

1 STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY  
2 BRANCH VII

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4 STATE OF WISCONSIN,

Plaintiff,

MOTION HEARING

5  
6 -vs-

Case No. 95 CF 454

7 GREG KORTZ,

Defendant.

8  
9  
10 BEFORE: HONORABLE JOHN A. DES JARDINS

11 DATE: May 13, 1996

12 APPEARANCES: VINCE BISKUPIC, District Attorney  
13 MICHAEL BALSUS, Assistant District  
14 Attorney  
15 Outagamie County Justice Center  
320 South Walnut Street  
Appleton, WI 54911  
Appearing on behalf of the State of  
Wisconsin.

16 MARY LOU ROBINSON, Attorney at Law  
17 103 East College Avenue  
18 Appleton, WI 54911  
Appearing on behalf of the Defendant,  
Greg Kortz, who also appears in person.

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22 TRANSCRIPT OF PROCEEDINGS

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25 REPORTER: Jane E. Swagel, RPR  
Official Court Reporter

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PROCEEDINGS

May 13, 1996

1:40 p.m.

(In open court.)

THE COURT: Let the record reflect that we're here on case file 95 CF 454, State of Wisconsin versus Greg Kortz, and would counsel state their appearances?

MR. BISKUPIC: Vince Biskupic, District Attorney, along with Assistant DA Michael Balskus representing the state.

MS. ROBINSON: Attorney Mary Lou Robinson appearing with Greg Kortz.

THE COURT: Okay. And this matter was scheduled--I'm not sure which attorney had this matter set. Mr. Biskupic. Okay.

And Mr. Biskupic, you filed a number of motions, and there was also--is it Lieutenant Heisler's testimony that was given earlier, and I don't think anything has been filed on that, so Mr. Biskupic?

MR. BISKUPIC: Beyond the documents filed on May 2, 1996, the state had previously submitted motions back on January 23, 1996, and I don't believe everything related to those had been

1 addressed. What I would like to do is just go back  
2 into time sequence to the January motions.

3 THE COURT: I thought I had addressed all  
4 the earlier motions, but maybe I missed some.

5 MR. BISKUPIC: There's some labeled  
6 State's Pretrial Motions that were filed January 23.  
7 First involves sequestration and then there's three  
8 more after that. It's in the packet dated  
9 January 23. Should be right after the state's  
10 discovery motions.

11 (Judge looks through court file.)

12 THE COURT: Okay. I see those now.

13 MR. BISKUPIC: My understanding those  
14 weren't all covered at the last hearing.

15 THE COURT: Okay. I think I had asked  
16 counsel if we covered everything, but we must have  
17 missed this set of motions. Okay, let's take them  
18 up then in order.

19 Number one, an order requesting all defense  
20 witnesses be sequestered. I think that should apply  
21 to all witnesses, whether the defense or prosecution,  
22 and the state (sic) would grant that request. I  
23 think that's rather standard.

24 Are you-- That's the next one, was my next  
25 question, a lead investigator, you're requesting be

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allowed to remain at counsel stable.

Attorney Robinson, what's your position on that?

MS. ROBINSON: I'm sorry, I just got this transcript five minutes ago I needed today for-- Would you ask me the question again?

THE COURT: They're requesting that the lead investigator sit at counsel table during the course of the proceedings.

MS. ROBINSON: Well, I guess I would object to that. And I know that if they need an investigator at counsel table, I don't have a problem with that. Because of some of the issues that may arise in this case, I would ask that Officer Heisler and Officer Pat Schuh not sit at counsel table.

THE COURT: Who is your lead investigator?

MR. BISKUPIC: Lieutenant Heisler, or Sergeant Heisler I think his rank is.

THE COURT: I think Sergeant Heisler has previously testified about some of those issues that I think Attorney Robinson is concerned about. It's down on black and white paper, I don't know, as far as transcript is concerned, how listening to more testimony would have any tendency to make any

1 impact. It's common in many cases for the state to  
2 designate a lead investigator to assist the  
3 prosecutor in felony cases, and unless there is some  
4 particular reasons other than just a general one  
5 that Mr. Heisler might be some focus of  
6 cross-examination on that issue, I'm not convinced  
7 that he shouldn't be allowed to sit at the  
8 prosecutor's table, so the Court will allow  
9 Mr. Biskupic to designate a lead investigator to sit  
10 at the table. It doesn't have to be Mr. Heisler; it  
11 could be someone else.

12 Number 3.

13 MR. BISKUPIC: This one is just a general  
14 request that there be no reference to potential  
15 penalties related to the two charges mentioned  
16 during the jury selection, opening statement,  
17 closing statement, or testimony throughout the  
18 trial. Obviously, the jury's duty is to apply the  
19 jury instructions and elements related to those and  
20 potential penalties or the class of the crime or the  
21 exposure to fines or incarceration are not relevant  
22 to the elements that the jury's supposed to look at  
23 when applying jury instructions to the testimony or  
24 evidence presented from either side, so we'd ask  
25 that the Court grant number 3.

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THE COURT: Attorney Robinson?

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MS. ROBINSON: If that's what number 3

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stands for, I certainly have never commented on the

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penalty in a case in my career, but I know it's

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against the rules.

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THE COURT: It is.

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MS. ROBINSON: For some Courts, that's

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good enough, that we've read the book of ethics.

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THE COURT: Those are the rules, but there

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have been times when people do not always follow the

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rules, not saying that Attorney Robinson would, but

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I know in other cases penalties have been mentioned

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to the jury and learned counsel usually avoid those

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pitfalls as learned counsel's dealing with each

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other in this case, so I would expect both attorneys

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not to mention the penalties in this particular

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case, and I'll grant your request as to number 3.

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MR. BISKUPIC: Number 4 is just a general

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order requesting no reference to any topics that

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would bring up issues of jury nullification, and I

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guess similar to the previous one, I guess were on

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record, we know that rule and I guess I'd want the

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Court to just reinforce it for both sides.

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THE COURT: Any response?

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MS. ROBINSON: Well, I understand the rule

1 on jury nullification, and I've never been cautioned  
2 for it. I think I understand how it applies, and I  
3 think that it's appropriate, and I think that  
4 there's a flip side to that, perhaps, as well, but--  
5 for the prosecution, but I have no problem with that.

6 THE COURT: I think jury nullification  
7 issues are becoming more common in the court system,  
8 and it's a legitimate concern, and the Court will  
9 therefore grant the request regarding jury  
10 nullification. Again, I think this probably comes  
11 with experience in the courts. Most experienced  
12 attorneys know not to get themselves involved in  
13 making an argument that parallels a classic jury  
14 nullification argument, so Court will grant the  
15 motion prohibiting counsel from seeking to ask the  
16 jury not to consider the law, but to make a  
17 statement or something of that nature, or send a  
18 message, that type of thing.

19 MS. ROBINSON: I would ask if the Court's  
20 interpretation of that, when I refer to the flip  
21 side, that I think the prosecutors also have a duty  
22 on the flip side of jury nullification is the send a  
23 message argument to the teenagers of the world. I  
24 think that we understand jury nullification has two  
25 ends to it, and we all--as long as we all follow the

1 rule, we have a nice, clean jury.

2 THE COURT: Right. The jury's job is not  
3 to send a message to the teenagers of the community,  
4 it's about the facts of this case, and the flip side  
5 is exactly that, so I think, as I have making my  
6 decision, I mentioned to send a message, that's--  
7 would constitute jury nullification; in other words,  
8 jury being concerned about something that isn't the  
9 elements of the offense and trying to send a message  
10 to other young people in the community would be an  
11 inappropriate argument.

12 Do we have any others from January that the  
13 Court did not address?

14 MR. BISKUPIC: No, I think it's  
15 appropriate to skip to the May 2nd ones. Some of  
16 the May 2nd ones referred back to potential  
17 discovery issues, but I think at this time, it's an  
18 appropriate spot to switch over to the May 2nd  
19 motions.

20 THE COURT: Okay. Regarding that first  
21 motion, I think I had already ruled on that one at  
22 our last hearing. You're making a request that  
23 defense counsel and witnesses not make reference to  
24 the victim's father or occupation as a police  
25 officer. I ruled on that.



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MR. BISKUPIC Okay.

