

Cross-examination of the DEFENSE EXPERT:

- I. General principles for cross examining defense experts.
 - A. A trial attorney should almost never conduct cross-examination of an expert (or any other witness for that matter) for the purpose of obtaining information. From the jury's perspective, which has no prior knowledge of the case, it may appear that the cross-examiner is examining an expert witness for the purpose of eliciting information. However, from the perspective of the cross-examiner, the expert witness testimony must be kept within the scope of the examiner's expectations. A prosecutor's most important asset may be his or her credibility. Jurors, as they should, take a criminal defendant's right to the presumption of innocence very seriously. From the first moment jurors see the state's attorney, the defendant, and defense counsel, they begin to assess credibility. Prosecutors take on the primary responsibility for establishing the credibility of the state's case, its witnesses, and ultimately its closing argument. This is particularly true when cross-examining a defense expert.
 - B. Prosecutors speak directly to the jury during voir dire, opening statement, and closing argument. However, we can also speak indirectly to the jury during cross-examination. During the cross-examination of any witness, but particularly during the cross-examination of a defense expert, the prosecutor must maintain absolute credibility. A prosecutor must never fail in his promise to the jury that the facts of the case are as he represents them to be. If a defense expert witness testifies in an unexpected manner on cross-examination, a well prepared attorney can often deal effectively with such answers by simply knowing the facts of the case better than the expert does and adjusting his or her cross-examination accordingly. If the cross-examiner becomes an unwitting participant in the presentation of unexpected testimony by inviting a defense expert to give unintended answers through open-ended or imprecise questions, the results can be disastrous. This demonstrates to the jury a lack of knowledge of the case, a lack of control, and a resulting loss of credibility.
 - C. Good reasons for cross-examination of a defense expert start with the flip side of an expert's point. Effective cross-examination can create an opportunity for the prosecutor to present or reiterate key points of evidence through the defense expert. Effective cross-examination of the defense expert can often bolster your theory of the case and be even more convincing than direct testimony. It can also demonstrate, or at least imply, that the expert is withholding information, providing incomplete information, is biased, or is expressing opinions that are based on incomplete or inaccurate facts or data.

Also, a precise and rhythmic cross of the defense expert (often difficult to do) can be an effective way of reiterating the story the prosecutor wants the jury to hear essentially giving the prosecutor an additional “closing argument” in the middle of the defense case. You don’t have to leave the defense expert in a “bloody heap” to gain concessions that are consistent with your theory of the case all of which can be brought to the jury’s attention at closing argument.

II. Key points for effective cross-examination of experts.

A. Have a Plan.

- a. What is your theory of the case?
- b. Cross-examination of each witness should be part of an integrated trial plan. A good cross in a vacuum is useless.
- c. Create a specific plan of attack but be flexible in the event you must detour. It is useful to have a “backup” plan for the exceptionally difficult witness.
- d. Research, read, study.
 1. Know all you can about the subject matter.
 2. Know all you can about the expert.
 3. Know the underlying facts, data, history upon which the expert relied better than he or she does.
 4. Review the expert’s publications.
 5. Review the expert’s prior testimony if possible.
 6. Consult with your own expert. Often your expert will be able to assist you in preparing your cross and pointing out the frailties of the defense expert’s opinions.
 7. Have your expert available in the courtroom when defense expert is testifying.
- e. Outline your plan but craft your questions precisely.
 1. Write them down, but again be flexible enough to adjust. Writing your questions out before hand and fine tuning them in advance will allow you to conduct your cross more freely. When the cross starts, you will be confident in your examination and it will appear more credible and have greater impact on the jury.
 2. Cross-examination of experts is not a time for “steam of consciousness” examination.
- f. Start strong and end strong (SSES)

B. How do I get good at it? (Bob Henderson)

- a. Remember cross-examination of an expert is a perilous time... for you!
- b. Be careful. Stick to the “safe” stuff. “Paint the corners.”
 1. “I will have no man in my boat who is not afraid of a whale.” – Starbuck (Ahab’s first mate – Herman Melville’s Moby Dick)

2. You know the answer and if you don't get it, you are prepared with seamless, black and white impeachment. (Do not quibble over shades of gray.)
 3. You don't care what the answer is.
 4. Desired answers are undeniable, or NOT believable if denied.
- c. Score quickly and be brief (Abraham Lincoln) (SSES)
 - d. Don't beat yourself. Make them beat you.
 - e. Don't panic if you get behind.
 - f. "You can observe a lot by watching." – (Yogi Berra)
 - g. Study is good, but you have to play the game.
 - h. Relax. Try to have some fun. There are lighter moments even in serious cases. (Example)
 - i. "Never mistake activity for accomplishment." (John Wooden)
 - j. Be courteous and respectful, even kind (if you can).
 - k. Is there a path of least resistance?
 - l. Slam Dunk the last shot.
- C. Style.
- a. Find yourself. You cannot be someone else.
 - b. If possible, don't tie yourself to the lectern.
 1. Demonstrative aids.
 2. White board.
 3. Exhibits (later used in closing arguments)
 4. Slides, photos, charts, graphs, etc.
 - c. Silence is golden.
 1. Don't be afraid of silence in the courtroom.
 2. Let the good answers sink in.
 3. Repeat the good stuff (if possible).

Example #1 Questioning the accuracy/reliability of expert's opinion with facts in the record.

- Q.** What they are trying to do with giving him part assessment and part a taste of prison is get his attention and find out what he needs psychologically, correct?
- A.** Or, correctionally.
- Q.** Correctionally, better term
- Q.** And so he went and performed that 90 day evaluation, right?
- A.** Yes sir.
- Q.** And have you seen Dr. Carol Backstetter's report on that eval?
- A.** Mmm, I probably have, I don't recall of the top of my head. Let me look through my notes.
- Q.** I'm going to show you, let me give you a copy and make it easy for you.

Q. So this was the report that Carol Backstetter did in January of 1978, after he was sent down on the diagnostic, correct?

A. Yes sir.

Q. I'll give you a moment to look at that full report if you would like.

A. Yes sir, just a moment.

Q. Alright I want to refer you down to what is the third paragraph and feel free to look at anything else you want to expose to the jury. Carol Backstetter, a clinical psychologist says,
"personality assessment indicates a standard and rather entrenched psychopathic orientation, ego strength is high, denial is high, and there appears to be little motivation for internal change at this point. Mr. Lovell feels he has been unjustly treated by the legal system and he is distressed at being locked up and being unable to race this season."
Presumably motorcycle racing, right?

A. Motocross.

Q. Yeah, motocross.

"But he did not verbalize any dissatisfaction with himself or his behaviors we are aware of material in the history suggesting drug and/or alcohol involvement, but Mr. Lovell is not seen as a primary substance abuse case. Testing indicates considerable latent hostility and this young man could act out in aggressive ways under stress."
Right?

