

1 other witnesses are testifying. Please don't discuss  
2 your testimony with any of the other witnesses. You are  
3 free to talk to the attorneys.

4 Who is your first witness?

5 MR. KEITER: Your Honor, the State will  
6 recall Abe Vanderberry.

7 THE COURT: All right. All the rest of the  
8 witnesses please step outside.

9 MR. KEITER: Your Honor, at this time, the  
10 State will reoffer, resubmit all the evidence from the  
11 guilt/innocence phase of the trial.

12 MR. DAVIS: And, Your Honor, subject to all  
13 objections that were previously made.

14 THE COURT: All right.  
15 Officer Vanderberry.

16 Mr. Keiter, you may proceed.

17 MR. KEITER: Yes, Your Honor. May I  
18 approach the witness?

19 THE COURT: You may.

20 **ABRAHAM VANDERBERRY,**  
21 having been previously sworn, testified as follows:

22 **DIRECT EXAMINATION**

23 BY MR. KEITER:

24 Q. We had talked in guilt/innocence about State's  
25 Exhibit No. 14. Did you find other evidence in the

1 house at 7823 Sarita Street, Officer Vanderberry?

2 A. Yes, sir, I did.

3 Q. And did you -- can you recall where you found  
4 this evidence?

5 A. It was under the kitchen sink.

6 Q. And was this evidence something that was  
7 concerning to you?

8 A. Yes, sir, it was.

9 Q. I'd like to show you in State's Exhibit No. 55?

10 MR. DAVIS: Your Honor, I'd object to him  
11 showing it to the jury. It hasn't been admitted into  
12 evidence.

13 THE COURT: Could you lay the predicate,  
14 please?

15 MR. KEITER: Yes, ma'am.

16 Q. (BY MR. KEITER) Based on what we've talked  
17 about in guilt/innocence, did you bring State's  
18 Exhibit 14 and its contents to the courtroom?

19 A. Yes, sir, I did.

20 Q. And do you recognize -- have you had a chance  
21 to go through State's Exhibit No. 14 and its contents?

22 A. Yes, sir, I have.

23 Q. Do you recognize the contents?

24 A. Yes, sir, I do.

25 Q. Including State's Exhibit 55?

1 A. Yes, sir.

2 Q. State's Exhibit 57A?

3 A. Yes, sir.

4 Q. State's Exhibit 57B?

5 A. Yes, sir.

6 Q. State's Exhibits 56A, B, C, D and E?

7 A. Yes, sir, I did.

8 Q. And F?

9 A. Yes, sir.

10 Q. Do you recognize all these --

11 A. Yes, sir, I do.

12 Q. -- exhibits? And are they in the same or  
13 substantially the same condition as they were when you  
14 tagged them on November 30th of 2009?

15 A. Yes, sir, they are.

16 Q. Other than the State's Exhibit sticker that has  
17 been placed on them, have they been altered in any way?

18 A. Not to my knowledge.

19 MR. KEITER: Your Honor, at this time State  
20 will offer State's Exhibits 15 -- 55, excuse me.

21 MR. DAVIS: May we approach, Your Honor?

22 THE COURT: Yes.

23 (Bench conference.)

24 MR. DAVIS: I would object, Your Honor, to  
25 these documents at least to those -- I object as being

1 irrelevant. I would ask the Court to engage in a 403  
2 (b) analysis. They are not probative of anything. The  
3 officer is going to offer speculation that they were  
4 involved or at the least the items he seized in a home  
5 invasion robbery or some type of robbery. There's no  
6 evidence there was ever any robbery. It was evidence  
7 that was there, and allowing him to speculate as to it  
8 would be unduly prejudicial, even in a sentencing  
9 hearing. There isn't any concrete evidence, there isn't  
10 any finding that it was there. So, I think using these  
11 items when there's been no notice either of -- I'd say  
12 it would be unduly prejudicial to the Defendant.

13 THE COURT: You objected when the witness  
14 was identifying the item. So, I'm not sure what the  
15 items are.

16 MR. KEITER: They are listed in the police  
17 report, so there was notice that the Defense has a copy  
18 of the police report. There are gloves, masks and duct  
19 tape. Based on Officer Vanderberry's training and  
20 experience, these are items that are commonly used by  
21 dealers to do home invasions.

22 THE COURT: Because this is the punishment  
23 phase of the trial, I do find that the evidence is  
24 probative. And the probative value outweighs any  
25 prejudicial effect.

1 (End of bench conference.)

2 THE COURT: All right. State's Exhibits, I  
3 believe, you've offered those items into evidence; is  
4 that correct, Mr. Keiter?

