

1 THE COURT: Okay. That will be denied.
2 The right of privacy in the holdover cell is ridiculous.

3 All right. Has he been sworn in?

4 MS. FLADER: Yes.

5 THE COURT: Okay. Let's go.

6 (Open court, defendant and jury present)

7 THE COURT: All right. Be seated.

8 For purposes of the record, call your next
9 witness.

10 MS. FLADER: I'll call Sergeant Minchew.

11 THE COURT: All right. Go ahead.

12 **ROBERT MINCHEW,**

13 having been first duly sworn, testified as follows:

14 **DIRECT EXAMINATION**

15 **BY MS. FLADER:**

16 Q. Would you introduce yourself to the jury?

17 A. I'm Sergeant Robert Minchew. I'm with the
18 Harris County Sheriff's Office.

19 Q. How long have you been with the sheriff's
20 office?

21 A. Twenty years.

22 Q. What brought you to the sheriff's office?

23 A. I got out of the military -- I was in the
24 Marine Corps for four years -- and needed a job.

25 Q. And did you -- did you just apply to the

1 sheriff's office?

2 A. I applied for the sheriff's office and Houston
3 police and the sheriff's office called first, so that's
4 where I went.

5 Q. And once you got on with them, what was the
6 first thing that you had to go through?

7 A. I went -- I had to work in the jail while
8 waiting to become a certified peace officer.

9 Q. And after you became a certified peace officer,
10 where did you go?

11 A. I took a test to get out to patrol. I got
12 hired in '90 -- the end of '92 and in '95 I went to
13 patrol in northeast Harris County.

14 Q. Did you have to go through the academy at all?

15 A. Yes.

16 Q. Okay. And when did you do that?

17 A. I believe it was the end of '93.

18 Q. Can you tell the jury about that?

19 A. I think it's described as 6 to 700 hours of
20 basic Penal Code and criminal code of procedure,
21 constitutional law, arrest tactics, weapons, officer
22 safety, vehicle driving, just all the basic things to
23 get certified through the state as a licensed peace
24 officer.

25 Q. How long were you on patrol?

1 A. Approximately five years.

2 Q. Then where did you go?

3 A. I had been going to college part-time and I got
4 a bachelor's degree in professional writing and
5 technical communication. I got asked to transfer to
6 human resources and did some special projects for the
7 command staff and for the human resources bureau.

8 Q. How long were you there?

9 A. Only six months.

10 Q. And then where did you go?

11 A. I got promoted to detective and went to the
12 Warrant Division.

13 Q. What did you do there?

14 A. I just served misdemeanor and felony warrants
15 all over the county. Just, we were issued warrants,
16 signed warrants, and it was our job to track down the
17 wanted person and arrest them and bring them into court
18 or to the jail.

19 Q. How long did you do that?

20 A. I was only there about six months.

21 Q. Then where did you go?

22 A. I got transferred to the Gulf Coast Violent
23 Offenders Task Force.

24 Q. What's that?

25 A. It's a federal task force. The U.S. Marshals

1 leads it. And it's made up of all the police agencies
2 in the Houston area. Probably 10 different agencies.
3 And we all worked as task force agents.

4 Q. Was there a TV show based on that job?

5 A. There were several. We always had camera crews
6 in the office, but I don't -- the local one was called
7 To Catch a Crook, I believe, on Channel 2.

8 Q. Okay. And so, how long were you with the Gulf
9 Coast Violent Offender Task Force?

10 A. Maybe a year-and-a-half.

11 Q. Then where did you go?

12 A. I went to -- back to the sheriff's office from
13 the task force to the Robbery Division.

14 Q. What kinds of things did you do in the Robbery
15 Division?

16 A. We would follow up on robbery reports that the
17 patrol officers would take in their normal course of
18 duties. They would respond to a robbery, take the
19 initial report. And if there wasn't a death or a
20 serious bodily injury with someone in the hospital, then
21 we would follow up on it, you know, as soon as we could
22 get to it. Sometimes we had to go to the scene or to
23 the hospital or different places whenever either
24 suspects were in custody right away or somebody was
25 injured and possibly losing their life or something like

1 that.

2 Q. How would you be assigned an investigation?

3 A. It's all computerized now. The admin sergeant
4 will get in and review every new case that happened the
5 previous day and that night. And depending on -- I was
6 assigned to a patrol district out of the Humble area,
7 District 2, the same area where I had worked patrol at.
8 There were two investigators for each patrol district.
9 I was assigned to the Humble, which includes Spring,
10 Aldene, Greenspoint, Huffman, just the whole northeast
11 part of the county.

