CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
MAY 1 1978
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 77-1589

WILLIAM P. RYAN,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

JOINT APPENDIX

Richard S. McLellon
BANGEL, BANGEL & BANGEL
505 Court Street
Portsmouth, Virginia 23704
Counsel for Appellant

Jerry P. Slonaker
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Office of the Attorney General
900 Fidelity Building
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Richmond, Virginia 23219
Counsel for Appellee

TABLE OF CONTENTS

Indictment of January 6, 1977 1

Trial Order on Indictment Counts 1,2,and 3 of May 18, 1977 2

Order overruling motion to grant a new trial dated June 16, 1977 5

Trial Order on Indictment Count 4 of July 28, 1977 7

Instruction E of trial of July 28, 1977 9

Sentencing Order on Indictment Counts 1,2 and 3 of July 28, 1977 10

Sentencing Order on Indictment Count 4 of August 4, 1977 12

Notice of Appeal of July 28, 1977 15

Notice of Appeal of August 24, 1977 16

Copy of Time and Tide Chart from Newspaper of of October 9, 1976, admitted as Commonwealth's exhibit for May 18, 1977 17

Assignments of Error 18

Transcript of Pretrial motion of January 20,1977; page 2, line 1 to page 10, line 15 19

Transcript of Pretrial motion of March 10,1977; page 31, line 20 to page 36, line 14 28

Trial transcript of May 18, 1977; page 18, line 4 to page 20, line 8; page 30, line 7 to page 38, line 4; page 44, line 17 to page 46, line 13; page 56, line 10, to page 58, line 17; page 80, line 1 to page 81, line 6; page 88, line 19 to page 90, line 15; page 94, line 1 to page 94, line 14. 34

Transcript of Posttrial motions of June 16, 1977; page 2, line 2 to page 10, line 6 58

Trial transcript of July 28, 1977; page 8, line 5 to page 10, line 14; page 16, line 9 to page 16, line 24; page 17, line 7 to page 30, line 24; page 34, line 1 to page 48, line 16; page 55, line 2 to page 107, line 20 67

Transcript of Posttrial motions of August 4, 1977; page 2, line 2 to page 15, line 18 153

COMMONWEALTH OF VIRGINIA)
) To-Wit:
CITY OF PORTSMOUTH)

BURGLARY WITH INTENT TO COMMIT RAPE 2X, SODOMY
JANUARY 6, 1977

28237

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH:

The Grand Jury charges that: on or about October 9, 19 76, in the City of Portsmouth William P. Ryan did break and enter in the night time the dwelling house of Pamela E. Vierrether, with intent to commit rape,

SECOND COUNT: on or about October 9, 1976, in the City of Portsmouth William P. Ryan did carnally know Pamela E. Vierrether, with his mouth,

THIRD COUNT: on or about October 9, 1976, in the City of Portsmouth William P. Ryan did attempt to rape Pamela E. Vierrether against her will, and by force,

FOURTH COUNT: on or about October 12, 1976, in the City of Portsmouth William P. Ryan did break and enter in the night time the dwelling house of Pamela E. Vierrether, with intent to commit rape and larceny,

against the peace and dignity of the Commonwealth of Virginia.

Va. Code § 18.2-90, 18.2-361, 18.2-25, 18.2-89

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH HELD ON THE 18TH DAY OF MAY, 1977

COMMONWEALTH OF VIRGINIA	)	
v.	)	Upon an Indictment for Burglary with Intent to Commit Rape, Sodomy
WILLIAM P. RYAN	)	Criminal Docket No. 28237 - May term, 1977

This day came the Attorney for the Commonwealth, and the accused, William P. Ryan, born on May 24, 1934, who stands indicted for burglary with intent to commit rape, sodomy, was led to the bar in custody of the jailer of this Court, and came also Robert L. Sondej and J. Wayne Sprinkle, attorneys for the said William P. Ryan, said attorneys having been heretofore appointed by the Court to represent the prisoner, William P. Ryan, and upon being arraigned, the accused tendered a plea of "Not Guilty" to burglary with intent to commit rape as charged in the first count of the indictment; "Not Guilty" to sodomy as charged in the second count of the indictment; and "Not Guilty" to attempted rape as charged in the third count of the indictment, after private consultation and with the advice of his counsel, and from a list furnished the Sheriff of this city by the Clerk of this Court, a panel of twenty jurors free from exceptions was completed, and from said panel the Attorney for the Commonwealth and the accused each erased four, each erasing one name alternately, the Attorney for the Commonwealth erasing the first name and the remaining twelve constituted the jury for the trial of this case, to-wit: Samuel A. Carruthers, Catherine Darpino, Kent B. Johnson, John E. Martin, Howard N. Tutor, Jacob C. Vance, Raymond C. West, Reynolds M. Seeds, James

F. Hanenkrat, Luther E. Pace, Randolph W. Pritchard, and Stephen C. Henderson, who being duly sworn the truth of and upon the premises to speak, the witnesses having been sworn, excluded from the Courtroom, called singularly, and testified; and thereupon, the jury having fully heard the evidence and argument of counsel retired to their room to consult of their verdict, and after some time returned into Court having found the following verdict: "We, the jury, find the defendant did break and enter the dwelling house of Pamela Vierrether with intent to comit rape and fix his punishment at: 10 years in the state penitentiary K. B. Johnson Foreman K. B. Johnson Date May 18, 1977"; "We, the jury, find the defendant did carnally know Pamela E Vierrether with his mouth and find him guilty and fix his Punishment at: 5 years in the state penitentiary K. B. Johnson Foreman K. B. Johnson Date May 18, 1977"; and "We, the jury, find the defendant guilty of attempt rape of Pamela E Vierrether and fix his punishment at: 10 years in the state Penitentiary K. B. Johnson Foreman K. B. Johnson Date May 18, 1977"; and thereupon, the prisoner, by counsel, moved the Court to set aside the jury's verdict as being contrary to the law and the evidence and grant him a new trial, which motion being fully heard, is continued.

And the prisoner, William P. Ryan, is remanded to jail.

The Court certifies that the prisoner and his counsel were present in person at every stage of the proceedings.

The Court certifies that it provided Leslie F. Jolly, a Court Reporter, to record verbatim the evidence and incidents of trial and doth further order that the expense of reporting and recording

the same shall be paid by the Commonwealth of Virginia, and the charges therefor have been taxed as a part of the costs of this case.

* * * * * * * * * *

A COPY, TESTE: WALTER M. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

By Iris P. Dalland D. C.

VIRGINIA: AT THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH HELD ON THE 16TH DAY OF JUNE, 1977

COMMONWEALTH OF VIRGINIA	)	Upon an Indictment for Burglary with Intent to Commit Rape, Sodomy, Attempt Rape, etc. Criminal Docket No. 28237 - June term, 1977
V	)	
WILLIAM P. RYAN	)	

This day came the Attorney for the Commonwealth, and the prisoner, William P. Ryan, born on May 24, 1934, and came also Robert L. Sondej and J. Wayne Sprinkle, attorneys for the said William P. Ryan, said attorneys having been heretofore appointed by the Court to represent the prisoner, William P. Ryan, and it appearing that on May 18, 1977 the said William P. Ryan was found guilty of breaking and entering the dwelling house of Pamela Vierether with intent to commit rape and his punishment fixed at ten (10) years in the State Penitentiary; guilty of carnally knowing Pamela E. Vierrether with his mouth and his punishment fixed at five (5) years in the State Penitentiaty; and guilty of attempt rape of Pamela E. Vierrether and his punishment fixed at ten (10) years in the State Penitentiary, the period by the jury in its verdicts rendered, and the said William P. Ryan, by counsel, having moved the Court to set aside the jury's verdicts as being contrary to the law and the evidence and grant him a new trial was continued, and said motion having come on this day to be heard and the Court having fully heard the evidence and argument of counsel relative to said motion, doth overrule said motion, to which action the prisoner, by counsel, exeepted; and on motion of the prisoner, by counsel, it is ordered that this case be referred to the Probation Officer of this Court to investigate and report

upon any and all facts tending to show extenuating circumstances pursuant to Section 19.2-299 of the Code of Virginia, and this case is continued to the 28th day of July, next, 1977 of this Court at 10:00 a. m.

And the prisoner, William P. Ryan, is remended to jail.

The Court certifies that the prisoner and his counsel were presant in person at every stage of the proceeding.

The Court certifies that it provided Leslie F. Jolly, a Court Reporter, to record verbatim the evidence and incidents of trial and doth further order that the expenses of reporting and recording the same ahall be paid by the Commonwealth of Virginia, and the charges therefor have been taxed as a part of the costs of this case.

* * * * * * * * * *

A COPY, TESTE: WALTER W. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

BY: Iris P. Holland D. C.

VIRGINIA: AT THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH HELD ON THE 28TH DAY OF JULY, 1977

COMMONWEALTH OF VIRGINIA	)	Upon an Indictment for Burglary with Intent to Commit Rape, Sodomy
V.	)	Criminal Docket No. 28237 - July term, 1977
WILLIAM P. RYAN	)	

This day came the Attorney for the Commonwealth, and the accused, William P. Ryan, born on May 24, 1934, who stands indicted for burglary with intent to commit rape as charged in the fourth count of the indictment, was led to the bar in custody of the jailer of this Court, and came also Robert L. Sondej and J. Wayne Sprinkle, attorneys for the said William P. Ryan, said attorneys having been heretofore appointed by the Court to represent the prisoner, William P. Ryan, and upon being arraigned, the accused tendered a plea of "Not Guilty" to burglary with intent to commit rape as charged in the fourth count of the indictment, after private consultation and with the advice of his counsel, and from a list furnished the Sheriff of this city by the Clerk of this Court, a panel of twenty jurors free from exceptions, was completed, and from said panel the Attorney for the Commonwealth and the accused each erased four, each erasing one name alternately, the Attorney for the Commonwealth erasing the first name and the remaining twelve constituted the jury for the trial of this case: Lloyd B. Laxton, Ann Phillips, Otelia M. Andrews, Gail P. Allen, Margie B. Acey, Lloyd Powers, Gary T. Roper, Charles W. Laury, John M. Penn, John J. Keil, Bertha S. Howe, and Louise Buxton, who being duly sworn the truth of and upon the premises to speak, the witnesses having been sworn, excluded from the Courtroom, called singularly, and testified; whereupon, at the close of the Commonwealth's evidence, the prisoner, by counsel, moved to strike the Commonwealth's evidence, which motion being fully hear, is overruled; and

the jury having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict, and after some time returned into Court having found the following verdict: "We the jury, find the defendant guilty of burglary with the intent to comit rape and fix punishment at 20 years in State Pennitary. Gary T. Roper, Foreman. Date July 28, 1977"; and thereupon, the prisoner, by counsel, moved the Court to set aside the jury's verdict as being contrary to the law and the evidence and grant him a new trial, which motion is continued, and this case is referred to the Probation Officer of this Court to investigate and report upon any and all facts tending to show extenuating circumstances pursuant to Section 19.2-299 of the Code of Virginia.

And the prisoner, William P. Ryan, is remanded to jail.

The Court certifies that the prisoner and his counsel were present in person at every stage of the proceeding.

The Court certifies that it provided Leslie F. Jolly, a Court Reporter, to record verbatim the evidence and incidents of trial and doth further order that the expense of reporting and recording the same shall be paid by the Commonwealth of Virginia, and the charges therefor have been taxed as a part of the costs of this case.

* * * * * * * * * *

A COPY, TESTE: WALTER M. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

BY: Iris P. Halland D. C.

INSTRUCTION NO. E

The Court instructs the jury that the fact that the defendant may have committed a prior criminal offense is not proof that he is guilty of the offense here charged, and such fact shall not be considered by the jury in reaching a conclusion as to his guilt or innocence on the present charge.

Granted
7-28-77
W.H.O.Jr

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH HELD ON THE 28TH DAY OF JULY, 1977

COMMONWEALTH OF VIRGINIA	)	
v.	)	Upon an Indictment for Burglary with Intent to Commit Rape, Sodomy - Criminal Docket No. 28237 - July term, 1977
WILLIAM P. RYAN	)	

William P. Ryan, born on May 24, 1934, who stands convicted of breaking and entering the dwelling house of Pamela Vierrhther with intent to commit rape as charged in the first count of the indictment; carnally knowing Pamela E. Vierrether with his mouth as charged in the second count of the indictment; and attempt rape of Pamela E. Vierrether as charged in the third count of the indictment on May 18, 1977, upon the jury's verdict, was led to the bar in custody of the jailer of this Court, and came also J. Wayne Sprinkle and Robert L. Sondej, attorneys for the said William P. Ryan, said attorneys having been heretofore appointed by the Court to represent the prisoner, William P. Ryan, and came as well the Attorney for the Commonwealth and the Probation Officer of this Court, who filed in open Court in the presence of the accused, who was advised of its contents, his report as prescribed by Section 19.2-299 of the Code of Virginia, which said report is ordered filed as a part of the record in this case; and thereupon, the accused, by counsel, advised the Court that he did wish to cross-examine the said Probation Officer as to matters contained therein; and did wish to present additional facts bearing upon the matter; and did wish to present additional argument; and thereupon, the witnesses were sworn, called singularly, and testified; whereupon, the Court having fully heard the

testimony, having considered all of the evidence in the case, the report of the Probation Officer, and such additional facts as were presented, doth deny probation; and thereupon, it being demanded of the said William P. Ryan, if anything for himself, he had or knew to say, why the Court here should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay of judgment, it is ordered that the said William P. Ryan be confined in the State Penitentiary for the term of ten (10) years on the first count of the indictment; five (5) years on the second count of the indictment; and ten (10) years on the third count of the indictment, the period by the jury in its verdict rendered; and thereupon, the prisoner, by counsel, moved the Court to run the sentences concurrently, which motion being fully heard, is overruled; and thereupon, the Court advised the accused that he has a right to apply for an appeal from this conviction to the Supreme Court of Virginia and was also advised that counsel would be appointed for that purpose if requested; and thereupon, the prisoner, by counsel, noted an appeal; and it appearing that the said William P. Ryan has been held in the jail of this city 289 days, awaiting the trial of this case, it is ordered that he be credited with the time spent by him upon his sentence aforesaid. And the Clerk of this Court is directed to forthwith transmit a copy of this order to the Superintendent of the State Penitentiary in Richmond, Virginia.

And the prisoner, William P. Ryan, is remanded to jail.

The Court certifies that the prisoner and his counsel were present in person at every stage of the proceedings.

A COPY, TESTE: WALTER M. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

BY Iris P. Hellard D. C.

August 4, 1977

VIRGINIA: AT THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH HELD ON THE 8TH DAY OF AUGUST, 1977

COMMONWEALTH OF VIRGINIA	)	
v.	)	Upon an Indictment for Burglary with Intent to Commit Rape, Sodomy
WILLIAM P. RYAN	)	Criminal Docket No. 28237 -
	)	August term, 1977

This day came again the Attorney for the Commonwealth, and the accused, William P. Ryan, born on May 24, 1934, was this day again led to the bar in custody of the jailer of this Court, and came also Robert L. Sondej and J. Wayne Sprinkle, attorneys for the said William P. Ryan, said attorneys having been heretofore appointed by the Court to represent the prisoner, William P. Ryan, and the said William P. Ryan having heretofore been found guilty of burglary with intent to commit rape as charged in the fourth count of the indictment and his punishment fixed at twenty (20) years in the State Penitentiary, the period by the jury in its verdict rendered on July 28, 1977, and the said William P. Ryan,

August 4, 1977

by counsel, having moved the Court on July 28, 1977 to set aside the jury's verdict as being contrary to the law and the evidence and grant him a new trial on the grounds that the said verdict is contrary to the law and the evidence, which motion was continued, and the Court having this day fully heard the evidence and argument of counsel relative to said motion, doth overrule said motion; and came also the Probation Officer of this Court, who filed in open Court in the presence of the prisoner, who was advised of its contents, his report as prescribed by Section 19.2-299 of the Code of Virginia, which said report is ordered filed as a part of the record in this case; and thereupon, the prisoner, by counsel, advised the Court that he did not wish to cross-examine the said Probation Officer as to any matter contained therein; and did not wish to present any additional facts bearing upon the matter; and did not wish to present any additional argument; and the Court having considered all of the evidence in the case and the report of the Probation Officer, doth deny probation; and thereupon, it being demanded of the said William P. Ryan, if anything for himself, he had or knew to say, why the Court here should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is ordered that the said William P. Ryan be confined in the State Penitentiary for the term of twenty (20) years, the period by the jury in its verdict rendered on July 28, 1977; whereupon, the Court advised the said William P. Ryan that he has a right to apply for an appeal from this conviction to the Supreme Court of Virginia and was also advised that counsel would be appointed for that purpose if requested; and thereupon, the prisoner, by counsel, noted an appeal; and it appearing to the Court that the said William P. Ryan has been held in the jail of this city no days, awaiting the trial of this case, it is ordered that he be credited with no time spent by him upon his sentence aforesaid.

And the Clerk of this Court is directed to forthwith transmit a copy of this order to the Superintendent of the State Penitentiary in Richmond, Virginia.

And the prisoner, William P. Ryan, is remanded to jail.

The Court certifies that the prisoner and his counsel were present in person at every stage of the proceeding.

