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RICARDO GUERRA

VOL. XXVI

PUNISHMENT HEARING

69,081

CAUSE NO. 359,805

69081

THE STATE OF TEXAS

IN THE DISTRICT COURT

VS.


OF HARRIS COUNTY, TEXAS

RICARDO ALDAPE GUERRA

248TH JUDICIAL DISTRICT

VOLUME XXVI
STATEMENT OF FACTS
PUNISHMENT HEARING
OCTOBER 13, 1982

FILED IN
COURT OF CRIMINAL APPEALS
DEC 12 1983
Thomas Lowe, Clerk

FILED
RAY HARDY
District Clerk
SEP 23 1983
Harris County, Texas
By 

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CAUSE NO. 359,805

THE STATE OF TEXAS

IN THE DISTRICT COURT

VS.

OF HARRIS COUNTY, TEXAS

RICARDO ALDAPE GUERRA

248TH JUDICIAL DISTRICT

* * *

A P P E A R A N C E S:

For the State of Texas:

Mr. Bob Moen
and

Mr. Dick Bax

For the Defendant:

Mr. Candelario Elizondo
and

Mr. Joe L. Hernandez

* * *

BE IT REMEMBERED that upon this the 13th day of
October, A.D. 1982, the above entitled and numbered
cause came for Punishment Hearing before the Honorable
Henry K. Oncken, Judge of the 248th District Court
of Harris County, Texas, and a jury; and both the
State and the Defendant appearing in person and/or by
counsel, announced ready for the Punishment Hearing;
and all preliminary matters having been disposed of,
the following facts were adduced in evidence, viz:

* * *

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1 (At this time, the following proceedings
2 were had outside the presence of the jury.)

3 MR. ELIZONDO: Your Honor, we have
4 prepared a Motion in Limine for the record.

5 I believe we have already raised the
6 motion, but we are going to re-urge our Motion
7 in Limine to preclude the State from going into
8 any criminal offenses that have not resulted in
9 a final conviction as being a violation of equal
10 protection under the law, denial of due process,
11 and a violation of 37.07-3 of the Texas Code of
12 Criminal Procedure.

13 MR. BAX: For the record, the Defendant
14 is in the presence of the Court at this time.

15 THE COURT: The Motion in Limine will
16 be denied.

17 MR. ELIZONDO: Note our exception.
18

19 WADE-GILBERT HEARING

20 MR. ELIZONDO: Also, for the record,
21 we are going to request a hearing outside the
22 presence of the jury to determine, first of all,
23 if the State of Texas can link the Defendant in
24 this case to any extraneous offenses that may or
25 may not have taken place.

1 THE COURT: As I understand it, we
2 will be conducting a Wade-Gilbert Hearing.

3 MR. BAX: Yes, sir.

4 MR. ELIZONDO: Are we going to conduct
5 the hearing outside the presence of the jury to
6 determine if an offense took place, aside from the
7 Wade-Gilbert Hearing?

8 Your Honor, I am asking for a hearing
9 outside the presence of the jury, first of all,
10 to determine if, in fact, the State has enough
11 elements to prove this case, this extraneous
12 offense, to a jury beyond a reasonable doubt.

13 MR. MOEN: My only reply to that, Your
14 Honor, is that we don't have the burden of proving
15 that he committed this extraneous offense beyond
16 a reasonable doubt before it would, in fact, be
17 admissible.

18 My representation to the Court --

19 MR. BAX: I think all the Court can
20 do at this time is hear all the testimony outside
21 the presence of the jury to determine, in the
22 Court's mind, is there is sufficient evidence
23 raised to commit the Defendant to the aggravated
24 robbery which the State intends to prove up before
25 the jury.

1 THE COURT: That is my understanding
2 of the request.

3 What is the State's reply?

4 MR. BAX: It will be time-consuming.

5 MR. MOEN: I don't think that it is a
6 matter of law. I understand why he is making a
7 motion, but I don't think he is entitled to do so
8 outside the presence of the jury as a matter of
9 law, and I would think that that would go to the
10 weight of the evidence rather than its
11 admissibility.

12 MR. BAX: Mr. Elizondo is aware of the
13 fact that whether or not the witnesses, after the
14 Wade-Gilbert Hearing, can identify these witnesses
15 or not, whether they are or are not allowed to
16 identify this Defendant in the presence of the
17 jury, that we will be able to show this Court
18 that the .45 caliber Datonics pistol that the
19 Defendant has admitted was in his possession was
20 taken five days earlier in an aggravated robbery,
21 and furthermore, that the Defendant's fingerprint
22 was recovered from a tape can found at the scene
23 of the aggravated robbery, and that the tape can
24 was used to wrap the hands of the victim of this
25 offense inside the Rebel Gun Store.

1 MR. MOEN: That tape and that can
2 was brought to the store by the individuals
3 involved in the robbery and left behind by those
4 individuals.