THE COURT: And I indicated that that wouldn't be proper, I don't see it as being relevant or germane to any facts in the case.

MR. BISKUPIC: Second one--

MS. ROBINSON: Your Honor, do I understand from that ruling, when you ruled on it before, my understanding of the ruling was is that you ruled and that in the event it becomes, at least from one side or the other, deemed to be relevant, that we can address you again on that outside the presence of the jury?

THE COURT: Yes. If, for some reason, during the course of the trial you need to have a hearing outside the presence of the jury because something has come up or something new that has come to the attorney that believes somehow that becomes relevant, I wouldn't close the door to having a hearing to make a determination whether, in fact, that is relevant. At this point, there should be no reference to the--counsel or by witnesses.

MR. BISKUPIC: I guess the only concern I have was to have this issue resolved to the--

THE COURT: It is resolved. I guess that goes with every ruling that I make today, it's

1 resolved, and however, if something comes up during  
2 the course of the case, doesn't mean that we can't  
3 revisit any one of these, so it's sort of like a  
4 trial would be something that takes unexpected turns  
5 at times, and we don't know all the facts until they  
6 actually happen, sometimes, in court.

7 MR. BISKUPIC: I guess the thing I was  
8 expressing in my motion was if it could be resolved  
9 completely ahead of time, that this obviously--  
10 issues that relate to potentially making the state  
11 witnesses, the prosecutor's witnesses--

12 THE COURT: To my mind, it is resolved,  
13 and I would have to have something that I cannot  
14 contemplate at this time that would cause it to have  
15 some relevancy, without the balancing prejudicial  
16 effect.

17 MR. BISKUPIC: Number 2 relates to  
18 discovery issues, and I know that this has come up  
19 at a number of different hearings, but the state  
20 wants to be certain on these discovery issues.  
21 Obviously, we're within a few weeks of trial, this  
22 case has been pending for a period of time, and we  
23 are at least aware from some portion of the police  
24 reports of some degree of defense investigation and  
25 what we believe is taking of a statement, at least,

1 from one individual, a juvenile, and--

2 THE COURT: I think we already covered  
3 that at the last hearing, I believe, in which the  
4 Court ordered that defense counsel should turn over  
5 any documentation that she might have, whether that  
6 be a written report or a tape recording, to the  
7 prosecution. I don't know if I used the word  
8 promptly in reading the motion, I think you were  
9 concerned about promptness, and it should be a  
10 prompt turning over.

11 MR. BISKUPIC: So considering we're about  
12 three, four weeks from trial, can the Court  
13 establish some date certain?

14 MS. ROBINSON: Let me respond to that  
15 first, I'd like to talk about an issue that he's  
16 addressing this particular witness.

17 THE COURT: Okay.

18 MS. ROBINSON: Your Honor, I think that I  
19 foresee, from an allegation the state has made in a  
20 police report, that suggests that they interviewed  
21 someone I had talked to. Now, I didn't take a  
22 statement from the person; I talked to someone. And  
23 there's some issue raised as to whether or not I  
24 could make a reference to having talked to them. I  
25 have no problem with the fact that I can't and the

1           role that I play as a rule if I talk to a potential  
2           witness, and we covered that last time. I do have  
3           some problem with the manner in which it's been  
4           cloaked by the state, in that they have made a  
5           suggestion in a police report in reference to that  
6           young man that he was--had become confused because I  
7           had told him, this is the officer's version, not  
8           what the kid told them in a statement, but that he  
9           had become confused because I had indicated that  
10          there was medical testimony that the deceased had  
11          only been struck once.

12                 Now, the fact is that I was out there shortly  
13          after the preliminary hearing, and the fact is that  
14          the preliminary hearing physician did testify that  
15          it could be consistent with, I think he was asked on  
16          direct, more than one blow, and it could be  
17          consistent with one blow. As in many cases, an  
18          investigation grows, it takes on its own life in  
19          that if the officers believe something has occurred,  
20          sometimes the witness's statements come back in that  
21          fashion.

22                 I did not, and I don't--and I think the state  
23          should be precluded, unless they want to have a  
24          hearing before or outside the presence of the jury  
25          and just ask this young man, whatever, because I

1 don't think the state should be--once they get a  
2 ruling from you that says that I can't suggest that  
3 I ever talked to the guy, that they can come in on  
4 their examination and they can say, now, you told--  
5 apparently they think he's told two stories or four  
6 stories or whatever and that you did it because  
7 Robinson went out there and confused you and told  
8 you that the medical examiner said it was only once,  
9 or the medical records said it was only once.

10 They're setting up an issue that, in fact, the  
11 medical person did say it was consistent with one  
12 blow, he said he didn't know it to be consistent  
13 with more than one, and they have another witness,  
14 as I understand, who may have something somewhat  
15 more elaborate, but I don't want them to, on the one  
16 hand, get a ruling from you that I can't--as if I  
17 wasn't there, which is fine with me, but then turn  
18 around and say to him, this is the fact that you  
19 became confused or told multiple stories.

20 In fact, I can--if the boy were questioned  
21 under oath, he would probably say that what I told  
22 him was that if he had anything to say that was  
23 different from what he thought he had said before,  
24 he should talk to his lawyer, and he had one at the  
25 time because he had some other difficulties, and

1 that he should take it up with him as to whether or  
2 not he corrected his statement, so I simply don't  
3 want them to raise that as an issue and have that  
4 become an issue within the trial, whether or not I  
5 was out confusing witnesses.

6 THE COURT: Attorney Biskupic?

7 MR. BISKUPIC: I definitely think that's  
8 an issue in this case. We have, and I offered the  
9 report to the Court, that specifically on a  
10 interview on December--or November 28, tells the  
11 officer that he saw two blows to the head, and then  
12 in a follow-up interview on December 12, indicates a  
13 change in the story and talks about an intervening  
14 fact where he's provided information, at least to  
15 some degree, whatever that may be, from  
16 Ms. Robinson, and obviously the change in the story  
17 is very important.

18 These are-- The number of blows in this case,  
19 I think, is an important issue on the elements of  
20 the offense, and here is a witness who was standing  
21 approximately five to eight feet from the incident  
22 and talks to the officers within approximately four  
23 or five days of the actual occurrence and describes  
24 one thing. And then approximately two to three  
25 weeks later, gives another version to the police

1 that has changed for some apparent reason, and I  
2 think it's important to explore with this witness,  
3 whether it's on direct or cross, why there was a  
4 change in the statement and if this intervening fact  
5 that led to some confusion or change intertwines  
6 defense counsel in the case. I think it's  
7 unfortunate, but it's relevant.

8 MS. ROBINSON: I don't have any problem  
9 with anything he said, except to this extent. For  
10 him to suggest to a jury that, in fact, there wasn't  
11 medical evidence at that time, that it was  
12 consistent with one blow. You see, I don't have any  
13 problem with how many times the kid changed the  
14 story, I know that the kid's second interview,  
15 according to their report, apparently, the lawyer  
16 contacted somebody and he was interviewed or  
17 whatever.

18 THE COURT: So you now interviewed him  
19 another time. Has the state interviewed him  
20 subsequent time?

21 MR. BISKUPIC: Once.

22 THE COURT: Just one time?

23 MR. BISKUPIC: Right.

24 THE COURT: So you don't know what his  
25 testimony will be now, so we have two conflicting--

1 MR. BISKUPIC: Well, the attachment to the  
2 motion indicates Sergeant Schevers spoke to him on  
3 the 12th.

4 MS. ROBINSON: In answer to the Court's  
5 question, they interviewed him after the event and  
6 they interviewed him once after I had been out in  
7 the community talking with people, among others,  
8 this person in the presence of his mother, his  
9 father was there for part of the time, he was at his  
10 home, they invited me there, and I think there was  
11 actually another young person there, I don't know if  
12 it was a family member or not, so they have talked  
13 to him again. I think the question is he may have  
14 made conflicting statements to me, to them,  
15 whomever.

16 The only problem that I think we need to  
17 resolve outside the presence of the jury is the  
18 extent to which they can try to embellish whether  
19 his changed statement, as they're saying, and I'm  
20 not conceding that it's a changed statement, whether  
21 his view of it when he was interviewed the second  
22 time by them could be credited to my giving him  
23 information that the state is going to try to color  
24 as being false information.