The Court certifies that it provided Leslie F. Jolly, a Court Reporter, to record verbatim the evidence and incidents of trial and doth further order that the expense of reporting and recording the same shall be paid by the Commonwealth of Virginia, and the charges therefore have been taxed as a part of the costs of this case.

ertified
o State

* * * * * * * * * * * *

A COPY, TESTE: [illegible]
[illegible]

BY [illegible]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA

-vs- CRIMINAL DOCKET NO. 28237

WILLIAM P. RYAN

NOTICE OF APPEAL

Now comes the Appellant, William P. Ryan, by counsel, and give Notice of Appeal from the judgements of the Court rendered herein on the 28th day of July, 1977, as required by Rule 5:6 of the Rules of the Supreme Court of Virginia.

Transcripts of the trial proceedings in this case will be hereafter filed.

WILLIAM P. RYAN

By J. Wayne Sprinkle
Of Counsel

Robert L. Sondej
Merchants & Farmers Bank Building
Crawford Street
Portsmouth, Virginia 23704

J. Wayne Sprinkle
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704

We hereby certify that we mailed a true copy of this Notice to James A. Cales, Commonwealth's Attorney, P. o. Box 1417, Portsmouth, Virginia 23705 on the 28th day of July, 1977.

J. Wayne Sprinkle

Robert L. Sondej

(58) Filed 7/28/77

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA,

vs.

WILLIAM P. RYAN, 28237

NOTICE OF APPEAL

William P. Ryan, by counsel, gives Notice of Appeal from the judgment order entered by the Circuit Court of the City of Portsmouth, Virginia, on August 4, 1977, this notice being in accordance with 5:6 of the rules of the Supreme Court of Virginia.

A transcript of the proceedings, facts, testimony, and other incidents of the case will hereafter be filed.

WILLIAM P. RYAN

By Richard S McLellon
Of Counsel

Richard S. McLellon
Bangel, Bangel & Bangel
Law Building
Portsmouth, Virginia 23704

I hereby certify that I have this 23 day of August, 1977, mailed a true copy of the foregoing Notice of Appeal to James A. Cales, Commonwealth's Attorney for the City of Portsmouth, P. O. Box 1417, Portsmouth, Virginia 23705.

Richard S McLellon

CIRCUIT COURT OF
PORTSMOUTH, VA.
1977 AUG 24 AM 9 49
BOOK PAGE
WALTER H. EDMONDS, CLERK

Showers Likely

Warmer Still

Today in Tidewater will be cloudy and unseasonably warm with occasional showers and thundershowers likely. The afternoon high temperature will be around 80.

Tonight will remain cloudy with showers a 60 per cent probability. The low will be near 60.

Fair and cooler weather is in the offing for Sunday. The high will be about 70. The rain chances will decrease to 20 per cent Sunday.

Winds today will be southerly, 10 to 20 miles per hour. A windshift to westerly, 15-25 m.p.h., is expected tonight, continuing on Sunday.

The Monday-through-Wednesday outlook is for fair and cool each day. Highs will average in the middle to the upper 60s and lows will average in the middle 50s.

The stalled trough and stationary front remained in Western Virginia Friday, but it is expected to reach the coast this evening. Major waves on the front were over Georgia and northern South Carolina. Heavy rains were spreading northeast across the Appalachians and western parts of North Carolina and Virginia, where flash flood watches were posted.

Tidewater got only light sprinkles to 9 p.m. Friday, but heavier showers were reported to the west. Norfolk's high Friday was 82, the low was 62, and the mean 72, which was 11 above normal for Oct. 8.

[illegible] Highs around 60. Lows in middle to upper 40s.

[illegible] Valley—Rain. [illegible] Lows in [illegible]

[illegible] and Southern [illegible]—Occasional rain. Highs around 60. Lows in middle to upper 40s.

Central Mountains—Occasional rain. Highs around 60. Lows in middle to upper 40s.

Southwest Plateau and Southwest Mountains—Chance of rain. Highs around 60. Lows in middle to upper 40s.

Friday's Readings

Temperatures	1975	1996
8 a.m.	55	69
2 p.m.	65	74
High	72	82
Low	52	66
Mean	62	75
Dept. from normal	-2	+11

	8 a.m.	8 p.m.
Precipitation	0	TR
Wind velocity, miles	SE4	SE6
Sea level pressure	30.04	29.98

Humidity	Temp.	R.H.
8 a.m.	69	87
2 p.m.	81	61
8 p.m.	74	88

Record high 92 in 1941. Record low 42 in 1889.

Seawater temperature, Chesapeake Light, 73. Seawater temperature, Diamond Shoals Light, 68.

City Wx next 24 hrs. [illegible] last 24 hours pcpn

LOW	Pcpn	HI	LOW	HI	
Roanoke	64	48	69	62	2.91
Richmond	71	58	80	62	.01
Lynchburg			74	65	.60
Charlottesville			77	67	.83
Bristol			65	58	.91

Tides

	AM High	AM Low	PM High	PM Low
Sewells Pt.	10:59	4:20	10:51	4:54
Portsmouth	10:55	4:35	11:07	5:09
Ocean View	10:16	3:54	10:28	4:28
Lynnhaven	10:25	4:21	10:38	4:55
Va. Beach	8:59	3:53	9:17	3:16
Newport News	10:59	4:38	11:11	5:12
Jamestown Isl.	1:11	7:46	1:33	8:20
Town Point	11:08	4:54	11:20	5:28
Suffolk	0:00	5:45	12:12	6:19
Kiptopeke Bch	9:59	3:45	10:11	4:19
Cape Charles	10:21	4:17	10:33	4:51
Onancock	1:09	7:29	1:31	8:03
Oregon Inlet	9:22	3:08	9:34	3:42
Yorktown	10:45	4:27	10:58	4:55
Cape Hatteras	8:41	2:10	8:53	2:44
Urbanna	12:57	7:15	1:19	7:49
Mobjack	10:28	4:16	10:40	4:50

MARINE FORECASTS

Cape Henlopen, Del., to Virginia Beach and Chesapeake Bay south of Point Lookout—Southerly winds, 10-20 knots today, becoming west, 10-20 knots tonight. Occasional showers and thundershowers today, likely continuing tonight.

South of Virginia Beach to Cape Fear and Albemarle and Pamlico Sounds—South to southwest winds, 10-20 knots today, and north to northwest, 15-25 knots tonight. Scattered showers and thundershowers today and tonight.

For latest marine weather, tune in 162.55 MHz on VHF public service band operating 24 hours a day.

VIRGINIA FORECAST

Rain, heavy at times, in West and occasional thunderstorms in East. Highs in 80s in West and in 70s to near 80 in East. Lows from 40s in mountains to near 50 in East.

EXTENDED FORECAST

RICHMOND (AP)—The National Weather Service's forecast for Virginia, Sunday through Tuesday:

Fair, cool weather will prevail. Highs in 60s. Lows in 40s to lower 50s. Somewhat cooler in mountains.

Tidewater Skies

Saturday, Oct. 9	
Sunset today	6:37
Sunrise Sunday	7:08
Moonrise tonight	7:26
Last Quarter	Oct. 16

The planet Venus, low in the west-southwest, is the first "star" visible after sunset and the planet Jupiter, high in the west, is the last "star" to fade out in the morning twilight.

Weather Table

WASHINGTON (AP)—National Weather Service report of maximum temperatures for 12-hour period, minimum temperatures for 18-hour period and precipitation for 24-hour period ending 7 p.m., plus forecast high, low and weather for next 24-hour period.

Station	W	Next 24 hrs H	Next 24 hrs L	Past 24 hrs H	Past 24 hrs L	Pr.
Albany	rn	61	52	67	52	.38
Amarillo	fr	76	39	64	26	
Asheville	pc	67	57	71	63	.42
Atlanta	cd	66	57	67	59	.50
Birmingham	cd	56	49	56	52	12
Bismarck	cl	69	32	66	44	
Boise	fr	77	44	75	41	
Boston	rn	70	60	76	63	
Buffalo	rn	50	45	50	45	.02
Burlington	rn	54	45	47	45	1.17
Charleston, S.C.	rn	81	68	84	74	
Charlotte	rn	73	63	73	66	1.83
Chicago	pc	58	44	56	45	
Cincinnati	cd	53	43	56	49	
Cleveland	rn	55	43	53	44	.02
Denver	cl	84	44	73	38	
Des Moines	cl	62	39	63	29	
Detroit	cd	56	39	54	41	
Duluth	cd	45	33	40	30	
Honolulu	cl	86	70	87	69	
Houston	fr	70	45	55	48	.15
Indianapolis	cd	58	44	53	47	
Jacksonville	rn	72	67	89	72	
Memphis	pc	60	48	56	49	
Miami Beach	rn	88	78	84	81	
Milwaukee	pc	57	40	56	41	
Minn-St. Paul	pc	57	36	55	29	.01
New Orleans	cd	66	51	65	57	
New York	rn	72	64	73	64	.15
Philadelphia	rn	71	64	71	61	
Phoenix	cl	93	60	87	64	
Pittsburgh	rn	53	45	54	46	11
Portland, Me.	rn	62	57	64	51	
Portland, Ore.	cd	68	54	71	54	
Richmond	rn	77	64	80	62	.01
St. Louis	cl	60	34	59	37	
Salt Lake	cl	73	41	69	38	
San Antonio	cl	73	40	65	41	.08
San Francisco	fr	70	57	80	57	
Seattle	pc	68	55	71	54	
Washington	rn	75	63	75	66	

WEATHER KEY: cd-cloudy, cl-clear, pc-partly cloudy, fr-fair, rn-rain.

Case No. 28232
Commonwealth's Exhibit # 4
Date 5-18-77
Judge [illegible]

ASSIGNMENTS OF ERROR

1. The Court erred in failing to strike the Commonwealth's evidence as to sodomy, as there was no penetration.

2. The Court erred in admitting the newspaper time and tide chart to establish sunrise, and could not take judicial notice of its accuracy.

3. The Court erred in denying defendant's right to inquire of the complaining witness' damage claim against defendant's employer.

4. The Court erred in admitting evidence upon the trial of count four, of the occurrences of counts one, two and three, as they were highly prejudicial and outweighed their probative value.

5. The Court erred in orally instructing the jury that they could consider evidence of a prior break in during the trial of count four after having granted Instruction E that a prior offense should not be considered by the jury in reaching a conclusion as to guilt or innocence.

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THE COURT: In your motion to sever, as I understand, it all happened at the same time and place.

MR. McLELLON: No, sir. Has Your Honor seen the indictment?

THE COURT: Yes.

MR. McLELLON: The first charge, the first three counts of the indictment charge October 9th. They charge burglary with intent to commit rape; then they charge sodomy; then the third count charges attempted rape. The fourth count charges, on October 12th, three days later, a burglary with intent to commit rape and larceny; in other words, the long separation between this, three or four days.

I think what they are attempting to do is try the defendant on two separate dates because of the fact that they have received certain evidence they want admissible. They want this admissible in the previous trial, because under the fourth count, on October 12th, the defendant is charged also with having taken a camera out of the place,

which would indicate, of course, that he had committed larceny.

Of course, he will offer his explanation at that trial, on the reason the camera was taken out of the house. I think the camera had been taken out of the house and put in the automobile.

I would also point out that on October 12th, Pamela Vierrether was not even in the house that night; and I don't know why they have brought an attempt to commit rape on her, when they themselves know she was not in the house. I think the reason they are attempting to do this is in order to lock it into the other three offenses they have charged on October 9th; and we have evidence that the defendant was told that very evening that she was not in the house, by Mrs. DeMarco, the witness for Mr. Cales. He had been by the house that evening and had been doing some work, and Mrs. DeMarco had personally told him that Pamela Vierrether was not home.

Of course, there could be no rape if

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she was not home. I don't think you could convict anybody of burglary with intent to commit rape when she was not in the house.

Under the Rules, which allows them to go ahead and combine offenses -- the rule is 3A:13 -- "Trial Together of More Than One Offense. (b) An Accused Charged with More Than One Offense -- the court may direct that an accused be tried at one time for all offenses then pending against him, if justice does not require separate trials and (i) the offenses meet the requirements of Rule 3A:7(b) or (ii) the accused and the Commonwealth's Attorney consent thereto."

Of course, under 2, we disagree with this. We do not consent to it, so they do not meet the requirements of 3A.

Under "Joinder of Offenses", it says, "...if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan."

The fact that the defendant was in the house some three or four nights later does

not constitute a common scheme or plan.

I challenge that Mr. Cales knows she was not in the house that night; and they would have absolutely no evidence of any breaking in with the intent to commit rape.

Of course, they can't go in the defendant's mind and go in the house and indicate he went in the house and intended to commit rape. There was not a soul in the house when the police got there.

The defendant's car was pulled up in the front yard. The defendant was in the house with the lights on. His explanation was that, of course, as I stated before, he had been required to do work on this house. The house was being purchased, and it was brand new, being fixed up.

The evidence will be that this man was a hyperactive man, and many times did work on houses at night. It was not unusual for him to be in the house at night.

The police officers, when they found him in the house, went outside in the car, and there was a camera in the back of the automobile, which they would show had been

taken out of the house.

I think in the interest of justice, that there would be certain evidence admissible in the second case that would not be admissible in the first case.

The defendant may very well elect to testify in the second case, on the second, three-day later charge, and may elect not to testify on the first one, which was concerning the October 9th indictment; but I think in the interest of justice, if Your Honor please, that these are in no way connected as one type of act or acts, the fact the man was found in the house three nights later. Nothing was being hidden; the lights were on; his car was sitting right in front of the house. The lights were on in the house; and they asked him what he was doing in there. They had staked the house out because of the previous offense, of course.

I think, Judge, they have to show that this was connected and constitutes some common plan or scheme.

I think under the circumstances that

it says "If justice does not require separate trials"; and I think the burden is on them to show this man would have justice by having both of these cases tried together. I think justice requires in this case that there be separate trials.

MR. CALES: Your Honor, we have the same house, the same defendant; we have, three nights apart, we have early morning burglaries. We concede the woman wasn't in the house. I don't think you need to have the fact he didn't know the woman wasn't in the house.

THE COURT: That's a matter of evidence. Mr. McLellon says he did not.

MR. CALES: Even if we didn't have the same intent, I think that the evidence in this case, what would be admissible in the first case, the Commonwealth's position is, would be admissible in the second. There is no evidence in this case that wouldn't be put on at the same trial.

You can rule against the Commonwealth, and you can't be wrong, because we can't appeal; but I think in the interest of

justice in this case, Your Honor, all the evidence is going on in each trial. I have no question in my mind that the evidence we put on at the first trial would be exactly the same as the evidence at the second trial; and that's what the Rule applies to; that's what the Rule goes to; the fact that we have this evidence and we are going to show a common scheme or plan. The man had a key to the house both times. He went into the house both times with a key. He went in the early morning hours, and the woman was there; and he tried certain sexual acts on her and committed certain sexual acts on her; and the next night, the woman wasn't there, and he stole something.

It's within three nights of each other. The MO is the same; even the entry is the same; the facts are basically the same, Your Honor.

In order to prove the first offense, we are going to take things that happened the second night and put them in evidence, and they are going to be admissible; and

we are going to take things that happened the first night.

The Commonwealth's position is that this is what this Rule goes to, not what may be easier on the defendant, as far as when he wants to take the stand is concerned, but what facts are going to come out, what facts are going to be put on.

The Rule allows the Court and the Commonwealth to try one set of facts. It just happens that we have two incidents separated by seventy-two hours or so, but it's all going to be one big ball of facts.

MR. McLELLON: I would disagree, Judge. In the first three counts of the indictment, only a sex act. The fourth count -- and of course Mr. Cales admits she was not home that night -- and it shows a larceny act.

THE COURT: Let's separate the trials, so in all fairness to the defendant, we want to give him a fair trial. It's close, and I'm not saying you can't put on the evidence to show this.

MR. McLELLON: I might say this: I halfway thought about moving to quash the indictment.

Would Your Honor strike this one?

THE COURT: No, sir. We just won't read the fourth one.

MR. CALES: We get to try what we want first, and we will make that election soon, but not today.

MR. McLELLON: All right.

THE COURT: It's not going to be quashed or anything.

MR. McLELLON: I understand. I just didn't want them to read that fourth count.

THE COURT: If it's tried on the fourth one, he will read only the fourth one. If it's tried on the three, we will read only the three.

***

MR. CALES: Are you going to ask for a jury?

MR. McLELLON: Oh, yes.

MR. CALES: I would like to note the Commonwealth's exception to the Court's ruling.

MR. McLELLON: We will formally request a jury trial. This Motion to Quash, I think that can be taken up at the time of trial.

On the discovery, I think probably

1 but it would be analogous to a murder case,
2 where he reads all the degrees of murder
3 and the Court instructs the jury on first
4 degree murder. That would be a perfect
5 analogy; and he can read them all tomorrow,
6 and when we get to the instructions,
7 Mr. Blachman and I could certainly have a
8 nice little conversation on this matter.
9 MR. BLACHMAN: In that situation, they
10 are lesser included offenses.
11 THE COURT: I think the indictment
12 is clear, and -- I don't think all of them
13 are -- but I think this one is.
14 MR. BLACHMAN: The indictment is clear,
15 but it's a matter of procedure as to what
16 statute they are proceeding under.
17 THE COURT: He just told you, both
18 of them.
19 MR. BLACHMAN: Note our exception.
20 MR. McLELLON: This is a motion, of
21 course, which is going to be the major
22 point in this case: Excluding evidence of
23 the prior, October 9th, sexual assault that
24 took place. I think this is somewhat tied
25 in with their election of whether or not

they are going to proceed on the attempted rape or the larceny.