5 MR. BAX: That is the proffer of our
6 evidence.

7 MR. MOEN: The test really at the
8 punishment phase, this portion of the trial on
9 this phase, anyway, is whether the testimony is
10 relevant as deemed by the Court, relevant and
11 admissible to the questions the jury will have
12 to answer, which is the test, and not whether we
13 can prove extraneous offenses beyond a reasonable
14 doubt, but whether or not this evidence we are
15 going to tender or offer will be relevant or
16 material to the jury to answer those two questions,
17 and we have made basically an oral proffer to the
18 Court on what we can show and intend to show by
19 our witnesses.

20 THE COURT: All right. We will conduct
21 a Wade-Gilbert Hearing, but as far as hearing
22 all the evidence outside the presence of the
23 jury, that will be denied.

24 MR. ELIZONDO: Your Honor, for the
25 record again, we will be making objections to the

1 extraneous offenses that the State intends to
2 prove during the punishment phase. May I have
3 a running objection at this time?

4 THE COURT: Yes, sir.

5 MR. ELIZONDO: Your Honor, for the
6 record, may I assume every objection I would make
7 to any question propounded on answers to the
8 questions would be overruled?

9 THE COURT: I don't know how you can
10 make that assumption.

11 MR. ELIZONDO: In regards to the
12 extraneous offenses?

13 THE COURT: I don't know how you can
14 make that assumption.

15 The extraneous offenses will be admitted.
16 There may be some questions asked relative to the
17 extraneous offenses --

18 MR. ELIZONDO: In regards to the
19 admissibility of the extraneous offenses?

20 THE COURT: There may be some questions
21 which would be objectionable.

22 MR. BAX: If I understand the Court,
23 might just, for example, is the Court saying if
24 we ask a leading question he would have to object
25 to that at the time?

1 THE COURT: Yes, sir.

2 MR. ELIZONDO: What I am objecting to
3 or asking for is a running objection to the
4 admissibility of extraneous offenses the State
5 would intend to prove at the punishment phase,
6 and as to that, if I object to any extraneous
7 offenses at the punishment phase, I assume my
8 objection to that would be overruled, not
9 precluding it from the right to object before
10 the jury anyway.

11 THE COURT: Basically speaking, the
12 objections to any extraneous offenses will be
13 overruled.

14 MR. ELIZONDO: And the answers to the
15 questions propounded in regards to the extraneous
16 offenses would also be overruled?

17 THE COURT: Yes, sir.

18 MR. ELIZONDO: And not precluding
19 me from objecting at the time of trial anyway?

20 THE COURT: Correct.

21 All right. Let's proceed.

22 MR. BAX: The State would call Robert
23 Dawson.

24 THE COURT: Robert Dawson, please.

25 MR. BAX: This witness has not been

1 sworn, Your Honor. There are three other
2 witnesses present here at this time.

3 THE COURT: Bring those witnesses in
4 and let us have them sworn at this time.

5 (The witnesses were sworn.)

6 THE COURT: The rule has been invoked,
7 which means only the witness giving testimony
8 can be in the courtroom at that time. The others
9 must remain in the hallway.

10 While you are there, do not discuss
11 your testimony with anybody else. You may, however,
12 discuss your testimony with the lawyers, but if
13 you do so, do so only outside the presence of
14 another witness.

15 You, sir, come around and have a chair.
16 The others, retire to the hallway, please.

1 ROBERT DAWSON,
2 was called as a witness on behalf of the State of
3 Texas, after having first been duly sworn, testified
4 as follows:

5
6 DIRECT EXAMINATION

7
8 QUESTIONS BY MR. BAX:

9 Q. Would you tell us your name, please?

10 A. Robert Dawson.

11 Q. And, Mr. Dawson, how are you employed?

12 A. I am employed with the Klein Independent School
13 District as a tax assessor-collector.

14 Q. Calling your attention back to July 8th, a
15 Thursday, of 1982, did you have an occasion to
16 go to the Rebel Gun Store which is located at
17 18448 Kuykendahl Road here in Houston, Texas?

18 A. Yes, sir. I went there.

19 Q. Can you tell us approximately the time of day
20 you went to that store?

21 A. A little bit before 4:00 o'clock, about ten minutes
22 before 4:00.

23 Q. 4:00 o'clock in the afternoon?

24 A. That is correct.

25 Q. What was your purpose in going to the Rebel Gun

1 Store that day, if you recall, sir?

2 A I was going to purchase some powder to load some
3 shells.

4 Q Have you frequented that store on few or many
5 occasions?

6 A I was there a couple of times before and a couple
7 of times since.

8 Q Would you tell us where you went inside the Rebel
9 Gun Store when you first entered?

10 A I walked by the counter where the salesmen were
11 working. I walked to the rear of the store where
12 the powder involved, the powder was, and I stopped
13 at a used gun rack in the back of the store and
14 was looking at a shotgun.

15 Q Had you removed a shotgun from the rack?

16 A Yes, I had. I was looking at it.

17 Q Was any employee of the Rebel Gun Store waiting
18 on you at that time?

19 A No. I went to the back of the store by myself.

20 Q Were you able to recognize any of the employees
21 of the Rebel Gun Store inside the store?

22 A I could see most of the store except for the
23 extreme right-hand side of the store as I walked
24 in the door.

25 Q When you walked in and were looking at the shotgun

1 in the used gun rack, could you tell us who else
2 you saw in the store at that time?