25 THE COURT: Do you contend that



1 Attorney Robinson's statement to the witness was, in  
2 fact, false?

3 MR. BISKUPIC: It depends on the date it  
4 was made. The prelim wasn't held till the 11th. If  
5 she's saying her contact was between the afternoon  
6 of the 11th and the prelim and the morning of the  
7 12th when the police talked to him a second time,  
8 maybe she did obtain something at the prelim, but  
9 it's my understanding that the interview that she  
10 had with Mr. Geiger took place before the prelim.

11 MS. ROBINSON: I could-- I don't have the  
12 notes here about that. I could put my finger on the  
13 date, but I know that I had already had the treating  
14 physician on the witness stand when I talked to this  
15 boy, and my impression was when I talked to him that  
16 night, because I wanted him to make a statement to  
17 someone if he had something to say that was  
18 consistent with what he was telling me that night,  
19 so simply advised him to call his attorney and have  
20 his attorney make arrangements to make a statement.  
21 This is the boy, after the event was over, had  
22 called the police and never had made a written  
23 statement prior to that, as I recall.

24 THE COURT: So he made an oral statement,  
25 then after speaking to Attorney Robinson, he made a

1 written statement, which is--his written statement  
2 was different than the oral statement.

3 MR. BISKUPIC: He spoke to the officers on  
4 the 28th, and there's a narrative attached to the  
5 motion.

6 MS. ROBINSON: But he didn't make a  
7 written statement, did he?

8 MR. BISKUPIC: I can't say for certain.

9 MS. ROBINSON: As I recall, when I talked  
10 to this boy, he was a witness who had never made a  
11 written statement to anyone, and in fact, had called  
12 the police department the night of the event and  
13 couldn't get through to anyone 'cause he was upset,  
14 concerned, a witness, and so on, and when I spoke to  
15 him, I don't believe he had made a written statement  
16 to anyone. Now, I didn't have the discovery; I  
17 learned that from him, that he had not made a  
18 written statement.

19 And part of what-- In hindsight, it should be  
20 clear here, in terms of the timing, at the time that  
21 I talked with him, I didn't have any discovery  
22 materials. I didn't know if he had made a statement  
23 or not made a statement till I talked to him, nor  
24 did I know what he told the officers, so it's--I  
25 don't--for the state to say that I got him to change

1 his statement by what I said is an unfair  
2 characterization of what I did, because I went out  
3 and asked him to tell me about it, and I wouldn't,  
4 at that time, know what he had said before.

5 THE COURT: Mr. Biskupic?

6 MR. BISKUPIC: Just so I have this  
7 scenario correct from defense counsel's perspective,  
8 there was an interview on the 28th by the police, I  
9 don't believe that there was a written statement,  
10 but there was an oral statement. That's the subject  
11 of the narrative on page, approximately, 40 to 41.  
12 Forty-one's attached. Sometime after that first  
13 interview on November 28, Ms. Robinson meets with  
14 this individual, and apparently it's her  
15 understanding that that's after the prelim, which is  
16 on the afternoon of December 11.

17 On December 12, 10 a.m., Sergeant Schevers  
18 speaks with this individual, and he indicates a  
19 different scenario than he originally gave to the  
20 police back on November 28. Whether the confusion  
21 was created from information Ms. Robinson had from  
22 some source other than prelim or from the prelim  
23 itself, I don't think is of consequence. The fact  
24 is that he expressed confusion based on that  
25 intervening interview with Ms. Robinson, and then

1 his story changes to something quite significant  
2 from his initial interview, this is a witness that's  
3 relevant, five to eight feet away from this--the  
4 actual alleged offense. This is a witness who,  
5 within five to six days of the incident, gives a  
6 statement explaining at least two blows, there are  
7 two blows to the head by the defendant to the  
8 victim, this is a witness who changes that within  
9 two weeks of that initial statement, and I think  
10 it's relevant for the state to explore the changes.

11 He's expressing in his December 12 interview  
12 that there was some confusion created from his  
13 interview with Ms. Robinson. Whether that was based  
14 on information she provided that she felt was  
15 accurate or not accurate I don't think is of  
16 consequence at this point. The fact is is that that  
17 interview created confusion and ultimately his story  
18 changed, regardless of intention from defense.

19 MS. ROBINSON: I have no problem with them  
20 if they want to say there's some confusion. They  
21 still, apparently, haven't taken a written statement  
22 from that guy, and I have a little difficulty with  
23 the reporting problem in this case of the narratives  
24 that have been done. I don't know if he was  
25 confused or if they were confused where--I don't

1 know who's confused. We don't have a statement from  
2 the boy. All I am concerned with is the narrow  
3 issue as to whether or not they unfairly try to  
4 cloak that I went out and did something to mislead  
5 this person, because I don't want to be in the  
6 position where we have to educate the jury about  
7 discovery rules and what I would have known if  
8 anything was ever said.

9 I was shocked that this guy told me he had  
10 never made a written statement to an officer because  
11 he seemed to me to be a witness that was readily  
12 available and nearby, and their report indicates  
13 that he had called the department that night, but no  
14 one had talked to him.

15 MR. BISKUPIC: Whether he made a written  
16 statement or oral statement is still a statement of  
17 record that is recorded by the police that will be  
18 used to cross-examine him during the process of his  
19 testimony on the stand, and any contradictions that  
20 have been created, I think it's fair game for the  
21 state and it's also very relevant to explore why  
22 this eyewitness has changed his story.

23 MS. ROBINSON: It's fair game, but you  
24 see, you're on the assumption that the officer's  
25 versions are always accurate and that the boy is

1 changing his story, and in this case, I'm not  
2 willing to concede that.

3 THE COURT: Well, from the way I see it is  
4 that every time a witness changes his story, their  
5 story, it becomes a credibility issue, and  
6 therefore, is highly relevant to the case. Now, the  
7 reason for making the change, I think, gets into  
8 some fairly tricky issues. For example, in this  
9 case, the tricky issue becomes the fact that defense  
10 counsel spoke to the person and that can lead to a  
11 number of inferences about defense counsel when, in  
12 fact, defense counsel isn't the issue in the case,  
13 and that can be highly--that could be highly  
14 prejudicial to the defense if the jury were allowed  
15 to, in essence, speculate that defense counsel  
16 somehow orchestrated or caused this.

17 From what I've heard in this case, up to this  
18 point, is that defense counsel's questioning was--  
19 there was nothing shown to be false or fallacious  
20 about her questioning, with clarity it has been  
21 shown to me, so that being the case, I think it's  
22 important for the Court to err, if anything, on the  
23 side of the defense counsel because I do not want to  
24 inhibit defense counsel from being allowed to  
25 question people when, in fact, they have no

1 investigators, they have to have the opportunity to  
2 go out and talk to people, to, in fact, almost  
3 become an investigator, even though they can't be a  
4 witness themselves, obviously, they have to have the  
5 right to go out and talk to people.

6 This would result potentially in a very  
7 confusing issue to the jury if they're to be  
8 focusing and evaluating on the defense attorney's  
9 conduct in her investigation of the case, and I  
10 think it ultimately might be quite prejudicial on an  
11 issue that they shouldn't be focused on. It would  
12 be another matter if you could clearly show it was  
13 something more than confusion. If it was like  
14 obviously false information being given to change  
15 the person's testimony, it would be a different  
16 story.

17 I think what you're going to have to do then is  
18 obviously be very careful in your questioning about  
19 the change in the story. It can be one, as  
20 Attorney Robinson has really indicated, as resulting  
21 from confusion about the facts, but not to show  
22 that--I think at this point I haven't seen any  
23 evidence to suggest that Attorney Robinson  
24 intentionally misled the person. She has a right to  
25 try to advocate for her client, try to change

1 people's stories if, in fact, she's searching for  
2 the truth and she thinks that something needs to be  
3 crystallized in certain areas, that if their stories  
4 change, they change, so do you understand, Counsel?

5 MR. BISKUPIC: I understand that ruling.  
6 I guess it overlaps with number 3, which, I guess,  
7 was more directed towards the form of the questions  
8 to that witness, and I think defense counsel has at  
9 least represented that the form of her questions for  
10 this witness would not create a situation where  
11 defense counsel would be asserting some personal  
12 knowledge of the statements made to the witness at  
13 this meeting.