They have said previously that they have found this camera in the automobile of William Ryan. I think, unquestionably, they could have indicted this man on the larceny section. In other words, this is burglary with intent to commit larceny.

I very strenuously contest the fact that they have also included in this count here "With the intent to commit rape and larceny".

I want to put on Mrs. Vierrether to testify to the fact that, on the 12th of October, she was not at home. I also want to put on Treva DeMarco, to testify -- unless Mr. Cales will stipulate to this -- that on the evening of October 11th, which would have been around ten-thirty or eleven o'clock at night, that William Ryan was at her home; and Treva DeMarco at that time personally told William Ryan that Mrs. Vierrether was not in the house.

Mr. Cales has absolutely no evidence whatsoever to base any type of indictment

on the attempt to commit rape, or breaking and entering with intent to commit rape.

I think this all ties in, if Your Honor, please, to this election, whether they are going to go on a burglary with attempt to commit rape or larceny.

The reason this is so important, the incident that occurred on the 9th was strictly a sexual offense. They will have absolutely no evidence whatsoever that anything was stolen from that house, nothing.

The preliminary hearing -- we have the transcript here of the preliminary hearing -- Mrs. Vierrether testified only to sexual offenses. There wasn't even a pencil stolen from the house, or so; but Mr. Cales, in order to show some kind of common plan or design -- which we submit he can no way show -- he indicts this man right here for intent to commit rape, breaking into the house on October 12th, with intent to commit rape, when he personally knows -- if he has talked to those witnesses -- knows there was no person in that house and no woman in that house.

1 I want to submit that his own witness,
2 Mrs. Treva DeMarco, sitting down in the
3 Commonwealth's Attorney's witness room down
4 there, she herself will personally testify
5 that she told this defendant that Mrs. Vierrether
6 was not at home.
7 There is a big difference, Your Honor,
8 of course, in getting this evidence in, which
9 they want to try to do; they want to try this
10 man right here, on the October 12th charge,
11 and introduce evidence as to what happened
12 on the 9th. They want to make him look like
13 a bad guy.
14 We submit that on this charge of
15 October 12th, the only testimony they are
16 going to be able to have from Pamela
17 Vierrether is to the fact that she had
18 charge of the house at this time. She had
19 the camera in there, and she didn't know
20 William Ryan, and didn't give him
21 permission to come in the house.
22 They want to submit to a jury now,
23 that there had been a sexual assault on
24 October 12th, in order to show that this
25 man stole -- there was a sexual assault on

1 the 9th -- in order to show this man is a
2 bad guy and went in there on the 12th, in
3 order to give him a pile of time.
4 I say that Mr. Cales has wrongfully
5 indicted this man, and represented to the
6 Grand Jury that he had broken into that
7 place with intent to commit rape.
8 With these motions, the way they are
9 here, with the submission here that they
10 are indicting him on intent to commit, of
11 course, rape, Mr. Cales, I think -- I forget
12 exactly the statement he made just a couple
13 of minutes ago -- that the evidence may not
14 show it. I will say it's not going to show
15 it, because they didn't have one iota of
16 evidence. The October 9th case was solely
17 a sexual assault. The October 12th case,
18 the only thing they have is a larceny.
19 Are you going to be able to put in
20 evidence to show the man was a bad guy on
21 the 9th, in order to convict him of taking
22 a camera on the 12th?
23 I could see possibly that if something
24 was stolen, even back on the 9th, and again,
25 something was stolen on the 12th, maybe they

1 could show he went in the house previously
2 on the night, to ransack the house. There
3 is going to be no evidence of that.
4 I would like to -- in order to bolster
5 this, and ask Your Honor to rule that that
6 evidence is going to be excluded -- I would
7 like to put Treva DeMarco on, to testify she
8 personally told this man that Mrs. Vierrether
9 was not home; so we know that Mrs. Vierrether
10 was not at home -- to put her on personally,
11 to testify she was not home.
12 MR. CALES: For the sake of brevity,
13 and not going over this thing three more
14 times, we will stipulate she was not at home.
***
15 MR. McLELLON: Will you also stipulate
16 that she told him -- Treva DeMarco -- that
17 Mrs. Vierrether was not at home?
18 MR. CALES: No. We will stipulate
19 she was not at home. As to Treva DeMarco,
20 we have no objection to him putting her on
21 the stand for this limited purpose, and
22 asking her if she told this defendant that
23 Mrs. Vierrether was not at home.
24 Let's go on with it, and cut all the
25 talking out.

PAMELA VIERRETHER, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

***

Q In the early morning hours of October 9th, did anything unusual happen?

A Yes. I woke up between six and six-thirty, and I realized someone was in bed next to me.

Q What caused you to wake up?

A Apparently, some noise or something in the house woke me up, because the children weren't awake.

Q Tell the jury what you found.

A I woke up and turned over and knew something was wrong; and I put my hand down next to me, and I felt, like a man's leg; and I moved my hand up his body, and I felt a man's face, his hair; and I screamed loud.

Q You screamed?

A Loud.

Q What happened when you screamed?

A He threw me down on the other side of the bed, and he put his hand over my mouth.

Q Did you get a good look at the man in the bed with you at this time?

A Yes. He was right face to face when I

saw him, when I felt his face. I looked right in his face.

Q Is this when you screamed?

A I screamed when I realized it wasn't one of my children there; I realized it was a stranger.

Q And this man put his hand over your face?

A Put his hand over my mouth when I screamed.

Q And what did this person do when he had his hand over your mouth?

A He told me to be quiet. He said he wasn't going to hurt me, and told me not to scream again; and he asked me if I would, and I guess I shook my head; and he took his hand off my mouth, and I must have started to speak in a very loud voice, and he told me he had a friend in the doorway and if I screamed again, he might harm the children.

Q Did you scream again?

A No.

Q Why not?

A I was afraid for the children.

Q What about for your own safety?

MR. SPRINKLE: I'm going to object to the leading questions.

THE COURT: Rephrase the question.

MR. MOORE:

Q Were you afraid, Mrs. Vierrether?

A I was petrified.

Q And that man that you said that was in your bed, that you looked face to face at, is he in the courtroom?

A Yes, he is.

Q Can you point him out to the jurors?

***

MR. SPRINKLE: May we approach the bench?

THE COURT: Let's go in the back.

IN THE CONFERENCE ROOM

(Present: The Court, Mr. Cales Mr. Moore, Mr. Sondej, Mr. Sprinkle, the Defendant, Deputy Sheriff Woodard, and the Court Reporter.)

MR. SPRINKLE: On behalf of the defense, of course, we filed a motion, which we saved for trial, I believe that was our understanding, to quash any evidence of identification -- we have reason to believe there are some circumstances where identification might be tainted.

THE COURT: He is talking about

MR. SPRINKLE: Did the composite look like this man's face?

MRS. VIERRETHER: Yes.

MR. SONDEJ: I don't think we have anything else.

IN THE COURTROOM

MR. MOORE: ***

Q Mrs. Vierrether, I believe the last question I asked you, you said you looked this man right in the face and you screamed; and I asked you if this man was in the courtroom. What was your answer?

A I told you he was.

Q Can you point him out for the ladies and gentlemen of the jury?

A He's sitting right there.

Q Which man are you referring to?

A The man on the end.

Q In the green coat?

A Yes.

MR. MOORE: Let the record reflect she pointed to the defendant, Mr. Ryan.

Q What happened after he put his hand over your mouth?

1 A He told me about the man in the doorway,
2 and that he was a very nervous man; and if I screamed
3 again, there was no telling what he would do, and he
4 might harm the children. The little boy woke up and
5 started to fuss.
6 Q You are referring to --
7 A Robert, the two-year-old.
8 Q That was in bed with you?
9 A Yes; and the man told me to quiet the boy
10 down. I patted him on the back, and I tried to
11 reassure him, and I told him to go back to sleep.
12 Q Tell the jury what happened next.
13 A I patted him for a few minutes -- I don't
14 know if he ever went to sleep or not -- and then he
15 just started to rape me. He started to attack me.
16 He started to playing around.
17 Q Let me ask you this: What type of clothes
18 had you worn to bed on this particular night?
19 A A nightgown.
20 Q Approximately how long was the nightgown?
21 A Not quite knee length.
22 Q And did you have any clothes on underneath
23 it?
24 A No, sir.
25 Q And tell the jury what he did at this

1 point, when you said he tried to rape you.

2 A He kept taking his penis and rubbing it

3 around my vagina area.

4 Q Were you laying on your back?

5 A I was on my back.

6 Q Where was Mr. Ryan, the defendant?

7 A On top of me.

8 Q And tell the jury -- and I know you don't

9 want to, but you have to tell them -- tell them

10 exactly what he did.

11 A He just kept taking his penis and rubbing

12 it around the vagina area, and he took his hand and

13 started to rub my breasts; and then he took his

14 tongue and he started playing around with his tongue

15 on my lower stomach; and he started down around the

16 vagina with his tongue.

17 Q Did he lick your vagina?

18 A Yes.

19 Q Approximately how long did this take

20 place?

21 A Approximately forty-five minutes.

22 Q Had the defendant been drinking, could

23 you tell?

24 A Yes, sir. He told me he had been

25 drinking.

1 Q At any time, to your knowledge, did he
2 get an erection?
3 A No, sir.
4 Q Did he attempt to put his penis into your
5 vagina?
6 A He tried.
7 Q How many times?
8 A I couldn't estimate -- numerous.
9 Q You are talking about during this
10 forty-five-minute span?
11 A Yes.
12 Q Did he finally stop?
13 A Yes, sir. I tried telling him once that
14 my husband was going to come home at seven. I told
15 him he was working nights. He didn't believe that.
16 He knew that wasn't true. I told him, after that,
17 I was expecting some workmen at the house at eight
18 o'clock, and he accepted that; and somehow or other,
19 he promised to leave at seven-thirty.
20 Q Did he leave at seven-thirty?
21 A No, sir. All of a sudden, he said something
22 about, "Oh, I stayed five minutes too long". It was
23 seven-thirty-five.
24 Q Did you have a clock in the room?
25 A Yes, sir; right on the table next to my bed.

1 Q Did you notice the clock at any time?
2 A I noticed when it was seven-thirty-five.
3 Q What happened at seven-thirty-five?
4 A He made me turn over on my stomach, and
5 he kept taking his finger and playing around with my
6 vagina area the whole time; and then he told me he
7 was going to tie me up because he didn't want me to
8 get loose for a while; and he got some tie belts and
9 my husband's leather belt and put my hands behind my
10 back and pulled my feet up and tied my ankles and
11 wrists together.
12 Q You were lying on your stomach?
13 A Yes.
14 Q What did Mr. Ryan do?
15 A He told me, "You don't want to call
16 anybody". He more or less implied I didn't want to
17 call the police; and then he tied me up and said he
18 was going to leave.
19 I told him to leave through the bedroom
20 window, because I didn't want him to see my children.
21 He said, "No; I'm going to leave through the bathroom
22 window." He knew the layout of the house.
23 He said once that he wanted to get me a
24 knife so I could cut myself loose. I told him no; I
25 didn't want the children to see him. I was petrified

1 of him in the room with the knife.

2 Q What window did he leave through, to your

3 knowledge?

4 A The bathroom window.

5 Q He said he didn't want to leave through

6 the bedroom window, but he wanted to leave through the

7 bathroom window?

8 A That's what he told me.

9 Q Do you have any idea how he would have so

10 much knowledge about your home?

11 A Not unless he had seen it previously.

12 Q What did you do after he left?

13 A I laid there a few minutes, because he

14 told me not to try to get loose. He kept saying he

15 would hurt the children; kept threatening me with the

16 children; kept saying he would hurt them if I didn't

17 cooperate.

18 After so long -- I don't know how long --

19 I told the two-year-old to get up and see if the man

20 was in the bathroom; and he came back and said no,

21 he wasn't.

22 I tried to get myself loose, and I could

23 not; so I had to call the two oldest boys in.

24 Q Did they get you untied?

25 A They couldn't untie the ropes, and I told

them to call O for operator; and while he was gone, the oldest -- five-year-old -- managed to slip the rope off my legs so I could walk to the kitchen telephone.

Q When you walked out to that area, did you notice whether the front door was shut or open at that time?

A It was shut, because I had the boys shut it.

Q Was it shut or open when Mr. Ryan was in the house?

A It was open.

Q What about the chair?

A It was pushed into -- more or less pushed into -- the room.

Q That door had been shut and locked?

A Shut and locked; I checked every door when I went to bed.

Q Before Mr. Ryan had left, did he say anything to you about --

MR. SONDEJ: He's leading the witness.

THE COURT: Don't lead the witness. I sustain the objection.

MR. MOORE: All right, sir.

MR. MOORE:

Q Did he say anything to you when he was leaving?

A He told me not to call the police. He said, "You don't want to do that." He said, "You don't want to call your children in here." He asked me how I was going to get unloose; and he said, "You don't want to call them in here and see you like that", because with my feet up like that --

Q Did you move out of that house that very day?

A Yes, sir; I left.

Q Were you in the house on October 12, 1976?

A No, sir.

Q When did you return to the house?

A I believe it was that Wednesday, when my husband came home.

Q Why did you move out of the house?

A Because the man threatened several times to come back, he kept telling me, since he couldn't succeed. He said once, "It's been a long time since you have had this." He implied that -- he seemed to sense my husband was gone -- and he kept telling me, he said, once before he left, he said, "I'm going to stay all day, until I succeed." He said, "I'm not

leaving"; and then he kept saying, "I'm going to come back." He kept asking me, "Can I come back?" He said, "I'm coming back tomorrow; I'm coming back another day."

***

Q Did the police arrive very shortly thereafter?

A Yes, sir; it was a few minutes after.

Q Do you recall the police officer's name?

A Yes, sir. It was a police woman, Sawyer.

Q She was the first officer there?

A Yes, sir.

Q Did you give a description to the police, to Officer Sawyer?

A Yes.

Q Do you recall what description you gave to the police?

A That he had very bushy hair; I tried to give an estimate of the height and the weight. I told them I wasn't too sure about the weight -- I'm not good at judging that -- and about his age.

Q What age did you give them?

A Late twenties.

Q What condition were you in when you were talking to them?

A Very hysterical.

them what had to be done, and that was it.

Q Why is it you remember that he was one of the men who had done some repairs earlier?

A I was told.

Q Somebody told you?

A Yes, sir; after.

MR. SPRINKLE: I'm going to object to all that testimony.

THE COURT: I ask the jury to disregard that last question.

MR. MOORE:

Q This all happened on Carter Road, in the City of Portsmouth?

A Yes.

MR. MOORE: That's all.

CROSS-EXAMINATION

***

EXAMINED BY MR. SONDEJ:

Q I have just a couple of questions I would like to ask you, ma'am: On the 9th of October, when you went to bed that night, did you pull your shades down and curtains; did you have curtains in the house?

A I had curtains in the bedrooms. They were all closed.

Q Did you have any lights on in that bedroom?

A I had a night light on in the house, for

1 the children.

2 Q Was that in your bedroom?

3 A No, sir; another area of the house.

4 Q Do you recall when you woke up, when you

5 first woke up, whether or not it was daylight or

6 could you ascertain whether it was daylight or dark

7 out?

8 A It wasn't dark out. I could see clearly

9 in the room.

10 Q So when you first realized that there was

11 a male in the room with you, it was at least -- it

12 wasn't dark outside -- it was daylight?

13 A I don't know what it was like outside.

14 It had to be light enough outside, because I could

15 see clearly in the house.

16 Q And you don't know how long that individual

17 had been in the house, whether it had been thirty

18 seconds or three or four hours, do you?

19 A No, not really.

20 Q So in other words, it would be a fair

21 statement to say he could have just walked in the

22 house, say, ten or fifteen seconds before you awoke?

23 A Probably a little bit longer. It would

24 take him a little longer to open the door. He knew

25 how many children I had, so he had to take time to

take a count.

Q It would be a fair estimate to say it could have been thirty seconds prior to the time you discovered him in the house?

A Probably. Apparently, our dog was hit in the process. How long it would take him to hit the dog in the head, I couldn't say.

Q Would it be fair to say thirty seconds or sixty seconds?

A Approximately, yes.

Q The visibility in the room was light enough for you to see?

A Yes, sir.

***

Q Now, the description that you gave the police on it, was it the Saturday, or that same day?

A Yes, sir; they were there.

Q What was that description of the individual who you said came into your house?

A Just like I just told Mr. Moore, I told them he had very bushy hair and he had the plaid pants on and white shirt and dark shoes.

Q Do you recall who you gave that to?

A The policewoman, Sawyer, took the report.

Q Now, going back to the time you were shown the pictures, did anybody from the Police Department

A When I said --

Q On the 9th, when he was allegedly at your house?

A I saw it very clearly that first time.

Q Are you saying you saw it one time or two times or three times?