5 MR. KEITER: I do at this time, yes, Your  
6 Honor, State's Exhibit 55, 56A up to and including  
7 State's Exhibit 56F and State's Exhibits 57A and 57B  
8 into evidence.

9 (State's Exhibit Nos. 55, 56A-F, 57A-B  
10 offered.)

11 MR. DAVIS: The same objection, Your Honor.

12 THE COURT: Those objections are overruled.  
13 State's Exhibits No. 55 and 56A through F and also 57A  
14 and B are admitted.

15 (State's Exhibit Nos. 55, 56A-F, 57A-B  
16 admitted.)

17 MR. KEITER: May I approach the witness,  
18 Your Honor?

19 THE COURT: You may.

20 Q. (BY MR. KEITER) Officer Vanderberry, during  
21 the guilt and innocence stage of the trial, you talked a  
22 lot about home invasions. And you're familiar with home  
23 invasions; is that correct?

24 A. Yes, sir, I am.

25 Q. I'm going to show you some items that have been

1 admitted into evidence, starting with State's  
2 Exhibit 55, can you tell the jury what that is?

3 A. That is going to be duct tape.

4 Q. State's Exhibits 57A and 57B, without touching  
5 these, can you tell us what these are?

6 A. Those are hair nets.

7 Q. What are they often used for based on your  
8 training and experience in drug cases?

9 MR. DAVIS: Objection, calls for  
10 speculation, Your Honor.

11 THE COURT: He can give an opinion.

12 A. They're converted into face masks to conceal  
13 the face.

14 Q. (BY MR. KEITER) And State's Exhibit 56A, B, C,  
15 D, E and F, what are these?

16 A. Those are work gloves.

17 Q. And did you locate all of this together?

18 A. Yes, sir.

19 Q. And in your opinion based on your training and  
20 experience, what did all this indicate to you?

21 A. It was indicative of home invasion equipment.

22 Q. Officer Vanderberry, is there anything in  
23 particular that caught your attention about the location  
24 of 7823 Sarita Street?

25 A. Not in the beginning, sir.

1 Q. Well, is it near any other public buildings?

2 A. Yes, there is a Deady Junior Middle School is  
3 next to Sarita.

4 Q. Is it within 1000 feet?

5 A. Yes, sir, it is.

6 Q. And is that against the law as well?

7 A. Yes, sir, it is.

8 Q. When you initially arrested and detained the  
9 Defendant, was there a conversation with you, Officer --  
10 Lieutenant Ohland and the Defendant?

11 A. Yes, there was.

12 Q. And in that conversation, were there some  
13 threats made to you?

14 A. Yes, sir, there were.

15 Q. Did you take those threats seriously?

16 A. Yes, sir, I did.

17 Q. Tell us what the Defendant told you?

18 A. While we were filing out the paperwork for the  
19 arrest blotter, he looked at me and he said, do you know  
20 who you're fucking with? Do you know what family I  
21 belong to? And there was no response from me. And then  
22 he goes, I can have it so you disappear. We can get to  
23 you at any time and your family.

24 Q. Did you take that seriously?

25 A. Yes, sir, I did.

1 Q. How serious did you take it?

2 A. We ended up filling retaliation charges against  
3 the Defendant.

4 Q. And when the Defendant told you, do you know  
5 what family I'm with, what did you take that to mean?

6 A. That he was referring to the Mexican Mafia.

7 MR. KEITER: Pass the witness, Your Honor.

8 THE COURT: All right, Mr. Davis.

9 MR. DAVIS: Yes, Your Honor.

10 **CROSS-EXAMINATION**

11 BY MR. DAVIS:

12 Q. Now, sir, you're familiar with the Mexican  
13 Mafia?

14 A. Yes, sir, I am.

15 Q. And you know it as a prison gang?

16 A. It is a -- yes, sir.

17 Q. You didn't take that seriously from this man,  
18 did you?

19 A. Yes, sir, I did.

20 Q. You knew he hadn't been to prison?

21 A. They have associates, sir, that are in the free  
22 world.

23 Q. In fact, you knew he had never been convicted  
24 of a felony, didn't you?

25 A. Yes, sir, later on I did, sir.



1 Q. At the time you do an arrest, you run his  
2 arrest record?

3 A. Yes, sir.

4 Q. And typically you got someone who you've  
5 arrested, they're upset about being arrested?

6 A. Sometimes.

7 Q. Okay. You've got some people that are happy  
8 that you've arrested them?

9 A. I've had a number of people that were excited  
10 that we were not home invaders when we ran search  
11 warrants on their houses and were ecstatic that they  
12 were just going to jail, and they weren't getting  
13 invaded.