14 THE COURT: I think we already touched on  
15 that somewhat, but it's clear that that would not be  
16 permitted.

17 Defense?

18 MS. ROBINSON: I understand.

19 THE COURT: You understand that? I want  
20 to go back to this--the issue about--in 2, I think  
21 you bring up the question of surprise, and we just  
22 discussed that. This would apply to both attorneys,  
23 that surprise could--unfair, undue surprise without  
24 an appropriate explanation could result in any  
25 number of sanctions from the Court, so it might be



1 for violating the court order to promptly provide  
2 discovery, it could result in potentially contempt  
3 finding, it could be subject to a fine, it could be  
4 an oral reprimand on the record, it could be a  
5 continuance of the case if it was that serious, or  
6 any other appropriate sanction that I can think of.

7 In some cases, I guess, if the state made the  
8 error, it could even include the possibility of not  
9 allowing the testimony to occur. I don't know  
10 what--we could do that against the defense or not.  
11 I think there might be some constitutional  
12 prohibitions against that, I'm not sure, so it could  
13 be any number of things, and it would just have to  
14 depend upon the gravity of the oversight and the--  
15 whether there was intent or recklessly--or gross  
16 recklessness would all enter into Court making a  
17 determination of the reprimand, fine, continuance,  
18 or not allowing the witness to testify.

19 Okay. Number 4.

20 MR. BISKUPIC: Number 4 relates to the  
21 issue raised at the last hearing regarding  
22 Sergeant Heisler's testimony, and the state's motion  
23 is to have an order precluding any comment or  
24 suggestion that would place the state in the  
25 position of having to call prosecutors to the stand.

1 I know Sergeant Heisler was questioned on  
2 corrections made in Officer Schaut's report and  
3 whether that was influenced by prosecutors in any  
4 fashion, and I think he's answered those questions  
5 at the previous hearing, and so in order to avoid a  
6 situation where the state would be in a position to  
7 have to testify if that's commented on during the  
8 trial, jury selection, the opening statements, or  
9 any testimony, we'd ask that the Court grant  
10 number 4 precluding any reference or bringing up of  
11 any allegations that the prosecution influenced that  
12 decision.

13 THE COURT: Attorney Robinson?

14 MS. ROBINSON: Well I think  
15 Officer Heisler's testimony, which I have a  
16 transcript of, I think, really absolves Mr. Biskupic  
17 of having actually made any decision to destroy the  
18 sheriff's department report. He does say that  
19 Mr. Biskupic was present for the meeting, but he  
20 does state that he made the decision. To that  
21 extent, I don't see how the prosecutor here is  
22 concerned about being called as a witness or any  
23 need for any outside prosecutor.

24 I do think that that general subject area is  
25 going to be, perhaps, relevant from time to time

1 during the trial, that is, the fact of the report  
2 being destroyed. I had expected by now I might get  
3 some update on my discovery request from the state  
4 in terms of how they thought we might handle that,  
5 because to date, I don't have from them any  
6 description of what testimony was originally  
7 credited to the fellow named Chris Dragosh. The  
8 statement of Officer Heisler was that there were  
9 statements made in Schaut's report, he summarized  
10 statements of Chris Dragosh that should have been  
11 credited to Greg Kortz, and that they had made the  
12 change.

13 I don't know which of the statements made by  
14 Greg Kortz, allegedly made by him, the way it  
15 appears today, were, in fact, the statements  
16 originally made by Chris Dragosh. I would indicate  
17 that the Officer Heisler's testimony about what  
18 happened is not consistent with what Officer  
19 Schaut's testimony is, but I don't think that  
20 reflects on the prosecutor's office, and that I will  
21 try the case, that I don't intend to try  
22 Mr. Biskupic.

23 THE COURT: Okay. Well, you don't intend  
24 that. It's possible that that could become an  
25 important issue in the case?

1 MS. ROBINSON: Could be an issue in the  
2 case. I'm going to say it this way. I don't see  
3 what more I can do pretrial about that issue that's  
4 not going to only serve to deprive Greg Kortz of a  
5 jury understanding how this case has developed, in  
6 that I don't--I'm not anxious to get a pretrial  
7 ruling that cleans up what has occurred, and because  
8 I don't want to be deprived of at least  
9 establishing, even if I have to do it outside of the  
10 presence of the jury from time to time, to be able  
11 to assert that as relevant to this case as the case  
12 develops.

13 I don't intend, in my opening statement, to try  
14 the issue of how police reports are made, but I  
15 think that so much of the reports in this case are,  
16 as Mr. Biskupic has characterized them, narrative  
17 reports. The manner in which narratives are taken  
18 and the sort of sanctity of them, once they're  
19 developed, I think, is--is important.

20 THE COURT: Mr. Biskupic, what's your  
21 response?

22 MR. BISKUPIC: That I think the  
23 preparation of reports is relevant evidence. The  
24 reasoning on the motion for number 4 was to  
25 obviously avoid a situation where, during the trial

1 or on the eve of the trial, an issue comes up where  
2 I feel I need to testify on any issues related to  
3 the preparation of those reports. I would ask that  
4 the state (sic) grant number 4, and if for some  
5 reason an issue comes up, that we just be very  
6 careful and address that outside the presence of the  
7 jury before even any inference or mild suggestion is  
8 raised on that issue.

9 THE COURT: Well, I guess we're at a  
10 disadvantage because we don't know exactly how the  
11 trial will develop and what issues of credibility  
12 will become very important, but credibility is one  
13 of the most important things that a jury has to  
14 decide in the case. Now, we have a meeting of the  
15 police officers and the district attorney, and  
16 Sergeant Heisler, in this decision--in this meeting  
17 makes the decision, but the DA who was there is the  
18 chief law enforcement officer for the county. Now,  
19 I don't know what's said and not said and how this  
20 all came about, but I can't imagine that a sergeant  
21 in the sheriff's department would do something that  
22 he felt would be contrary to what the DA's wishes  
23 were.

24 I think, in this scenario, it's unfortunate the  
25 way it came out, but it almost draws the district

1 attorney in as a potential witness when you have  
2 Sergeant Heisler there, and on this important issue  
3 of credibility as to a witness's statement and the  
4 way it was changed, I just think that the potential  
5 is there to drag the DA into the testimony, so  
6 Mr. Biskupic?

7 MR. BISKUPIC: Well, once again, if  
8 there's some link established, and I don't believe  
9 that there was any foundation laid from  
10 Sergeant Heisler's testimony, I want to be prepared  
11 to answer that, whether I have to testify or not.  
12 But I think it's--I think there should be some offer  
13 of proof showing any relevance to that. Once again,  
14 I mean, similar situation arises when defense  
15 counsel has to meet with witnesses, the state has to  
16 meet with investigators or sometimes are drawn into  
17 those situations, but there's been no offer of proof  
18 or any indication to show that the state even played  
19 a role in that process of the correction of the  
20 reports, or the prosecutor--or I did, and similar to  
21 the Court's ruling on reference to defense counsel  
22 having any contact with Dean Geiger, I think that  
23 beyond the order that we're requesting in number 4,  
24 that there shouldn't be any reference to my  
25 attendance at a meeting if Mr. Heisler has already

1 testified that it was his decision.

2 MS. ROBINSON: May I be heard on that?

3 THE COURT: I think in response to that is  
4 that I think as a prosecutor, you're charged with  
5 all--having information that is available to the  
6 police, you were at this meeting in which it was  
7 decided to take back these reports, and then  
8 something that's an inconsistent statement is  
9 suddenly taken out of the police reports that is  
10 obviously, well, one side of the coin is that it was  
11 an honest error in the police officer attributing a  
12 statement to an individual versus something else.