A It was there where I could see him, but to see him close up to recognize him, it would be just the one time.

***

Q One time. I have one further question: Mrs. Vierrether, you had a claim, or have a claim, against Bob Jones Realty?

MR. CALES: I object.

THE COURT: Sustain the objection.

IN THE CONFERENCE ROOM

(Present: The Court, Mr. Cales, Mr. Moore, Mr. Sondej, Mr. Sprinkle the Defendant, Deputy Sheriff Woodard, and the Court Reporter.)

MR. SONDEJ: The question that was asked, Your Honor, is whether or not she had a claim against Bob Jones Realty for this incident. I don't know this to be true, but I understand from talking to Mr. McLellon, there was supposed to be a

1 claim against Bob Jones Realty. We feel
2 it's a very pertinent question, especially
3 on cross-examination, to show that if, in
4 fact, she has a claim pending, it would go
5 to her motivation, and also her bias or
6 incredibility of testifying against
7 Mr. Ryan, which would maybe substantiate
8 her claim, inasmuch as Mr. Ryan was in the
9 employ of Bob Jones Realty at the time this
10 occurred; and I think it's a proper question
11 on cross-examination, and goes right to the
12 credibility.
13 MR. CALES: Your Honor, our problem
14 is -- I don't think it should have been
15 brought out to start with -- and the claim
16 has been settled; and now, the seed has been
17 sewn, and probably the best way to answer it
18 now is to let him ask him, and let her say
19 all claims have been settled.
20 THE COURT: I don't think it has any
21 place in this court, and I think it should
22 end right where it is. He says the case
23 has been settled.
24 MR. SONDEJ: I don't know.
25 THE COURT: Mrs. Vierrether, did you

have a claim against Bob Jones Realty?

MRS. VIERRETHER: Yes, sir.

THE COURT: Has it been settled?

MRS. VIERRETHER: Yes.

THE COURT: There is nothing pending now?

MRS. VIERRETHER: No, sir.

MR. SONDEJ: I still want to note our exception on the record. We think, during the course of her identifying the pictures, being shown the lineup, if there was a claim being contemplated, it should go to her credibility.

MR. CALES: I object.

THE COURT: Sustain the objection.

MR. SONDEJ: Note our exception. That's all of this witness.

***

THE COURT: Mrs. Vierrether, return to the witness room. Do not discuss the case with anybody until the case is over.

Mr. Sondej, do you understand that; Mr. Sprinkle: I advised the witness not to discuss the case with anybody until it's over; Mr. Cales?

MR. CALES: Yes, sir.

***

AT THE BENCH

THE COURT: The Commonwealth is going to offer from the newspaper of October 9, 1976, Virginian-Pilot, a certain weather forecast; is that what you call it?

MR. CALES: Well, it's not forecast here.

THE COURT: Time and temperature and tides.

MR. SONDEJ: We are going to object to this on the basis it is pure hearsay. This document is comprised several hours before the day of the actual offense. It is a prediction, and we don't know what happened on that particular day.

THE COURT: All right. I'm going to let it in. I will take judicial notice that I follow it in the paper every day; certainly as to the sunrise and the temperatures and the tides, the tides more particularly; and I find it very accurate. It will be introduced as Commonwealth's Exhibit 4.

IN OPEN COURT

MR. CALES: We would at this time introduce tides and temperature of October 9th.

THE COURT: All right, sir; Commonwealth's Exhibit No. 4.

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MR. CALES: Commonwealth rests, Your Honor.

* * * * * * * * *

THE COURT: Ladies and gentlemen, please do not discuss the case among yourselves. Please do not discuss it with anybody; and by all means, do not go to the Carter Road address.

I want everybody to remain seated in the courtroom until the jury has had time to clear the building.

When you come back, go right to the jury room or the jury box, and still do not talk to anybody or engage in any conversation with the lawyers, spectators or anyone.

We will return at two o'clock.

(Court reconvened following luncheon recess.)

Mr. McLellon, I think the record should show that he was excluded. He really doesn't know what went on as far as the evidence today, unless he has been talking with the other witnesses or somebody in the courtroom; and I do think the record should show that.

I'm not going to waive my right to call Treva Demarco; and I frankly don't think the Commonwealth has to say whether we are going to call her or not in our next case.

THE COURT: You do admit there is going to be a conflict between you and Treva Demarco?

MR. McLELLON: All right, Judge.

THE COURT: Your motion is denied. We will proceed with the case.

***

MR. SONDEJ: We would move to strike the Commonwealth's evidence.

MR. SPRINKLE: You have already ruled that this newspaper article was admissible, based on judicial notice.

THE COURT: I will say that that's what I said up there.

MR. SPRINKLE: You took that in judicial notice, because you have the habit of reading the newspaper every morning, and seeing the tides.

MR. CALES: I object, Your Honor.

THE COURT: He is questioning me. I think he has the right. You are absolutely right.

MR. SPRINKLE: I make a motion to strike the Commonwealth's case at this point, based on insufficient evidence at this time to prove a prima facie case.

THE COURT: Motion denied.

MR. SPRINKLE: Count two.

THE COURT: You said all three counts.

MR. SPRINKLE: Yes, sir. Count two, based on 18.2-361, the indictment says on or about October 9, 1976, in the City of Portsmouth, William P. Ryan did carnally know Pamela Vierrether with his mouth.

18.2-361 is the statute based on -- that is, of course, divided in two sections -- one deals with force and one without force.

There is no evidence of force at this time; and I think later on, we take this up, there has been force shown; but it doesn't say anything in the indictment; and there is a variance there; and I think later on, taking up the instructions in this, there is no mention of force in the indictment. The statute talks about force.

THE COURT: What is your next motion? You said you would take it up with the instructions.

MR. SPRINKLE: That's it.

MR. SONDEJ: We rest our case; and we would renew our motion to strike again, for insufficient evidence.

***

MR. SPRINKLE: I would like the record to show that we have advised Mr. Ryan of his right to testify, and his other witnesses; and isn't it your indication that you wish to waive your right to testify and to have these other witnesses here?

DEFENDANT: That's right.

MR. SPRINKLE: You have been fully informed of those rights?

***

MR. SONDEJ: We would move to set aside the verdict as contrary to the law and the evidence; and ask that the motion be continued until the record can be printed up.

The motion is to all three counts, but in particular, to the sodomy charge.

It concerns us about the matter of penetration; and I would like to see the record before we argue the motion.

THE COURT: All right. I will let it stand on the motion. He will remain in custody until the motion is argued.

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THE COURT: Mr. Sprinkle and Mr. Sondej, are you all ready to proceed?

MR. SPRINKLE: Yes, sir.

THE COURT: Mr. Moore, is the Commonwealth ready to proceed?

MR. MOORE: Yes, sir, Judge.

THE COURT: I will be glad to hear from you at this time. Let the record show we are here today on a motion to set aside the verdict as contrary to the law and evidence. Is that correct, gentlemen?

MR. SPRINKLE: Yes, sir, Judge.

(Court Reporter sworn.)

MR. SPRINKLE: As you well recall, in the trial we had in this case on the 18th of May 1977, we made a motion to set aside the verdict as contrary to the law and the evidence; and I would like to address myself to the sodomy charge, if I might.

It is our contention that we believe that the Commonwealth, based on the evidence deduced at trial, insufficiently

showed that penetration occurred during the act or alleged act of sodomy. Of course, the Commonwealth has the burden to prove that beyond a reasonable doubt. It is the essential element of the crime of sodomy; Hudson vs. Commonwealth, 141 Va. 525, 127 S.E. 89, 1925 decision.

Now, Your Honor has brought to defense counsel's attention, a case, Carter vs. State, which is 122 Ga., Appellate, Page 21, 176 S.E. 2d, at 238 -- I believe it is a Court of Appeals decision on the State of Georgia, that deals with penetration in a sodomy situation, not unlike the case that we have at hand. The Court, in Carter -- the Appellate Court, not the Supreme Court of Georgia -- held that in their view, that all that is required in that situation is the contact between the mouth and the sexual organ of the female. This is cited in Amjur 72, Sodomy Section 5, on Penetration, Footnote 46. That footnote also cites a Texas case, Sinclair vs. State, which is 311 SW2d 824, decided in 1958. It talks

about the statute there in Texas, says that the statute literally reads that the offense, sodomy, can be when one puts his mouth on the sexual part, not penetration.

Of course, we have in Virginia this Ashby case, which is 208 Va. 443, 1558 SE2d 657; and the Supreme Court of Virginia, of course, held in that case that the facts are a little bit different -- the same charge of sodomy -- but it was with a little boy and a man; and the facts seemed to manifest, on page 444, 208 Va., the answer was, when he put his mouth on the man's penis or privates, I believe you can say that was a case where he actually touched the sexual organ; but the Supreme Court reversed that verdict, based on the evidence there was no penetration. You have to have penetration, not just touching.

Now, that same Amjur cited sodomy, also says, on the other hand, that a mere touching does not constitute the necessary "slight" penetration required by the law. They cite the Ashby case from Virginia.

They also cite State vs. Olsen. I

know you have seen this; and it deals with "touching female organ with mouth or tongue does not constitute sodomy"; and I would like to introduce this case for the Judge's perusal. I will give a copy to the Commonwealth.

Of course, upon your reading that case, you will see that the question is raised here in that case, where the penetration is necessary to constitute sodomy. On page 811, paragraph 2, it says -- let me quote -- "It is certain that either the male or the female's sexual organ must be involved before there can be carnal knowing of one person by another within the purview of the sodomy statute." It is similar to ours. "The only sexual organ involved in this case is that of the female. We cannot hold that a touching of that organ with the mouth or tongue constitutes carnally knowing the female, since touching it with the male sexual organ does not constitute carnal knowledge. That there can be such penetration by the mouth and tongue is recognized, and it has been held to constitute sodomy." They

cite an old Georgia case, Comer vs. State. That case is more law than it is facts, because you will see in the Olsen case, there is no penetration; they just talk about touching.

What I believe the law to be in the case, and if you look at page 32 --

THE COURT: I have got 32.

MR. SPRINKLE: The only evidence, I believe -- maybe Mr. Moore or Mr. Cales can correct me -- about the allegation, about any sodomy or any penetration -- and it says on page 32:

"Q And tell the jury -- and I know you don't want to, but you have to tell them -- tell them exactly what he did."

The answer was, "He just kept taking his penis and rubbing it around the vagina area, and he took his hand and started to rub my breasts; and then he took his tongue and he started playing around with his tongue on my lower stomach; and he started down around the vagina with his tongue.

"Did he lick your vagina?

"Yes.

"Approximately how long did this take place?

"Approximately forty-five minutes."

I believe that's a fair reading of the transcript, and I believe that's the only evidence regarding sodomy. It is my contention that is not penetration. This may be a case of anatomy rather than law.

What exactly is the vagina, the female organ? There are various definitions for it, but no definition was introduced at trial.

She says, "He started down around the vagina with his tongue." We don't know whether that is penetration or not. The lady could have meant the part right between her legs; but a lot of definitions don't cover that.

There is a legal definition, Clark vs. People, 79 Northeastern, at Page 941 and 943, and the definition is, which is consistent with a lot of medical definitions, it is now "leading from the very lips back to the womb."

My contention is that, based on what we

have here on page 32, you really don't have a justification for that. You don't have any penetration of that canal. He started down around the vagina. Is she talking about the outside or inside of that canal?

No one introduced in any evidence at that trial, that there was penetration. No question was asked about the outside part being part of the vagina; just that he licked around that area.

You have those bare facts. That's all you have; and I just feel there is a reasonable doubt whether there was any penetration; and of course, the burden is on the Commonwealth to prove beyond a reasonable doubt that there was penetration.

I don't think you can look at that page and say that the Commonwealth proved it in the case we have with Mr. Ryan. For that reason, I feel the sodomy charge ought to be struck.

Thank you, Judge.

MR. MOORE: The Commonwealth, of course, would disagree with Mr. Sprinkle's interpretation.

The Court, I think, has already ruled at the trial, I think Mr. Sprinkle made the motion then, that there was no penetration, before the case went to the jury; and the Court ruled there was, and let the case go to the jury on the sodomy charge; and I think the Court was proper in its ruling.

I think the vagina, Judge, is -- certainly Mr. Sprinkle can call it a medical term or not -- but it's a certain part of the body that couldn't be licked other than by penetration; and of course, there are cases that differ, Judge, as to what is penetration and what is sufficient: Whether it is a mere licking or has to be more penetration.

In the Virginia case, you are talking about a different form of sodomy than we have here. I don't see any merit at this stage to Mr. Sprinkle's argument.

THE COURT: I think, Mr. Sprinkle, you gave a fair reading of the transcript on page 32, but if you read it carefully, it says he started around the vagina with his tongue; and on direct examination, she was asked, "Did he lick your vagina?" and the

answer was "Yes"; and it goes on, "How long did this take place?" and she said, "Approximately forty-five minutes."

It went to the jury, and the jury determined there had been penetration; and your motion is overruled.

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Now, Mr. Sondej and Mr. Sprinkle, does Mr. Ryan want a presentence report, or are you all prepared?

MR. SONDEJ: Can we confer with Mr. Ryan on that?

THE COURT: Take him to the jury room.

MR. SONDEJ: Note our exception to the Court's ruling.

(Mr. Sondej, Mr. Sprinkle and the Defendant confer in jury room.)

(Court reconvened following recess.)

MR. SONDEJ: If it please the Court, Mr. Ryan would like to have a presentence report prepared.

THE COURT: Under the statute, I think he is entitled to it.

MR. SONDEJ: Yes, sir. It takes about six weeks and we still have another

MR. SONDEJ: Your form and that letter that you sent me.

DEFENDANT: You mean that I sent the Clerk of Court?

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MR. SONDEJ: I guess it's already in the record.

There is a matter -- and this will go back to the indictment -- we anticipate -- as you know, Mr. Ryan was tried for the first three counts of the indictment earlier, alleging that he committed certain criminal offenses on or about October 9, 1976 -- I would anticipate that Mr. Moore, to substantiate the charge of the allegation of intent to commit rape, the only evidence that he would have would go back to the October 9th offense, and he would probably make some reference to this in his opening statement.

I want to bring it up now, because I don't want to interrupt the opening statement of the Commonwealth, and ask to have a matter heard outside of the presence of the jury.

We would object to any evidence or any comment made by Mr. Moore in reference to the October 9, 1976 situation at this trial

here today, in which he has been charged with breaking and entering with the intent to commit larceny and rape.

MR. MOORE: The Commonwealth has every intention of relating certain incidents that occurred on October 9th to this charge of October 12th, the reason being, we have got him charged with the intent to commit rape. The man was there before with the intent to commit rape, and said he would be back.

Of course, the police officers found him back there, Judge, in three days.

THE COURT: I will allow it.

MR. SONDEJ: That goes right back to the indictment, sir. From the evidence they are going to have about a camera that's involved and that's seized, if that be the case and they find he did not have permission to go in the house, and they found a camera, they have got to find him guilty of breaking and entering to commit larceny.

If you allow them the previous situation of October 9th, they are obliged

again, they have got to find him guilty of breaking and entering with the intent to commit rape; therefore, you have got two criminal convictions on one count.

THE COURT: I don't know what his evidence is going to be. I can't pre-judge his case. I'm going to let him put his case on.

MR. SONDEJ: You are allowing him to proceed on two charges on one count of the indictment.

THE COURT: No, sir.

MR. SONDEJ: Note our exception, please.

***

DEFENDANT: First of all, I would like to say in the record that I choose to represent myself.

THE COURT: What is your background in this, and what is your expertise; how can you do this?

DEFENDANT: It's very simple -- I have been in court before.

THE COURT: You have a tenth grade education?

DEFENDANT: Yes, sir.

THE COURT: Separate the witnesses, please.

(Witnesses excluded from the courtroom.)

(Mr. Moore presents opening statement to the Court and the jury on behalf of the Commonwealth.)

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MR. MOORE: Now, on October 9th of 1976, Mrs. Vierrether, the Commonwealth's first witness, was at her home, asleep, and her husband was out to sea; and about six o'clock in the morning, the defendant, Mr. Ryan --

MR. SONDEJ: For the record, we are going to object to any statements made by Mr. Moore in reference to events which allegedly occurred on October 9, 1976, inasmuch as we don't believe they are relevant to the indictment charged today.

THE COURT: Overrule your objection. Continue, Mr. Moore.

MR. SONDEJ: Note our exception, please.

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(Mr. Moore continues opening

statement to the Court and the jury on behalf of the Commonwealth.)

(Mr. Sprinkle presents opening statement to the Court and the jury on behalf of the defendant.)

* * * * * * * * *

PAMELA VIERRETHER, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. MOORE:

Q State your name, please, ma'am.

A Pamela Vierrether.

Q Mrs. Vierrether, on October 9th of 1976, where were you living?

A At 3428 Carter Road.

Q Is that located in the City of Portsmouth?

A Portsmouth.

Q Were you also living there on the date of October 12, 1976?

A I wasn't in the house.

Q Was that still your residence?

A It was my residence.

Q Did you intend to be living at that address?

1 A Yes.

2 Q I would direct your attention to certain
3 events that happened on October 9, 1976. Approximately
4 what time did you go to bed that night?