A. Yes sir, I would only clarify, ah, Ms. Backstetter identified as a clinical psychologist, and she identifies her degree as a master's level. She would only be a clinical psychologist in the correctional system. That would not allow her to be a licensed clinical psychologist in the community.

Q. Sure.

A. With that clarification, yes sir, you've described the third paragraph accurately.

Q. And with that clarification, she was very accurate in predicting his future wasn't she doctor?

A. He could act out in aggressive ways under stress, yes sir.

Q. That's what he's done. He's acted out in aggressive ways.

A. Yes sir.

Q. After this evaluation was performed.

A. Yes sir, tragically aggressive ways.

Q. Tragically, aggressive ways. Or horrendously aggressive ways, depending on your viewpoint.

A. I would accept both of those.

4. Emphasis often occurs through SILENCE.

Example #2 Record rebuts implication that Criminal Justice System failed the defendant.

- It failed the crime victims.

Q. Do you disagree with the fact, as I'm representing it, that ultimately he said "get me out of this program," admitted the probation violations, and went to prison?

A. No sir, no sir. I just don't recall. I'm not a good source to affirm that's exactly what happened. I don't dispute it, I just can't speak to yes that's what occurred.

Q. In fact, the record is though; you know he went to prison in July of 1979, correct?

A. That's correct.

Q. And that, the only thing pending against him was the aggravated robbery and the two felony thefts from Davis County, that he had previously been granted probation for, right?

A. Yes sir.

Q. He hadn't committed a new crime at that point?

A. Not to my knowledge

Q. Okay, and so he did...

A. Wait, not one that he had been convicted of. I don't know what else was going on.

Q. Fair enough and I appreciate that answer.

Q. Okay, so you had a slide up here that indicated that he went to prison and did four years. In actuality he was released from prison and paroled on January 19th, 1982. Do you recall that?

A. Yes sir, I think I said that he went to a halfway house at the end of that period of time.

Q. Okay, so your, he was paroled in '82, right?

A. Yes sir, at age 24 he was paroled. Uh, the time he would have been in prison would have begun in mid '79.

Q. July '79

A. So that would be at the point he would have been in prison...

Q. Two and a half years?

A. Two and a half years and then maybe to a halfway house.

Q. Okay, he didn't do the whole year and a half though in the halfway house right?

A. No sir.

Q. In fact, he terminated parole altogether in August of 1983 right?

A. That's my recollection

Q. Now he was sentenced to prison in '79, July of '79 for the aggravated robbery, which was a first degree felony, to five years to life in prison, right?

A. Yes sir.

Q. Isn't it a shame that he didn't do more time in prison and Joyce Yost might be alive?

A. Well yes sir, if he had continued on in prison then she would not have been raped and killed.

III. Basic methods of cross-examining experts.

A. Four basic approaches (not mutually exclusive):

1. Demonstrate the expert is unqualified.
2. Question the facts, data, or assumptions upon which the expert relies.
3. Show that the conclusions reached are incorrect, or that other equally valid, but contrary conclusions follow from the same facts or assumptions.
4. Undermine the witness' general credibility.

B. Questioning the expert's qualifications.

- a. While an expert may be "technically" qualified you may still undermine the force of his/her claim to be an expert.
- b. Consider pre-trial motions in limine to "corral" the expert. Don't let them run wild.
- c. Consider voir dire during trial to question the expert's competency or relevancy of "unexpected" opinions. This can be an effective way to keep out certain evidence and keep the expert off balance.

C. Questioning the factual bases or assumptions upon which the expert relies.

- a. This is a frequent and, if successful, effective method of undermining an expert's credibility.
 - i. Success depends upon careful preparation.
- b. URE 705- an expert may state an opinion without first testifying to the underlying facts or data. But the expert may be required to disclose such facts/data on cross.
- c. Will witness concede that underlying or assumed facts upon which he/she relies are wrong thus the conclusions drawn therefrom are similarly wrong, at least to some degree?
- d. It is also useful—provided you know the answer—to test the witness on the consequences of employing different factual assumptions. (ie. hypothetical questions laden with actual facts that you have either already proven or can prove on rebuttal and which you are confident the jury will find)
- e. Alternatively, it is sometimes possible to undermine the expert's opinions by questioning the methods employed or by suggesting that certain relevant factors were not considered.

Example #3 Statistical probabilities of reoffending vs. individualized risk assessment.

Q. Is psychopathy an aggravating factor potentially?

A. I can answer it, but not yes or no.

Q. Well, let me ask it this way; is it important in assessing risk to try to individualize a risk assessment?

A. Yes sir.

Q. And some of the tools that are available to professionals such as you, with regard to testing, there are psychological instruments that are used to determine a defendant's level of risk in the community correct?

A. That's a broad statement but that's correct.

Q. For instance, let's just talk about a few of them. There is one that is commonly used in corrections called a Level of Services Inventory, right.

A. Yes sir.

Q. You're very familiar with that?

A. Yes sir.

Q. There are others that psychologists depending on whom you consult use, like for instance, the hare psychopathy checklist.

A. Revised.

Q. Revised,

A. Yes sir, PCLR.

Q. PCLR, PCL dash R, right.

A. Yes sir.

Q. The violence risk appraisal guide, the VRAG.

A. Yes sir.

Q. There is also one called the SORAG, the sexual offender's risk appraisal guide, correct?

A. That's correct.

Q. You've done, you personally have done none of those in your assessing the defendant's potential risk on parole, correct?

A. That's correct.

Q. Now, is it fair to say doctor, that when you act as a defense witness, as you are doing today, that you believe there are limitations with personality testing and PCLR's and VRAG's and SORAG's and all those kinds of things correct?

A. No sir, it is not as a defense witness. For the purposes of the risk assessments that I am looking at, which are violence risk assessment for prison or a parole recidivism risk in older age after age 64 following 37 years in prison. I don't regard any of those instruments as illuminating those two risk assessment contexts. Now there are risk assessment contexts that I think those instruments would be relevant in. I simply don't think that they are relevant or informative of the two contexts that I am looking at.

Q. Well the context that you are looking at are statistics right?

A. Well no, the context is in prison from now through the remainder of a life term or on older age parole, those are the two contexts. The information that is most informative or illuminative of the risk in those contexts, if it's available, is group statistical data.

Q. Okay and I don't dispute the fact with regard to risk in prison but what I am talking about is the "Average Joe" on the street. What is relevant to the community? Don't they want to know what the SORAG might say, what the VRAG might say, what the Psychopathy Checklist Revised might say? In other words, this person is going to be out on the street, the community wants to know what he is now, agreed?