12 Q. At one time how many investigations would you
13 have that you were actively working on, approximately?

14 A. Anywhere from 10 to 30.

15 Q. So, when you would get an investigation report
16 assigned to you, what was the first thing that you would
17 do?

18 A. I would just read the patrolman's report and
19 determine if the case was what we called workable or
20 solvable. Many of the cases had nothing to follow up
21 on, no leads, and the only thing we could do was maybe
22 ask Crime Stoppers or the media to display -- you know,
23 do a press release on it because we had no other leads.
24 And then we would just have to put those aside unless we
25 got new information on them.

1 And then the other ones in the workable
2 stack, we would just try to identify suspects, follow up
3 on leads like license plates, or somebody, you know, got
4 caught with the victim's credit card, or their vehicle,
5 or a tip comes in through Crime Stoppers, or, you know.
6 Numerous ways to follow up on the cases and each one was
7 different.

8 Q. Okay. I want to talk to you about an incident
9 that occurred on September 12th, 2011. Were you
10 assigned this case?

11 A. Yes.

12 Q. And how were you assigned the case?

13 A. I believe my sergeant just e-mailed me a list
14 of case numbers that had happened and that one -- this
15 one was one that I followed up on the next day that I
16 got it.

17 Q. And when you got it, you read the report that
18 was already in the system; is that right?

19 A. Yes.

20 Q. Okay. And based on that report, were there
21 potential suspects that had been developed?

22 A. Yes, there were.

23 Q. Okay. And the way that those were developed is
24 that they had been arrested in the complainant's car; is
25 that right?

1 A. Yes.

2 Q. And so, that's a potential suspect for you?

3 A. Right.

4 Q. When you had that information, what's the first
5 thing that you did?

6 A. I believe I researched the suspects and --
7 well, I just researched the suspects and was able to
8 obtain photos of them.

9 Q. Okay. And were those booking photos from when
10 they were arrested that night, the night of the
11 incident?

12 A. Yes.

13 Q. And so, what did you do with those booking
14 photos?

15 A. We have a software called Mugshot Software and
16 it allows you to input the suspect's photo and it
17 automatically selects the other five photos based on
18 race, age range, maybe. You know, it depends.
19 Sometimes they're just two or three years apart. And
20 you can strike individual photos or add photos if you
21 don't like the way it looks.

22 Q. When you're creating -- and you call it a
23 photospread; is that right?

24 A. Yes.

25 Q. When you're creating this photospread, what is

1 your main concern?

2 A. You want to be fair with the photospread. For
3 instance, you don't want to have a white suspect in the
4 photo line-up that's your robbery suspect and then five
5 black males or one black male and five white males. You
6 want it to be -- they don't need to be six identical
7 twins, but they need to be fairly close in age and
8 physical description. You don't want to have five
9 300-pound midgets and one very skinny 110-pound guy,
10 real tall guy. So, you have to kind of look at it and
11 make sure that your suspect doesn't stand out crazily by
12 himself. And you also want it to be where it's just a
13 fair representation of six, say, black males, white
14 males, Hispanic males, Asian males, whatever the target
15 suspect's race and age is.

16 Q. And so, the two suspects that had been
17 developed in this case, what were their names?

18 A. Byron Keith Ferguson. He was the driver of the
19 vehicle that was stopped. And I believe the passenger
20 was Ezquiel Valdillez.

21 Q. Okay. And you said Ferguson. Is it also a
22 name Byron Keith Harmon?

23 A. I'm sorry. Ferguson was my partner at the
24 time. I got that confused.

25 Q. Okay.

1 A. Byron Harmon was the suspect and Deputy
2 Ferguson, he was on robbery with me at the time.

3 Q. Okay. All right. So, Byron Keith Harmon was
4 one of the suspects. And Ezquiel -- and I'm terrible
5 with pronouncing names -- Valdillez. Is that correct?

6 A. Yes.

7 Q. So, those were the two suspects that had been
8 developed from the traffic stop driving the
9 complainant's stolen car?

10 A. Yes.

11 Q. All right. And so, then you put those
12 individuals in a photospread?

13 A. Yes.

14 Q. Okay. Did you read in the initial report that
15 the complainant had reported that it was two black male
16 suspects that had committed the initial offense?

17 A. Yes, I did.

18 Q. Okay. Now, when you saw -- I'm just going to
19 call him Ezquiel because it's easier. When you saw
20 Ezquiel, did you notice that he was not a black male?

21 A. I did notice and it was probably because of his
22 name, but he looked like he could have been a very
23 light-skinned black male, but, you know, I couldn't
24 tell.

25 MS. FLADER: Your Honor, may I approach the

1 witness?

