

OSCAR COMEAUX - April 26, 2013
Redirect Examination by Mr. Phanco

1 A. White T-shirt and some blue jeans.

2 Q. Blue jean shorts or long pants?

3 A. I can't remember. I can't remember that.

4 Q. But they were like blue jeans?

5 A. Blue jeans.

6 MR. PHANCO: Pass the witness.

7 MR. GREENLEE: No further questions.

8 MR. PHANCO: Nothing from the State.

9 THE COURT: All right. You are excused.
10 State.

11 MR. PHANCO: Call Officer Matamoros, Your
12 Honor.

13 THE COURT: You may proceed.

14 MR. PHANCO: Thank you, Your Honor.

15 **ARTHUR MATAMOROS,**

16 having been first duly sworn, testified as follows:

17 **DIRECT EXAMINATION**

18 BY MR. PHANCO:

19 Q. All right. Afternoon. How are you?

20 A. Good.

21 Q. All right. Introduce yourself to the jury, and
22 tell them your first and last name.

23 A. I'm Corporal Arthur Matamoros. I'm employed
24 with the Harris County Constable Precinct 6.

25 Q. All right. Could you spell Matamoros just for

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1 the court reporter real quick?

2 A. I'm sorry. Repeat.

3 Q. Just spell your last name.

4 A. M-A-T-A-M-O-R-O-S.

5 Q. All right. All right. You said you were
6 employed with Constable 6. How long have you been
7 there?

8 A. About nineteen years.

9 Q. Okay. And what are your duties? I mean, kind
10 of what -- you know, your job description.

11 A. I'm currently assigned to the police storefront
12 which deals with community activities and stuff.

13 Q. Okay.

14 A. I also patrol out there in that area.

15 Q. All right. So give me kind of, you know, what
16 your typical day is. What is it that you do?

17 A. Basically, I come on at 7:00 o'clock in the
18 morning. I -- after roll call, which is about 7:00,
19 7:05, then I go out into the community of -- it's on the
20 east side of Denver Harbor. It's -- I'm sorry -- east
21 side of Houston, which is called Denver Harbor. There's
22 approximately five -- four or five elementary schools
23 out there that I patrol, just ride through for
24 visibility.

25 After that I check in at the storefront.

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1 I work alongside another HPD Officer that also works in
2 that general area, also. Basically, we're just there in
3 the office answering any complaints that come in, or
4 phone calls or anything like that, any kind of community
5 concerns.

6 Q. You interact with the citizens and stuff like
7 that?

8 A. Right, interact a lot with them.

9 Q. All right. I'm going to show you what's been
10 marked as State's Exhibit No. 1. All right. You have a
11 screen to your right. Tell me if you can see it okay.

12 A. Okay.

13 Q. Is this in your area of where you patrol?

14 A. Yes. Actually, Lyons Avenue runs through
15 Denver Harbor.

16 Q. Okay. So Lyons Avenue is kind of the main drag
17 through your area?

18 A. Yes, it is.

19 Q. I want to just turn your attention away from
20 the map for a second. I want to turn you to October 5th
21 of 2011. Do you recall doing kind of a robbery
22 investigation on that day?

23 A. I actually had overheard one of our units --

24 MR. GREENLEE: Objection. That's hearsay.

25 THE COURT: Sustained.

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1 Q. (By Mr. Phanco) Without going into what people
2 told you or anything like that, do you recall doing an
3 investigation on October 5th, 2011, in regards to a
4 robbery of some sort?

5 A. I checked by with our units.

6 Q. Okay. Now when you say you checked by --
7 because, you know, tell the jury kind of what that
8 means, to check by. What happens that you come out
9 there?

10 A. We -- I checked by with the unit sergeant.
11 They had radioed --

12 MR. GREENLEE: Objection. That would be
13 hearsay, anything over a radio.

14 Q. (By Mr. Phanco) I guess --

15 THE COURT: Sustained.

16 Q. (By Mr. Phanco) I guess I lead you into that
17 one. Without going into specifically what people told
18 you, are you dispatched out to scenes?

19 A. Yes.

20 Q. Okay. So you get calls on radios that you need
21 to go to places?

22 A. Yes.

23 Q. All right. Now on this particular day, do you
24 remember being dispatched out to a possible robbery on
25 October 5th, 2011, in this particular area?

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1 A. Yes, I was.