A. Well no sir, what is most relevant for whatever the audience is, is what what data or what measures will accurately assess the contexts that what we're talking about, and so people might find the name of that instrument to be interesting the sex offender risk appraisal guide, but if in fact it has not been standardized or doesn't address the context that we're talking about. Then the fact that somebody might be interested in it is irrelevant it's maybe even a source of error for the ultimate determination that's made. And so the methodology that I identified here is one that I think the best research supports. I recognize there are instruments that might be used for other purposes in other predictive contexts. But for the context that I am focused on I did not think those would be helpful.

Q. Well you chose not to do them right?

A. Because of that scientific perspective.

Q. But another clinical psychologist might?

A. That's possible.

D. Questioning the conclusions reached.

- a. Assuming the witness is well qualified and the data or facts relied upon are accurate, the opinions reached either:
 - i. Do not necessarily follow from the facts relied on, or
 - ii. Other, equally valid, conclusions can be derived from the same data.
- b. Unless the expert has made an obvious mistake in his/her analysis you are un-likely to get an admission of error. It is much more likely that there are other recognized experts who disagree with his conclusions or that other, contrary opinions are also consistent with the facts relied upon by the expert.
 - i. If your expert is a more convincing witness, that may be all the cross you need.
- c. Sometimes an overzealous expert will go too far and say something clearly unsupportable or illogical. In that case, you may want to concentrate on exposing the obvious error. If the witness is unreliable on one subject, a jury may well disregard everything else, even if not

specifically shown to be erroneous. Find the most preposterous opinions or conclusions and exploit them.

Example #4 Outrageous/Preposterous opinion.

- A. Um, well no sir, let me modify this. There are 28 percent of these offenders who are violent offenders, within that group .09 commit, percent, commit a new homicide. So it's not .09 percent of the entire four hundred and four thousand it is
- Q. Okay, fair enough.
- A. .09 of the 28.6 percent. So 28.6 percent of four hundred and four thousand is approximately um, ah, ah,
- Q. I'm gonna figure that out, 115,726.
- A. Yes sir, so it's .09 of that hundred thousand so it's gonna put you closer to
- Q. Ten thousand four hundred...?
- A. No sir, more like a thousand, so more like not thirty, if the entire sample of four hundred and four thousand if .9 percent of those had committed a new homicide then you would have about thirty six hundred new homicides. In this instance, the portion of the sample that you're talking about is closer to a hundred thousand and change and so now we've got .9 percent of those which brings us a much lower number, it's more like, it's still, it's still is a lot, it's many individuals that have been killed but it's more like a thousand than the four thousand four hundred where you started off.
- Q. Okay, so, but a thousand people have been murdered.
- A. Yes sir.
- Q. Okay and twice that have been raped or sexually assaulted.
- A. Approximately, yes sir.

- E. Questioning the expert's credibility generally.
- a. Has the witness made contrary statements previously?
 - i. In his/her writings or publications.
 - ii. In other cases.(prior testimony or affidavits)
 - iii. In a written report or other communication.
 - b. Is the witness biased?
 - i. By virtue of his/her unwavering practice/opinions.
 - a.) Has the witness ever testified differently?
 - b.) Has the witness ever strayed from his presentation?
 - c.) Is there evidence that the defense expert's presentation is "canned" or rehearsed?

Example Expert's slides copy written 2011.

- ii. By virtue of the limits of his/her experience. (always a defense expert; always an advocate for a particular position or outcome)
- iii. By virtue of the fact that his/her livelihood is based on providing opinions designed to accomplish a particular result.
 - 1. While the mere fact that an expert is being paid proves nothing to most jurors, (they expect an expert to be compensated) in the extreme cases an expert's fees can appear unconscionable.

Example #5

Only a "Capitol Litigation expert" / Livelihood depends on ONE opinion.

- Q.** Couple of other things and we will conclude, now you talked earlier in your testimony I think Mr. Bowhuis asked you right out of the gates whether you had a bias for or against the death penalty.
- A.** That's correct.
- Q.** And your answer was no you didn't.
- A.** That's correct.
- Q.** But the truth of the matter is you do not or have not testified on behalf of the state in any capital murder proceeding in your career is that accurate?
- A.** I never testify on anyone's behalf and my testimony has never been requested by the state at a capital proceedings.
- Q.** Well, you have never been retained by the state in a capital proceeding, correct?
- A.** That's correct.
- Q.** And you're paid to offer your testimony here today, correct?
- A.** No sir, I am paid for my time that I spend in the evaluation and ultimately for my appearance here, but I can be called or not. I charge for my time not for my testimony.
- Q.** How much do you charge for your time?
- A.** In this case, three hundred and sixty dollars per hour.
- Q.** Three hundred sixty dollars per hour?
- A.** Yes sir.
- Q.** Do you know how many hours do you have in this case?
- A.** As of leaving court yesterday my office advises me that I had 66.7 hours in this case.
- Q.** 66.7 hours in this case, and then you have been on the witness stand since eight thirty this morning
- A.** Yes sir.
- Q.** You were here at eight o'clock with the rest of us?
- A.** Yes sir and was up earlier this morning reviewing records.
- Q.** Okay, and you charge for you time whether you are testifying or not, if you are working on the case right?
- A.** For whatever, yes sir, whether I am testifying or reviewing records or doing interviews... I, the meter stops when I get back to my hotel. It's not like, I mean I am still here, but I am not charging overnight, it's only when I'm actively involved in professional functions.
- Q.** And did you review anything last night in preparation for your testimony today?
- A.** Um, I only reviewed my slides last night. This morning I reviewed records.
- Q.** Do you know how many total hours you have into the case since you started your testimony yesterday or maybe since, I don't know if you reviewed things Monday night or not, but do you know how many total hours you have since coming to Ogden to testify?

- A. As of midnight last night it was 66.7. This morning I began reviewing materials at about 5:30, so were about, you know I could easily have 9 hours today before I get back to the hotel so that would put us at about 75 hours.
- Q. Okay, fair enough.
- A. And that's associated with this case now, back in 2001, I think I spent 40 or 50 hours in the case at that time. I can't tell you with precision about that.
- Q. That's fair enough, 40 or 50 hours.
- A. And my rate was lower then.
- Q. What was your rate back then?
- A. You know I think I was at \$250 an hour, but I didn't pull the billing records to verify that.
- Q. It's also fair to say doctor; you don't see patients at this point in your practice, is that correct.
- A. That's correct, my practice is entirely forensic or court related.
- Q. When you say entirely forensic, are you primarily engaged in death penalty litigation?
- A. That's just over half, I'm primarily involved in criminal cases. Last calculation I did I think about fifty-five percent of my practice was capital sentencing at trial.
- Q. And forty-five in other criminal areas?
- A. Yes sir, it could be in post-conviction or federal habeas, it could be regarding mental retardation determinations or it could be regarding other criminal matters, depending on the year I think it's anywhere from 15-30% may be in cases that have nothing to do with capital sentencing.
- Q. How much, I'm sorry?
- A. 15-30% I think depending on the year, that's an approximation
- Q. So by deduction then, 70-85% involves some form of capital litigation.
- A. Yes sir, again depending on the year.
- Q. That's all.