2 THE COURT: Yes.

3 Q. (By Ms. Flader) I'm going to show you what has
4 been previously marked as State's Exhibit 1 and State's
5 Exhibit 2. Are these the photospreads that you created
6 in regards to this case (indicating)?

7 A. Yes. That's Ezquiel and that's Byron Harmon
8 (indicating).

9 Q. And when you created these photospreads, you
10 created them in the manner that you expressed just
11 before, that you had the computer select people and then
12 you had the computer select which position they were
13 placed in; is that correct?

14 A. Right. The computer randomly selects one
15 through six as the position.

16 Q. Okay. And why does the computer do it rather
17 than you?

18 A. It just takes the human error out of it. That
19 way you can't -- you know, a lot of people wouldn't want
20 to be in the number-one position. And if you select the
21 suspect in number one, well, then, he'll say: Well, no
22 wonder, I was the first one they looked at, they were
23 nervous. So, if you let the computer -- and I've done
24 hundreds of these over seven years before I left
25 Robbery. I probably did 3 to 500 photo lineups. It's

1 better just to do it the same way every time randomly
2 and let the computer do it. And only if I see something
3 obviously wrong, you know, maybe the booking deputy put
4 in the wrong race. So, like on this one, if a white guy
5 pops up, well, you can't have that. So, I manually
6 strike him, let the computer fill in another one.
7 That's just the way I do it every time.

8 Q. Okay. And then after you've created these
9 photospreads, did you then go and show them to the
10 complainant?

11 A. Yes.

12 Q. Okay. I want to talk about that. What day did
13 you go and visit the complainant?

14 A. It was December 16th. Approximately four days
15 after the robbery.

16 Q. When you -- when you went and met with the
17 complainant, did you talk to him first and set up a time
18 to go and meet with him or how did you make contact with
19 him?

20 A. I had to use his daughter as a translator
21 because he didn't speak very good English. And she
22 helped -- oh, I'm sorry. I'm wrong on that. That was
23 the video line-up.

24 The photo line-up, we just used his address
25 off of the report and went to his apartment.

1 Q. Okay. And was he there when you got there?

2 A. Yes, he was.

3 Q. Okay. And did you or your partner speak
4 Vietnamese?

5 A. No.

6 Q. And did you know that the complainant only
7 spoke Vietnamese?

8 A. No. The deputy had referred that he spoke
9 limited English or there was a translation problem, but
10 I didn't know he was -- he was strictly Vietnamese or
11 almost Vietnamese only.

12 Q. Okay. When you got there, did you try to
13 communicate with him?

14 A. Yes.

15 Q. How did you try to communicate with him?

16 A. I tried to tell him we were there for the
17 robbery and I finally got through about why we were
18 there. You know, I showed him our I.D.s and our badges.
19 And I wanted -- I asked him to sit down. And he was a
20 very animated man. He was very lively. He had
21 something wrong with his throat, I believe. And he
22 spoke, but he was speaking in a whisper. And we were
23 having a lot of trouble communicating. And I tried to
24 explain to him about the photo line-up and how -- what I
25 needed him to do. And he understood photos. I need you

1 to look at photos. And he nodded his head. And I asked
2 him: Do you read English? And he shook his head.
3 Because we have an instruction form that we typically
4 use. We have the person read the instruction form and
5 it's got some basic instructions that say, you know, we
6 don't want you to guess; you know, your identification
7 is not the sole -- you know, the sole evidence against
8 this person, things like that. It's just a general
9 warning about how -- you know, about looking at the
10 photo line-up. And he couldn't read English. There was
11 another man in the apartment who didn't read or speak
12 English either, so...

13 Q. So, did you then show him the photospreads?

14 A. Yes.

15 Q. Did you show them together or did you show them
16 one at a time?

17 A. No. One at a time.

18 Q. Why did you do that?

19 A. That's just the way I do it. I mean, it's two
20 separate suspects. You never put two suspects in the
21 same photo line-up. You only have one suspect per photo
22 line-up. And that's just our standard procedure. So, I
23 showed them one at a time.

24 Q. When you showed him the first photospread,
25 which defendant does the first photospread include?

1 A. That's Ezquiel Valdillez.

2 Q. And when you showed him that photospread, can
3 you tell the jury how he reacted?

4 A. I thought he was going to have a heart attack.
5 I've been doing that a long time and it was one of the
6 top two or three most obvious reactions I've ever had.
7 He jumps up out of the chair and he starts -- I guess he
8 was like slapping the paper or something similar,
9 tapping at the photo. And I said: Who is that? Who is
10 that? And he started hitting himself in the head, you
11 know. And then: He take my car, he take my car. So,
12 he was driving at his kitchen table. So, he drove for
13 awhile (indicating). And then I went back over it. You
14 know, he take car, he take car, he drive off in car,
15 something like that.