2 Q. Okay. Now the question I had was, is this
3 particular area that we see on this map in Houston,
4 Harris County, Texas?

5 A. Yes, it is.

6 Q. And is State's 1 -- everything that we can see
7 on that encompasses Houston, Harris County. Is it all
8 in Houston, Harris County, Texas?

9 A. Yes.

10 Q. Okay. All right. So tell me, once you got out
11 at the scene, what did you do?

12 A. Well, I was one of the check-by units. I set
13 up a perimeter where we had heard -- or I had checked --
14 I checked by in the area where I had heard a suspect was
15 running a scene of a possible robbery.

16 Q. Okay. And did you do any of the running or
17 following of the suspect or anything like that?

18 A. No. I just drove around the general area
19 looking for a possible suspect.

20 Q. All right. Cutting to the chase, why is it
21 that you're here today? What part of this investigation
22 did you make?

23 A. I actually took all the information from the
24 initial officer that was on the scene that he had been
25 flagged down. I took the information.

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1 Q. And what officer was that?

2 A. That was Corporal Comeaux.

3 Q. All right. Corporal Comeaux?

4 A. Yes.

5 Q. Okay. You take down all the information from
6 him. All right. Did he give you anything?

7 A. Yes. They had recovered a wallet.

8 MR. GREENLEE: Objection. That's hearsay.

9 THE COURT: Sustained.

10 Q. (By Mr. Phanco) Did he give you anything?

11 A. Yes, he did.

12 Q. What did he give you?

13 A. He gave me a wallet.

14 Q. Okay. And what did you do with the wallet?

15 A. Well, when I -- after I recovered it, I took
16 all the information he gave me in regards to the
17 possible robbery and stuff. I -- I went back to the
18 storefront, where I have access to our computer.

19 In the process of inventorying the wallet,
20 I was just doing an initial report on it. I didn't have
21 any information at all about what had occurred, or the
22 complainant, who is the victim. I had no information.
23 As I was inventorying the wallet, I came across an I.D.,
24 which was a driver's license, and also a phone number
25 that was in the wallet and had the same name as on

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1 there.

2 So I made a courtesy call, made contact
3 with him. And he advised me that he had just been
4 robbed in a general area there on Farmer Street.

5 Q. Okay. Do you recall who it is whose wallet --
6 whose information was in the wallet? Do you recall the
7 name?

8 A. It was a last name of Valdez.

9 Q. Okay. And you called him. And he said, yeah,
10 that's my wallet?

11 A. Yes.

12 Q. What did you do next?

13 A. I was in the process of completing the report.
14 I went ahead and told him I would meet him at his
15 residence to hand him over all the property. There was
16 no money or anything, just the property.

17 Q. Did you do that?

18 A. Yes, I did.

19 Q. And did he say any -- well, without going into
20 what he said, was he happy when he received his wallet
21 back?

22 A. Yes, of course, he was. It had his -- I
23 believe it was a driver's license in there or an
24 identification card issued by the State of Texas.

25 Q. Did you do a report about what Deputy Comeaux

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1 told you and about finding the wallet and returning it?

2 A. Yes.

3 Q. Okay. And did you do anything else?

4 A. After returning it, I went back to the office
5 and completed the report.

6 Q. Okay. And that was pretty much the end of your
7 work on this particular case?

8 A. Yes, it was.

9 MR. PHANCO: I pass the witness, Your
10 Honor.

11 THE COURT: Okay. Your cross.

12 MR. GREENLEE: Thank you.

13 **CROSS-EXAMINATION**

14 BY MR. GREENLEE:

15 Q. Corporal Matamoros, is that correct?

16 A. Yes.

17 Q. When you say you were driving around the area,
18 did you see anybody?

19 A. No, I didn't.

20 Q. And when you received the wallet, was the
21 wallet at all processed by you or anybody at your
22 direction, if you know?

23 A. Repeat.

24 Q. When you got this wallet from Corporal
25 Comeaux --

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1 A. Right.

2 Q. -- did you or anyone at your direction process
3 the wallet, check, for instance, for fingerprints or
4 anything like that --

5 A. No.

6 Q. -- to your knowledge?

7 A. No.

8 Q. And you certainly did not do that; is that
9 correct?

10 A. No, I did not.

11 Q. Did you direct anyone else to do that?

12 A. No, I did not.

13 Q. So it would be fair to say, would it not,
14 Corporal Matamoros, that the person sitting next to
15 me -- you're not saying this person was involved in
16 anything, a robbery or anything like that in that area
17 on October the 5th, 2011? That would be fair to say; is
18 that correct?