5 A Probably between ten and eleven.

6 Q Who would have been in the home with you?

7 A Just myself and my four children.

8 Q Where would your husband have been?

9 A He was in the Mediterranean.

10 Q Did you lock all your doors and windows
11 before you went to bed?

12 A They were all locked.

13 Q Did you make any special precautions to
14 the front door?

15 A I had a kitchen chair pushed tight up
16 against the front door.

17 Q And did anything unusual happen this
18 particular night?

19 A Yes; someone broke in.

20 Q When did you first discover somebody had
21 broken in?

22 A Between six and six-thirty, I found
23 someone laying in bed next to me.

24 Q Would that have been in the morning time
25 or afternoon time?

1 A It was in the morning, Saturday morning.

2 Q And that person in the bed with you, what

3 did he do?

4 A He tried to rape me.

5 Q Tell the jury, if you will, or let me ask

6 you this: When you woke up, what did this person do?

7 A When I first woke up, I screamed.

8 Q Then what happened?

9 A Then he threw me down on the bed and put

10 his hand over my mouth; and he threatened me and told

11 me not to scream any more.

12 Q What type of actions did he make towards

13 you?

14 A You mean the whole time he was in the

15 room with me?

16 Q Yes, ma'am.

17 A He just laid me down on my back, and he

18 was on top of me. He kept trying to rape me the

19 whole time; and he was in the house for an hour and a

20 half. He kept fooling around with my body.

21 Q Did he have his pants on or off?

22 A I really don't remember.

23 Q Do you recall whether or not his zipper

24 would have been down?

25 A Uh huh.

1 Q Did he expose his private parts to you?
2 A Yes.
3 Q Did he do anything with his private parts?
4 A He kept rubbing it up against my vagina.
5 Q Was he successful in what he was trying?
6 A No.
7 Q And approximately how long did he stay
8 that night?
9 A About an hour and a half; maybe a little
10 longer.
11 Q And was anybody else with this man?
12 A He told me, when I first realized he was
13 there, he said, "There's somebody in the doorway";
14 and he said my screaming made this guy nervous, and
15 if he got nervous, there's no telling what he would
16 do; and I had my little son, he was only two at the
17 time, in bed with me the whole time.
18 Q And did you talk with him during this
19 hour and a half?
20 A Yes.
21 Q Did he say anything to you before he left?
22 A For a good half hour before he left, he
23 kept telling me, "I'm going to come back. I can't
24 succeed; and I'm going to come back, and I'm going to
25 succeed." He told me once, "I'm going to stay for

breakfast"; and he kept saying, "I'm going to come back, and I'm going to succeed next time." He said it quite a few times. I was convinced he meant it.

Q Did this person finally leave?

A He left approximately, I guess it must have been between seven-thirty and quarter to eight.

Q What did you do when he left?

A I waited a few minutes and had my two year old get out of the bed and go to the bathroom window, to see if he was gone. I yelled for my two oldest boys.

Q Did he do anything to you before he left?

A He tied me up. He had me completely tied up. I was on my stomach, and he had my wrists and my ankles all tied together. I couldn't move.

Q Did you call the police?

A I had to have my oldest boy, who is only seven, do it. I couldn't get out of bed. I was tied up completely.

Q Did the police come immediately?

A Yes.

Q Is that man that did these things to you on October 9, 1976 in the courtroom?

A Yes, he is.

Q Would you point him out, please?

1 A He's sitting over there.

2 Q Are you pointing to the man in the blue

3 jacket?

4 A Yes; on the end.

5 MR. MOORE: Let the record show

6 she is pointing to Mr. Ryan, the

7 defendant.

8 Q Are you absolutely positive this is the

9 man?

10 A I am positive.

11 Q Did you remain at these premises?

12 A No. I left. I was afraid to stay in the

13 house.

14 Q When did you leave?

15 A Late that afternoon or evening,

16 October 9th, I left.

17 Q That was a Saturday?

18 A Yes.

19 Q Where did you go?

20 A I went to stay in a friend's house. I

21 took the children out of the house. I was afraid to

22 stay alone until my husband got home.

23 Q Did you notify the police you were not

24 going to be staying there?

25 A Yes. They knew on October 9th, the

evening, where I was.

Q Did you give anybody permission for any reason to come back into your home?

A No. I told them I didn't want anybody in the house, because I didn't know if the police was done with the work in the house. No one was to enter the house at all.

Q Did you give anybody permission to come into your house at two o'clock in the morning, or at any time, to make repairs?

A No. I said I wanted the house left as it was.

Q What was the condition of your home when you left on that Saturday afternoon, to go to the friend's home?

A What do you mean by "the condition"?

Q As far as your doors and windows?

A All the doors were locked; all the windows were covered. If I didn't have curtains, we had at least a blanket or something over the windows. We had wood up on the back door, braced between the door and the steps that go down into the garage. It was impossible to go through that door at all. All the doors were completely locked.

Q Did you have anybody checking on the

house while you were staying with the friend?

A I came back to -- we came back to -- the house, because my animals were there.

Q Who is "we"?

A My brother-in-law.

Q What is his name?

A Steve Vierrether.

Q Let me show you this: Have you ever seen this camera before?

A Yes, I have.

Q Whose camera is it?

A It's my girl friend's, Mrs. Valenta's.

Q Have you ever borrowed that camera from her?

A I borrowed it from her some time in August, to take pictures of the house to show to my husband, since he wasn't here to see what the house looked like.

Q When did you move into your home on Carter Road?

A October 4th.

Q On the night of October 9th, was this camera in your home?

A Yes; it was on the 9th.

Q Where was it?

A It was sitting on my dresser. As you face my dresser, it was on the left-hand side of the dresser.

Q Was it in your home from October 9th through October 12th?

A Yes. It was there when I left.

Q Did you give anybody permission to borrow this camera?

A No.

Q There is a picture inside this case. Do you know who this picture is of?

A Yes. That's a picture of Mrs. Valenta's daughter; that's her husband; that's her back yard.

Q That's the picture of the daughter of the friend you borrowed the camera from?

A Yes.

MR. MOORE: The Commonwealth would introduce the camera.

MR. SONDEJ: I would object to that, subject to connecting it up, Judge. No foundation has been laid.

THE COURT: All right. At this time I will sustain the objection.

MR. MOORE: That's all the questions I have.

CROSS-EXAMINATION

EXAMINED BY MR. SONDEJ:

Q Mrs. Vierrether, you moved in on October 4, 1976, to the Carter Road address; right?

A Right.

Q You and your husband had not closed; in other words, you weren't the owner of the house at that time, were you?

A No.

Q You were paying rent?

A That's correct.

Q And you, I believe, testified that October 9, 1976, you moved out.

A I didn't move out.

Q Well, you removed yourself from the premises?

A That's correct.

Q You took your family and went to Norfolk?

A That's right. I wasn't going to stay there.

Q Isn't it true that you stopped paying rent during that period of time?

A No; it's not true. I paid a month's rent.

Q Did you pay rent in November 1976?

A I can't remember what date we stopped paying rent. I believe we didn't pay rent for approximately a month or two. I put a month's rent into escrow with my lawyer.

Q But you didn't pay Mr. Jones.

A He knew where we were.

Q And it's true you didn't actually close on the transfer of the ownership of the house until January or February of 1977?

A It was January of this year.

Q Did you ever see Mr. Ryan prior to October 9, 1976?

A Yes, I have.

Q Where have you seen him?

A He was supposed to come in the house and do some work in the kitchen.

Q In what capacity, to your knowledge, was he employed by Bob Jones Realty?

A Bob Jones Realty sent him to the house.

Q But he had been there prior to October 9, 1976; so you had seen him?

A Right.

Q Did you have any conversation with him?

A I imagine I told him what work had to be done in the house; but I also had the electricians

1 in the house, and I was unpacking.

2 Q Did you not tell Bob Jones that you were

3 not coming back to that residence on October 9th?

4 A I said I didn't know what I was doing.

5 I said I wouldn't make any decision until my husband

6 came home. Legally, the house was still mine. My

7 husband was being flown home.

8 Q On October 9th, when you left, it's true

9 that there were still some repairs that had to be

10 made to the house; is that correct?

11 A Yes. I also told Bob Jones Realty that

12 no repairs were to be done to the house while I was

13 gone.

14 Q Did you tell Mr. Ryan that?

15 A I didn't have any conversation with him.

16 Q Did you tell anybody else?

17 A I imagine it was Treva DeMarco. Bob Jones

18 Realty was informed.

19 Q Who was informed?

20 A Treva DeMarco was my agent.

21 Q So it is not true that Bob Jones was

22 informed himself?

23 A I don't remember talking to him. He was

24 out of town at the time.

25 Q But you said you informed Bob Jones.

A Realty, I said.

Q Not personally?

A No. I said the Realty. As far as I'm concerned, if I informed an agent, I informed a real estate company.

MR. SONDEJ: No further questions.

REDIRECT EXAMINATION

EXAMINED BY MR. MOORE:

Q What was your purpose of leaving the house on October 9th?

A I was terrified the man would come back.

Q What kind of living items did you have in the home?

A I had all my -- everything I owned in that house, except the few clothes I took with us.

Q Had you set up house there?

A Yes, sir.

Q Did you come back between the 9th and the 12th, and check on the house?

A Yes.

Q When did you eventually move back into the home?

A My husband got back on Wednesday; and the two of us stayed there that Wednesday night; and we brought the children back on Thursday.

Q What Wednesday would that have been?

A The Wednesday after it happened.

Q In the middle of October?

A Yes, sir; so it would be the 13th, I believe.

Q Are you living there now?

A Yes, sir; definitely staying there.

Q All this happened in the City of Portsmouth?

A That's correct.

MR. MOORE: That's all.

RECROSS-EXAMINATION

EXAMINED BY MR. SONDEJ:

Q Likewise, you testified on cross-examination that when you left the house on October 9th, you did not know what you were going to do until your husband returned?

A I was in a state of shock. I was not capable of making any decisions.

Q But it was a correct statement that when you moved out on October 9th, you did not know what you were going to do until your husband returned?

A No. I didn't feel I was capable of making any decisions at that time.

MR. SONDEJ: Thank you.

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STEVE VIERRETHER, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. MOORE:

Q State your name, please.

A Steve Vierrether.

Q Are you related to Pamela Vierrether?

A Yes, sir.

Q What relation are you?

A She is my sister-in-law.

Q And are you familiar with the events that occurred at her home on October 9, 1976?

A Yes, sir.

Q And did you go to her residence on Carter Road on that day?

A Yes, sir, I did.

Q And let me show you this camera. Have you ever seen this camera before?

A Yes, sir. That camera case, I have.

Q Where had you seen that camera case?

A It was laying on Pam's triple dresser in her bedroom.

Q Is that at the Carter Road address?

A Yes, sir; the new house.

Q Would it have been there on October 9, 1976?

A Yes, sir.

Q And your sister-in-law, did she move out of the house on that particular date?

A That afternoon.

Q Stayed with some friends in Norfolk?

A That's right.

Q Did you have occasion to go back to the home between the 9th and the 12th of October?

A Well, yes, sir. We stayed there until the afternoon of the 9th, until late, about four or five o'clock; then we went back the next morning, because we had to pick up some things for the children; and the next time we went was, it would be a Tuesday.

Q Tuesday; did you go -- I think the 12th was on a Tuesday, wasn't it -- I may be mistaken.

MR. SONDEJ: We would agree, if the 9th was a Saturday, the 12th was a Tuesday.

MR. MOORE: Thank you, Mr. Sondej.

Q When would have been the last day you would have been at the house?

A The last day we would have been at the house would have been Sunday.

Q You are talking about the last day after this particular incident happened?

A Yes, sir.

Q Was that camera --

MR. SPRINKLE: Object to the leading questions.

THE COURT: Don't lead the witness.

MR. MOORE:

Q Did you see the camera on the Sunday you went over there?

A Yes.

Q Where was it sitting then?

A (Witness indicates counsel table.) If that were the triple dresser, it would be sitting right about where that first pad of paper is.

Q The same place you had seen it on the 9th?

A Yes, sir.

Q What did you do when you went over to the house to check on it?

A The morning of the 9th, you mean?

Q Yes, sir; and the days that you went to check between the 9th and the 12th.

A Well, after all the confusion settled, and after all police officers and everybody left, I went through the house that afternoon, to make sure the

windows were shut. I put nails into the windows that looked like they had bad latches on them, and in the window frames themselves. I shored up the back door so it couldn't be opened.

They have louvre-type doors on the closets. I made sure all the louvre doors were closed so they were straight, right across the front.

I had three timers. I set up one in the living room, one in the family room, and one in the bedroom.

Q Tell what the timers did.

A The timers -- I had a light hooked up to one, and the TV hooked up to one timer in the family room; in the living room, in the front, I had one hooked up to just a light; and in the bedroom, I had one hooked up to a table lamp right next to the bed there.

Q What was supposed to happen when these lights and TV were on the timer; how did you have them set?

A I don't remember exactly when dark was then, when it started getting dark, but I had them set -- it was probably around six-thirty, I imagine -- so the TV and the light in the living room would go on; and about fifteen minutes later, the front room

light would go on; and those would go off around eleven-thirty. Then around, I think it was about eleven o'clock, about a half hour prior, I had it where the bedroom lamp would go on, so it would look like how people go in to retire for the night, and they always go in first and turn on the bedroom light; and the bedroom light would go off between twelve and twelve-thirty at the latest.

Q Did you have the volume turned on the TV?

A I had Pam go to the outside of the front door, and I had her stand out there; and I turned the volume up and had her tell me where it sounded like you could hear it, where it was normal for the outside, yet, it wasn't too loud, like it was excessive.

Q Did you have these set from October 9th through October 12th of '76?

A Did I have -- you mean, were they on the timers -- yes, sir. That evening when we left, until they moved back in the house, in fact, they were on timers.

MR. MOORE: That's all the questions I have got.

CROSS-EXAMINATION

EXAMINED BY MR. SONDEJ:

Q You noticed this camera in the residence or house that was being occupied by your sister-in-law?

A Yes, sir.

Q You never looked inside of it, did you?

A It was open when it was on the dresser.

Q Did you look inside and see the camera?

A Didn't have to, because the camera was ajar in there.

Q This is a camera made by Polaroid?

A Yes, sir.

Q This case is made by Polaroid?

A Yes, sir.

Q Can you tell me how you identified this camera and this case as being the same one you saw in the house on Carter Road? Is that the same one or is it one similar to it, or looks like it?

A Well, I guess, if you want to get down to the nitty-gritty, I didn't take any serial numbers, but it looks like it.

Q There is nothing you can identify this camera by as being one and the same, except it's a black case and Polaroid camera?

A The same type of case and camera. I don't

have a serial number.

Q Also, when you went over to the house on the 9th, you say that you shored up the windows and --

A The doors.

Q When you say "shored up" the doors, did you nail them shut?

A No, sir. I used bricks and lumber, just as I would on an aboard-ship-type of thing; and I shored them up so it was a pressure-type thing.

Q From the inside or the outside?

A The inside.

Q Did you put lumber across them and nail the doors shut?

A No; but I had it so far down, a person would have actually had to bust the door in, the way it was shored at the bottom. This was the back door now.

Q You didn't do the front door?

A No. I checked the front door about four times, to make sure it was locked.

Q You didn't change the locks, did you?

A No, sir.

Q So it was the same locks that would have been on the house when it was originally constructed?

A As far as I know.

Q Also, you were there on the 9th, which was a Saturday?

A Saturday morning.

Q You agree to that?

A Yes, sir.

Q And I believe you came back on the 10th, the next day?

A Yes, sir.

Q Did you connect and employ the timers on the 9th or the 10th?

A I connected them the 9th, even before we left. I went to the next door neighbor's, and asked if he had any so I wouldn't have to go out and purchase any. I borrowed them from the next door neighbor.

Q Had you ever used the timers before?

A Those particular timers, no, sir, not those particular timers.

Q Did you connect them up on the 9th?

A Yes, sir, the evening of the 9th.

Q What time did you set them to activate themselves?

A Okay, the first one, like I said, the family room was to go off around dusk, around six-thirty; and the next one in the front room would go off about fifteen minutes later, turn on.

Q The earliest you set one of the timers was around six-thirty p.m.?

A Yes.

Q And I believe you testified that the latest they were to deactivate themselves would have been around eleven-thirty or twelve o'clock?

A Twelve or twelve-thirty.

Q You went back on the 10th of October?

A Yes, sir.

Q To shore up the back door?

A No. I did that the first night.

Q You went back on the 10th; when did you go back on the 10th?

A In the daytime.

Q So you weren't there between the hours of six-thirty and twelve-thirty?

A No, not the next day, I wasn't.

Q So you don't know of your own knowledge whether the timers activated themselves?

A Yes. I checked the timers out after I put them on, to make sure they worked.

Q I'm talking about on the 10th, Sunday, you didn't see the timers activate themselves, did you?

A Oh, no.

Q You just assumed they did work?

A Well, I checked them out when I put them on, to see if they did work.

Q So it's an assumption on your part that they worked on the 10th?

A Yes, sir.

Q Did you go there on the 11th?

A No.

Q It's another assumption that they worked on the 11th?

A Yes, sir.

Q You weren't there on the 12th, were you?

A No. We were down here.

Q So that's another assumption on your part, that they activated themselves?