16 MS. FLADER: Your Honor, at this time,
17 State would offer State's Exhibit 1 into evidence,
18 tendering to opposing counsel for any objections.

19 **(State's Exhibit No. 1 Offered)**

20 THE COURT: Okay.

21 MR. JOHNSON: No objection, Your Honor.

22 THE COURT: State's 1 is admitted.

23 **(State's Exhibit No. 1 Admitted)**

24 MS. FLADER: Your Honor, may I publish it
25 to the jury?

1 THE COURT: Yes.

2 Q. (By Ms. Flader) Okay. So, this is the
3 photospread that included the co-defendant in this case,
4 Ezquiel?

5 A. Yes.

6 Q. All right. And he was randomly placed in
7 position number five; is that correct?

8 A. Yes. You can see the numbers on the bottom
9 left corner of each photo.

10 Q. When the complainant identified him, we see a
11 circle and my name is Loi Phan. Who wrote that?

12 A. Mr. Phan wrote it. I asked him to sign his
13 name and that's what he wrote. So, I -- I just left it
14 alone.

15 Q. Okay. And so, by signing that, that is
16 indicating that that's the individual that he chose as
17 one of the suspects in this case?

18 A. Yes.

19 Q. All right. And then did you show him
20 photospread number two?

21 A. Yes.

22 Q. And whose photo was included in photospread
23 number two?

24 A. Byron Harmon.

25 Q. Okay. And that's the defendant in this case?

1 A. Yes.

2 Q. Do you see him in the courtroom today?

3 A. Yes. He's wearing a -- kind of a greenish
4 shirt.

5 MS. FLADER: Your Honor, would the record
6 reflect that the witness has identified the defendant?

7 THE COURT: Yes.

8 Q. (By Ms. Flader) And what position was
9 Mr. Harmon placed in?

10 A. He was in number six.

11 Q. And did you select that or did the computer?

12 A. The computer.

13 Q. All right. When you showed the complainant the
14 photospread of State's Exhibit 2, can you describe to
15 the jury how he reacted to that photospread?

16 A. Yes. He picked it up and -- and was studying
17 it for 20 to 30 seconds and then he used -- I believe it
18 was two fingers and did that (indicating), like he
19 couldn't tell if it was number one or number six. And I
20 waited. I told him to look closely. He looked again
21 and he did one and six (indicating). And kind of
22 shrugged a little bit. So, I took it away at that time.

23 MS. FLADER: Your Honor, at this time,
24 State would offer State's Exhibit 2 into evidence,
25 tendering to opposing counsel for any objection.

1 **(State's Exhibit No. 2 Offered)**

2 MR. JOHNSON: No objection, Your Honor.

3 THE COURT: State's 2 is admitted.

4 **(State's Exhibit No. 2 Admitted)**

5 MS. FLADER: May I publish it, Judge?

6 THE COURT: Yes.

7 Q. (By Ms. Flader) So, we're looking at State's
8 Exhibit 2 and you indicated that Mr. Phan put his finger
9 on the photo of the defendant in position number six and
10 the person in position number one. He put his finger on
11 both of them at the same time; is that right?

12 A. Yes.

13 Q. And then he made a shrugging -- shrugging
14 gesture?

15 A. Uh-huh, yes.

16 Q. Is that right?

17 A. Yes. Can I say one more thing?

18 Q. Go ahead.

19 A. And during that time, he actually laid down on
20 the ground and covered up his head like he was being
21 struck. And I'm not sure what that meant, but it kind
22 of implied that, you know, I got knocked to the
23 ground --

24 MR. JOHNSON: Your Honor, I'm going to
25 object to speculation.

1 THE COURT: Sustained.

2 Q. (By Ms. Flader) Okay. So, he laid down on the
3 ground and sort of covered his head --

4 A. Yes.

5 Q. -- when you showed him State's Exhibit 2?

6 A. Yes.

7 Q. All right. You said that he shrugged his
8 shoulders. What did you take that as an indication of?

9 MR. JOHNSON: Calls for speculation, Your
10 Honor.

11 THE COURT: Sustained.

12 Q. (By Ms. Flader) There's several different kinds
13 of identification for a photospread; is that correct?

14 A. Yes.

15 Q. Can you tell the jury what those are?

16 A. I would call them positive, tentative, and a
17 negative.

18 Q. And can you just explain what each of those are
19 to the jury?

20 A. Positive would be where they select one photo,
21 you ask them if they're sure. They say yes. And could
22 you circle the photo that you indicated. They circle
23 it, sign their name. That's a positive.