13 Now, it seems to me that there are some  
14 credibility issues there that would, first of all,  
15 maybe apply to the police officer who originally  
16 took the statement and also a question as to whether  
17 the statement was actually made. Then there are  
18 questions as to the accuracy of other statements  
19 that the police officer may have been involved in  
20 taking, so clearly it affects his credibility, and  
21 the prosecutor is, in many respects, placed on a  
22 pedestal to, I guess, protect the record, and when  
23 it has to deal with evidence and knows that a police  
24 officer is going to take back reports and change  
25 them so the defense is obviously not going to find

1 out about it, I think rather than just saying the  
2 officer made the decision, the prosecutor would have  
3 the responsibility, number one, to preserve the  
4 report so that it would not be changed and  
5 destroyed, so I think your obligation was a little  
6 greater than just being in the meeting and not  
7 making the decision, because by your silence, I  
8 think you've actually ratified that decision.

9 You're the chief law enforcement officer.

10 Now, the issue for the trial, is there some way  
11 that you can get roped into this so that you get in  
12 a position to defend yourself through testimony. As  
13 I have indicated, I think the evidence is relevant,  
14 so Mr. Biskupic, do you think you should remain on  
15 the case?

16 MR. BISKUPIC: I guess my inquiry to the  
17 Court is what degree of latitude? Obviously, you  
18 can't be clairvoyant about what's going to come in  
19 as evidence, but I can see that the preparation of  
20 reports by any officer in any case is relevant  
21 inquiry by the state or the defense on questioning.  
22 Obviously, if there's an inference raised that part  
23 of the decision to correct or change the report was  
24 influenced by silence or by overt statements by a  
25 prosecutor, I would like to make myself available to



1 testify. Obviously, that creates a dilemma that I  
2 can't be a witness and prosecute at the same time.

3 THE COURT: As to number 4, I am going to  
4 take that under advisement. Let's move to number 5.

5 MR. BISKUPIC: Five relates to the fact  
6 that during the pendency of this case, there have  
7 been other matters filed against the defendant, and  
8 obviously a waiver was sought in this case and also  
9 in the other case and that those procedural  
10 decisions by the state on this case in seeking  
11 waiver and ultimately charging out the uttering  
12 charges and the seeking the waiver on those charges,  
13 state feels that those aren't relevant to the facts  
14 and elements related to this case, and we would ask  
15 for an order precluding any comment on the fact the  
16 defendant was charged with additional offenses, the  
17 fact that he was waived in this case, and also  
18 waived in another case.

19 THE COURT: Attorney Robinson, any  
20 response?

21 MS. ROBINSON: At this time, I don't have  
22 a theory of defense in which I would consider those  
23 items relevant. It may arise at some point that I  
24 might deem they're relevant, and I would seek some  
25 guidance from the Court before I bring it up in

1 front of the jury.

2 THE COURT: Like the other rulings, the  
3 Court will grant number 5 on behalf of the state,  
4 and again, it's as good as the situation warrants it  
5 at this time, so we would have to have, at least on  
6 every one of these rulings, an additional hearing to  
7 determine why the Court should change its decision.

8 Number 6.

9 MR. BISKUPIC: Number 6 relates to the  
10 state's giving notice whether any witnesses were  
11 promised any consideration or received any  
12 compensation or consideration on other charges in  
13 relation to cooperation or testimony in this case,  
14 and the state represents to the Court that there has  
15 been no such agreements since the initial return of  
16 discovery. Some witnesses do or potential witnesses  
17 do have criminal convictions. I'm compiling the  
18 actual Judgments of Convictions from the Clerk of  
19 Courts and will turn those over to defense counsel  
20 when complete.

21 THE COURT: Attorney Robinson?

22 MS. ROBINSON: Well, as I understand  
23 number 6, he's suggesting that I can't testify about  
24 these things. I do think that I, first of all,  
25 have--am entitled to know any conversations officers

1 have had with potential witnesses about how their  
2 cooperation in this case or the fact of meeting with  
3 them in a squad car and a communication about this  
4 case, if it relates to how they're being dealt with  
5 and in terms of going to juvenile court or not going  
6 to juvenile court in other cases. I think that's  
7 their duty to disclose. And the Court's ruled on  
8 that before and they're saying there is none, but I  
9 don't think that precludes me from asking a witness  
10 as they testify if it's appropriate whether or not  
11 they believe their cooperation with the state in  
12 this case will have the favorable impact--

13 (Telephone rings in courtroom.)

14 MS. ROBINSON: Or will have or has had a  
15 favorable impact, that is, what's in the  
16 individual's mind, which may, in some instances, be  
17 different from what's in the state's official  
18 protocol, and I think that if I can ask them, you  
19 should be permitted to ask them whether they have  
20 been promised anything or if they've received  
21 anything or if they have--and I don't foresee that  
22 this would apply, or whether they believe that by  
23 being cooperative, and that to some cooperative  
24 could be meaning simply being truthful, being  
25 willing to come forward, and that's certainly

1 something for examination, in this case, if in  
2 their--if they believe that it has had a favorable  
3 or will have a favorable impact on their own  
4 personal relationship with law enforcement or the  
5 system.

6 THE COURT: Well, I agree with what--what  
7 Attorney Robinson says in part. I agree that if a  
8 witness says that I was promised this or if I'd be  
9 cooperative, this would happen, and some person made  
10 that statement, the witness, that that would be  
11 relevant. As to their own feelings about how they  
12 reacted, how this would happen, is totally  
13 speculative; there's no standard. One person who  
14 cooperates might have great feelings about it;  
15 another person who cooperates might think it was  
16 horrible. I don't think there's any standard to  
17 determining a person's feelings as to whether their  
18 cooperation helps their case or not. There's no  
19 standard.

20 MS. ROBINSON: May I clarify what I was  
21 trying to say? I didn't say it very well.

22 THE COURT: Okay.

23 MS. ROBINSON: It's this, that I've had  
24 the experience where an individual testifies that  
25 they believe that by availing themselves in the case

1 at hand, they expect that they are going to be  
2 treated with some leniency or special consideration.  
3 Now, the prosecutor's office and the sheriff's  
4 department can always come forward and say no, we  
5 didn't make any deal with them. In other words, if  
6 the individual believes that this--they are--they  
7 want to be helpful to the state because they expect  
8 and may state, may not state, that they were led to  
9 believe they were in enough trouble already and this  
10 would help them with their problems.

11 I don't think the fact of a police report or  
12 the state coming back with a discovery answer that  
13 says, well, we don't really have a deal with this  
14 person, we haven't made any offers or any, you know,  
15 about specific charges or whatever, I'm suggesting  
16 that that does not carte blanche foreclose the  
17 inquiry of a witness, and of course, it would be  
18 foolish for me to go stomping through the witnesses  
19 saying, Do you think this is going to help your  
20 case, and they say no, no, no. It's not, like, one  
21 of my wholesale questions, but I don't think I  
22 should be precluded from at least the potential  
23 opportunity of witnesses who testify or do things  
24 because they believe that even an officer on the  
25 beat who doesn't make the deals for the prosecutor's

1 office has led them to believe it was the way to  
2 handle it.

3 THE COURT: Attorney Biskupic?

4 MR. BISKUPIC: I guess the concern I have  
5 with that approach is that by raising the inference  
6 or even starting to bring out adjudications or  
7 convictions or charges that a witness may have had,  
8 whether they resulted in adjudication or conviction  
9 or not, basically back door is getting in character  
10 evidence on that individual that goes beyond the  
11 norm of asking the person about their conviction and  
12 finding out that number.

13 THE COURT: Well, when you get into a  
14 person's subjective beliefs about what they're doing  
15 here and if that going to help them or not, the  
16 Court doesn't see that there's any--anything  
17 objective to this whatsoever. Maybe that's why  
18 Attorney Robinson wants to have the right to ask it,  
19 and yet at the same time, it could open the door to  
20 some confusion.

21 Now, I'm just trying to envision in my own mind  
22 how you would ask this question. Do you have any  
23 examples?

24 MS. ROBINSON: Yes. Have you had a lot of  
25 contact with Officer Jones in the past? Oh, yeah, a

1 lot.

2 Do you have an opinion as to whether or not  
3 he's given you some special attention? Yeah.

4 And did he frequently check on your conduct or  
5 misconduct in the past? Well, a lot of contact,  
6 that sort of thing.

7 Now, you and the officer have a much better  
8 relationship now that you have been cooperative as a  
9 witness in a major case? That's right.

10 Do you believe that your telling the officer  
11 the statement that you have told him will help you  
12 to have less police contact in the future?