F. Some general observations in conclusion.

- a. Pretrial preparations.
 - i. UCA 77-17-13 notice/reports/availability to consult with counsel. Consider pre-trial orders modifying notice requirements. Thirty days before trial is often inadequate.
 - ii. Motions in-limine.
 - a. Foundation/qualifications.
 - b. Relevancy.
 - c. Proper testimony?
 - d. Exclusion of witness?
 - iii. Consulting experts.
 - a. Preparation.
 - b. Flaws in opposing expert's analysis.
 - c. Trial assistance.
 - d. Keeps opposing experts honest.

- b. Should I or shouldn't I?
 - i. Don't be afraid not to cross-examine.
- c. Voir Dire during trial.
 - i. Experts exhibits.
 - ii. Hearsay upon hearsay upon hearsay.
 - 1. Juries seem to care about where "facts, data and assumptions" come from.
 - iii. Relevance.
 - iv. Condition the jury to question the expert's credibility.

****Attachment: See Voir Dire transcript of James Gaskill.****

1 was on the day of the shooting.

2 **THE COURT:** Okay. All right. Well I guess the only
3 way to resolve it is to hear from Professor Gaskill. So I
4 guess you will just have to take your chances with him on the
5 stand. And you can call him as a witness and if he doesn't lay
6 the foundation than the animation doesn't come in. If he
7 doesn't lay a foundation for the photographs then they don't
8 come in. Okay?

9 **MR. RICHARDS:** Okay.

10 **THE COURT:** All right. He is going to be your next
11 witness?

12 **MR. RICHARDS:** He will be.

13 **THE COURT:** Let's bring in the jury then.

14 **(The following proceedings were held in open court after the**
15 **jury entered the courtroom.)**

16 **THE COURT:** Let the record reflect that the jury is
17 now present.

18 Mr. Richards, do you want to call your next witness?

19 **MR. RICHARDS:** Professor James Gaskill.

20 **THE COURT:** Thank you.

21 * * *

22 **PROFESSOR JAMES GASKILL,**

23 **Called by the Defense, having been duly**
24 **sworn, is examined and testifies as follows:**

25 * * *

DIRECT EXAMINATION

BY MR. RICHARDS:

Q. State your name, please.

A. My name is James Gaskill.

Q. And Professor Gaskill, would you tell us what you do?

A. Currently, I'm mostly retired. I do some consulting work. I still teach some classes at Weber State University in the Department of Criminal Justice.

Q. And your focus as far as profession through all the years has been what?

A. I'm a forensic scientist.

Q. And you have heard the term "CSI"?

A. Yes, I have.

Q. What is that?

A. Stands for crime scene investigator, crime scene investigations. It's a term used to describe the people or the process of collecting and preserving evidence and analyzing it to reconstruct what occurred during that incident.

Q. What I would like to do is ask you what your certificates and training have been as far as this profession as a forensic scientist.

A. I have a Bachelor's and a Master's Degree from the University of Utah in biology. Subsequent to that I went to work for the State Medical Examiner doing autopsies and investigations of dead bodies. And I worked there until 1970.

1 I went to Santa Clara County and worked as a research
2 associate in Santa Clara County Crime Lab. And subsequent to
3 that I came to Weber State, was hired to teach and to start and
4 operate a crime laboratory. At that time there were no crime
5 laboratories that did -- excuse me -- that did sophisticated
6 kinds of analysis. There were fingerprint people and people
7 who collected evidence, of course, but as far as the State
8 Crime Lab there wasn't a functioning laboratory.

9 And so I started a laboratory at Weber State as part
10 of my faculty responsibilities. So I ran the crime laboratory.
11 I examined evidence. I went to crime scenes. I testified.
12 And at the same time I taught forensic science and have
13 continued to teach since then.

14 In 1994 we divested Weber State University of the
15 crime laboratory. It became Department of Public Safety Crime
16 Lab. So I then was faculty who didn't do the crime laboratory,
17 but I still continued to do consulting, officers would call me
18 with questions, attorneys would call me. And so I have
19 continued to be a practicing scientist.

20 I have been a member of the American Academy of
21 Forensic Science and have attended many, many seminars
22 workshops and meetings with that organization. Also with the
23 California Association of Criminalists, the NorthWest
24 Association of Forensic Scientists, and the Utah Chapter of the
25 International Association for Identification.

1 I have been to FBI laboratory training in Quantico,
2 Virgina. I have been to training in places all over the United
3 States in the last 40 years. I have taught forensic science at
4 Weber State University, at Brigham Young University, at Wyoming
5 Community College. I have been certified as an instructor from
6 the Wyoming Police Academy Organization and the Utah Peace
7 Officer Standards and Training. So I have taught at those
8 police academies.

9 Q. Let me ask a few other questions. You heard some of
10 the prosecution's crime scene investigators testify over the
11 last couple of days; is that right?

12 A. Yes.

13 Q. And they mention knowing you. Did you know them?

14 A. Sure. They are my students.

15 Q. So you taught them?

16 A. Yes.

17 Q. All right. As far as testifying at trials, have you
18 ever been qualified as an expert witness to testify in criminal
19 trials?

20 A. Yes.

21 Q. How many times?

22 A. 2000 to 2500 times.

23 Q. By the defense or by the prosecution?

24 A. Both.

25 Q. Okay. How much of each or do you know?

1 A. Well, when I was working for the State Crime Lab --
2 when I was operating the State Crime Laboratory I would say
3 that the bulk of the cases that I testified in were testimony
4 for the prosecution.

5 Q. But you still did some for defense during that time?

6 A. Yes.

7 Q. Okay.

8 A. But since then it's probably -- maybe a few more
9 prosecution than defense, but certainly a higher percentage of
10 defense since I retired from the crime lab.

11 Q. Okay. Have you testified in murder trials for the
12 prosecution before?

13 A. Yes, I have.

14 Q. How many?

15 A. I don't know a number.

16 Q. Been more than one or two?

17 A. Certainly.

18 Q. Okay. And have you testified recently for the
19 prosecution for the State of Utah as an expert witness within
20 the last 10 years?

21 A. Oh, certainly within the last 10 years.

22 Q. Within the last five?

23 A. I'm trying to think about the last time I testified
24 for the prosecution in Utah. I don't remember the last time it
25 was, but it's been certainly the last few years. The last time

1 I testified for the prosecution was in Idaho.

2 Q. And I want to talk specifically about areas of your
3 expertise in the forensic science business.

4 A. Okay.

5 Q. I guess, that was a lousy question, wasn't it?

6 A. Couldn't tell if it was a question.

7 Q. Could you tell us what your areas of expertise are?

8 A. I have been qualified as an expert in many areas of
9 forensic science. I've testified as a crime scene
10 reconstruction expert, blood expert, a fingerprint expert, a
11 firearms expert, hairs, glass, paint, soil, shoe prints.