24 A tentative, they will say: I'm almost
25 positive it's him, I'm not -- you know, it's either him

1 or him, or -- there's different grades of tentative.
2 And what I do is say: How sure are you? Which I
3 couldn't do in this case, unfortunately. And he chose
4 two photos. If he had only chose one photo, then I
5 would have tried to communicate to him, you know,
6 zero -- or 50 percent, 75, 100, and have them write that
7 with their name, 75 percent. And that would be a
8 tentative. Or if they select two photos. If they
9 select more than two photos, I consider that a negative.
10 And when they do two, it makes it 50-50 and I consider
11 that a tentative, but...

12 Q. So, in this situation where he points at two
13 photographs, what would you classify that as?

14 A. I would consider that a tentative, that needs
15 more -- a lot more than just the photo line-up.

16 Q. Okay. So, you had him tentatively identifying
17 the defendant in the photospread and you had the fact
18 that the defendant was caught driving the stolen
19 vehicle --

20 A. Yes.

21 Q. -- is that correct?

22 A. Yes.

23 Q. What was your perception of the case based on
24 just that information?

25 MR. JOHNSON: Your Honor, I'm going to

1 object to that characterization. It's his theory that
2 it was a tentative. Mr. Phan never said anything to the
3 degree in which he was identified.

4 THE COURT: Overruled. You'll get to
5 cross-examine the witness.

6 Go ahead.

7 Q. (By Ms. Flader) You can answer.

8 A. I'm sorry. Could you ask it again?

9 Q. Maybe.

10 The fact that Mr. Phan had tentatively
11 identified the defendant and the fact that the defendant
12 was caught driving the stolen car, what was that -- what
13 was your opinion about that?

14 MR. JOHNSON: Same objection, Your Honor.

15 THE COURT: Overruled.

16 A. I believe --

17 THE COURT: Go ahead.

18 A. I believe that I had the right suspect, one of
19 the two right suspects.

20 Q. (By Ms. Flader) Okay. And the other suspect
21 was Ezquiel, who the complainant positively identified
22 in that photospread, correct?

23 A. Yes. And also, it was due to the lapsed time
24 from the robbery to the traffic stop or when they were
25 found in the car. It was only a few hours.

1 Q. What does that mean?

2 A. Well, a lot of times we have a stolen car and
3 it may be three days later before that car is found and
4 it's been passed off either to a drug user or -- it's
5 called a crack rental, basically. Hey, I'll let you
6 borrow this car for drugs, something -- I'm not saying
7 that's what happened in this case, but if you have a two
8 to three-day gap between the stolen car and the
9 recovery, then there's no telling how many times it's
10 changed hands, but whenever the car is found, almost
11 immediately then, you know, that gives more weight to
12 the -- to the belief that the people in the car are the
13 ones that took the car.

14 Q. Okay. And when the time difference is two
15 hours, that's a very short amount of time, correct?

16 A. Right. Especially when you include the travel
17 time between northeast Harris County and then into the
18 city of Houston on Rittenhouse where this happened.

19 Q. Okay. So, even though in your opinion you had
20 the correct defendant, was your testimony correct?

21 A. Yes.

22 Q. Did you do anything additional just to verify
23 that this was the correct defendant?

24 A. I wasn't happy with the photo line-up. I like
25 to -- I like to be sure. So, I asked the daughter of

1 the victim if she could bring him in for a video
2 line-up, a person -- live line-up.

3 Q. And can you describe what that procedure is?

4 A. A live line-up, there's a room here downtown at
5 49 San Jacinto and there's a line-up deputy. He's
6 assigned to do nothing but line-ups. He will go pull
7 the suspect out of the Harris County Jail, or if he
8 comes up on his own, and then he will actually go into
9 the jail and pick four -- four other inmates -- a live
10 line-up is usually five people. And he will go find
11 four inmates, kind of like on the photo line-up that are
12 similar in physical characteristics, race, sex, and age,
13 in the same basic group. Once again, it's not going to
14 be five identical twins because people are different.

15 Anyway, they bring them in. And they --
16 it's a one-way glass. The victim can see the suspect
17 and the other four people, but they can't see through
18 the glass. And they bring them in and they have them
19 stand on a -- on one through five little dots. They
20 turn on a video camera and then one of the officers
21 that's conducting the investigation -- in this case I
22 believe it was Deputy Ferguson -- he has a standard form
23 and you call out: Number one, step -- oh, prior to
24 that, you let the target suspect, the one you're looking
25 at, in this case Mr. Harmon, you let them choose where

1 they want to be in the line-up. They may be more
2 comfortable in number one or five or in the middle. So,
3 we let them choose so there's no question about it.