3 A. The only ones I saw in the store were the two
4 store employees and a customer at the counter
5 being shown a weapon.

6 Q. Have you seen that customer here today that you
7 saw at the counter?

8 A. He was here earlier.

9 Q. The person sworn in a few moments ago?

10 A. That's correct.

11 Q. As you were looking at the shotgun, did anything
12 unusual happen?

13 A. Yes. I was looking at the shotgun, directing my
14 attention toward it. It was an over-and-under
15 shotgun. I had it broken open looking at it, and
16 I heard some commotion and looked up and heard
17 someone say, "No move. No move," and I looked
18 up and saw a man with a handgun trained on the
19 manager of the store.

20 At the time, I didn't know what was
21 going on.

22 Q. When did that -- how far did that take place from
23 you, to your best estimate?

24 A. Approximately thirty-five, forty feet.

25 Q. And can you describe the man at the manager's area

1 who had told him, "Don't move. Don't move"?
2 A. He was a Latin American male, I would say around
3 thirty-five, had about a five-day growth of
4 beard, thin mustache.
5 Q. You say a five-day growth of beard?
6 How would that compare to the beard that
7 you have?
8 A. Much shorter, much lighter. You can see more of
9 his face through it.
10 Q. Would it be more accurate to describe it as
11 unshaven?
12 A. Yes, stubble. Razor stubble.
13 Q. What happened after you heard that conversation
14 take place with the manager?
15 A. Well, I was unsure what to do. I stood there --
16 I just stood there very still.
17 Q. You still had the shotgun in your hand?
18 A. Still had the shotgun in my hand.
19 Q. It wasn't loaded, I take it?
20 A. No.
21 Q. Did anyone approach you at that time or shortly
22 thereafter?
23 A. Right after I began to realize what was going on,
24 two younger Latin American males came from the
25 left side of the store, the side I couldn't see

1 because of the display racks, and one of them
2 approached me and took the shotgun away from me
3 and shoved me.

4 Q Did you notice whether either one of those two
5 persons that approached you, whether they had
6 weapons on their person at the time?

7 A The only weapon I saw to start with was the one
8 I saw pulled on the store manager.

9 Q Could you tell us the words spoke to you by the
10 two younger Latin American males that approached
11 you?

12 A The one Latin American male that approached me
13 told me he wanted to search me. I don't know
14 if those were his exact words, but he made it
15 known he was going to search me for weapons.

16 Q How did he make it known he wanted to search you
17 for weapons?

18 A I don't remember what he said. He said something
19 like, "Let me check," and started patting my suit
20 and my trousers, legs to see if I had a concealed
21 weapon.

22 Q Where was the other Latin American male who had
23 approached you at this time while the other was
24 patting you down and searching you?

25 A He had just left.

1 He put the shotgun on the counter and
2 left it to pat me down.

3 Q Let me see if I am following you correctly.

4 The first man at the counter, was he
5 still with the manager?

6 A He stayed where he was, holding the gun on the
7 store employees.

8 Q Okay. Two men had approached you, correct?

9 A Well, one of the two men had approached me.

10 Q Where was the third man? Do you know where he
11 was?

12 A He walked behind the counter.

13 Q And the counter where you were at, or --

14 A The counter where the store employees were.

15 Q So, two of the three men were over by the store
16 employees and one of the three men came to your
17 location?

18 A Correct.

19 Q After the man that had approached you had patted
20 you down and searched you, what happened after
21 that?

22 A He went behind the counter and got the store
23 employees and brought them toward the rear of the
24 building, throwing the store manager -- he threw
25 him on the ground one time, got him and herded us

1 into the back of the store in a storeroom.

2 Q Where were the other two men when this was being

3 done that had entered the store?

4 A Both of the younger guys were herding us. The

5 older guy still had the pistol, the automatic

6 pistol.

7 Q All right.

8 A And was covering us.

9 Q And where did they take you to?

10 A They took us to the rear in the storage area.

11 There was a wall in between the sales room and

12 the storage area and with a door in it, and they

13 opened the door and took us to the back.

14 Q What happened inside the room?

15 A They made us lay down on the floor and taped

16 our arms behind us with white athletic tape,

17 inch wide white athletic tape and told us not

18 to move or they would shoot us.

19 Q Did you have your face down on the floor?

20 A Face down on the floor.

21 Q Could you tell us who was doing the taping as

22 far as you are concerned? Who taped your hands

23 behind your back?

24 A The younger of the two, the middle -- there was

25 one that was approximately thirty-five. There was

1 one that was twenty-two or so, and then there
2 was a younger man, and the younger man started
3 the taping, but he was assisted by the older one
4 also.

5 Q In relation to the men as you had described them
6 earlier, the older man being at the counter --

7 A Correct.

8 Q -- another Latin American male being with him
9 when they came in and a third one being with you
10 and patting you down --

11 A Right.

12 Q -- which ones are we talking about doing the taping
13 on you? The one who was patting you down?

14 A Right. He was assisting the younger man.

15 Q He was assisting the man at the counter with the
16 pistol?

17 A The one with the pistol was still covering us with
18 a pistol. He was the only one with a weapon at
19 this point.

20 Q Have you seen anyone here in the courtroom today
21 you recognize as being one of the three men in
22 the Rebel Gun Store on July 8th, 1982?