14 Q. I see. But generally you encounter people  
15 upset at you when you're arresting them, don't you?

16 A. Yes, sir, we do encounter people that are  
17 upset.

18 Q. And you encounter people who mouth off and say  
19 a whole bunch of stuff?

20 A. Yes, sir, they do mouth off.

21 Q. Who talk a whole bunch of trash when they're  
22 going to jail?

23 A. I've never had that many threaten me, sir.

24 Q. I understand. You're pretty -- a nice guy  
25 mostly, right?

1 A. It is a time to deescalate things.

2 Q. In this situation he's telling you stuff that  
3 you know you can verify that isn't true?

4 A. I cannot verify that he will come after me or  
5 my family, sir.

6 Q. Well, now nothing has happened to you since  
7 this case has been pending over the three years, right?

8 A. Nothing that I know about.

9 Q. And at the time he made these statements, he  
10 doesn't have any ability to carry out any threats  
11 because you're not letting him use the cell phone,  
12 right?

13 A. At that time they can use communications in the  
14 jail, sir.

15 Q. All right. And when you were at the scene and  
16 you saw these items, you're aware that Mr. Flores works  
17 in landscaping?

18 A. I was not aware of any employment.

19 Q. So, the gloves that you saw inside could be  
20 consistent with someone who works in landscaping?

21 A. They could be consistent with that, sir.

22 Q. The duct tape could be consistent with someone  
23 who may have been taping up wires or something at the  
24 house?

25 A. That's quite possible.

1 Q. And, obviously, the hair nets are used  
2 sometimes for people to put their hair up in, right?

3 A. Yes, sir.

4 Q. Now, obviously if you have someone who is from  
5 Colombia and they tell you that you don't know what  
6 family I'm from, you wouldn't assume that that person  
7 was from the Mexican Mafia, would you?

8 A. I would assume that it would be organized crime  
9 from Colombia, sir.

10 Q. So you would assume when he says you don't know  
11 what family I'm from that he must be a member of a gang  
12 and organized crime in Colombia?

13 A. With the totality of his statements, I would  
14 assume that he is from some security threat group.

15 Q. But you don't have any other independent  
16 knowledge of that; isn't that right?

17 A. No, sir, I do not.

18 Q. And you don't have any information of him  
19 committing any home invasion robberies, either?

20 A. Not that I'm aware of.

21 Q. So, you go inside and you find these items and  
22 you jump to the conclusion that these are consistent  
23 with what's used in a home invasion robbery?

24 A. That is correct, sir.

25 Q. Even though it's a hair net, no ski mask?

1 A. No, sir.

2 MR. DAVIS: May I have one moment, Your  
3 Honor?

4 THE COURT: You may.

5 Q. (BY MR. DAVIS) Now, you didn't file a  
6 retaliation charge at the same time that you filed the  
7 other charges; isn't that right?

8 A. That is correct.

9 Q. It wasn't until he had posted bail that you  
10 decided to file the retaliation charges and have him  
11 rearrested; isn't that true?

12 A. No, sir, that is not correct.

13 Q. Well, you waited a couple of days later?

14 A. That was because we were deciding with the  
15 litany of charges that we filed in the beginning if we  
16 were going to get a DA to accept the retaliation charge,  
17 which is a lower charge.

18 Q. Now, you say the litany of the charges. You  
19 filed the marijuana and the cocaine charge, right?

20 A. Correct.

21 Q. And so that litany of those two charges that  
22 you have filed when he posted bail on those charges, you  
23 came back and charged him with a retaliation case mainly  
24 because the DA's were delaying?

25 MR. KEITER: Objection as to relevance,

1 Your Honor.

2 THE COURT: Overruled.

3 A. No, sir, it was getting to talk to special  
4 crimes and explaining them the circumstances and for us  
5 to file those charges.

6 Q. (BY MR. DAVIS) When you write up your report,  
7 you list the charges that you're charging in your  
8 report, right?

9 A. Yes, sir.

10 Q. And in your report you don't list retaliation  
11 as one of the charges you were filing?

12 A. At the time we were not filing retaliation on  
13 November 30th.

14 Q. So, when you follow or you complete your  
15 investigation, you do your investigation, you write your  
16 report, right?

17 A. Correct.

18 Q. And in your report, after you've done your  
19 investigation, you list the charges that you're planning  
20 to charge?