4 And then after the inmates are set up, then
5 we start the video camera and the victim sits down. In
6 this case, we had the victim and his daughter. We let
7 them know that they needed to -- that he needed to watch
8 the line-up, he needed to stay calm and quiet and watch
9 all the suspects do their little turn. And then we call
10 out instructions for each inmate to step forward, turn,
11 turn, turn, turn until they're facing back. And then we
12 have them step back to the square of the circle. And
13 then the next one. And we go through all five inmates.

14 After all five inmates have done the exact
15 same thing, then the line-up is considered over, and
16 then you ask the victim if he recognized anyone, you
17 know, in this case that robbed you.

18 Q. Okay. And so, you did that live line-up in
19 this situation?

20 A. Yes.

21 Q. And how did you contact the complainant to have
22 him come down to the police station to view this
23 line-up?

24 A. Through his daughter. And she was also the
25 owner of the vehicle. So, we had to deal with her on

1 trying to get her car back and things like that.

2 Q. All right. And so, when she is there with him,
3 is she translating for him?

4 A. Yes.

5 Q. When you began the process, what instructions
6 did you give him through the translator?

7 A. Just to sit back and relax and watch all five
8 inmates, try not to say anything or do anything. I
9 informed them you don't -- and he was scared. He was --
10 he didn't understand the whole one-way glass thing. So,
11 I had his daughter tell him, you know, there's no reason
12 to be scared. They can't see him, they can't get to
13 him, and we have three police officers in this room just
14 in case he's scared. Just to calm him down. Most
15 people that go in there are intimidated, especially in a
16 violent crime --

17 MR. JOHNSON: Your Honor, I'm going to
18 object to the nonresponsiveness.

19 THE COURT: Let's keep it in question and
20 answer, please.

21 Q. (By Ms. Flader) What other instructions did you
22 give him?

23 A. Just to stay seated, watch all five inmates
24 carefully, don't say anything or do anything until we
25 tell you that the line-ups are over. It will be

1 videotaped and the inmates cannot see you. And that's
2 really about it.

3 Q. Okay. Now, the suspect, when he was brought
4 down for the live line-up, was he given the opportunity
5 to choose which position he would stand in?

6 A. Yes, he was.

7 Q. Okay. And what position did he initially
8 choose?

9 A. He initially said number two and then we said
10 okay. And then as we were getting ready to walk out of
11 the room, he said he wanted to change his mind and be in
12 number one. So, we said okay. Then we informed the
13 line-up deputy that Mr. Harmon needed to be in the
14 number-one position.

15 Q. And was he in the number-one position?

16 A. Yes.

17 Q. You mentioned that it was recorded; is that
18 correct?

19 A. Yes.

20 MS. FLADER: Your Honor, may I approach?

21 THE COURT: Yes.

22 Q. (By Ms. Flader) I'm going to show you what has
23 been marked as State's Exhibit 3. Do you recognize this
24 (indicating)?

25 A. Yes. It's a CD copy with my handwriting on it

1 with the case number.

2 Q. And is this the video that was created of the
3 live line-up that was conducted that day of the
4 defendant?

5 A. Yes.

6 Q. Okay. And was it made on a device capable of
7 video recording?

8 A. Yes.

9 Q. Okay. And were you the one that operated that
10 video recorder?

11 A. No, I was not.

12 Q. Was it operated by someone who knows how to use
13 a video recorder?

14 A. Yes.

15 Q. And have you watched it prior to today?

16 A. Yes.

17 Q. Is it a fair and accurate copy of that line-up?

18 A. Yes.

19 MS. FLADER: Your Honor, at this time,
20 State would offer State's Exhibit No. 3 into evidence,
21 tendering to opposing counsel for any objections.

22 **(State's Exhibit No. 3 Offered)**

23 MR. JOHNSON: No objection, Your Honor.

24 THE COURT: State's 3 is admitted.

25 **(State's Exhibit No. 3 Admitted)**

1 MS. FLADER: And may I publish it to the
2 jury?

3 THE COURT: Yes.

4 (State's Exhibit No. 3 published)

5 Q. (By Ms. Flader) I want you to walk us through
6 the complainant's reaction to this entire process from
7 the time he -- that inmates began coming into the room.

8 A. I think you can hear him say something. It
9 sounds like number one and his sister -- I mean his
10 daughter says something in Vietnamese to him and kind of
11 pats his arm. And he was staring at number one for
12 quite a while until everybody started doing their turns.
13 And then as soon as it was over and the fifth inmate
14 stepped back, he starts saying: Number one again.
15 Number one, number one, number one. And that was about
16 it.