23 A Yes, sir.

24 Q And could you tell us who that is, please, if you
25 see him in the courtroom at this time?

1 A. I don't see him.

2 Q. Do you want to come down and take a look?

3 MR. MOEN: Joe, would you get up just
4 a second?

5 A. That young man sitting there on the front row
6 with the blue jacket.

7 Q. (By Mr. Bax) Which one of the three was he?

8 A. He was the youngest one.

9 Q. He would have been the one originally at the
10 counter, the man with the gun?

11 A. He was at the counter. The man with the gun was
12 in front of the counter.

13 Q. He was not the one that had patted you down?

14 A. No.

15 Q. Do you see anybody else today you can recognize
16 as being one of the other two men?

17 A. No.

18 Q. Do you see anything in the courtroom, other than
19 a live person, drawing your attention now to
20 State's Exhibit 19 and State's Exhibit 20, the
21 two life-sized mannequins, that you can
22 recognize?

23 A. The mannequin farthest from me resembles the older
24 one quite a bit, other than the mannequin is
25 clean-shaven. The man in question had a light

1 mustache and razor stubble.

2 Q. And at this time, you don't see the third person
3 that was in here? Is that right?

4 MR. ELIZONDO: Objection, Your Honor.
5 That has been asked and answered. Repetitious.

6 THE COURT: Overruled.

7 Q. (By Mr. Bax) The third person you don't see
8 in the courtroom at this time?

9 A. No, I do not.

10 Q. Are you saying he is not here?

11 A. I am saying I am not positive.

12 MR. BAX: Pass the witness.

13 MR. ELIZONDO: No questions, Your
14 Honor.

15 THE COURT: You may stand aside.
16
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1 STEVE EARHARDT,
2 was called as a witness on behalf of the State of
3 Texas, after having first been duly sworn, testified
4 as follows:

5
6 DIRECT EXAMINATION

7
8 QUESTIONS BY MR. BAX:

9 MR. BAX: May I proceed?

10 THE COURT: You may proceed.

11 Q (By Mr. Bax) Tell us your name, please.

12 A Steve Earhardt.

13 Q Steve, how are you employed?

14 A I work for Baker Sand Control as a machinist.

15 Q Steve, back on July 8th of this year, did you have
16 occasion to go to the Rebel Gun Store located on
17 Kuykendahl Road here in Houston, Harris County,
18 Texas?

19 A Yes, sir.

20 Q Do you recall the approximate time that you went
21 to that location?

22 A It was 3:30 when I walked in the door.

23 Q Can you tell us why you went to the Rebel Gun
24 Store on that day?

25 A I went in to buy a holster for a gun of mine.

1 Q Where did you go when you first went into the
2 store? What location in the store?
3 A I went to the front counter.
4 Q Were you talking with anyone there at the front
5 counter when you first went in?
6 A Yes, sir. When I first went in, I was talking
7 to Dennis.
8 Q Is that Dennis Zastrow?
9 A Yes.
10 Q Is he an employee at the Rebel Gun Store?
11 A Yes, he is.
12 Q As you were having this conversation with Dennis
13 Zastrow, did anything unusual happen?
14 A Yes, sir. Someone came in and robbed the place.
15 Q All right. Was there one person or more than
16 one?
17 A More than one. Three.
18 Q Did they come in all together, or did you see them
19 when they came in?
20 A Yes, sir. Two walked in first and went to the
21 rear of the gun store and then the third entered
22 after they had been in for about two or three
23 minutes and walked up to the front of the store
24 at the counter and pulled a gun on Dennis.
25 Q The two men first came in and went to another part

1 of the store?

2 A Yes, sir. The rear of the store.

3 Q Did you notice those people as they came into

4 the store?

5 A No, sir. I didn't.

6 Q How do you know then they came in two or three

7 minutes before the third man came in?

8 A I heard the buzzer on the door and I heard them

9 walk behind me.

10 Q Did you turn around and look at all, or did you

11 pay any attention to it?

12 A I didn't pay attention to it.

13 Q When the third man came in, I believe you testified

14 he came and had a gun?

15 A Yes, sir. He walked in the door carrying a paper

16 sack.

17 Q And what happened as far as you and Dennis

18 Zastrow were concerned?

19 A The man with the paper sack, I was talking to

20 Jay and he was showing me a pistol, and this guy

21 walked in and pulled a gun out of a sack and

22 at the time, Dennis was talking on the phone to

23 a customer.