A No. I really wouldn't call it assumption, because I told the next door neighbors, if the lights didn't come on --

Q To your own personal knowledge?

A Oh, yes, sir.

MR. SONDEJ: I have no further questions.

THE COURT: You may be excused if you like, or you may stay in the courtroom; just don't discuss the case

with anybody until it's over.

(Counsel approach bench and confer with the Court.)

* * * * * * * * *

DETECTIVE DAVID WHITE, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. MOORE:

Q State your name and connection with the Police Department, sir.

A Detective David White, assigned to Burglary Squad.

Q Were you so assigned on October 12, 1976?

A Yes, sir.

Q Did you have occasion to be in the vicinity of Carter Road in the City of Portsmouth on that date?

A Yes, sir.

Q Did you have occasion on this particular night to come in contact with the defendant here, Mr. Ryan?

A Yes, sir.

Q Would you tell the Court and the jury

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1 under what circumstances?

2 A Yes, sir. I was on special assignment

3 in Churchland, with another officer; and we knew a

4 burglary had taken place on Carter Road. A burglary

5 had taken place that day, and we were going to go by,

6 to check the house. We knew no one was home; and as

7 we went by to check the house, it was around two

8 o'clock in the morning; and the address was 3428 Carter

9 Road. We pulled up front --

10 Q Let me ask you this, Detective White:

11 What kind of automobile were you driving?

12 A It was an old beat-up Pontiac. It was a

13 funny car, they call them, police funny car.

14 Q How were you and the other Sergeant

15 dressed?

16 A We were dressed in -- not police clothes --

17 we were dressed in funny clothes also.

18 Q Civilian clothes?

19 A Civilian clothes, yes.

20 Q And you said that you had another area

21 under observation?

22 A Yes; uh huh.

23 Q Was it, in particular, 3428 Carter Road,

24 where Mrs. Vierrether lived?

25 A No.

Q Tell the Judge what you did when you went by Mrs. Vierrether's home.

A We knew where the house was at, pulled up front; and we noticed a car was in front. There's a driveway, and the car was pulled off the driveway into the yard; and as I stopped, there was a light in the house, and a figure appeared at the doorway from inside the house.

He appeared at the doorway, and we hollered and said, "What are you doing there?" and he began to approach us. The closer he got to us, we recognized him as being a suspect we was looking for; and as soon as we recognized him as being a suspect, we identified ourselves as police officers with our badges.

Q Is that man you saw come out of the house in the courtroom?

A Yes, sitting at the table.

Q You are pointing to the defendant, Mr. Ryan?

A Yes.

MR. MOORE: Let the record so reflect.

Q What address was he coming out of?

A 3428 Carter Road.

Q City of Portsmouth?

A Yes.

Q Do you know who was living there at the time?

A I don't know exactly who was living there.

MR. SPRINKLE: Objection. He's got to know of his own knowledge.

THE COURT: Sustain the objection.

MR. MOORE:

Q What did you do when this man approached you?

A He approached me, and I identified myself, ourselves, as police officers; and we put the badge on him and arrested him.

MR. SPRINKLE: Objection. We are going to object to anything after this time.

THE COURT: Go ahead.

A I then advised him of his rights before I questioned him.

MR. MOORE:

Q What rights did you advise him of?

A I advised him he had a right to remain silent, had a right to a lawyer with him at all times; and he understood all his rights. This was before anything, after we recognized him as the man we was looking for.

Q Was this done orally?

A Yes, sir.

Q Was another police officer with you?

A Sergeant Lodge.

Q Tell the Judge what particular rights you advised him of.

MR. SPRINKLE: He's already asked him, and he didn't tell him.

A I told him he had a right to remain silent and to have a lawyer present during all questioning; and anything he said could be used against him in a court of law; and if he couldn't afford a lawyer, one would be appointed for him.

MR. MOORE:

Q Did you have occasion to question him?

A I asked him what he was doing there.

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MR. SONDEJ: I would like an opportunity to inquire before he goes any further.

THE COURT: Let's go in the back.

IN THE CONFERENCE ROOM

(Present: The Court, Mr. Moore, Mr. Sondej, Mr. Sprinkle, Defendant, Detective White, Deputy Sheriff and the Court Reporter.)

DETECTIVE DAVID WHITE, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

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EXAMINED BY MR. MOORE:

Q Detective White, after you advised this man of his rights, what questions did you ask him?

A First of all, I asked him what he was doing there; and he said he was with Bob Jones Realty, doing repair work inside, at two o'clock in the morning; and then we went inside.

Q You went inside the premises?

A Yes, sir. At this time we went inside the -- the front door was open -- and I checked around to see if I could find any repair work being done, and I did not find any type of repair work being done.

Q Did you see anything inside the house that would indicate repair work being done?

A No.

Q Did you find any tools?

A No, sir. I did find the TV was pulled out and unplugged.

Q The TV set was pulled out and unplugged?

A Yes, sir; and I went outside, and the car motor was running.

Q After you went inside and looked around,

what did you do?

A I asked him where was the repair work, and he couldn't show me any type of repair work; and I could not find any; and then he had a key on him, and I took the key away from him and tried the front door, and the key fitted the front door.

Q Let me show you this key. Have you ever seen that key before?

A Yes, sir.

Q Where have you seen that key?

A This is the key he had on him.

Q And what did you do with the key?

A I marked it, put my initials on it and marked it.

Q Did you see what the key went to?

A It says Bob Jones Realty. It had an address, Carter Road on it, and I tried it in the front door and it fitted.

Q It was the key to the front door?

A Yes.

MR. MOORE: The Commonwealth would introduce the key in evidence.

THE COURT: Commonwealth's Exhibit 1.

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MR. MOORE:

Q After you tried the key, what did you do?

A After I tried the key, the car was running, and there was an old station wagon, and the car was running with the lights on; and I went out there and cut the motor off.

Q Did you notice anything unusual in the car?

A I looked around the car and saw that case right there in the back.

Q You are pointing to this case here?

MR. SONDEJ: I would have another motion at this time.

AT THE BENCH

MR. SONDEJ: I'm going to move to suppress any evidence he takes from that car at this particular time. He has already said the man was a suspect. He cuts the motor and the lights off, and he said he started looking around in the car. He does not have a search warrant. There is nothing to indicate the car is going to be removed or anything of that nature.

THE COURT: I overrule the motion.

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He said he saw it.

MR. SONDEJ: He said he started looking around.

THE COURT: Overruled.

IN OPEN COURT

MR. MOORE:

Q Where was the car parked?

A Parked in the front yard. There's a driveway that goes up, and it was in the yard. The lights were on and the motor was running. I cut the motor off.

Q Where did you find this?

A The back window was down, and this was in the back, in the back of the -- I think it was a station wagon -- and I asked him was it his, and he said yes; and I took the picture out and asked him --

Q You said you pulled that camera out?

A Yes, sir.

Q Tell us what you did.

A I pulled it out and asked him was it his, and he said yes. There was a picture here. I asked him who was the picture.

Q Show the picture to the jury.

A It was a picture of a little girl, and I asked him who was the picture, and he couldn't say

whose picture it was.

MR. MOORE: The Commonwealth introduces the picture into evidence.

THE COURT: Commonwealth's Exhibit 2.

MR. MOORE:

Q Where was the picture, now?

A The picture was in the camera here, right inside the case. I pulled it out and asked him who was the picture, and he couldn't describe it; so he said the camera was his, and I put the camera back in the car and left it there.

MR. MOORE: The Commonwealth would introduce the camera in evidence.

THE COURT: Commonwealth's Exhibit 3.

MR. SPRINKLE: I'm going to object to that, Judge, on different grounds.

AT THE BENCH

MR. SPRINKLE: We haven't got any evidence or foundation where they brought it down here. They said in the hearing in the back room that this camera was left in the car. I have got proof that the camera was taken out earlier, or

disappeared, being transported down here. It doesn't show the chain of evidence. I have got evidence the other way.

THE COURT: Ask him how he can identify it.

IN OPEN COURT

MR. MOORE:

Q Can you identify this camera as being the same one that was in that automobile?

A Yes, sir.

Q How would you identify it, sir?

A It appears to be the same camera that come out, plus the picture, I remember the picture thoroughly, because I put it back in there.

MR. MOORE: The Commonwealth offers the camera in evidence.

MR. SPRINKLE: I object to that, Judge.

THE COURT: The objection is overruled; Commonwealth's Exhibit No. 3.

MR. MOORE:

Q This all occurred at 3428 Carter Road, City of Portsmouth?

A Yes, sir; 3428 Carter Road, Churchland.

Q When you first pulled up, where was the defendant, Mr. Ryan, standing?

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A He appeared in the doorway.

Q Was it inside or outside the house?

A Inside.

Q What separated him, between you and him; did the house have a door on it?

A The house had a door on it, yes.

Q Was it a wood door or screen door?

A I think it was a wooden door.

Q Was the door shut or open?

MR. SPRINKLE: I object. He's leading the witness.

THE COURT: You are leading the witness. I sustain the objection.

MR. MOORE:

Q What was the condition of the door when you first pulled by this residence?

A It was open.

Q The door was open?

A Yes, sir.

Q And you told me Mr. Ryan was standing inside the door?

A Yes, sir.

Q Was any type of thing between you and Mr. Ryan?

A No, sir.

Q Was there a screen door on the house?

A I don't recall a screen door being on it.

MR. MOORE: That's all the questions I have.

CROSS-EXAMINATION

EXAMINED BY MR. SONDEJ:

Q Did Mr. Ryan, or either you, reduce in writing the remarks that he made to you on the evening of October 12th, and have him sign it?

A No, sir.

Q Did he ever execute a -- do you know what I'm speaking of when I speak of a Rights Waiver Form that is utilized by the Portsmouth Police Department?

A Not to me, no, sir.

Q You don't know what a Rights Waiver Form is?

A I know; but I turned it over to someone else.

Q Do you know what a Rights Waiver Form is?

A Yes, sir.

Q You all have a standard form in the Police Department?

A Yes.

Q Did you use one of them with Mr. Ryan on October 12th, in Portsmouth?

A No, sir.

Q Did Mr. Ryan write out a statement and sign it in your presence, or Detective Lodge's presence?

A No.

Q Did you reduce in writing what Mr. Ryan told you, and ask him to sign it?

A No.

Q Have you got it reduced in writing, the remarks he made to you, in your possession today?

A No, sir.

Q So you are just recalling these events from your memory, as it occurred on October 12, 1976?

A Yes, sir.

Q How many cases have you worked since that time?

A I don't recall.

Q Five, ten, fifteen, twenty?

A I don't recall.

Q A hundred, two hundred?

A I don't recall.

Q Now, you say you found no tools inside the house?

A No.

Q Did you find any tools inside Mr. Ryan's station wagon?

A There was tools in the back, yes, sir.

Q And he told you he was working for Bob Jones Realty, and he was asked to do repair work, and he produced a key at that particular time, which was used by you to open the front door?

A I took a key from him.

Q It could open the front door?

A Yes, sir.

Q The same door he was standing in?

A Yes, sir.

Q Now, the camera, did you take the camera into your possession on October 12th?

A I took the camera in my possession; it was on October 12th; it was the next day.

Q Wait a minute -- two o'clock in the morning -- approximately two o'clock in the morning; right?

A Yes.

Q And you noticed the camera in the station wagon, an old beat-up station wagon?

A Yes, sir.

Q And you picked it up; it was similar to that case right there?

A Yes.

Q And you opened it up and found a camera

inside?

A Yes.

Q And you found a picture inside the camera?

A Yes, sir.

Q And you took the picture out and questioned Mr. Ryan about it, and put it back in the camera?

A Yes, sir.

Q Did you take the camera then and put it back inside the car?

A Yes.

Q That was sometime between two and two-thirty on the early morning of October 12th?

A Yes, sir.

Q When is the next time you saw the camera?

A The next day. Excuse me -- it was the same date, in the morning. It was at the police compound, Frederick Boulevard.

Q What time?

A I don't recall what time -- some time during the morning hours -- it could have been twelve.

Q Did you get a search warrant?

A No; I didn't get a search warrant.

Q Did you secure permission of Mr. Ryan to

search the vehicle, then?

A No. I was inventorying the vehicle.

Q Was the vehicle out of your sight and possession from early morning of October 12th until later that afternoon, when you went to the police compound? You didn't keep it with you?

A No.

Q You didn't drive it from the Carter Road address?

A It was towed.

Q Was it towed by a civilian or a member of the Portsmouth Police Department?

A I don't recall who towed it.

Q Did you call for the towing service?

A No. They have a towing list.

Q They are civilians, aren't they?

A Yes.

Q They are paid by the City, per job?

A I wouldn't know that. I'm not familiar.

Q But the camera, to your information, what you observed, was examined by you and placed back inside the vehicle?

A Yes.

Q This was the early hours?

A Two o'clock, two-thirty.

Q How many hours later on did you see it again?

A Well, I don't recall how many hours. It was the same day. It was the next morning.

Q Did you take any object, like a pen or a knife, and initial the case when you first saw it on the 12th?

A No. I recognize the picture.

Q Did you initial the camera?

A No.

Q Did you fingerprint the case or the camera?

A No.

Q Did you fingerprint the picture?

A No.

Q No attempt was made by you or any member of the Police Department or law enforcement agency to print that camera?

A To my knowledge, no. I don't know it was done.

Q You have no report submitted to you in that regard, do you, sir?

A No.

Q Now, how many lights were on in the house?

A I don't recall how many lights was on in

the house. I knew the front light was on.

Q Front inside light or outside light?

A Inside.

Q What about the outside?

A I don't recall about the outside. The only thing I recall was one of the inside lights was on.

Q Was it a two-story or one-story house?

A It appeared to be a one-story.

Q Any lights on upstairs?

A I don't remember the lights being on upstairs.

Q Did you see any damaged doors?

A Any damaged door?

Q Did you see any door that was damaged, that might have needed repair?

A Inside or outside the house?

Q Inside.

A No.

Q Did you examine the doors very carefully?

A I checked around to see if any repair work was being done, and I couldn't find any.

Q Did you see any damage to the back door?

A No, sir.

Q You saw nothing that needed repair?

A No, sir.

Q Let me ask you this: Did you see any holes in the stairs?

A No.

Q Did you see anything that needed to be done with the flashing inside or outside the house?

A No.

Q Did you see anything that needed to be done to the vanities?

A I don't recall.

Q Did you see any door knobs that had to be put on?

A I don't recall that either.

Q Did you examine the stove, to see if that needed to be repaired?

A Oh, no.

Q Did you yourself go upstairs and downstairs?

A I think I went all through the house.

Q Do you think, or do you know?

A I went all through the house.

Q Did you do this yourself, Detective White?

A I did it myself.

Q Do you have any notes in that regard, that you examined the premises?

A No.

Q How long were you in the house?

A I don't recall how long I was in the house.

Q Was Detective Lodge in there with you?

A Yes.

Q Did he go through all the rooms with you?

A He could have gone through with me or separately; I don't recall. I went through them all; I can answer for myself.

Q What about Mr. Ryan?

A Ryan was with me when I went through them.

Q Every room?

A Every room.

Q Detective White, do you have any notes that have refreshed your recollection today?

A I'm going by my case file I have got here.

Q Do you have any notes that have refreshed your recollection?

A The date and time, yes, sir, I have it in front of me.

MR. SONDEJ: May I see them, Your Honor?

THE COURT: Go ahead.

(Mr. Sondej examines file.)

MR. MOORE: I don't have any objection, but he's got the whole file.

Did you use the whole file, Detective White?

A No, sir; just the front page.

MR. SONDEJ: Would you take out what notes you have used to refresh your recollection, please.

(Witness removes notes from file.)

A That's the only notes I have used. That's the offense report.

(Mr. Sondej examines notes.)

MR. SONDEJ:

Q This offense report, that wasn't made by you, was it?

A No.

Q Who made that?

A Detective Jones.

Q So what you are testifying to, to refresh your recollection now, was made by someone else?

A Yes.

Q Do you have any notes of your own, that you have used to refresh your recollection?

A No.

Q Do you have a case file?

A This is the case file right here.

Q Did you maintain a separate one?

A No.

Q Were you working with Detective Lodge; was he your partner?

A Yes.

Q To your knowledge, does he have in his possession any notes that might have been compiled by you?

A I can't answer for him.

Q That offense report, all it says is the lights were on in the car; it doesn't say anything about the motor running, does it?

A No; it don't say anything about the motor running.

MR. SONDEJ: Thank you, Detective.

THE COURT: You may be excused, Mr. White. If you stay, don't discuss the case with anybody until it's over.

* * * * * * * * *

LESLIE F. JOLLY & ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
PORTSMOUTH, VIRGINIA 23705

SERGEANT RICHARD E. LODGE, witness called by Attorney for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. MOORE:

Q State your name and connection with the Portsmouth Police Department, please.

A Sergeant Richard E. Lodge, assigned to Burglary Squad.

Q What is your particular assignment in relationship to the Burglary Squad?

A In charge of the Burglary Squad.

Q Were you so engaged on October 12, 1976?

A Yes, sir, I was.

Q Did you have occasion on this particular day or night to come in contact with the defendant here, Mr. William Ryan?

A Yes, sir, I did.

Q Tell the Judge and jury under what circumstances you came in contact with the defendant.