13 THE COURT: Mr. Biskupic?

14 MR. BISKUPIC: Well, it's pretty  
15 speculative to have a person guess what kind of  
16 police contacts they're going to have in the future.

17 THE COURT: I think that line of  
18 questioning is--it seems like it gets into the area  
19 of subjectivity and speculative issues. If a  
20 witness were asked the question, you thought you  
21 were going to benefit by telling this story, could  
22 that be a question that would be asked? I would  
23 think so, but all these other types of questions  
24 that Attorney Robinson proposed, I don't think so,  
25 but you thought you'd benefit from talking to the

1 police, right? Yes, no. And if a person says no,  
2 it's cut off at that point. If the person would  
3 answer yes, well, how do you think you would benefit  
4 or how do you think you were going to benefit would  
5 be the follow-up.

6 Attorney Robinson?

7 MS. ROBINSON: I have no problem with  
8 that. I appreciate-- I can appreciate the  
9 difference between what you did and what I did, and  
10 I can live with that.

11 THE COURT: Okay, that is the extent of  
12 Attorney Biskupic's motions. I took one under  
13 advisement, and there is another reason I did that,  
14 I wanted to talk about potential jury sequestration.

15 MS. ROBINSON: Could we-- Before we go on  
16 to something else, just as a housekeeping issue, I  
17 have a couple things. One, the preliminary hearing  
18 transcript is finally prepared, and I had made a  
19 motion which this Court hasn't ruled on, and I'd ask  
20 that the Court would have--to do that or do it at  
21 the time of trial, but just for our record. I had  
22 made a motion to dismiss after the preliminary  
23 hearing, I reserved it in this court, you couldn't  
24 rule on it because you didn't have the preliminary  
25 hearing transcript.



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THE COURT: I didn't know we had it.

MS. ROBINSON: It just came. I just got mine a few minutes ago.

THE COURT: I haven't read it.

MS. ROBINSON: I understand, but that's just something that I'm noting we need to do. Then the state has given me notice of a person named Dake who is here in the Outagamie County Jail. The statement was taken from him when he was in the Fond du Lac County Jail, and to clarify our discovery, I don't have Dake's criminal record, presumably he has one, and he is a potential witness at trial, and I'd ask that they would get that to me pretrial.

The Court, at our last meeting, indicated that I could examine juvenile records in your office. I have not come to do that because I believed I was going to get the adjudications, the juvenile adjudications from the state and then I wouldn't have to examine those files.

THE COURT: Have you made a specific request as to the individuals?

MS. ROBINSON: Well--

THE COURT: I would think that would be pretty easy to comply with.

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MR. BISKUPIC: If I get a list, that's fine.

MS. ROBINSON: The list would be the people in their sheriff's department reports. They have a list of--most of the witnesses in this case are, in fact, juveniles, and I think that it would be most efficient to treat them as all potential witnesses from one side or the other, so we had them pretrial to examine. It might clearly impact on whether or not I choose to call someone or not call them and so I'd like to have a reasonable time before trial, what their juvenile cases are.

The other reason for having it at a reasonable time before trial is that would save me time looking through which files are adjudications versus the ones that are the consent decrees or whatever--different--whatever the juvenile word is for it, that didn't result in adjudications.

THE COURT: Consent decrees.

Mr. Biskupic?

MR. BISKUPIC: You tell me what your preference is. If there's a list or some specific names, I could have somebody dig out what those case numbers are and the dispos.

THE COURT: Why don't you provide a list

1 to Mr. Biskupic and he can provide copies of the  
2 dispos?

3 MS. ROBINSON: And then--

4 THE COURT: Or the judgments.

5 MS. ROBINSON: I have had an opportunity  
6 to look at the photographs of the case. I don't  
7 think all of the photographs-- Well, I've looked at  
8 94 photographs, and as far as the sheriff's  
9 department knows, Pat Schuh knows, those are all the  
10 photographs. I would like to have an opportunity to  
11 have negatives which are in the sheriff's  
12 department's possession available to have  
13 transferred from their department to a photographer  
14 of my choice to make some enhancements.

15 THE COURT: Attorney Biskupic?

16 MR. BISKUPIC: I think there's a process  
17 available to have copies of negatives made. I guess  
18 my preference is not to have the police agency  
19 relinquish custody of the negatives, but if defense  
20 is willing to incur the cost, we would prepare  
21 copies of the negatives so those can be provided.

22 MS. ROBINSON: I don't want copies of  
23 negatives. I would like to be able to make  
24 photographs from the best negative that exists and  
25 that's the negative that is the first one. What I

1 had proposed to Officer Heisler was that I could get  
2 a photo agency here in the city, they could perhaps  
3 defer them directly to the photo agency, they would  
4 be--probably be there 24 hours or less.

5 THE COURT: I think that sounds like a  
6 good plan, and the legal significance of negatives  
7 has been diminished greatly by the fact of the way  
8 photographs are authenticated simply by indicating  
9 whether they accurately depict the scene as the  
10 witness observed. They don't have to rely upon the  
11 old techniques of establishing the negative and  
12 other such things as the F stop. I don't think  
13 cameras have F stops anymore, so I'll provide that  
14 the sheriff's department can that way maintain the  
15 custody of the negative anyway, even though it's not  
16 a legal issue, they can deliver it and then  
17 Attorney Robinson can pick up her pictures and they  
18 can go back and get their negatives.

19 MS. ROBINSON: If there are other  
20 photographs in the possession of the--of  
21 Dr. Chambliss, I don't know. He made a reference to  
22 having photographs, and I don't think the  
23 photographs I've seen are the--would include those.  
24 There are autopsy photographs, but I think there may  
25 be additional photographs, and I'd ask that the

1 Court--that the state would inquire and get them--  
2 let me know.

3 MR. BISKUPIC: I can do that.

4 MS. ROBINSON: I know that as of a few  
5 days ago, the state has now submitted fingerprints  
6 of my client to the crime lab for some comparisons,  
7 and I don't have any idea what the time line on that  
8 is, but I'd like to have--I'd like to have those the  
9 day they learn about them, I'd like to have that  
10 information.

11 THE COURT: Knowing the crime lab though,  
12 they'll probably be ready the day before trial.

13 MR. BISKUPIC: I'm told they will be ready  
14 this week, so I can promptly turn those over.

15 THE COURT: Maybe they're getting better.

16 MS. ROBINSON: And I would ask that the  
17 state would bring whatever physical evidence,  
18 apparently everything is at the crime lab, that it  
19 be brought back to the department so that I can  
20 examine it.

21 THE COURT: Well, regarding that,  
22 Attorney Biskupic, I know in the past that defense  
23 counsel's been allowed to go down to the crime lab  
24 and look at the items, even, to expedite that.  
25 Would there be any objection to you--I know the DA

1 has the power to allow that. Do you have any  
2 problem with allowing Attorney Robinson to go to the  
3 crime lab, whether it's in Madison or Wausau, to  
4 examine the articles?

5 MR. BISKUPIC: Well, it's my understanding  
6 that with this report being completed this week,  
7 that there would be no reason for them to maintain  
8 the stuff that they do have at the crime lab down  
9 there and that it would be returned also with any  
10 reports this week, so it's my belief that those  
11 items, such as a bat or a pipe and some clothing,  
12 that were sent down there would be back in the  
13 custody of the sheriff by Friday this week.

14 THE COURT: Is that agreeable,  
15 Attorney Robinson?

16 MS. ROBINSON: Well, I would ask the Court  
17 to make an order that in the event that they're not  
18 back here by Friday of this week, that the  
19 prosecutor notify the crime lab that I'm going to go  
20 down there on Monday to see the stuff.

21 THE COURT: Agreeable?

22 MR. BISKUPIC: I don't have a problem with  
23 that.

24 MS. ROBINSON: And then in regard to--

25 THE COURT: I thought you said you just

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had a few things.

MS. ROBINSON: These are things that I don't have from them. I'm sorry. They aren't just a few.

THE COURT: Okay.

MS. ROBINSON: I don't have any certainty as to what physical evidence actually exists.

THE COURT: Isn't there an inventory sheet?

MR. BISKUPIC: I'm pretty sure that the items seized were referenced in the report, including clothing and a baseball bat and a piece of pipe, and then physically there's photographs of different things that the police did take.