24 Q Let me stop you there just a second.

25 Is Jay another employee there at the

1 Rebel Gun Store?

2 A Yes, sir. He is.

3 Q When you were at the front counter talking with
4 Jay, was Jay behind the counter?

5 A Yes.

6 Q And Dennis was on the telephone talking to a
7 customer?

8 A Yes, sir.

9 Q Was he also in the same area Jay was located?

10 A Yes, sir. About ten feet.

11 Q The man that came in with the paper bag, what did
12 he do?

13 A He pulled a gun out of the sack and stuck it in
14 Dennis' face and told him not to move, it was
15 a robbery.

16 Q How far away were you from the man that had entered
17 the store and pulled the gun out of the paper
18 sack?

19 A About ten feet.

20 Q Could you describe that person?

21 A Yes, sir. I can. It's that mannequin right there
22 with the purple shirt.

23 Q I am going to point to State's Exhibit 20.

24 Is this the facsimile or duplicate of the
25 person you saw enter the store with a paper sack

1 who eventually then pulled out a pistol?

2 A. Yes, sir. It is.

3 Q. Any doubt in your mind after looking at State's
4 Exhibit 20 that that is the person?

5 A. No, sir. No doubt.

6 Q. What did the person say after he pulled the
7 pistol out, if anything?

8 A. He told Dennis not to move. He said, "No move.
9 This is a robbery," and I thought he was kidding
10 at first. I thought he was playing a joke, and
11 I turned to Jay and asked him, "Is this a joke,"
12 and he said, "No, it is not." He said, "You'd
13 better put your gun down," so I laid the gun I
14 was holding down on the counter and that is when
15 that guy turned and poked the gun at me and
16 said, "No joke. This is a robbery."

17 Q. Who said that? State's Exhibit 20?

18 A. Yes, sir.

19 Q. When he said, "No joke. This is a robbery," did
20 he have an accent of any type when he was talking?

21 A. Yes, sir. He couldn't hardly speak. What he
22 said was, "No joke. Stickup," is exactly what
23 he said.

24 Q. You have testified you had a pistol. Where did
25 that pistol come from that you had?

1 A. Jay was showing it to me. It was in the display
2 case.
3 Q. I take it that pistol was not loaded?
4 A. No, sir. It wasn't.
5 Q. Did you then put that pistol down that you had?
6 A. Yes, sir.
7 Q. What happened after that?
8 A. By this time, the two guys that had walked in
9 prior had got -- the guy that was here before
10 me -- I don't know.
11 Q. The man that testified before you?
12 A. Yes.
13 Q. Okay.
14 A. Had got from the rear of the store and they took
15 him and walked back behind the counter where
16 Dennis Zastrow was, and he had dropped the phone
17 and had his hands up, and they went back there
18 and they had pistols on him and told him not to
19 move and they searched him and they made him
20 stand up and they threw him to the ground.
21 Q. Who did they throw to the ground?
22 A. Dennis Zastrow.
23 Q. Let me see if I -- the other two men you heard
24 walk in behind you?
25 A. Yes, sir.

1 Q You then saw them come to the same counter where
2 Dennis was at?

3 A Yes, sir. Behind me.

4 Q So they weren't behind the counter?

5 A Yes, sir.

6 Q So now, behind the counter is who, Dennis, Jay,
7 the customer that was testifying just before
8 you?

9 A Yes, sir.

10 Q And these two other Latin American males that
11 had just walked in?

12 A Yes, sir.

13 Q And on the opposite counter is yourself and --

14 A And that guy.

15 Q The man represented by State's Exhibit 20?

16 A Yes, sir.

17 Q Tell us what happened at that time after Dennis
18 had been thrown to the ground and I take it the
19 customer was searched by these persons.

20 A Well, this guy was holding a gun on me on the
21 other side, and then they made Dennis stand up,
22 and then they motioned for us to move and they
23 started pushing us towards the back room.

24 Q And who is doing the pushing and who is doing the
25 --

1 A. This guy right here.

2 Q. Let me stop you there now. You are not referring
3 to State's Exhibit 20. You are referring to
4 another exhibit in the courtroom?

5 A. This one here.

6 Q. The one with the green shirt, State's Exhibit
7 19?

8 A. Yes, sir.

9 Q. All right. When you got back to the back room,
10 what happened there?

11 A. Well, they pushed us through the door and shut
12 the door behind us and then they held pistols
13 on us and pushed us all to the floor, stomach
14 first on the ground, and they took some first aid
15 adhesive tape out of that paper sack that he had
16 and started --

17 Q. Who was taking the tape out? Do you recall which
18 one of the men took the tape out?

19 A. It was the guy in the purple shirt that had the
20 sack, and he distributed it to the other two,
21 handed it to them.

22 Q. Let me stop you there for a second.

23 Did the tape come out of the same paper
24 bag --

25 A. That I am not sure. I believe it did.

1 Q -- that the man had come in with that he
2 produced the pistol from?

3 A I believe so.

4 Q And he gave it to the other two people?

5 A Yes, sir.

6 Q You have now identified two of the people as
7 far as the mannequins are concerned, the first
8 one being State's Exhibit 20 and then State's
9 Exhibit 19 being one of the other two men that
10 came in?

11 A Yes, sir.

12 Q Do you see anyone else in the courtroom today
13 or have you seen anyone else in the courtroom
14 today that you recognize as being the third
15 person involved in this robbery?