12 Q. Okay. Specifically though glass --

13 A. Glass.

14 Q. -- and firearms?

15 A. Firearms.

16 Q. And general crime scene reconstruction?

17 A. Yes.

18 Q. Now, you were hired by me to investigate this case;
19 is that correct?

20 A. Yes, it is.

21 Q. At least from a crime scene investigator standpoint?

22 A. That is right.

23 Q. Or a forensic science standpoint?

24 A. Yes. I don't really -- there is no one who just is a
25 crime scene person and doesn't do other kinds of things. We

1 have to -- you have to have an understanding of what it is
2 you're doing. So all crime scene investigators are forensic
3 scientists and to a large extent all forensic scientists do
4 some crime scene reconstruction and investigation. That's how
5 we try to tie this whole package together so it's not just a --
6 somebody working over here, and somebody working over here, and
7 we are not communicating. Somebody who has just this expertise
8 and some of this.

9 Q. To try to put together the whole picture?

10 A. Exactly.

11 Q. Having those general areas of expertise is important?

12 A. Right.

13 Q. Okay. And in this particular case, the one we're
14 talking about today, what information did you utilize in coming
15 up with your opinions?

16 A. Well, I have been to the crime scene, itself, several
17 times. I have read police reports. I have read interviews and
18 reports from the officers as to what they did. I've read the
19 information from the CSI from Weber County CSI, people -- some
20 of whom testified here. I read the medical examiner report. I
21 have read some medical reports of those persons who were
22 injured but didn't die. I have made measurements and taken
23 photographs and done some of my own investigation.

24 Q. You have been out to the crime scene here on 717 East
25 1050 North?

1 A. Yes.

2 Q. How many times have you been out there?

3 A. I think four, maybe. Four or five.

4 Q. Have you gone day time or nighttime?

5 A. Both.

6 Q. And during those times that you have gone out, did
7 you have someone taking pictures for you?

8 A. Yes.

9 Q. And you had an opportunity to examine those
10 photographs?

11 A. Yes.

12 Q. And would they be accurate representations of what
13 you saw there?

14 A. I think within the limits of the enviromental
15 conditions they were accurate. I would say that they -- they
16 accurately represent what we could see.

17 Q. Okay. Now, specifically were you able after your
18 examination of everything that you have looked at -- and did we
19 forget anything else? Is that about what you looked at?

20 A. Well, I might be forgetting something, but if I am I
21 don't know what it is.

22 Q. I guess, you sat through all of the testimony so far;
23 is that right?

24 A. Certainly, the testimony of the preliminary hearing.
25 I looked at those -- at that transcript. And I have also been

1 in the courtroom, I think with the exception of opening
2 exercises, I think, I have been --

3 Q. Open statements?

4 A. Opening statements. I have been here all the time.

5 Q. So you have listened to the testimony of the
6 witnesses from the stand?

7 A. I have very carefully.

8 Q. Okay. And as you have examined all of this evidence
9 have you come up with some opinions?

10 A. Yes.

11 Q. Okay. And what would the opinions --

12 MR. SHAW: Your Honor, may I voir dire the witness?

13 THE COURT: All right.

14 VOIR DIRE EXAMINATION

15 BY MR. SHAW:

16 Q. Mr. Gaskill, I'm interested first to know about an
17 animation that you may have had some part in. I want to ask
18 you questions about that. You did not create that animation?

19 A. I'm not. I'm not the person who created. I'm not
20 the computer specialist who created that.

21 Q. Who created it?

22 A. I'm not exactly sure if there was more than one. A
23 man named Josh. And I don't remember Josh's last name. I
24 think is the primary person.

25 Q. Do you even know the company that created it?

1 A. The name of the company I don't know. I know that --
2 I know two of the people who are involved and one of them is
3 Brown and the other one is Josh.

4 Q. Where is the company located?

5 A. I don't know if they have a headquarters. I don't
6 know where it is.

7 Q. Did you deal with them personally?

8 A. I dealt with Josh personally, yes.

9 Q. Talk to him face to face?

10 A. Yeah.

11 Q. What about the other person?

12 A. Not in this case. I have dealt with him in other
13 situations .

14 Q. Talked to him on the telephone?

15 A. I don't know that I talked to him on the telephone in
16 this case.

17 Q. Okay. In consulting with those individuals, did
18 you -- do you know their backgrounds to whether or not they
19 have any education in physics?

20 A. I don't. I have worked with Josh on one other case
21 and --

22 Q. The answer to the question is: I don't know. Right?

23 A. The answer is --

24 Q. Do you have if they have any background in
25 bioengineering?

1 A. I don't know.

2 Q. Do you know if they have any background in

3 biomechanics?

4 A. I don't know.

5 Q. Do you know if they have any background in forensic

6 pathology?

7 A. I don't know.

8 Q. Do you know if they have any background in

9 videography, videography as opposed to animation?

10 A. Can you clarify? I'm not sure that I know the

11 difference between those two.

12 Q. Moving pictures as opposed to animation.

13 A. I don't know if they have any videography -

14 Q. Do you know if they have background in kinesiology?

15 A. I don't know.

16 Q. Do you know what kinesiology is?

17 A. I think I do but --

18 Q. Tell us what it is.

19 A. It's the study of motion.

20 Q. Study of muscle and body movement?

21 A. Correct.

22 Q. Do you know what biomechanics is?

23 A. Study of the mechanics of biological organisms.

24 Q. Would you agree that it is the application of

25 mechanical forces to living organisms?

1 A. Certainly.

2 Q. Okay. And you don't know whether these two had any
3 background in those things, right?

4 A. I don't.

5 Q. All right. The animation that you created, did you
6 show these individuals the medical examiner's report relative
7 to the trajectory of the wounds that Sabrina Prieto suffered
8 and Rosendo Nevarez suffered?

9 A. We discussed that. If I showed them the specific
10 report or if they had a copy of it I don't recall. But that
11 was a topic of discussion between me and Josh.

12 Q. As you sit here today, you don't know whether they
13 had a copy of the medical examiner's report for each of these
14 two victims; is that fair?

15 A. I don't personally remember if they had a copy or
16 not.

17 Q. You didn't give it to them?

18 A. I don't -- I don't remember if I did.

19 Q. Okay. And do you know whether or not you showed them
20 any photographs. Crime scene photographs?

21 A. I believe I did.

22 Q. Believe you did or did you?

23 A. Well, my memory is not perfect in that area so I'm
24 going to say that I believe I did. But they had -- they had
25 knowledge of that.

1 Q. Taking from your response then, Professor Gaskill, I
2 take it that you cannot tell this Court which specific
3 photographs from the crime scene you may have showed these two
4 individuals; is that fair?