THE COURT: When they log in evidence in the--you know, the sheriff's department, do they not fill out an inventory sheet at that time?

MR. BISKUPIC: I believe so.

MS. ROBINSON: Maybe I could get a copy of that inventory sheet, if the Court would--

MR. BISKUPIC: I can get that.

MS. ROBINSON: And I was under the impression that the gun that Chris Dragosh had behind the seat of the truck that night had been confiscated. Is that not correct?

1 THE COURT: Mr. Biskupic doesn't know--

2 MR. BISKUPIC: I don't know.

3 MS. ROBINSON: Well, the police report  
4 makes a reference to the fellow being permitted to  
5 drive down the next day or something and presented  
6 Officer Schuh with a cased, unloaded gun that  
7 purported to be the one that he was reaching for  
8 from behind the seat that night, but now I can't  
9 seem to determine where that gun is.

10 MR. BISKUPIC: I can make an inquiry. I  
11 assume if it's inventoried, it would be reflected on  
12 the same sheet I would be getting on the previous  
13 question.

14 THE COURT: Correct. So try to make a  
15 determination where the gun is.

16 MR. BISKUPIC: Okay.

17 MS. ROBINSON: And then finally, I would  
18 like the state to agree to release to me the x-rays  
19 that are in the possession of the Appleton Medical  
20 Center.

21 MR. BISKUPIC: I can check to see where  
22 those are and who's maintaining those and find out  
23 accessibility.

24 MS. ROBINSON: Perhaps the coroner has  
25 them.



1 THE COURT: I think the hospital might  
2 have a problem with releasing their x-rays.

3 MS. ROBINSON: They release them very  
4 readily in cases, your Honor, because they have  
5 equipment in which to produce copies.

6 THE COURT: So you're asking for a copy?

7 MS. ROBINSON: Wonderful world of personal  
8 injury cases. They release a lot of them.

9 THE COURT: All right. And is that the  
10 end of your short list?

11 MS. ROBINSON: Yes, your Honor.

12 THE COURT: Good. Well, the Court also  
13 wanted to take up the issue of alternate jurors and  
14 sequestration. I think this case had some publicity  
15 in the very beginning, but lately there's been, I  
16 don't think, any media attention to it. Do you  
17 think there is a need to sequester a jury, Counsel?  
18 I would suppose during the trial you'd expect that  
19 the media would be watching this one, I'm not sure.

20 MR. BISKUPIC: I guess the concerns the  
21 state would have would be sometimes on the eve of  
22 trial, sometimes there is a story, and obviously, if  
23 there is some media outlet covering the trial,  
24 there's usually daily reports, and I guess my  
25 preference is that during the course of the trial,

1 the jury be sequestered.

2 THE COURT: Attorney Robinson?

3 MS. ROBINSON: I would urge that we not  
4 determine to sequester them at this time. I think  
5 that there may be, because initially there was some  
6 publicity, it may present some problems in selecting  
7 a jury. I'm optimistic that there won't be or that  
8 it will be a relatively easy task. I think that by  
9 sequestering a jury, particularly what has happened  
10 in the last year in our country, the jury is--  
11 becomes an additional factor that we're really put  
12 upon by the inconvenience of the sequestration, and  
13 I think if you're going to trust jurors in the  
14 initial part of the case, I suspect most of them  
15 will have heard something about this case, and  
16 you're going to instruct them to set that aside and  
17 the instruction that you give them really sets them  
18 apart from the community because their answer to  
19 themselves and to the world forever is they heard  
20 the evidence, and I think instructing them not to  
21 discuss it and not to watch the media and read the  
22 articles, I think that--because I think in this case  
23 you're going to have to some people to set aside  
24 whatever they've read about the case already in  
25 order to get a jury, and if they can do that, then

1 it would seem they could do that for another few  
2 days.

3 THE COURT: Any response?

4 MR. BISKUPIC: Just that on the nature of  
5 the case and circumstances regarding the number of  
6 people involved, that it seems obviously beyond the  
7 control of the attorneys involved and obviously the  
8 Court and what shows up in the media. Lastly,

9 friends of either side would be in a likely position  
10 to share their thoughts with the media and how  
11 that's portrayed and how individual issues in the  
12 trial are portrayed through the media that's  
13 obviously beyond our control and could in the form  
14 of opinions and friends of either side or degrees of  
15 editorializing by reporters could come to the  
16 attention of the jury during a trial that is  
17 anticipated to last a week, and that I think it's  
18 better to immunize the jury or have this be on the  
19 safe side and to sequester them.

20 THE COURT: Do you think all three TV  
21 stations will cover this trial?

22 MR. BISKUPIC: I'm not sure. I can just  
23 say from the Coerper case a couple weeks ago, some  
24 of the stations were there some days, some were  
25 there other days, and there was significant coverage

1 in the Appleton paper that made reference obviously  
2 to backgrounds of inmate witnesses and some things  
3 that were even beyond the testimony presented, that  
4 somebody or their family members were exposed to  
5 those and it was brought to their attention, which  
6 is always a risk when they're not sequestered. I  
7 think there's some concern about the overall  
8 fairness of the jury and the process.

9 THE COURT: Ms. Robinson?

10 MS. ROBINSON: Well, in regard to the  
11 friends and relatives, friends and relatives can sit  
12 in the courtroom when the jury sees that as well, so  
13 we really have to trust a jury to really rise above  
14 how we all generally are in terms of our judgments  
15 and gossiping and to hear this case, and you  
16 instruct them until they're blue in the face, and I  
17 don't think them--locking them up for the evening in  
18 a motel handles those problems. I think it does  
19 make them unduly uncomfortable, and if they see TV  
20 cameras here or whatever, in the courtroom, and  
21 they're not hearing the media, they still get the  
22 impression that they're involved in something really  
23 big, it still creates that picture.

24 I think that as long as the attorneys  
25 understand that there are some very strict rules

1 about talking to the media and what you say to the  
2 media, if you risk talking to them at all while the  
3 case is pending, I certainly know that people who  
4 are close to Greg Korts will not talk to the media,  
5 and I would assume that Mr. Biskupic would have some  
6 control over whether or not officers or others talk  
7 to the media, and mostly that's what the case is  
8 going to--I'm reluctant to have--I'm not urging that  
9 we sequester the jury.

10 THE COURT: Well, the Court has some  
11 reluctance to sequester as well, and I know one  
12 thing, I'd feel pretty silly if I sequestered the  
13 jurors and we didn't have the media here covering  
14 the case, so what I think I'd like my judicial  
15 assistant to do is call at least the TV stations.  
16 That's probably the wrong thing to do because then  
17 they'll say oh, yeah, we'll cover it, but just to  
18 make sure, and then I can balance these  
19 considerations. I don't think jurors should be  
20 sequestered needlessly, and therefore, I'll look  
21 closely at both sides before making that  
22 determination, but I do know one thing, I'd feel  
23 real foolish if the TV cameras didn't show up after  
24 sequestering the jurors.

25 MS. ROBINSON: Is it an insurmountable

1 problem to prepare sort of a--sort of plan B for  
2 sequestering if necessary? That is, if we  
3 determine--

4 THE COURT: What would happen is that I  
5 think it would be very difficult for the county to  
6 reserve rooms.

7 MS. ROBINSON: I guess that's my question.  
8 Is it difficult?

9 THE COURT: Problem is--

10 (Clerk talks to judge off the record.)

11 THE COURT: I guess their sending out  
12 summons is affected by sequestration because the  
13 numbers go up if we're going to sequester a jury.

14 MR. BISKUPIC: I can inform the Court that  
15 there was at least one TV station at the preliminary  
16 hearing, and I occasionally do get inquiries as to  
17 dates and status of this case, so it's not something  
18 that's being ignored.

19 THE COURT: The probability is there that  
20 they'll be present. I'll decide by Wednesday on  
21 that.

22 MS. ROBINSON: Next Wednesday?

23 THE COURT: This Wednesday. I would  
24 decide tomorrow, but I'm going to be in  
25 Waupaca County all day, so--

1 MS. ROBINSON: Could the clerk tell us,  
2 your Honor, when the jury summons will go out to  
3 this jury? That is, when the list will be available  
4 to us.