21 A. No, we only list the charges that are filed,  
22 sir.

23 Q. I understand. Now, you're writing this report  
24 prior to the charges being filed, though?

25 A. Yes, sir.

1 Q. You're writing your report prior to the DA  
2 making a decision to accept those charges?

3 A. No. We called the DA that night of the arrest  
4 and have the District Attorney's Office accept charges.

5 Q. But you get where I'm coming from?

6 A. No, sir, I do not.

7 Q. In your report that you complete, you don't put  
8 anything about the retaliation charge --

9 A. The --

10 Q. -- until after he posted bail?

11 A. The element of the retaliation is in the  
12 report, sir.

13 Q. You say that he made a statement in your  
14 report?

15 A. Yes, sir.

16 Q. I do remember. All right. But in terms of you  
17 charging him with the charge retaliation, that doesn't  
18 come until after he posted bail, true or not true?

19 A. I did not know when he posted bail, sir.

20 Q. So, you don't get an update on the cases as to  
21 what happens?

22 A. No, sir.

23 MR. DAVIS: One moment, Your Honor?

24 THE COURT: All right.

25 Q. (BY MR. DAVIS) Did you have some choice words

1 for Mr. Flores when he didn't agree to give you consent  
2 to search the house?

3 A. No, sir.

4 Q. Isn't it true that you cursed him out when he  
5 wouldn't sign the consent form for you to go in, and you  
6 had to actually go and get a search warrant?

7 A. No, sir.

8 Q. When you had to get the search warrant, it  
9 delayed the process a little bit; isn't that right?

10 A. It does delay the process.

11 Q. And you asked him for consent to search?

12 A. We do request consent first.

13 Q. And he didn't give consent?

14 A. That's common. No, he did not.

15 Q. And you had to go the extra yard of getting a  
16 search warrant?

17 A. Yes, we have to get a search warrant.

18 Q. And it's your testimony that you didn't cuss  
19 him out and have an argument with him about the search  
20 warrant?

21 A. No, sir, I did not.

22 Q. Is it true that you told Mr. Flores that you're  
23 going to regret that you didn't sign this consent form?  
24 I'm the F'ing man. Without using the foul language.  
25 I'm the F'ing man, and you're going to regret this?

1 A. No, sir, I did not.

2 Q. You talked about this being around a school.

3 Now in the photos that we saw, the aerial photos, we  
4 don't see the school in that photograph, do we?

5 A. I'd have to see the photos again, sir.

6 Q. If the school was right around the corner or  
7 within that diagram, it would have to have been outside  
8 of a thousand feet if it's not in those photos, right?

9 A. Sir, laser measurement was done. The school is  
10 within 422 feet of the rear of his house.

11 Q. Of the rear of the house?

12 A. Yes, sir.

13 Q. I see. So, if you're using the distance from  
14 the school to the back of the house, you're saying it's  
15 about 427 feet?

16 A. 427, yes, sir.

17 Q. And did you do that measurement, sir?

18 A. Accident division went out there with laser  
19 range finders.

20 Q. So, you didn't have any first-hand knowledge  
21 about how that was done?

22 A. No, sir.

23 Q. So, you got a report back that it was close to  
24 the school?

25 A. Yes, sir.



1 Q. So, now you didn't have --

2 MR. DAVIS: One moment, Your Honor?

3 I don't have any more questions, Your  
4 Honor.

5 THE COURT: All right. Is there anything  
6 further?

7 MR. KEITER: Briefly, Your Honor.

8 **REDIRECT EXAMINATION**

9 BY MR. KEITER:

10 Q. Officer Vanderberry, the retaliation charge was  
11 filed on December 1st of 2009; is that correct?

12 A. Yes, sir.

13 Q. So, is it common to -- is it common to be able  
14 to still have the charge before they make bond?

15 A. Yes, sir.

16 Q. And you don't know, do you, when they make  
17 bond?

18 A. No, sir.

19 Q. And so does it sound -- does it sound accurate  
20 if he made bond on December 2nd of 2009?

21 A. It could be.

22 Q. And when the Defendant threatened you, was that  
23 before or after you executed the search warrant?

24 A. That was before the warrant.

25 Q. So, at that time, what was the only offense the

1 Defendant was under arrest for?

2 A. Traffic violations.

3 Q. And so he was willing to make that threat to  
4 you before you had even executed the search warrant?

5 A. Yes, sir.

6 MR. KEITER: Pass the witness.

7 THE COURT: All right. Is there anything  
8 further?

9 MR. DAVIS: No, Your Honor.

10 THE COURT: May Officer Vanderberry be  
11 excused?

12 MR. KEITER: Yes, Your Honor.

13 THE COURT: Thank you, Officer. You may  
14 step down.

15 Call your next witness.

16 MS. ALLEN: Yvonne Stern.

17 THE BAILIFF: Judge, this witness has  
18 previously been sworn.

19 THE COURT: All right. Ma'am, have a seat.

20 Ms. Allen, you may proceed.

21 MS. ALLEN: Thank you, Your Honor.

22

23

24

25