him and his buddies, they should go to jail. This case should have been investigated more thoroughly, the whole case, I feel.

And as far as any sentence of this case, I

1 didn't know that I was breaking any laws by leaving
2 the courtroom. I left the courtroom when Mr.
3 Modugno said, "Where is your witness at?" I said,
4 "She was supposed to be here." I looked around,
5 she wasn't here.

6 I went down to Edgewood looking for her,
7 drove to Canton looking for her. I couldn't find
8 her until Saturday morning. Monday or Tuesday I
9 brought her down to the courtroom. I wasn't trying
10 to run.

11 I called Mr. Modugno after the court was
12 over with. I told him I found Towanda Toles, I
13 will bring her down Monday. And Mr. Modugno went
14 by her house, but she wasn't there. I went by
15 there hours later, she was there. I brought her
16 down and dropped her off at court and went back
17 home and sat and called Mr. Modugno after court,
18 and he said some girl came in and she seen me and
19 all this other stuff nine months later.

20 This Richard -- I don't know his last name.
21 Mr. Modugno knows. He is apparently with this girl
22 on the night of this incident and he says he don't
23 want to go to court, have nothing to do with court,
24 but at the time the incident took place across the
25 street, he stated that him and this girl was in the

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house and heard a gunshot from across the street which came from the inside of the house. He didn't see anybody enter the house or leave the house. He told the girl to go about her business. She left then and she was supposed to have called the police.

This girl that stated this, she lied. She didn't see me go in the house or come out of any kind of house. And this man that won't come to court, he was there with her and said that is not true.

THE COURT: I wish you could have been here to tell the jury all of this. Of course, you weren't.

THE DEFENDANT: Some things I can't. Things that I say to you now would have been objected to. And this guy's record, he shot me and all this, been objections if I had been in court.

Only thing that I can say about the rules without being objected for this testimony to be heard, Attorney Modugno can't say this is a juvenile, he was selling drugs, such and such. You can't say these things, but these things should have been brought out, but they can't be brought out like that. Only thing that could be brought

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out is what I'm saying now, but this case should be investigated more thoroughly by the detectives.

And as far as this case, I was set up. The evidence -- they have shotgun shells, fingerprints. They said they found no fingerprints. They said they found no fingerprints. There was fingerprints on there, probably. They knew there probably was. Found no ski mask. They could take DNA samples, hair samples. They wouldn't do it, they wouldn't take no samples, anything.

This is a total railroad. That is how I feel. That's all. I have nothing more further to say as far as the case. I hope that I could bring it back on appeal.

THE COURT: Thank you.

Of course, you heard the prosecutor indicate what the penalty is for felonious assault when the felonious assault is committed with the use of a firearm and for one who has been convicted previously of an offense of violence. There is a minimum of 11 years of actual incarceration.

So, on the charge of felonious assault to which the jury found you guilty, it's the sentence of the law and judgment of the Court that you serve a period of actual incarceration of 8 years and not

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to exceed a term of 15 years, and that in addition to that you serve for the use of the firearm in that offense an actual incarceration of three years and pay the costs of prosecution for that offense.

For the offense of aggravated burglary, which is an aggravated felony of the first degree and for one who has committed that offense with a firearm, there first must be imposed for that offense a term of three years of actual incarceration; and then for the main offense of aggravated burglary, it's the sentence of the law and judgment of the Court that you serve a period of not less than 8 nor more than 25 years, pay the costs of prosecution, and the sentences are to be served consecutively and not concurrently.

Thank you.

THE DEFENDANT: Thank you

1 to exceed a term of 15 years, and that in addition
2 to that you serve for the use of the firearm in
3 that offense an actual incarceration of three years
4 and pay the costs of prosecution for that offense.

5 For the offense of aggravated burglary,
6 which is an aggravated felony of the first degree
7 and for one who has committed that offense with a
8 firearm, there first must be imposed for that
9 offense a term of three years of actual
10 incarceration; and then for the main offense of
11 aggravated burglary, it's the sentence of the law
12 and judgment of the Court that you serve a period
13 of not less than 8 nor more than 25 years, pay the
14 costs of prosecution, and the sentences are to be
15 served consecutively and not concurrently.

16 Thank you.

17 THE DEFENDANT: Thank you

18 (Whereupon, end of Transcript of
19 Proceedings.)
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C E R T I F I C A T E

I, Thomas C. Lazar, Official Shorthand Reporter, Court of Common Pleas, Summit County, Ohio, do hereby certify that the above and foregoing is a complete, true and accurate TRANSCRIPT OF PROCEEDINGS, and that the foregoing 382 typewritten pages constitutes all the testimony in the trial of this matter.

Thomas C. Lazar
Court Reporter

Dated: Akron, Ohio

November 22, 1991

* * * * *

CLERK OF COURTS
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DANA ZALESKI

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