19 A. Yes, that's correct.

20 MR. GREENLEE: Pass the witness, Your
21 Honor.

22 THE COURT: Okay. Any redirect?

23 MR. PHANCO: Nothing further from this
24 witness.

25 THE COURT: You are excused. Thank you.

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1 State, you want to call your next witness?

2 MR. PHANCO: May we approach, Judge?

3 THE COURT: Sure.

4 (At the bench)

5 MR. PHANCO: I'm going to suggest -- well,
6 long story short, Judge, I believe that the defense has
7 opened the door to signature crimes because of identity.
8 He's questioned identity in this case. And when he does
9 that, I'm now able to put on a signature crime. I have
10 some case law to present. I assume he's going to
11 object. We may want to do that over lunch, or however
12 you would like to handle it. But my next witness will
13 be a victim from another crime that this man had
14 committed.

15 MR. GREENLEE: Well, Your Honor, obviously
16 I'm going to object to --

17 COURT REPORTER: Steven.

18 MR. GREENLEE: Clearly, I'm going to
19 object as to any extraneous at this point in time.

20 THE COURT: Present me the case law.

21 (Continuing in jury's hearing)

22 THE COURT: The Court has legal matters to
23 take care of right now, so we're going to recess. And
24 your lunch will possibly be here soon. So please
25 remember your admonitions. And do not discuss this case

1 with anyone, not even among yourselves. Enjoy your
2 lunch. Court's in recess. And we will resume testimony
3 at 1:00 o'clock.

4 (Lunch recess)

5 (Outside jury's hearing)

6 THE COURT: State, you may proceed.

7 MR. PHANCO: Yes, Your Honor. Your Honor,
8 at this time the State is asking that we be able to put
9 on an extraneous offense in this particular case. We
10 are well-aware that under 404(b), extraneous cases
11 cannot be proven up. Most importantly, it can't be
12 proven up to show the type of character that this
13 defendant displays, that he has a pension for committing
14 crimes.

15 However, 404(b) specifically lays out --
16 and I'm reading from the Code here -- evidence of other
17 crimes, wrongs or acts is not admissible to prove the
18 character of a person in order to show action and
19 conformity therewith. However, may be admissible for
20 other purposes such as proof of motive, opportunity,
21 intent, preparation, plan, knowledge and identity. And
22 it's for those purposes that we're asking that we be
23 able to be -- to put on this extraneous offense. Not to
24 show that he has a particular character for committing
25 these crimes, but to show that the crime that he has

1 committed is a signature crime and to show that it goes
2 to his identification, which has been put at issue by
3 defense counsel when they questioned our particular
4 witness about how good his eyesight was, whether he was
5 wearing his glasses, how long has he been wearing those
6 glasses, how long did he have the prescription for the
7 glasses, what the lighting was like, how far away he
8 could see. All of these things put into question the
9 identification of this particular defendant. And when
10 that door has been opened, we are able to put on
11 extraneous offenses for the sole purpose of proving up
12 identity, which is what we're going to be doing.

13 In fact, Your Honor can give a limiting
14 instruction to the jury to tell them that the purpose of
15 the following witness will be for the sole purpose of
16 identification and not given to the weight of whether he
17 is guilty or not guilty of the primary offense. And we
18 have no problem giving the jury that particular
19 instruction in this case; because, again, we're just
20 doing it for purposes of identity and not for character.

21 *THE COURT:* Okay. What's the defense's
22 response?

23 *MR. GREENLEE:* Your Honor, I would have
24 several responses to that. And I guess the first would
25 be looking at whether or not the cross-examination added

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1 anything new to what was simply addressed on direct
2 examination. I don't think there is any question when
3 the prosecutor takes the complaining witness a
4 photospread and asks the complaining witness, is this
5 your signature and is this the picture that you circled,
6 which is a picture of the defendant, at that point in
7 time the prosecutor clearly has put identification into
8 evidence for consideration. Because at some point in
9 time the D.A., I would assume, will offer into evidence
10 the photospread, I assume, or through a police officer
11 who would testify as to the foundation.

12 I've advised the witness that I'm showing
13 you some pictures of some individuals. We're not saying
14 that the defendant or the suspect is included in these
15 pictures. You're not under any obligation to identify
16 anyone. And if you take a look at them, in this case,
17 there's a picture circled. So clearly, it's the State's
18 intent, I would assume, at some point in time to put in
19 evidence, to show the picture circled being that of the
20 defendant.