17 Q. What kind of identification would you consider
18 that to be?

19 A. Positive.

20 Q. What about his demeanor? What was his demeanor
21 like while the inmates were walking into the room?

22 A. He was -- he didn't get up really out of his
23 chair a lot, but he was ringing his hands and he was
24 clenching his fists repeatedly and he would close his
25 eyes and open them back up, but he just continued to

1 look at number one off and on.

2 Q. And how would you characterize that reaction to
3 seeing the defendant?

4 A. I would say it was typical --

5 MR. JOHNSON: Calls for speculation, Your
6 Honor.

7 THE COURT: Overruled.

8 Go ahead.

9 A. It's a typical reaction for someone who's been
10 in a -- been in something like a robbery and they're
11 that close to the defendant. It just brings back all
12 those memories. Kind of like a post-traumatic stress
13 disorder or something similar where they're reliving the
14 incident.

15 Q. (By Ms. Flader) You saw the defendant back at
16 that time in September of 2011 and you have an
17 opportunity to see him now. Can you describe to the
18 jury if there's any change in the defendant?

19 A. It looks like he's got some facial hair and
20 maybe gained 30 to 40 pounds, maybe 30.

21 Q. Does it change someone's appearance when they
22 gain that much weight?

23 A. It did to me. Yes. Sorry.

24 MS. FLADER: Pass the witness.

25 THE COURT: Mr. Johnson.

1 MR. JOHNSON: Thank you, Judge.

2 CROSS-EXAMINATION

3 BY MR. JOHNSON:

4 Q. Sergeant -- is it Minchew?

5 A. Yes.

6 Q. When you normally show someone a photospread,
7 what are the instructions that you give -- let's go over
8 them one at a time.

9 What's normally the first instruction you
10 give a person before you show them a photospread.

11 A. Are you talking about the written forms?

12 Q. Yes, sir. They're kind of warnings or
13 instructions before you actually show them the
14 photospread.

15 A. I don't have a copy with me, but it says that
16 you're being asked to look at these photos as part of an
17 investigation. And, actually, there's a space to
18 initial next to each instruction. And it says that
19 you're not to assume that the -- the person who -- or
20 the suspect in this case is in the photos.

21 Q. Why is that important, do you think, to give
22 someone that instruction?

23 A. Just to -- I mean, it wouldn't be fair if you
24 went up and told someone: He's in there, you just need
25 to find him.

1 Q. Might not that be the impression a person that
2 doesn't speak English would have when two big, burly
3 police officers show up with a photospread, don't you
4 think that that might be a signal that a regular person
5 might get that, hey, he's in here, all you have to do is
6 pick him out? Isn't that the concern that you're
7 alleviating when you give that instruction?

8 A. It's a possibility, yes.

9 Q. What's the next instruction?

10 A. You need to understand that by identifying
11 someone in the photo line-up that that's not the only
12 evidence in the case and that this case does not hinge
13 or does not rely solely on your photo identification.

14 Q. And don't you also tell them: Don't feel like
15 you have to pick out anybody?

16 A. Yeah, that would be one of the next
17 instructions. Do not feel that you need to pick out
18 anybody.

19 Q. And that's important. I mean, why would that
20 be important, do you think?

21 A. It's tied into the number one that we
22 discussed, about feeling the need --

23 Q. Because, clearly, a victim of a crime, you're
24 out there to help him, he's going to want to help you,
25 don't you think?

1 A. Out of the hundreds I've done, I've had lots of
2 people or more people than not say he's not in there.
3 So, I can't really say that.

4 Q. How many of those people did you not read the
5 instructions to?

6 A. Only a few.

7 Q. Any more instructions?

8 A. What's that?

9 Q. Any more instructions?

10 A. Not that I can remember.

11 Oh, there's one that says you're asked not
12 to speak about this photo line-up to anyone else that
13 may be related to the case.

14 Q. So, you don't get cross-contamination,
15 everybody suddenly starts picking out the same guy, I
16 guess.

17 And from your testimony, I gather, none of
18 those were given to Mr. Phan before you gave him the
19 photospread?

20 A. No, they weren't.

21 Q. And just to be clear, he emphatically picked
22 out Valdillez. And when you showed him the photospread
23 that had Mr. Harmon in it, he just touched two pictures?

24 A. Yes.

25 Q. And, in fact, you don't know what that meant;

1 you don't know whether it means it's one of these two,
2 or if I had to guess, it could be one of these guys; I
3 mean, you don't really know because you don't speak
4 Vietnamese and he doesn't speak English. Isn't that
5 fair to say?

6 A. That's accurate.

7 Q. And so, four days later he's taken downtown and
8 he's shown a live line-up with Mr. Harmon in it,
9 correct?

10 A. Yes.

11 Q. And after -- if I read your report correct,
12 when he identified Mr. Harmon, he said: I recognize his
13 face; is that correct?