A Yes, sir. We were working stakeout in a section close by there, on special assignment; and we rode by this particular house, 3428 Carter Road; and we were aware of a situation that happened there

earlier; and we observed this man standing in the front entrance foyer, inside the house; the light was on.

It was a little after two o'clock in the morning; and we knew nobody was supposed to be in that house at that time; and we were in what we call a funny car -- it was an out-of-state license plate, beat up Pontiac. We hollered at him, and he started out the front door; and he walked halfway down the walk, and we got out of the car and recognized him from a prior situation; and knowing nobody belonged in that house, we approached him and placed him under arrest, and advised him of his rights and walked back in the house with him.

Q Did yourself or Detective White ask him any questions about why he was there or whatnot?

A Yes, sir, we did.

Q Tell the Judge what you recall.

A We asked him what he was doing. He said he was working for the real estate company, which we knew was untrue at this time.

MR. SONDEJ: We object.

THE COURT: I ask the jury to disregard the last statement, "We knew it wasn't true."

MR. MOORE:

Q You asked him what he was doing?

A He said he was doing repair work in the house.

Q What did you all do next?

A We went back in the house and searched the rest of the house and made sure nobody was in there.

Q Did you see any tools in the house?

A No, sir; no tools whatsoever. The television in the den was unplugged and pulled away from the wall also.

Q Did you see any signs of any repair work being done?

A No, sir, no signs of any repair work being done whatsoever.

Q Did you ascertain how entry was gained?

A Yes, sir.

Q How was it?

A He had a key he used in the front door, which the key was taken from him.

Q And was there a car parked in the yard?

A Yes, sir. He stated to us it was his automobile, and it was pulled up in the front yard by the front porch; the headlights were on, the motor

was running. Detective White reached inside the car and turned the motor off, and the headlights off; and he saw a camera in there and took the camera out and opened the camera and looked at it, and it was a picture in there.

We asked Mr. Ryan at that time who it was a picture of, and he was unable to answer that.

Q Let me show you Commonwealth's Exhibit 2. Have you ever seen this picture before?

A Yes, sir. This is the picture that was inside the case the night we took this camera out of the car.

Q Is this the camera that was in Mr. Ryan's car?

A It looks like the camera. Like I say, it looks like the camera. This picture was in the case at the time, when Detective White took it out. This looks like the camera; yes, sir.

MR. MOORE: That's all the questions I have.

CROSS-EXAMINATION

EXAMINED BY MR. SONDEJ:

Q Detective Lodge, you have no notes to refresh your recollection, except the offense report, do you?

A Pardon me?

Q You have no notes in your possession, with the exception of the offense report which was made by Sandra Jones and Mike Stallings?

A Yes, sir.

Q You do have notes?

A No, sir, I don't.

Q And you went through the entire house with Detective White, to inspect it, to see whether any repairs had been done?

A Yes.

Q Did you see anything that had to be repaired? You testified that you could see no evidence of repairs that had been done that evening; but did you see anything that needed to be repaired?

A Not that I recall, no, sir.

Q What about the back door?

A I don't recall; no, sir.

Q So you can't testify -- it is not your testimony -- that there wasn't something to be

repaired in the house; you just found no evidence that anything had been repaired that particular evening?

A I couldn't say whether it was anything in the house to be repaired in the house or not. He showed us a couple of things. He said, "See, this needs to be repaired"; but to me, it looked in proper working order. There were no tools in the house whatsoever.

Q You cannot testify that there were not repairs needed to be done in the house?

A No, sir, I couldn't.

Q Your testimony is that you found no repairs that had been done a short period prior to the time you went in the house?

A Yes, sir.

Q Like sawdust on the floor or fresh paint?

A No, sir; I found none of that.

Q If a door had been put on a closet, would you have noticed whether it had been recently put on there, say, an hour before you arrived, or two days before you arrived?

A Could I tell?

Q Yes.

A No, sir, I couldn't.

Q Were the keys taken out of Mr. Ryan's automobile?

A I believe the keys were taken off of Mr. Ryan. Correction -- the key to the front door.

Q Let me make myself clear. I apologize -- were the keys to the automobile taken out of the ignition?

A Yes, sir; I believe they were. Here again, I'm not one hundred percent sure on that. I believe they were.

Q When you first arrived at 3428 Carter Road, did you notice how many lights were on inside the house?

A Exactly, no, sir. I knew the living room light was on or the entrance foyer light.

Q How about the lights upstairs? Was it a two-story house?

A I believe it was, yes, sir. I say a two-story -- I don't recall whether it was two-story or an attic upstairs. I don't recall whether there were any lights on up there or not.

Q You don't recall any other lights on, aside from the living room and the foyer?

A I take that back -- I believe the kitchen light was on, and the bedroom light was.

~~Q Did you or Detective White advise~~ Mr. Ryan of his rights?

A Detective White advised him of his rights.

Q This was outside the residence?

A Yes.

Q Did he make any statement to you outside, or did you take him inside?

A He made a statement outside, I believe, after we placed him under arrest and advised him of his rights; and he said he was doing repair work.

Q Was the camera taken into your possession or Detective White's possession that same period of time you all were at 3428 Carter Road?

A Here again, I believe the camera was left in the car. I know I didn't take it. I believe it was left in the car at the scene.

Q Did you notice any tools in the station wagon?

A I believe there were some tools in the station wagon, yes, sir.

MR. SONDEJ: That's all.

* * * * * * * * *

MR. MOORE: Commonwealth rests.

THE COURT: Ladies and gentlemen of the jury, this will be a good time to break

for lunch. We may have some matters to take up while you are gone.

Come back at two o'clock. Do not discuss the case among yourselves; do not discuss it with anyone else; do not go to the address on Carter Road. When you come back, go in the jury room.

(Jurors excused for luncheon recess.)

IN THE CONFERENCE ROOM

(Present: The Court, Mr. Moore, Mr. Sondej, Mr. Sprinkle and the Court Reporter.)

MR. SONDEJ: With regard to the evidence -- well, the indictment dealing with the breaking and entering with the intent to commit rape -- Judge, I submit to His Honor, and I respectfully move to strike the terminology "intent to commit rape", inasmuch as the Commonwealth has not proved a prima facia case that this man was there on the 12th with intent to commit rape.

Their best evidence shows he had a key to the house; that he was there, with

the automobile sitting in the front yard; the lights were all on in the house; that he had tools in the car.

Detective Lodge can't testify that repairs needed to be done. The only thing he could say, he didn't see any evidence that repairs had been made.

The only thing they have got is something that happened three days prior to that. I think it's insufficient on a matter of law. I think it would lead to speculation for the jury to conclude that. I think it would have to be speculative, and a matter of conjecture on their behalf.

MR. MOORE: The man was there on the 9th, and said he would be back. He said he was going to come back and finish what he couldn't do; and Judge, he did come back three days later, and nobody was home; but the house would have been of such condition, Judge, that somebody from the outside could have reasonably thought somebody was at that house when they first went up there.

MR. SONDEJ: I think they have made a

case out for the jury, with the larceny.

THE COURT: I think it's a question of fact for the jury. He did say, "I'm going to come back to finish what I started."

I overrule your motion.

MR. SONDEJ: If they find him guilty of that, it will merely mean they were incited by the evidence of what happened on the 9th.

THE COURT: He made the statement on the 9th that he would be back; and a couple of days later, he was back.

* * * * * * * * *

(Court reconvened following luncheon recess.)

IN THE COURTROOM

ROBERT JONES, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SONDEJ:

Q For the record, your name is Robert Jones?

A Yes.

Q And I believe -- what is your relationship with Bob Jones Realty?

A I'm the president of Bob Jones Realty.

Q Do you know Mr. William Ryan here?

A Yes, sir.

Q How long have you known Mr. Ryan?

A Approximately two to three years.

Q Do you know of a residence in the City of Portsmouth known as 3428 Carter Road?

A Yes, sir.

Q Now, directing your attention back to October 1976, what was your relationship with Mr. Ryan?

A Mr. Ryan did some work for us.

Q When you say "work", he wasn't a salesman, was he?

A No, sir. He was more or less a handyman.

Q What would be the nature of his work?

A Basically, you know, painting, carpentry and what-have-you.

Q This would be on the real estate that you were selling?

A That's correct.

Q Or buying?

A Uh huh.

Q Now, directing your attention specifically,

Mr. Jones, to the period of around October 4th through around October 12, 1976, and I specify the residence that we previously mentioned as 3428 Carter Road, did you authorize Mr. Ryan to perform some handy-work on that particular residence?

A Yes.

Q And is this the same residence that Pamela Vierrether and her husband were to purchase from you?

A That's correct.

Q Did you provide Mr. Ryan with a key to that residence?

A Yes.

Q Do you know Joe Williams?

A Yes.

Q What is his connection with you?

A Mr. Williams does painting also for our company.

Q Something similar to the type of employment that Mr. Ryan would have with you?

A Yes.

Q Did you ever authorize Mr. Williams to do any repair work or painting work on 3428 Carter Road?

A Yes.

Q Would this have been after October 12, 1976,

or prior to October 12, 1976?

A I don't remember the date.

Q Let me ask you this: With respect to the last question about prior to October 12 or after October 12th, were you asked by Mr. Williams or authorized Mr. Williams to do some work on this 3428 Carter Road -- do you know if it was after Mr. Ryan was arrested or before Mr. Ryan was arrested?

A I just can't remember.

MR. SONDEJ: Thank you, Mr. Jones. Answer Mr. Moore's questions.

CROSS-EXAMINATION

EXAMINED BY MR. MOORE:

Q Mr. Jones, do you remember the time period which you would give Mr. Ryan that key?

A You mean the date?

Q Approximate date?

A No, sir. I couldn't tell you the date.

Q Would it have been some time in September?

A I really don't know.

Q Let me ask you this, then: At the time you gave Mr. Ryan the key, would someone have been living at this particular Carter Road address?

A No, sir.

Q What was the status of the home, as far as

a new owner would be?

A The home was vacant at the time.

Q For what purpose did you give him the key at this period of time, sir?

A To go in and make the repairs.

Q Was this a new home?

A Yes.

Q Why were repairs necessary prior to selling this home?

A There was some, you know, repairs that the owner, Mr. and Mrs. Vierrether, I believe the name was, they had requested that certain things be done.

Q Would this request have been prior to them moving into the house?

A They wanted them prior, yes, sir.

Q Do you give other workmen of yours keys to do work of this kind where houses aren't completed?

A Yes, sir.

Q Would you authorize them to use the key when the house was occupied?

A Not ordinarily, no, sir.

Q Did you, under any circumstances, authorize Mr. Ryan to use that key when the house was occupied?

A No, sir.

Q Did you authorize Mr. Ryan to be on the

premises of Carter Road at two o'clock in the morning on the night of October 12th?

A I wasn't in town at the time.

Q To your knowledge, did anybody in your employ give him permission to be over there?

A Not to my knowledge.

MR. MOORE: That's all.

REDIRECT EXAMINATION

EXAMINED BY MR. SONDEJ:

Q Do you know when Mrs. Vierrether took occupancy of 3428 Carter Road?

A Yes, sir. I know, but I don't remember the date. I was there the day she moved in.

Q Would it have been -- you know that Mr. Ryan was arrested for breaking and entering into the house on October 12th -- you know that, don't you?

A Yes, sir.

Q Would she have taken occupancy a few days prior to October 12th?

A Yes, sir.

Q Did you give Mr. Ryan the key prior to October 12th?

A Yes, sir.

Q To your knowledge, did Mr. Ryan go there after Mrs. Vierrether had taken occupancy, and do some

repair work?

A Yes, sir.

MR. SONDEJ: Thank you.

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JOSEPH WILLIAMS, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q Would you tell the Judge and the jury your name, please?

A Joseph Williams.

Q Do you know Mr. Ryan, William Ryan, the defendant in this matter?

A Yes; I know him.

Q In October of last year, did you do any repair work to 3428 Carter Road?

A Yes.

Q Do you happen to recall the dates you did the work?

A I have got them listed on a bill, but I didn't bring it with me. Offhand, I couldn't tell you the dates.

Q Was it in the fall?

A It was in October.

Q Can you tell the Judge and jury what kind of repairs you did to that house?

A Yes, sir. I was called in to fix the louvred doors in the closet. I had to actually replace them, because they weren't repairable. I had to do some plastering, and plastering a couple of holes in the wall; and I had to replace a kick-plate at the base of the range in the kitchen.

Q Are you talking about the stove in the kitchen?

A Yes. I had to make some doors for the vanity in the bath, and caulk around the tile and vanity in the bath. I had to repair some flashing up in the attic.

Q Do you recall whether anybody had done any work to that house previous to your involvement in the house?

A Well, the house, I had painted the house much earlier.

Q Was this for Bob Jones?

A Yes, sir. He called me to paint the house for him, and the house was a new home that hadn't been completed; and they called me in and asked me -- at this time, Mr. Zehmer, with Jones Realty, called me up

and asked me if I would do some repairs; it was expedient that I get them done.

Q That required night work?

A Well, if it was that urgent -- I mean, at the time, I was real busy -- I was not familiar at the time, but it could have. If a guy was urgent enough and wanted the house, I have done it late.

Q Was the work you did subsequent to what Mr. Ryan did?

A I don't know what Mr. Ryan did. All I can say is I went in and pointed out -- did what he pointed out for me to do.

Now, the louvred doors were replaced. It looked like it was some time to repair the louvred doors, because it had nails in them.

Q Were you the last one to do any repair work to the house?

A I can't answer for anybody else.

Q When did you finish?

A I guess it was in October. It was very --

Q Late in October?

A I have the bill, and I could tell you that by looking it up on my bill.

MR. SONDEJ: That's all.

CROSS-EXAMINATION

EXAMINED BY MR. MOORE:

Q Was anybody living there when you did your repairs?

A Yes, sir.

Q Did you come out to the home to do your work?

A Yes, sir.

Q And what time of the day did you come out to do your work?

A I guess it was early in the morning, about nine.

Q What time that day, the days, did you finish your work?

A Well, I had to come back a couple of times. I guess in the afternoon or evening.

Q What was the latest period of time you did your work during the day?

A About five or five-thirty, something like that, I guess.

Q Was Mrs. Vierrether home when you came to do your work?

A Yes, sir.

Q She was there?

A Yes, sir.

Q Some other workmen there, too?

A Yes; I had two other people most of the time.

MR. MOORE: That's all.

REDIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q What is the latest you ever worked on this house?

MR. MOORE: Objection, Judge.

THE COURT: I will let him answer.

A About five-thirty, I guess.

MR. SPRINKLE: That's all.

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THAYNE G. BENTON, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q Please tell the jury and the Judge your name.

A My name is Thayne G. Benton.

Q What is your occupation?

A I work for Portsmouth Gas.

Q Do you know Mr. Ryan, sitting at the

table there?

A Yes, I do.

Q Have you ever done any construction work for him?

A I have worked with him.

Q Let me draw your attention to October 11, 1976: Did you do any repair work with him or try to do some repair work with him at 3428 Carter Road?

A Yes, I did.

Q Did you actually go to the house that day?

A Twice. The first time, it was around between six and seven.

Q Are you talking about morning or afternoon?

A Afternoon.

Q Did you actually go up to the house yourself?

A I did.

Q As a result of going up to the house, what did you find?

A There wasn't anybody home.

Q When was this?

A In October.

Q Where was Mr. Ryan?

A In my truck.

Q What was the purpose of going to the house?

A We had several odd jobs to do -- hang a door.

Q As a result of nobody being there, what did you do?

A We left.

Q Did you return?

A That night, about nine or nine-thirty.

Q Was it dark then?

A Yes.

Q Were any lights on?

A Inside the house, I don't think. I never rung the doorbell, and I didn't see any lights on.

Q What was your purpose in going back to the house that time of night?

A To complete the house.

Q Did Mr. Ryan go up to the house?

A No.

Q Do you recall what the exact date you were there with Mr. Ryan?

A The date?

Q Yes.

A No, I don't.

Q Was it the day before he was arrested?

A Right; the day, I couldn't tell you.

Q Do you remember what month it was last year?

A It was in October.

Q It was the day before he was arrested?

A Right.

Q You were there about nine-thirty?

A At night, right.

Q And you didn't see anyone there?

A No.

Q As a result of that, what did you do?

A Went to my house -- I live across the street -- unloaded the wood and went home.

Q What time did you get home?

A This could have been around ten or ten-thirty.

Q Now, at six-thirty -- I believe six-thirty is when you said you first went there -- did Mr. Ryan have a key?

A No, he didn't.

Q Did he have a key the second time?

A No, he didn't.

MR. SPRINKLE: That's all the questions I have of this witness, Judge.

CROSS-EXAMINATION

EXAMINED BY MR. MOORE:

Q Mr. Benton, when you went there from the first time, you say, from six to seven that night, to do some work, why didn't you go in and do your work, sir?

A Because no one was home, and we didn't have no way to get in.

Q When you went there around nine or nine-thirty, to do some work, did you do some work?

A There wasn't nobody home.

Q That's the reason you didn't do the work on either one of these two occasions on this particular night?

A That's right.

MR. MOORE: Thank you, sir.

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CHARLES RANSOM, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q Please tell the jury and the Judge your name.

A Charles Ransom.