21 The witness, himself, was very clear. And
22 on numerous occasions Mr. Valdez said, I'm not sure. I
23 cannot be certain. I'm not saying it is. I'm not
24 saying it's not. So, essentially, in my
25 cross-examination I didn't add anything new to the

1 process. I just simply amplified what was there for
2 clarification purposes. So I do not think the door has
3 been opened there.

4 Secondly, if we're talking about a
5 signature offense, the requirement for a signature
6 offense is that it has to be exactly that, a signature
7 offense. It must be identical all the way down in
8 manner and means.

9 Additionally to that, at that point in
10 time if the Court does, in fact, allow that, it becomes
11 a question of does any prejudicial effect outweigh any
12 probative value for the jury? Because even with a
13 limiting instruction, which I do not think cures this
14 issue -- even with a limiting instruction, the purpose,
15 in the prosecutor's own words -- the purpose behind
16 bringing in this particular extraneous offense is to
17 prove the issue of identification so that the jury,
18 which at this point in time could conceivably have a
19 reasonable doubt about I.D., effectively, what you're
20 saying is, well, because there may have been other
21 crimes committed over here, which in our opinion are
22 signature, are identical in manner and means; therefore,
23 the implication is clear. It must have been this
24 particular person who committed the offense. Because
25 none of our witnesses can positively say. And in

1 particular, the complaining witness can't positively
2 identify this particular defendant.

3 At that point, in allowing, I think it
4 shifts the paradigm and requires the defense to put on a
5 case of some type to rebut that, which effectively
6 shifts the burden of proof. And it becomes a question
7 of both the Fifth and Sixth, Fifth Amendment on due
8 process in requiring him to testify and the Sixth
9 Amendment to burden of proof.

10 I simply do not think a limiting
11 instruction cures the distinction to the jury. Sort of
12 like saying we're not offering it for the truth of the
13 matter asserted therein. We're just providing this
14 information to the jury, the idea being a jury is going
15 to understand the distinction that we have this
16 evidence; and it may be based on hearsay or some other
17 reason. But we're not offering it to show the truth.

18 I do not think there is a curative
19 instruction that's going to tell this jury, okay, ladies
20 and gentlemen of the jury, we effectively believe that
21 you have a reasonable doubt about the identification.
22 Because Mr. Valdez was very clear. Even after looking
23 at the photospread, he says, I'm not saying it is. I am
24 not sure. He said that on numerous occasions. So
25 effectively, now allowing the prosecution to do

1 indirectly what they cannot do, which is prove or
2 supplement or make up for Mr. Valdez's lack of ability
3 to make an identification by saying, see, there is
4 another crime over there that was committed that we
5 think is signature; and therefore, if you believe he
6 engaged in that crime over here then, therefore, he must
7 have engaged in this crime over here. That
8 ineffectively denies him, clearly, of his Sixth
9 Amendment right.

10 MR. PHANCO: Your Honor, I have a brief
11 response to a couple of things that Mr. Greenlee said.
12 First of all, he said he added nothing new during his
13 cross-examination. And from the cases that I put before
14 you, you can see that is not a requirement for him to
15 do. The only thing he needed to do is open the door.
16 And reading from Thomas versus State, which is a
17 Criminal Court of Appeals case that is still good law
18 from 2003, they say identity was placed at issue by the
19 defendant in trial for burglary of a habitation with
20 intent to commit sexual assault, thereby allowing
21 admission of an extraneous offense where the defendant
22 cross-examined the victim regarding whether she could
23 identify him because of lighting, whether she saw him
24 long enough, which we have in this case, and whether she
25 was wearing her glasses, which again we have in this

1 case.

2 Essentially what the Criminal Court of
3 Appeals is saying is exactly what Mr. Greenlee did on
4 the cross-examination of the victim in this case, that
5 that is opening the door. Adding something new is not a
6 requirement, which is what Mr. Greenlee had said.

7 On top of that, the probative versus
8 prejudicial value, weight is not something that goes
9 into the calculation of whether it comes in for I.D. As
10 you can see from those cases, they never discuss that;
11 because that is something for an extraneous offense that
12 shows character. Then you have to go into the probative
13 versus prejudicial value. But as you can see in the
14 cases we presented to you and from the law here that I
15 read is that if it's prove up for something other than
16 character, i.e., identification, which we're asking for
17 in this case, then that is not a -- that is not a
18 measurement that we do.