5 A. That's correct.

6 Q. Now, in this animation that you created, and for that
7 matter in the photographs that you created, did you do anything
8 to try to replicate the size of the blue Ford truck in Exhibit
9 2, parked on the south side of 1050 North?

10 A. I don't think that we specifically tried to replicate
11 that. We used a pick-up truck that was the same -- half ton
12 pick-up, three-quarter ton pick-up, general size.

13 Q. You don't even know if the blue truck was half ton or
14 a three-quarter ton, do you?

15 A. No, I don't.

16 Q. And the photos that you have produced are late
17 model -- is a late model large Ford at least three-quarter ton,
18 maybe one-ton truck, isn't it, Mr. Gaskill?

19 A. Well, that's fair to say.

20 Q. Is that fair?

21 A. I wouldn't quibble whether over it was a one-ton,
22 three-quarter ton, or half ton.

23 Q. And with respect to any vehicle that may have been
24 parked in front of that truck -- and, again, may have been
25 parked in front of that truck, you have no description of that

1 particular vehicle to rely on, correct?

2 A. I have a description from another party who was
3 there.

4 Q. Did they identify it as to make, model, or size?

5 A. That person did identify it as to make and model,
6 yes.

7 Q. What did they say?

8 A. They said it was a Lincoln Towncar.

9 Q. Lincoln Towncar?

10 A. Right.

11 Q. Who was that person?

12 A. That person, I believe, lived next door to the Nava
13 home.

14 Q. I see. The blue Ford truck in the photograph -- and
15 in the photographs -- crime scene photographs and the
16 photograph that you -- and then the photographs that you took
17 sometime this winter, that is clearly a different make and
18 model of vehicle, correct?

19 A. Yes.

20 Q. You did nothing to try to assure -- you did nothing
21 to try to contact the manufacturer and replace that blue Ford
22 with an accurate replica of it; is that fair?

23 A. Yes.

24 Q. Is it also fair to say that the animation that you
25 created does not show a proper angle of entry to the female

1 victim that is approaching the carport?

2 A. I don't think it's absolutely accurate that we get it
3 right.

4 Q. So that's not accurate?

5 A. Well, I believe it's not precise, that's correct.

6 Q. Okay. And you would concur, would you not,
7 Mr. Gaskill, that as a crime scene reconstructionist you want
8 to try to make things accurate.

9 A. Within the limits of what we can do that's exactly
10 right.

11 Q. Okay. Moving for the photographs that were taken,
12 when were they taken?

13 A. Which photographs are you referring to?

14 Q. Oh, the ones that counsel has shown the court.

15 A. I don't believe I know which ones they are.

16 MS. SIPES: He wasn't there.

17 MR. RICHARDS: Exhibit 9.

18 THE COURT: Could we have the record reflect what it
19 is?

20 MR. SHAW: It is Exhibit -- Defendant's Exhibit.

21 MR. RICHARDS: No. 9-27.

22 MR. SHAW: Oh, you got them marked separate?

23 THE COURT: Each one of these is marked separately.

24 Q. Just take a moment and look at those. Make sure you
25 are familiar with them. Have you looked over those

1 photographs?

2 A. Yes.

3 Q. And it looks to be photographs taken on different
4 dates because some have snow in the picture and some do not,
5 right?

6 A. That's right.

7 Q. There are a couple of crime scene photographs in
8 those, correct, in that Exhibit, Exhibit 9-27?

9 A. They are -- by that do you mean that there were a
10 couple that were taken by --

11 Q. CSI.

12 A. Yes. Yes.

13 Q. Okay. But the photographs -- and I want to be
14 specific about this. Were you present when all photographs
15 were taken in Exhibits 9-27 other than the CSI photographs, you
16 were personally present?

17 A. They are -- if I cannot answer yes can I elaborate a
18 little bit?

19 Q. Well, I think you need to answer yes or no first.

20 A. The answer is no.

21 Q. Okay. Now, I want you to identify which specific
22 photographs you were not present for -- and I don't want those
23 to be -- I want to go through the exhibit and identify
24 specifically the ones that you were not there for.

25 A. I was not there for 9. I was not there for 10. I

1 was not there for 11. I was not there for 12. I was not there
2 for 13. I'm not sure -- 17, I'm not sure exactly what that
3 photograph is. Eighteen --

4 Q. Excuse me. Let me stop you right there.

5 A. So whether I was there or not I'm not sure.

6 Q. Let me just see if I can approach the witness and see
7 which one you are referring to. Mine don't have numbers.

8 A. Yeah, 17 is page nine. If you have the same form
9 that I have, the same pages that I have.

10 Q. Okay. So 17 is a maybe, you don't know?

11 A. Correct.

12 Q. I'm not sure about 18. I was not present for 19.
13 Was not present for -- excuse me. I was not present for 19.
14 And 25, 26, and 27 are not photographs so --

15 MR. SHAW: Let me approach and make sure I --

16 A. Those were three that were part of the animation.

17 Q. Okay. So 25, 26, are 27 are not photographs?

18 A. Yeah. They are part of the animation. So I wasn't
19 present when they were made either.

20 Q. Are there any other photographs here or is this
21 exhibit at the end?

22 A. The ones that I didn't mention I was present for.

23 Q. Okay. So the ones that you were not present for you
24 cannot tell this Court whether or not they fairly and
25 accurately reflect what's depicted in the photographs because

1 you weren't there?

2 A. In so far as the way it still looks, I can certainly
3 say whether it does still look like that or not.

4 Q. My question though is: You didn't do the
5 photography, correct?

6 A. That's correct.

7 Q. And you were not present when they were taken?

8 A. That's correct.

9 Q. So you have no knowledge specifically as to who took
10 the photographs, correct?

11 A. Aside from having listened to the witnesses in this
12 trial I don't.

13 Q. Okay. Or how the photographs were taken relative to
14 lighting conditions, zoom quality of the lens, whether the lens
15 was zoomed or not?

16 A. That's correct.

17 Q. Okay. Now, the photographs that depict snow on the
18 ground, when were those -- you were present for those, I guess?

19 A. Yes, I was.

20 Q. When were those taken?

21 A. I think there were two different times when they were
22 taken, and I think since January of this year.

23 Q. Now, albeit you were present, you did not take the
24 photographs yourself personally, right?

25 A. That's correct.

1 Q. Someone else did?

2 A. Right.

3 Q. So, in fact, some of those photographs have you in

4 the picture?

5 A. Yes, they do.

6 Q. Okay. The photographer then operating the camera

7 when those photographs were taken, was the one who clearly

8 created it, snapped the photo, right?

9 A. Sure.

10 Q. Did you have any involvement in telling him how to

11 take the picture?

12 A. Yeah, we discussed the -- yeah, we discussed how we

13 were going to take the pictures. Yeah.

14 Q. Did you direct him specifically as to his placement

15 and what you wanted him to show on those photographs?