16 A Yes, sir. I have.

17 Q And do you see that person in this courtroom at
18 this time?

19 If you want to get down and get a
20 better vantage point of the audience, do so.

21 MR. MOEN: Come on down and take a
22 look.

23 A The guy right there on the first row.

24 MR. MOEN: Blue jacket?

25 A Yes.

1 Q (By Mr. Bax) When you came over here this
2 morning, as far as the person you have just
3 identified in the courtroom as the spectator
4 wearing the blue jacket, has anyone told you
5 before you came you would be here and the third
6 person would be in this courtroom who was involved
7 in this robbery?

8 A. No, sir.

9 Q At anyone's suggestion, did you identify him here
10 today?

11 A. No, sir.

12 Q How many people were there in the courtroom when
13 you came over today? Can you give your best
14 estimate when you identified that person as being
15 the third person identified in this robbery?

16 A. Outside of maybe fifteen people.

17 Q And were many of those people of Latin American
18 descent or Spanish?

19 A. A few; not the majority.

20 Q Well, was he the person you have identified as a
21 spectator, was he the only Latin American male
22 here in the courtroom at this time?

23 A. No, sir.

24 Q If you would, tell us then what happened while
25 you were back there in the room with the two

1 employees of the store, Jay and Dennis, and also
2 the customer that was in the store at the same
3 time. What happened back in the room?

4 A. Well, as they had us facedown on the ground, they
5 pulled our arms behind our backs and took that
6 tape and taped our arms behind our backs. After
7 they got us all taped up, they were speaking
8 back and forth to us, to each other in Spanish.

9 Q. While they were speaking back and forth to one
10 another in Spanish, were you able to look up
11 or view the people there in the room taping their
12 hands and speaking to each other in Spanish?

13 A. Partially, yes, sir.

14 Q. How long did this take place in the back of the
15 room, the taping of the hands and the conversations
16 between the three men back there?

17 A. I would say between ten and fifteen minutes.

18 Q. And during that period, were you able to look up
19 and either see a full-face view of the three
20 men, or from time to time even see partial views
21 of their faces?

22 A. Not after I was taped up, no, sir.

23 Q. What prevented you from looking at the people
24 after you were taped up?

25 A. I was face towards the wall with my head down, and

1 I was afraid of getting shot and didn't move
2 my head up too much.

3 Q Were you told anything by the men about what would
4 happen if you did?

5 A They told us they would shoot us if we did.

6 Q Did the three men stay in the room or come and
7 go during that period?

8 A They left, I would say, maybe two times. One guy
9 stayed in the room. The other two went up front
10 and they opened the door. I heard the door open
11 a couple of times and heard them speak back and
12 forth to each other.

13 Q Going back now in time to when you first were able
14 to look at the two men that had walked in behind
15 you --

16 A Yes, sir.

17 Q -- what first drew your attention to those two
18 men when you first had occasion to look at them?

19 A One of them was holding a gun on us.

20 Q And --

21 A And they walked around in front of us, you know,
22 and whenever they was pushing us through the door
23 is when I had a chance to get a good look at
24 them.

25 Q One of those first two people, the facsimile is

1 State's Exhibit 19?

2 A Yes.

3 Q When you first saw him, how far away was he from
4 you?

5 A He was right in front of me.

6 Q If you would, come down from the stand for us
7 and get as close to State's Exhibit 19 as you
8 were when you saw him back on July 8th, if
9 you would do that for us.

10 A About that far away from me.

11 Q Would it be fair to say that is a foot and a
12 half to two feet?

13 A Yes, sir.

14 Q Did he have a gun at that point in time?

15 A That I don't remember. I remember one of them
16 had a gun. I don't remember if the other did.

17 Q When you were a foot to a foot and a half to two
18 feet away from the person you have identified or
19 the exhibit you have identified as State's Exhibit
20 No. 19, how long were you able to look at him
21 face-to-face right there at the counter?

22 A I would say a minute or two.

23 Q Was he saying anything to you or saying anything
24 to the other people during this period of time?

25 A They was talking back and forth to each other in

1 Spanish.

2 Q At that time, were you concentrating on what the
3 man looked like?

4 A Yes, sir.

5 Q Were you concentrating on what the other two people
6 who were along with him, what they looked like?

7 A Yes, sir, as best I could without showing that
8 I was.

9 Q What were the lighting conditions like inside
10 of the Rebel Gun Store?

11 A About equal to this if not better.

12 Q All right. Would you be prepared to say it was
13 actually well-lit?

14 A Yes, sir.

15 Q Do you see the person in the courtroom -- I am not
16 talking about the mannequin or replica of the
17 mannequin, but do you see a person in the
18 courtroom that you recognize to be the original,
19 if you will, of State's Exhibit 19?

20 A Yes, sir. I do.

21 Q And would you point that person out for us, please?

22 A The guy right there in the white shirt.

23 Q All right, and if, counting myself as number one
24 and Mr. Moen as number two, what number would he
25 be going around the table?

1 A. The fourth.

2 Q. Number four?

3 A. Yes, sir.

4 Q. Is there a question in your mind or a doubt in
5 your mind that he is one of the three people
6 that entered the Rebel Gun Store back on July
7 8th?