19 And lastly, saying that we are just
20 calling it a signature crime and, therefore, wanting to
21 get something in, that's incorrect. The law actually
22 tells you what signature crime is; and that's anything
23 that would be showing proximity, place and common mode.
24 And in this case what we're going to hear is that the
25 proximity -- it was less than three weeks from when

1 Mr. Valdez was attacked. The place, it was -- this
2 particular victim was coming from the same grocery
3 store, carrying bags, and is an older, over sixty-five,
4 Hispanic male, which is the same situation that
5 Mr. Valdez found himself in, coming from the same area,
6 same grocery store, Hispanic male over sixty-five.

7 And then when we're talking about common
8 mode, we're talking about the type of crime and how it's
9 committed. And both of these victims, the victim I plan
10 on putting on, will testify Mr. Hemphill punched him in
11 the face till he was on the ground and kept him down on
12 the ground, put his hand in his pocket, took his wallet,
13 which is exactly what Mr. Valdez testified to.

14 Therefore, you would have exactly
15 everything that shows this is a signature crime. You
16 would have proximity, you would have place, and you
17 would have common mode, which is what the Court of
18 Appeals calls a signature crime.

19 *THE COURT:* Okay.

20 *MR. GREENLEE:* And I guess my comment
21 would be, Your Honor, the same arguments that I just
22 made. If the Court is considering, I would then ask for
23 a recess until Monday to give me an opportunity to
24 research the applicable law to make certain the cases
25 cited by the State and if there is any descending

1 opinions or other cases which may clarify those
2 definitions. I'd ask at this point in time we recess
3 the case till Monday to give me an opportunity to do
4 that.

5 MR. PHANCO: In response to that, I
6 told -- Mr. Greenlee always knew this was going to be an
7 issue if it were to come up in trial. We discussed
8 that. And the witness that is going to be put on, he's
9 had notification via extraneous offense notification
10 that he would be going on in this case ever since we
11 filed motions on it.

12 MR. GREENLEE: The notice I had was the
13 extraneous for the punishment, if we got there, not
14 bringing someone in on guilt or innocence to prove
15 alleged signature crimes. There is -- all I'm asking
16 for is at this point in time for the Court to give me an
17 opportunity to research the issue.

18 THE COURT: Okay. The motion for a
19 continuance is denied, and the Court does believe that
20 the identity has been placed at issue. And the
21 extraneous will come in under Texas Rules of Evidence
22 404(b). And the Court will give a limiting instruction
23 orally and in the jury charge.

24 Let's bring out the jury.

25 *(Jury enters courtroom)*

1 THE COURT: All right. Did you guys enjoy
2 your lunch? Please be seated.

3 Okay. All right. State, would you please
4 call your next witness.

5 MR. PHANCO: Yes, Your Honor. I call
6 Mr. Concepcion.

7 THE COURT: Ladies and gentlemen of the
8 jury, you are instructed if there is any evidence before
9 you in this case regarding the defendant's committing an
10 alleged offense or offenses other than the offense
11 alleged against him in the indictment in this case, you
12 cannot consider such evidence for any purpose unless you
13 find and believe beyond a reasonable doubt that the
14 defendant committed such other offense or offenses, if
15 any. And even then you may only consider the same in
16 determining the motive, opportunity, intent,
17 preparation, plan, knowledge, identity or absence of
18 mistake or accident of the defendant, if any, in
19 connection with the offense, if any, alleged against him
20 in the indictment and for no other purpose.

21 You may bring him in.

22 *(Interpreter for this witness)*

23 THE COURT: You may proceed.

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CONCEPCION,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PHANCO:

Q. Good afternoon, sir.

A. Good afternoon.

Q. Introduce yourself to the jury and let them know your first name.

A. My name is Concepcion.

Q. And, sir, the name you gave is your first name?

A. Yes.

Q. And why -- you would prefer us not use your last name in your testimony?

A. Yes.

Q. Okay. But you have a last name?

A. Yes.

Q. All right. Mr. Concepcion, is that all right if I call you that?

A. Yes.

Q. Okay.

MR. GREENLEE: Your Honor, may we approach?

THE COURT: You may.

(At the bench)

MR. GREENLEE: At this point in time I'm