14 A. Yes.

15 Q. Now, who else was in the live line-up that was
16 in the photospread?

17 A. I don't believe any of them were.

18 Q. So, he had already seen Mr. Harmon's face four
19 days before in the photospread?

20 A. Yes.

21 Q. And so, that didn't -- you didn't get a good
22 I.D. there. So, then you put Mr. Harmon with four other
23 guys and said: Try again. You don't think that's a
24 little bit suggestive?

25 A. No, not based on my experience, especially when

1 something happens in the dark or fast or in about five
2 seconds. They don't get a -- they get more of a sense
3 of the entire person, the entire suspect.

4 Q. But he said: I recognize his face?

5 A. Yes.

6 Q. He didn't say I recognize his body or how tall
7 he is or how much he weighs. He said: I recognize his
8 face. Is that correct?

9 A. He was saying a lot, but that's all I
10 recognized in English.

11 Q. Now, a minute ago you said: Well, this car was
12 picked up so soon after the robbery. What was it, about
13 an hour-and-a-half, hour and 45 minutes later; is that a
14 fair --

15 A. It appeared to be closer to two hours.

16 Q. And you said, well, given the travel time, it
17 even narrows the gap, but how long does it take from the
18 Mount Houston road over to Rittenhouse where he was --
19 the car was stopped?

20 A. I'm not sure of the exact time. It's in -- you
21 know, my area is restricted to unincorporated Harris
22 County. And the Houston Police Department were actually
23 the ones that found the vehicle over there. So, I never
24 did --

25 Q. Okay. So, when you say given the travel time,

1 you really don't know what the travel time is?

2 A. Right. I mean, if it was a street in the
3 county, I would know, I could tell you. I don't drive
4 that area very often, so...

5 Q. And I think you testified that a lot of times
6 stolen cars get passed around a lot, sometimes in
7 exchange for drugs or other favors, and that's not
8 uncommon out in those neighborhoods?

9 A. Right.

10 Q. And it doesn't take much time to pass a car
11 off, does it?

12 MS. FLADER: Judge, I would object to
13 speculation.

14 THE COURT: Sustained.

15 Q. (By Mr. Johnson) And it's your understanding
16 that when Mr. Phan originally described the big man, he
17 said he was wearing a black shirt; is that correct?

18 MS. FLADER: Judge, I'm going to object to
19 hearsay. This officer doesn't have personal knowledge
20 of that.

21 THE COURT: Overruled. You can answer it
22 if you know.

23 A. I'd have to review Deputy Gustafson's report.

24 Q. (By Mr. Johnson) That's all right. He's
25 already testified.

1 A. Okay.

2 Q. You said at any given time you have between 20
3 and 30 investigations. Do you know how many you had
4 back in November of 2011 -- I mean, September 2011? I'm
5 sorry.

6 A. No, sir. It changes daily based on trials and
7 plea bargains and confessions and -- I mean, we keep a
8 case opened until a suspect is arrested and I file the
9 warrants and the person may not be arrested for two or
10 three years, depending on if they're running or hiding.
11 So, I consider that an open case until the person has
12 actually been brought to court. So, a lot of those may
13 have already been -- the investigation part completed,
14 but it's still considered an open, so...

15 Q. But you don't know how many cases you had?

16 A. No, sir, I don't. It changes all the time.

17 MR. JOHNSON: Pass the witness.

18 THE COURT: Ms. Flader.

19 MS. FLADER: No more questions, Judge.

20 THE COURT: You may step down, sir.

21 MS. FLADER: And with that, the State would
22 rest.

23 MR. JOHNSON: May I have a moment, Your
24 Honor?

25 THE COURT: Okay.

1 (Pause)

2 MS. FLADER: Judge, may this witness be
3 excused?

4 THE COURT: Yes.

5 MR. JOHNSON: No objection, Judge.
6 Defense would rest, Your Honor.

7 THE COURT: What says the State?

8 MS. FLADER: State rests and closes, Judge.

9 THE COURT: Please retire to the jury room.

10 (Recess)

11 (Open court, defendant present, no jury)

12 THE COURT: Does the State have any
13 objection to the charge?

14 MS. FLADER: No, Judge.

15 THE COURT: Defense have any objections to
16 the charge?

17 MR. JOHNSON: I've got another couple of
18 pages, Judge.

19 THE COURT: Okay.

20 (Pause)

21 MR. JOHNSON: It's fine with me, Judge.

22 THE COURT: Okay. Fifteen minutes?

23 MR. JOHNSON: That's fine.

24 THE COURT: I'll give you a two-minute
25 warning.