16 A. Yes.

17 Q. All right. Those were day time?

18 A. There may be one that he took at night in there but

19 I'm not sure about that one. The ones that we are talking

20 about now were daytime ones.

21 Q. Who took the pictures, Mr. Gaskill?

22 A. Michael Stuart.

23 Q. He is not a photographer, is he?

24 A. I don't know his background with whether or not he

25 was -- had training in photography or not.

1 Q. He is an investigator for the defense.

2 A. He is an investigator.

3 Q. More specifically, with respect to the photographs

4 that were taken while you were present, you don't know that

5 they accurately and fairly depict the view of a shooter from

6 the Yukon Denali? You can't say that to this Court, can you?

7 A. I have not taken pictures from a Yukon Denali. So I

8 can say that they reasonably accurately depict the information

9 that I have acquired regarding that shooting.

10 Q. But you weren't standing on a Yukon Denali taking

11 those photographs while they were being taken, correct?

12 A. Correct.

13 Q. So you don't know the exact or precise height of the

14 shooter at the time this incident occurred standing on that

15 Yukon Denali, right?

16 A. That's right.

17 Q. So you don't know whether that shooter was standing

18 on the floorboard or the seat for that matter?

19 A. There has been some conflicting testimony about that

20 as a matter of fact.

21 MR. SHAW: That's all.

22 THE COURT: All right.

23 Mr. Richards.

24 MR. RICHARDS: Thank you.

25 MR. SHAW: And, Your Honor, based on that the State

1 would move to exclude 9-27.

2 THE COURT: I don't think he has offered them yet.

3 MR. SHAW: Okay. Well, I just want to make sure.

4 THE COURT: I will give a chance to be heard on that
5 at that particular time.

6 MR. RICHARDS: I don't know where it went.

7 MS. SIPES: The one you gave to him.

8 THE COURT: He's got your exhibit.

9 DIRECT EXAMINATION (cont'd.)

10 BY MR. RICHARDS:

11 Q. Let me go through real briefly. And maybe we're
12 beating a dead horse, but let me go through this. So 9, 10,
13 11, 12, and 13 are all crime scene investigation photos that
14 you received from Sandy Ladd; is that correct?

15 A. I received them from you.

16 Q. Well, from me but --

17 A. But they were, in fact, portrayed to me as
18 photographs taken by Sandy Ladd.

19 Q. Okay. And then on 14 and 15, those were taken just
20 this last week; is that correct, last Friday?

21 A. Yes.

22 Q. Okay. And you were there?

23 A. I was.

24 Q. And Mike Stuart took the pictures?

25 A. That's right.

1 Q. And you directed him where to be and what to shoot?
2 A. Right.
3 Q. And do they accurately reflect what you intended them
4 to reflect?
5 A. Yes, they do.
6 Q. Exhibit 16 is a Google picture; is that right?
7 A. It could be. I don't -- it says it's a Google
8 picture so I have to go along with that. But I wasn't there
9 when it was taken.
10 Q. You were not there when it was taken, were you?
11 A. No.
12 Q. You have been to the scene?
13 A. I have.
14 Q. Does this accurately reflect what the scene looks
15 like in a daytime photo looking from the east toward the west?
16 A. Yes, it does.
17 Q. All right. And Exhibits 17 and 18 were both taken
18 from the reconstruction video that you had produced, correct?
19 One is kind of hard to see because it's so dark.
20 A. Seventeen and 18, yes. Excuse me. Are you talking
21 about page 17 and 18?
22 Q. Exhibit 17 and Exhibit 18.
23 A. Okay.
24 Q. Exhibit 17 is this one here.
25 A. Yes, 17 and 18. I just want to make sure that I know

1 what I'm talking about. So, yes, that --

2 Q. Okay.

3 A. Well, that's my understanding.

4 Q. Nineteen is, again, a photo from Sandy Ladd?

5 A. Yes.

6 Q. And 20, 21, 22, 23, and 24 are all photographs that
7 were taken while you were present a couple of weeks ago,
8 correct?

9 A. Yes.

10 Q. And do they accurately depict what you wanted them to
11 depict?

12 A. Yes.

13 Q. All right. And then 25, 26, and 27 are all still
14 shots out of the video that you had produced, correct?

15 A. That's -- yes, that's my understanding and that's
16 what they look like.

17 Q. And the purpose of these photos, particularly, the
18 reconstruction ones of the video is to at least give an
19 indication of what you believe may have happened this night?

20 A. Right, I think it's easier to understand pictures
21 sometimes than it is word descriptions.

22 Q. All right.

23 MR. RICHARDS: I'll move for admission of 9-27.

24 THE COURT: Any objection?

25 MR. SHAW: No objection to 9-13 and 19, since those

1 are CSI. We do renew our objection with regard to 14 and 15.

2 **THE COURT:** Let's hold on. So no objection to 9-13.

3 And what was the other one?

4 **MR. SHAW:** Nineteen, I believe is the CSI photo.

5 **THE COURT:** So 9-13 plus 19 there is no objection.

6 All right. And the ones you did object to were --

7 **MR. SHAW:** 14 and 15.

8 **THE COURT:** Did you want to make a record as to why
9 you are objecting?

10 **MR. SHAW:** Yes. Those are photographs taken as I
11 understand it, last Friday or some Friday here in the recent
12 last couple of weeks.

13 **MR. RICHARDS:** Last two, three weeks, yeah.

14 **MR. SHAW:** Snow on the ground, vehicles present that
15 clearly are not the same as the crime scene depicted by CSI,
16 investigators on scene. You have a newer model large Ford
17 truck in the photograph. You have another white car in the
18 driveway. Apparently, intended to replicate the Cavalier. It
19 is not a Cavalier. Those are photographs that do not
20 accurately reflect the scene counsel has indicated or asked the
21 witness whether they accurately reflected what the witness
22 wanted them to reflect. But the issue here is: Do they
23 accurately reflect the scene of the crime such that they have
24 value for this jury. Our objection is that they were not an
25 accurate depiction of the scene on the night of August 5th

1 2007.

2 There are also individuals placed in the photograph
3 that we have no foundation for their being placed in particular
4 locations. We have no foundation for their height, they can be
5 seen over and above the roof of the truck. Professor Gaskill
6 has testified that he doesn't know exactly how high Mike Stuart
7 was standing when he took those photographs. No one has made
8 an attempt to replicate a shooter's view over the top of the
9 truck depicted in 15 -- 14 and 15, they don't know. They can't
10 replicate that. No one made an attempt to take a photograph
11 standing from the same position of the shooter.

12 **THE COURT:** Mr. Richards, do you want to tell us why
13 we should admit 14, 15.

14 **MR. RICHARDS:** I would be happy to. Maybe just a
15 couple of questions.