8 A. No, sir.

9 Q. Were you ever shown a photograph spread of some
10 people and asked whether or not you could
11 identify anyone from that photograph spread?

12 A. Yes, I was.

13 Q. And would you tell the Court when that took
14 place?

15 A. This morning.

16 Q. Prior to this morning. had anyone ever attempted
17 to show you any photographs of anyone in connection
18 with this case or asked you to view any type of
19 a lineup of any sort?

20 A. No, sir. Not at all.

21 MR. BAX: May I have this marked,
22 please?

23 (At this time, State's Exhibit No. 80
24 was marked for identification purposes by the
25 court reporter.)

1 Q (By Mr. Bax) Sir, let me show you what has been
2 marked for identification purposes as State's
3 Exhibit No. 80, and let me see if you can
4 identify that for us.

5 A The picture?

6 Q Let me rephrase it.

7 Is State's Exhibit 80 the photograph
8 spread that was shown to you this morning?

9 A Yes, sir. It is.

10 Q I believe this photo spread was shown to you
11 in my office at the corner of Franklin --

12 A Yes, sir. It was.

13 Q Were there other people there at the time?

14 A Yes, sir. There was.

15 Q I believe that would be two deputy constables
16 from Precinct 4 and also the customer, the witness
17 that testified prior to your taking the stand?

18 A Yes, sir.

19 Q Did anyone suggest which photograph, if any, you
20 should select from this State's Exhibit No. 80?

21 A No, sir. They didn't.

22 Q How long did it take you to identify a photograph
23 after looking at State's Exhibit 80?

24 A I identified it immediately.

25 Q And which photograph -- they are all numbered 1,

1 2, 3, 4, and 5.

2 Which photograph did you select at
3 that time as being one of the persons you saw
4 inside the Rebel Gun Store on July 8th?

5 A. Number five.

6 MR. BAX: Your Honor, for the purposes
7 of this hearing, we would at this time offer
8 State's Exhibit 80.

9 MR. ELIZONDO: No objections to that.

10 THE COURT: State's Exhibit 80 will be
11 admitted for the purposes of this hearing.

12 Q (By Mr. Bax) When you identified the photograph
13 in State's Exhibit No. 80 -- and I believe it
14 would be No. 5 -- and when you identified State's
15 Exhibit No. 19 here in the courtroom today,
16 and finally, when you identified the Defendant
17 wearing the white shirt here in the courtroom
18 today, did you do that based on your memory of the
19 events which transpired back on July 8th of
20 1982?

21 A. Yes, sir. I did.

22 Q Now, the photographs that you were shown in
23 State's Exhibit No. 80 -- let me just go over
24 these for the record -- do you recognize the
25 first picture labeled No. 1, who that is a

1 photograph of?

2 A Yes, sir.

3 Q And who is the first picture a photograph of?

4 A This guy in the purple shirt.

5 Q State's Exhibit No. 20?

6 A Yes, sir.

7 Q And that would be the first man you saw enter the
8 Rebel Gun Store with the pistol and the bag?

9 A Right.

10 Q Now, he does not have a beard or any facial hair
11 as it appears in that photograph; is that
12 correct?

13 A Yes.

14 Q It even appears -- can you tell whether that is
15 a picture of a live person or a dead person?

16 A Dead.

17 Q The second photograph, No. 2, is a photograph
18 appearing to be a Mexican-American male wearing
19 some sunglasses and smiling; is that correct?

20 A Yes, sir.

21 Q He does not have facial hair? Is that correct?

22 A Yes, sir.

23 Q State's Exhibit No. 3, or the third photograph
24 in State's Exhibit No. 30, is a photograph
25 containing three persons in one picture; is that

1 correct?

2 A Yes, sir.

3 Q The one, as you look at the photograph to the left,
4 the first to the left, has a beard, mustache,
5 and would you say long hair?

6 A Yes, sir.

7 Q All right. The person in the middle of that
8 photograph, number three, has the only facial
9 hair that appears to be a mustache? Is that
10 correct?

11 A Yes, sir.

12 Q And the third one has no facial hair at all?
13 Is that correct?

14 A Yes, sir.

15 Q Number four, the fourth to this exhibit, appears
16 to be a Mexican-American male with no facial
17 hair. Is that correct?

18 A Yes, sir.

19 Q And finally, the fifth photograph, the one you have
20 identified as the Defendant in this case, has
21 long hair, a thin beard, and a mustache. Is
22 that correct?

23 A Yes, sir.

24 Q In State's Exhibit No. 80, it only appears that
25 two of the seven persons depicted in State's

1 Exhibit No. 80 have facial hair, a beard, and
2 a mustache. Is that a fair assumption after
3 looking at those photographs?

4 A. Yes, sir.

5 Q. Do you recall, in viewing the man at the lineup
6 and the person you have identified at the lineup,
7 the person you have identified here in court
8 today, did he have facial hair back on July
9 8th of '82 when you saw him?

10 A. Yes, sir. He did.

11 Q. Because only his photograph is here with facial
12 hair and there is only one other photograph in
13 this photo spread. There is only one other
14 person that has facial hair.