Q Let me draw your attention to about October 12, 1976, last year. Who were you employed with at that time?

A Downtown Exxon.

Q What was your capacity at that time?

A Wrecker operator.

Q Do you recall being summoned out to a home on Carter Road, to tow a car?

A I do.

Q Do you remember what kind of car it was?

A It was a dark-colored station wagon.

Q Do you recall what was in the back of the station wagon?

A There was a tool box back there. It had a CB in the car, and that's about, really, all I saw.

Q Did you see a camera?

A No.

Q Did you fill out a work sheet about the car, before you had it towed away?

A I had the officer do it.

Q Does your office retain a copy of that inventory sheet?

A Yes.

Q Did you see a camera listed on that inventory sheet?

A No.

Q Is this a copy of that list?

A Yes, it is.

Q Are you sure?

A Yes.

Q Is the camera listed on there?

A No, sir.

THE COURT: Did you give a copy to the office you work for?

A Yes.

MR. SPRINKLE: We introduce this list.

THE COURT: Defendant's Exhibit A.

MR. SPRINKLE: We would like to introduce the statements you have as Inventory of Downtown Exxon.

CROSS-EXAMINATION

EXAMINED BY MR. MOORE:

Q Where did you take the car?

A Frederick compound.

Q Who did you haul it there for?

A Well, the Portsmouth Police Department called to have it towed, and I had him sign the sheet.

Q That was back in October of '76, wasn't it?

A Yes, it was.

Q You can't remember all the things in the back of that car that were in there, can you?

A It wasn't that much back there.

Q Was it tools back there?

A It was a tool box back there.

Q What was in the tool box?

A I believe one of the officers opened it up, and it was a few tools in there. What I say is just about all I saw.

Q If the police officer testified there were some other things in that car, could you be mistaken?

A I think I could, but I don't think I was.

MR. MOORE: That's all.

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IN THE CONFERENCE ROOM

(Present: The Court, Mr. Moore, Mr. Sondej, Mr. Sprinkle, Defendant, Clerk of Court, Deputy Sheriff, and Court Reporter.)

MR. SPRINKLE: I would like to put on the record a little conversation: Mr. Ryan, you have been informed you have the right to testify, and you don't have to testify unless you want to.

DEFENDANT: Yes.

MR. SPRINKLE: If you want to testify, you have an absolute right to testify.

DEFENDANT: But you understand, you are not going to call my other two witnesses.

MR. SPRINKLE: We are talking about you right now.

DEFENDANT: I'm going to name them: Sawyer and Pat Marriner.

MR. SPRINKLE: I have got Mr. Fogerty and Pat Marriner. Do you want to testify, or don't you?

DEFENDANT: You advised me not to.

MR. SPRINKLE: I advised you either way, and the option is yours.

DEFENDANT: Okay; I won't testify.

THE COURT: You understand you have the absolute right to stand silent if you want, and you may testify if you want to.

DEFENDANT: Yes, sir.

MR. SPRINKLE: You are doing that freely and voluntarily, of your own mind, and not what Mr. Sondej or Mr. Moore or the Judge or I have told you?

DEFENDANT: Yes, sir.

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IN THE COURTROOM

PAT MARRINER, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q Please tell the jury and the Judge your name.

A Pat Marriner.

Q You will have to speak up.

A Pat Marriner.

Q Are you related to Mr. Ryan?

A Yes. He is my half-brother.

Q Where are you employed?

A I'm a broker for Bob Jones Realty.

Q Do you recall Mr. Ryan, to your own knowledge, working on a house on Carter Road, 3428 Carter Road?

A 3428; that's right.

Q He was doing that work at the behest of Mr. Jones; is that correct?

A Yes, he was.

Q To your own knowledge, was Mr. Ryan pressed to get that work done?

A Yes, he was.

Q Had he worked in other houses for Mr. Jones?

A Yes.

Q Did that require him to work late at night?

MR. MOORE: Objection, Judge.

THE COURT: I overrule the objection.

MR. SPRINKLE:

Q Did that require him to work late in other

houses for Mr. Jones?

A Yes, he had.

Q He was doing repair work?

A Uh huh.

Q Did Mr. Jones own that house at 3428 Carter Road?

A Yes, he did.

MR. SPRINKLE: Thank you.

CROSS-EXAMINATION

EXAMINED BY MR. MOORE:

Q What relationship are you to Mr. Ryan?

A He is my half-brother.

MR. MOORE: I don't have any questions, Judge.

THE COURT: You may return to the witness room. Don't discuss the case with anybody until it's over.

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EDWARD THOMAS FOGERTY, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. SPRINKLE:

Q Will you please tell the jury and Judge your name?

A Edward Thomas Fogerty.

Q How do you spell that?

A F-o-g-e-r-t-y.

Q Do you happen to know Mr. Ryan, sitting at the defense table?

A Yes.

Q Drawing your attention to October 12th, 4th, of 1976, did you work with Mr. Ryan on a house in Portsmouth?

A Yes, I did.

Q Was the house on Carter Road?

A I think it was on that street, but it's across the street from the school.

Q What kind of work were you all doing?

A We were doing some repair work on a new home.

Q Did you do repair work with him before?

A Yes, sir.

Q Did you work for Mr. Jones?

A Yes.

Q Did he have a key to the house?

A Yes, sir.

MR. SPRINKLE: That's all I have.

MR. MOORE: I don't have any questions, Judge.

THE COURT: Thank you. You may be excused. You may leave or stay if you want, just don't discuss the case until it's over.

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MR. SPRINKLE: Defense rests, Your Honor.

THE COURT: Any rebuttal, Mr. Moore?

MR. MOORE: No, sir.

THE COURT: We will take up instructions; and I would estimate we will be twenty minutes to a half hour.

Please don't engage in any conversation with anybody, any lawyers, witnesses or spectators; just stay to yourselves, and don't go too far.

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IN THE CONFERENCE ROOM

(Present: The Court, Mr. Moore, Mr. Sondej, Mr. Sprinkle, Defendant, Deputy Sheriff and the Court Reporter.)

MR. SONDEJ: I would like to renew our motion to strike. I believe that this case can be cleaned up considerably; and from a practical standpoint, I don't know whether it's going to make any difference -- he can be convicted of one or the other. He's got twenty-five years he's facing. A jury can't find him guilty of both of these things.

THE COURT: They can; I will make that perfectly clear.

MR. MOORE: My instruction won't allow them to do it.

MR. SONDEJ: I really think the case could be cleaned up, and it would save us a lot of problems with Ryan in the future.

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(Court and counsel review instructions.)

MR. SONDEJ: I am speaking solely for myself.

MR. SPRINKLE: You are speaking for me, too.

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THE COURT: Mr. Sprinkle and Mr. Sondej, you all have filed a motion for a new trial. Are you ready to proceed?

MR. SONDEJ: We are.

MR. MOORE: We are ready, Your Honor.

MR. SONDEJ: I would first address myself to the motion to set aside the jury verdict and the granting of a new trial.

As the Court will recall, Mr. Ryan was tried by a jury on July 28, 1977. The indictment alleged that he was charged with breaking and entering with the intent to commit rape and larceny, the specific words that were used in the indictment.

In any event, the jury found Mr. Ryan guilty of breaking and entering the residence of Pamela Vierrether on October 12, 1976, and fixed his punishment at twenty years in the state penitentiary.

It is our contention that the verdict was contrary to the law and evidence that were applicable to such cases, and also there

was an instruction that was given, and there was an inquiry made by the jury, and there was a response to the inquiry by the Court, which we contend was misleading and confusing, insofar as the jury is concerned.

Now, we submit, Your Honor, that the Court properly instructed the jury to disregard and not to consider evidence of previous offenses that the defendant may have committed, in reaching a conclusion as to the defendant's guilt or innocence of the specific criminal charge that he allegedly committed on October 12, 1976; and what I allude to is that His Honor will remember that Mr. Ryan had previously been charged with offenses which allegedly occurred on October 9, 1976, involving the same victim, Mrs. Pamela Vierrether; and that particular case was tried by a jury several months ago, and Mr. Ryan was found guilty, I believe, of sodomy and breaking and entering with the intent to commit rape, attempted rape.

In any event, Your Honor, at the conclusion of the Commonwealth's evidence

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last week, on July 28, and at the conclusion of the defense evidence, the Court instructed the jury -- and I believe it was Instruction E -- and this instruction I quote, "The Court instructs the jury that the fact that the defendant may have committed a prior criminal offense is not proof that he is guilty of the offense here charged, and such fact shall not be considered by the jury in reaching a conclusion as to his guilt or innocence on the present charge."

My notes reflected the jury retired at approximately four-fifteen p.m.; and at approximately five-twenty p.m., the jury requested whether you could ask a question; and the inquiry by the jury -- and Your Honor, I had prepared the question, and I believe His Honor will recall endorsing --

THE COURT: As I recall, we all agreed that was what was said.

MR. SONDEJ: The inquiry by the jury: Can the jury consider the testimony of Mrs. Pamela Vierrether as to the attempted rape on October 9, 1976, in reaching the conclusion that the defendant is guilty of

breaking and entering with the intent to commit rape on October 12, 1976?

In response to this question, the Court stated, "Yes; you can consider her testimony today, in reaching your conclusion, as well as all the evidence."

After that inquiry, the jury then again began deliberations -- and I may stand corrected, but my notes again reflect that the jury returned with a verdict somewhere in the vicinity of five minutes.

At that time the jury found the defendant guilty of breaking and entering with the intent to commit rape, and fixed his punishment at twenty years, which is the maximum imposable punishment for such an offense.

Now, prior to commencement of the actual trial on this particular charge, the offense which occurred on October 12, 1976, counsel for the defendant made a motion to suppress any evidence of prior acts of misconduct or prior offenses. This was at a pre-trial hearing on the 28th; and

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specifically, we had asked the Court to not allow the Commonwealth to pursue or introduce evidence of any events which may have occurred on October 9, 1976, which Mr. Ryan had previously been tried for and convicted.

However, this motion was denied, and the Court, over objection of counsel for the defendant, allowed Mrs. Vierrether to testify that Mr. Ryan had attempted to rape her on October 9, 1976, three days prior to the offense which he was being tried for on July 28, 1977. That offense allegedly occurred on October 12th.

What our position is, Your Honor, is that the instruction that was given, first of all, the Court took a position that that evidence was admissible; and I believe, although I don't recall any reason being stated by the Commonwealth's Attorney of why he was intending to introduce that evidence, I believe that that evidence is admissible. I say "that evidence", I refer to the events which allegedly occurred on October 9, 1976, is admissible only for the purpose of

showing motive, intent or relationship between the parties; and I say that Virginia has taken a position, has reversed itself, towards allowing such evidence in; and I believe the latest case was Gibson vs. Commonwealth, 216 Virginia, which says that this is the exception to the general rule; and the Gibson case says it's admissible to establish the prior relationship between the parties; and later on in the opinion, it says "motivation".

Now, the Court instructed the jury, Your Honor, and I submit to the Court that the Court instructed the jury -- and again, I go back and quote part of the instruction -- "Such fact shall not be considered by the jury in reaching a conclusion as to his guilt or innocence on the present charge."

When the Court instructed the jury, that became the law of the case, because it was not objected to; and I believe the Supreme Court has ruled that, where an instruction is given by the Court and it is not objected to, that it becomes the law of

the case.

Well, our position is that, at that point in time, a course was taken which told that jury that "You shall consider all the evidence that you have heard against Mr. Ryan, except any prior acts of misconduct or previous offenses."

Now, I believe the instruction is proper, and I submit that the instruction was proper. Perhaps what was ommitted was an instruction that would have been favorable to the Commonwealth, that the fact that Mr. Ryan might have made an utterance to Mrs. Vierrether that "I shall return and finish what I was incapable of doing on the 9th", and perhaps that evidence and instruction to the jury may have been, "You may consider that fact or those facts in deriving at a conclusion that Mr. Ryan possessed the necessary intent, the element of intent to commit rape when he allegedly entered her residence or the home that was located on Carter Road in the City of Portsmouth, where she had occupied it on October 9th, and had vacated it."

Now, this, if you take into consideration what actually happened, Judge, the jury obviously was hung up on the question of whether or not they could consider what allegedly transpired on the 9th, in connection with the charges that were pending against Mr. Ryan, and he was being tried for, which was the offense which allegedly occurred on the 12th. If you exclude that evidence, exclude that evidence, there was not one fragment of evidence in the case, in the record, that would allow the jury to find Mr. Ryan guilty of breaking and entering with the intent to commit rape.

They may have found him guilty of petit larceny, but outside of her testimony of what occurred on the 9th, there is not one fragment of evidence to support a verdict of breaking and entering with the intent to commit rape.

Now, obviously, the jury was out a little more than an hour; and we submit they were hung up on this, that particular issue, whether or not they could consider

that particular evidence. Although the Court has told them that, and again, I quote, "That such facts shall not be considered by the jury in reaching a conclusion as to his guilt or innocence", the jury comes back, and they focus in on this one point, this one particular point; and they ask the Court, "Can we go back and consider that?"

Now, whether or not it was a mistake at that particular time, when the instruction was given, it should have remained that way; but anyway, regardless of that, the Court told the jury that they could consider that. This is our interpretation of it; and lo and behold, the jury goes out and comes right back in, within a very short period of time, and I say a very, very short period of time, when you take into consideration the period of time they were out before they asked the question; and they came back and found him guilty of the offense, the offense they are asking about. They consider that evidence of the attempted rape on the 9th, to find him guilty, or to deliberate on his innocence

or guilt, of the 12th; and they find him guilty and give him the maximum punishment that is available for that particular crime.

Your Honor, our contention, and I'm sure Mr. Moore's position is going to be somewhat, that this whole question and this instruction and the response of the Court is a matter of interpretation.

However, I think that you have got to read the instruction and give it the literal interpretation in what it says, not what I may have intended, not what Mr. Moore might have intended, but what is on the four corners of that instruction, and look at the question the jury asked. There is no other conclusion to reach, but they thought they couldn't consider that evidence until the Court told them they could.

We submit, Your Honor, that the law of the case was as the Court had instructed the jury prior to its commencing its deliberation; and then the inquiry by the jury, and the response by the Court, was misleading; and therefore, it was to the prejudice of the accused; and we would

respectfully request to set aside the jury verdict, and ask for a new trial.

MR. MOORE: The jury was hung up, if at all, over Mr. Sondej's improper argument to them, regarding his closing argument; and he told them a couple of times to wipe the slate clean about the 9th; and he continued to do it; and I think that's where they were hung up.

The instruction clearly says they can't consider evidence of prior offenses, whether or not he is guilty of this offense he is charged with today. Any Court in the State would have granted that instruction.

What the jury questioned was, "Can we consider the evidence of the 9th as to the attempt?" The Court said, "You can consider all the evidence", which they did, Judge.

THE COURT: First of all, I want to thank Mr. Sprinkle and Mr. Sondej. I think they have done an outstanding job in this.

I heard the case. I think the jury, as far as being hung up, I don't know exactly how long they were out. I don't think you can consider them hung in any way

shape or form.

I think Mr. Ryan received a fair trial; and I think it was a question for the jury. When he said, "I shall return", the jury could hear that it was all part of his modus operandi; and I think he received a fair trial; and I overrule the motion you made; and also, Mr. Ryan has filed some handwritten motions; and I overrule them, too.

Mr. Sondej and Mr. Sprinkle, he has a presentence report. Have you all been over that with him? Do you want to go over it with him again today?

MR. SONDEJ: Your Honor, I have not even thought about that particular matter.

Mr. Ryan, you have seen the presentence report, have you?

DEFENDANT: Yes.

MR. SONDEJ: Do you think it would be in your best interest to go back over it again before His Honor considers making a decision on the jury's verdict?

DEFENDANT: No.

MR. SONDEJ: For the record, his response

is that he doesn't believe it's necessary to go back over it.

Are you ready to be sentenced today?

DEFENDANT: Yes.

THE COURT: On Indictment 28,237, on the Fourth Count of the Indictment, you having been tried by the jury and found guilty, do you have anything to say before I pronounce sentence upon you?

Nothing being said, I sentence you in accordance with the jury verdict, to twenty years in the state penitentiary.

You know you have the right to appeal. If you do not have the funds to appeal, I shall appoint Mr. Sondej and Mr. Sprinkle to represent you.

Mr. Ryan, I further understand you have filed some additional papers with the Supreme Court of Virginia, and Judge McMurran has appointed Mr. Knowles sitting behind you. Mr. Knowles, make yourself known to Mr. Ryan, and proceed along those lines of the appointment.

MR. SONDEJ: Your Honor, before you recess, I have the written motion that I

have just argued, as well as Mr. Ryan's; and I would like to put them in the file.

THE COURT: Put them in the file, and Mr. Norris, see the appropriate order is prepared, appointing Mr. Sprinkle and Mr. Sondej to perfect the appeal, unless and until he hires his own attorney.

MR. SONDEJ: Mr. Ryan is making an inquiry whether or not the twenty years you have just imposed, as recommended by the jury, runs consecutively or concurrently with the other twenty-five?

THE COURT: You know, those words always confuse a lot of people. They run like boxcars, one behind the other.

MR. SONDEJ: So it will be a total of forty-five?

THE COURT: Yes, sir.

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