16 **Q.** So 14 and 15, but 14 specifically --

17 **MR. SHAW:** Let me clarify, 'cause I'm not done.

18 **MR. RICHARDS:** Oh --

19 **THE COURT:** Well, I'm sorry I just --

20 **MR. SHAW:** Well, I misspoke with regard to numbers.

21 Mine, again, aren't numbered, Your Honor. And the photos that
22 I was speaking of specifically are: 20, 21, 22, 23, 24. Those
23 are the photographs taken here in the snow with vehicles placed
24 and so on. So my record with respect to 14 and 15 was wrong
25 initially. It should be 20-24.

1 **THE COURT:** What about 14 and 15, what are you
2 objecting to?

3 **MR. SHAW:** Fourteen I am -- this is one where.

4 **THE COURT:** This is one that shows somebody standing
5 by the white car in the driveway.

6 **MR. SHAW:** Yes correct. And that clearly is taken
7 during the snow.

8 **THE COURT:** So it's 14, 15, 20, 21, 22, 23, and 24;
9 is that right?

10 **MR. SHAW:** Yes.

11 **THE COURT:** Okay. Any others?

12 **MR. SHAW:** And the animations, 25, 26, and 27. And I
13 can make a further record on those if you want me to.

14 **THE COURT:** Let me hear from Mr. Richards then.

15 **MR. RICHARDS:** Well, Your Honor, the photos that
16 Mr. Professor Gaskill directed to be taken are depictions of
17 the scene of the crime at a later date, no different than
18 State's Exhibit No. 1, the big board where they had the Google
19 picture from the sky. That certainly wasn't taken the night of
20 the crime. And these are no different than that. I'll get
21 into Professor Gaskill exactly what he was trying to get at in
22 these pictures. Maybe we need to do that before we have them
23 admitted. I don't have any problem doing them individually.

24 **THE COURT:** Well, I think the key here is whether or
25 not these photographs accurately depict what happened or where

1 things were positioned or what the situation looked like at the
2 time of the crime back in August '07. And what I'm hearing
3 Professor Gaskill say is I don't know that they depict what it
4 looked like back in August of '07.

5 **MR. RICHARDS:** Any more than Exhibit 1 depicts that?

6 **THE COURT:** But Exhibit 1 is an aerial showing the
7 street and all.

8 **MR. HEWARD:** Nobody has tried to put cars or people
9 in anybody's position in Exhibit No. 1.

10 **THE COURT:** It's a huge difference between Exhibit 1
11 and 14-24 so --

12 **MR. RICHARDS:** Well --

13 **THE COURT:** Anyway I'm going to exclude photographs
14 14, 15, 20, 21, 22, 23, and 24. They just do not accurately
15 depict what it looked like at the time of the -- occurred at
16 the crime. Exhibits 25, 26, 27 I'm going to exclude. It just
17 seems to me that Professor Gaskill can't lay any kind of a
18 foundation for the animation here. He didn't prepare it. We
19 don't know what went into it. We don't know who was involved
20 in it.

21 **MR. RICHARDS:** Well, he testified as to who did it.

22 **THE COURT:** Well, he can testify as to his theory of
23 the case. But the animation doesn't -- you are not even close
24 to laying a foundation to get the animation in. There is just
25 no basis for showing that it has any semblance to what we are

1 talking about in this case. So anyway, that's my ruling.

2 Go ahead.

3 **MR. SHAW:** Your Honor, if I may interrupt just
4 briefly.

5 **THE COURT:** All right.

6 **MR. SHAW:** Seventeen is also a still of the animation
7 we've objected to that.

8 **THE COURT:** The animation is out.

9 **MR. SHAW:** And I don't know what 18 is.

10 **MR. RICHARDS:** That's also animation.

11 **THE COURT:** It's animation.

12 **MR. SHAW:** Eighteen is animation and we've objected
13 to that.

14 **THE COURT:** Seventeen and 18 are both out.

15 **MR. RICHARDS:** All right. We'll do without pictures.

16 **Q.** Are there some -- you've testified previously as to
17 all of the information that you used in coming up with your
18 opinion; is that correct?

19 **A.** Yes.

20 **Q.** All right. And were there some things that would
21 have helped you, you know, perfect world, had certain items
22 that would have helped or assisted you in coming up with your
23 expert opinion, Professor Gaskill?

24 **A.** Of course.

25 **Q.** Can you describe to the jury what that is, what they

1 **MR. RICHARDS:** No. I've got four of them here.

2 **THE COURT:** Defendant's 28-32 was that --

3 **MR. RICHARDS:** And while we have the break, Your
4 Honor, --

5 **THE COURT:** Okay.

6 **MR. RICHARDS:** -- I would like to argue one more
7 time. I mean, I didn't want to do it in front of the jury,
8 certainly. But I think he can lay foundation that would
9 support his theory as to what happened. And then the animation
10 just puts life to that or gives effect to it. And that's no
11 different than what the State is doing with their bringing in a
12 gun that wasn't at the scene and you let that in.

13 **THE COURT:** Well, what the problem is: There is no
14 foundation here. That's the problem.

15 **MR. RICHARDS:** There is no foundation for the gun
16 either. That wasn't -- we didn't know that's the kind of gun,
17 the size of the gun.

18 **THE COURT:** I think that's a different story. But
19 what I heard him say is I don't know who created it. I don't
20 know how it was created. I don't know what they relied upon in
21 creating it. I'm not sure the background of the people who
22 created it. I mean, you can't just throw an animation up
23 there. You have got to lay a foundation for it.

24 From what I heard from Professor Gaskill, the
25 foundation is totally incomplete here. So it may -- and he

1 certainly can testify to his theory. I'm just not going to let
2 the animation come in at this particular time.

3 **MR. RICHARDS:** And yet, we let in all of the
4 testimony of these witnesses that is so contradictory and so
5 impossible.

6 **THE COURT:** Well, but that's -- the difference is
7 there you are talking about their credibility as witnesses.
8 And that's for the jury to decide, whether not they believe a
9 particular witness. That's --

10 **MR. RICHARDS:** And the State can cross-examine
11 Professor Gaskill.

12 **MR. SHAW:** We plan to.

13 **THE COURT:** Well, yeah. I just don't think you can
14 just put up an animation and say, you know, this is our theory
15 of the case. There has got to be some foundation for it. I
16 mean, I don't know how they arrived at any of the stuff in the
17 animation. I mean, the animation has got the shooter up in the
18 carport. And I -- that's got to be a first, doesn't it?

19 **MR. RICHARDS:** Well, I'm going to have Professor
20 Gaskill talk about that.

21 **THE COURT:** And I guess, he can testify to it. I'm
22 just saying there is no foundation for the animation that's --

23 **MR. RICHARDS:** Well, maybe it was premature for the
24 State to voir dire on that. I wasn't going to get into that
25 one until he had given all his foundation. But anyway, we will