5 THE COURT: I think as soon as I decide on  
6 sequestration, make that determination; is that  
7 correct?

8 THE CLERK: It will take maybe a day or  
9 two to pull--

10 THE COURT: After I decide this  
11 sequestration, it will take a few days, so it could  
12 be--you might know already by Friday.

13 MS. ROBINSON: May I ask that sometimes it  
14 seems they go out with the name of a case on them  
15 and sometimes they don't.

16 THE COURT: The only thing they're  
17 notified is whether it's sequestered or not. I  
18 wasn't aware that they ever had the name.

19 MS. ROBINSON: I've had that in several  
20 counties, and it really invites the juror  
21 potentially to go out and start researching.

22 THE COURT: Yeah, I think that's a very  
23 bad idea.

24 At any rate, it's also the Court's intent to  
25 have two alternate jurors. I understand that this

1 trial is likely to be four to five days; is that  
2 correct?

3 MR. BISKUPIC: Yes.

4 THE COURT: Any comment on that?

5 MR. BISKUPIC: That's fine with the state.

6 MS. ROBINSON: No comment other than that  
7 I would ask that the alternates not know who they  
8 are.

9 THE COURT: That's the procedure. We get  
10 to the question of back on, I believe it's number 4,  
11 I keep on coming back to the fact that although at  
12 this time it doesn't appear that Mr. Biskupic would  
13 be a witness, that the potential seems to be there,  
14 and if a potential is there, then we have a  
15 potential for a mistrial and if Mr. Biskupic would  
16 be called as a witness, so--I don't think the Court  
17 should venture into this area involving an attorney  
18 without careful consideration. With great  
19 reluctance, I think that in this particular case,  
20 the Court would find that that potential exists in  
21 this case, and I'm not sure exactly how great it is,  
22 and I don't know that Attorney Robinson knows that.

23 MS. ROBINSON: Could I talk to him for a  
24 minute?

25 (Discussion off the record between



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counsel.)

MR. BISKUPIC: The only thing I would say to the Court on this remaining issue is that if an issue comes up regarding my participation in a meeting, which apparently it may, that I think the state would be in the position to want me to testify as to that, regardless of whether the defense would or wouldn't, and that the only problem I would be concerned about in seeking an outside prosecutor is the timing and preparation.

Obviously, this has been pending for a period of time, and we've had a firm trial date, and as far as the state is aware, all our subpoenas are properly served and that the people are available, and for me to start inquiring with various DAs around the area or state, that the first question I would probably get back is when do they have to be ready, and we're four weeks, I think, from today, is the selection of jury.

THE COURT: So you don't know if you can find--

MR. BISKUPIC: I can try, but I don't know if the Court wants to create a situation where we have a conference call sometime in the next couple days to let you know where I'm at on that.

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MS. ROBINSON: There seems some confusion, maybe, in what I'm hearing from Mr. Biskupic. I think he can assume, unless I am blocked by the Court, that the jury will know that there was a meeting, that all of the investigators attended it with the prosecutor to discuss the issue of throwing a report away. Now, beyond that, I don't know if there will be an issue, but that, I think, at bare minimum, unless this Court rules that I can't elicit that, and if that weighs in his making a decision, that is what I know.

THE COURT: Well, that being the issue, the potential there certainly exists that Mr. Biskupic would want to maybe testify. Not only that, it becomes, I think, just a practical problem for an attorney who starts to become subject to some of the issues of trial, whether or not he decides to take the witness stand. He might well, but it would become somewhat difficult, and as a practical matter, that's not the standard here, of course. The issue is is that the Court is concerned about having a mistrial. If Mr. Biskupic felt that he just had to take the witness stand, despite being an attorney in the case, there wouldn't be much recourse.

1 MS. ROBINSON: Can someone else in his  
2 office try it?

3 THE COURT: I don't think so. I think  
4 there are Supreme Court rules about that, especially  
5 if the boss is going to testify and you would have  
6 someone else in the office questioning the boss, so  
7 to speak. I think that that would create conflict  
8 of interest problems and potential rules violations  
9 under the Supreme Court rules, so what the Court  
10 will do at this time is reluctantly order that  
11 Mr. Biskupic's office be taken off the case because  
12 of the potential that he could be called as a  
13 witness and ask Mr. Biskupic to promptly attempt to  
14 locate a special prosecutor for this case and notify  
15 the Court and Attorney Robinson as promptly as you  
16 can once you locate one.

17 That could be done-- Do you have any objection  
18 to him calling our office and letting us know who it  
19 is and then call you--

20 MS. ROBINSON: None whatsoever, your  
21 Honor. I can remember when we could call whomever  
22 we wanted and we knew what could and couldn't be  
23 said in ex parte conversations before locked doors.

24 THE COURT: Okay.

25 MR. BISKUPIC: I guess the only other

1 things I would raise, based on the Court's ruling,  
2 is if my role has been interjected into the case  
3 where I would be a potential witness, I would almost  
4 believe that on the flip side, the same would call--  
5 probably be--have been created by a change in  
6 Mr. Geiger's statement and by Ms. Robinson's  
7 intervening contact with him. I don't see why the  
8 rules would apply differently to either side.

9 I mean, obviously this defendant's entitled to  
10 appropriate representation, but if an issue has been  
11 created where defense counsel would also potentially  
12 be a witness on an important change in a statement  
13 of an eyewitness, I think that the same  
14 consideration should be made on that side.

15 MS. ROBINSON: But I don't think I'll be a  
16 witness because even if the state would try to make  
17 an issue that I consider to be an elaboration of  
18 something that they don't even believe to be true,  
19 that there were at least a couple of other adult  
20 people there, and I simply would call all of them  
21 and ask them if they recall whatever-- I just don't  
22 view it as this. The issue I raised today was  
23 simply I didn't want the state to come tying my hand  
24 by that, people you've talked--and I've done it this  
25 way for a long time, and I understand that certain

1 handicapped part of it, but at the same time,  
2 without them raising it because we don't have a  
3 statement from this kid. I don't know what this kid  
4 says today. Nobody has a written statement from  
5 him, and what we have is a police report that says  
6 the boy was confused and he said such and such and a  
7 date. That's all we know.

8 THE COURT: The problem with that is any  
9 time an attorney would go off and question somebody,  
10 subsequently they change their statement, you'd have  
11 defense attorneys being fearful of the fact of ever  
12 going out and questioning someone. The difference  
13 from Attorney Robinson's case from your scenario is  
14 that it wasn't changed testimony, but it was a  
15 meeting that was held in which the police report was  
16 changed, thereby attributing difference of testimony  
17 to different witnesses.

18 It calls into question the credibility of the  
19 police officer who took the statement primarily, and  
20 to some extent as to how that all--the explanation  
21 as to how this was changed is not changing  
22 testimony, but it's changed the police report,  
23 becomes relevant in your involvement in that  
24 decision, has some relevance that you were there, so  
25 it's quite a different factual situation from

1 Robinson's--Attorney Robinson's position because I  
2 don't think I could prevent and would not want to  
3 set a precedent of preventing defense attorneys from  
4 going out and speaking to people, because then  
5 they'd be afraid that if they did that, testimony  
6 could change and they would be thrown off the case.  
7 It could be used for not proper purposes as well,  
8 so--

9 MR. BISKUPIC: What if the scenario arises  
10 where Dean Geiger, on the stand, says yes, that was  
11 the source of my confusion, the meeting with defense  
12 counsel?

13 THE COURT: Well, I guess-- I don't know.  
14 We're talking about speculation here and that's just  
15 speculation, so I don't know that I need to pass on  
16 that. Your scenario and what I've seen from  
17 Attorney Robinson's question are not speculation, so  
18 I'm not going to speculate on a situation that  
19 doesn't exist before the Court.

20 MR. BISKUPIC: Just one last thing. On my  
21 inquiries for outside prosecutors, what's the  
22 Court's preference if I do run into that issue of  
23 availability within four weeks?

24 THE COURT: We'll have to have a telephone  
25 conference. If you find a prosecutor, but let's say

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if you can't--the prosecutor that you want, you've checked around and nobody's available to take it, but you do get one that you're satisfied with, then we'll have to have a telephone conference with defense counsel and discuss the schedule.

This matter's adjourned.

(Proceedings concluded at 3:08 p.m.)