15 Is that why you picked out number five
16 as being the man inside the Rebel Gun Store?

17 A. No, sir.

18 Q. Why did you pick out number five?

19 A. Because I got a better look at him besides this
20 guy here.

21 Q. Did you pick out number five in the photographs
22 because that is, in fact, the person you saw
23 inside the Rebel Gun Store?

24 A. Yes, sir.

25 Q. Had you been shown State's Exhibit No. 5 -- or

1 photograph 5 in State's Exhibit No. 80 with
2 fifteen other photographs of Mexican-American
3 males with long hair, beards, and mustaches,
4 do you feel you would still be able to pick him
5 out as the person?

6 A. Yes, sir.

7 Q. Why is that?

8 A. It is just not hard to forget when somebody is
9 holding a gun on you.

10 MR. BAX: May I have one moment, Your
11 Honor?

12 Pass the witness.

13
14 CROSS EXAMINATION

15
16 QUESTIONS BY MR. ELIZONDO:

17 Q. I have a few questions, Mr. Earhardt.

18 Did you go to a lineup in regards to
19 this case?

20 A. No, sir. I didn't.

21 Q. Did you ever talk to the police in regards to this
22 case?

23 A. No, sir. I didn't.

24 Q. When is the first time you talked to the police
25 with regards to this case?

1 A. The day of the robbery.
2 Q. And the second time?
3 A. Never.
4 Q. Well, you talked to them today.
5 A. Talked to them today.
6 Q. But prior to today, had you talked to the police
7 with regards to this robbery at the Rebel Gun
8 Store?
9 A. No, sir.
10 Q. So you have never been asked to go to a lineup
11 in regards to this robbery at the Rebel Gun
12 Store?
13 A. No, I have not.
14 Q. Have you seen State's Exhibits 19 or 20 prior
15 to today?
16 A. No, sir. I haven't.
17 Q. Have you seen them in the newspapers or in the
18 media or television?
19 A. No, sir. I haven't.
20 Q. So then, it is your testimony that today is the
21 first day you have seen what is marked as State's
22 Exhibits 19 and 20?
23 A. Yes, sir.
24 Q. Were you told that Ricardo Aldape Guerra would
25 be present in the courtroom today while you

1 testified?

2 A. No, sir.

3 Q. State's Exhibit No. 80 is a picture of seven
4 individuals; is that correct?

5 A. I would say yes, sir.

6 Q. And of those seven, only two have facial hair;
7 is that correct?

8 A. Yes, sir.

9 Q. And one appears to have blood all over him, so you
10 could assume he is a dead man?

11 A. Yes, sir.

12 Q. How close were you to the Defendant in this case
13 when he was tying you up?

14 A. He was right on top of me.

15 Q. Was your face to the ground or face to the ceiling?

16 A. When he was tying me up, it was to the ground.

17 Q. And prior to that?

18 A. Well, like I said before, I was standing right
19 there in front of him.

20 Q. Did State's Exhibit No. 19 help you in any way
21 in identifying the Defendant in this case?

22 A. Yes, sir. Just the facial hair. Of course, he
23 doesn't have it now.

24 Q. But it did help you, did it not?

25 A. It helped identify him, yes, sir. It did.

1 Q If you had not seen State's Exhibit No. 19,
2 then you would have had a more difficult time
3 identifying the Defendant, would you not?

4 MR. BAX: Objection, Your Honor.
5 Speculation.

6 THE COURT: It is a Wade-Gilbert
7 Hearing.

8 MR. BAX: I know what it is, but it
9 is calling for speculation.

10 THE COURT: Rephrase your question.

11 Q (By Mr. Elizondo) How did State's Exhibit No.
12 19 help you in identifying the Defendant?

13 A Just in seeing the facial hair.

14 Q And seeing the long hair?

15 A Just the facial hair.

16 Q Without seeing that State's Exhibit No. 19, would
17 you have been able to identify the Defendant?

18 A Yes, sir. By his profile.

19 Q Have you seen his profile?

20 A Yes, sir.

21 Q Where have you seen his profile?

22 A When he was in the gun store.

23 Q Have you seen his profile today?

24 A Yes, sir. I am looking at it right here.

25 Q When you say "right here," are you referring to

1 State's Exhibit 19?

2 A. Yes, sir.

3 Q. You haven't seen the Defendant's profile in this
4 case, have you?

5 A. Yes, sir. As I walked in a while ago.

6 Q. Other than today, has anybody shown you any
7 photographs or photo spreads in regard to this
8 robbery?

9 A. No, sir.

10 MR. ELIZONDO: No further questions,
11 Your Honor.

12 THE COURT: Anything further, Mr. Bax?

13
14 RE-DIRECT EXAMINATION

15
16 QUESTIONS BY MR. BAX:

17 Q. Is there any question in your mind at all that
18 the person you have pointed out in the courtroom
19 seated at the counsel table is one of the three
20 persons that came into the Rebel Gun Store back
21 on July 8th?

22 A. No, sir.

23 Q. And you have identified him here in court today
24 because you have seen State's Exhibit 19 or
25 because you remember what the Defendant looked like

1 back on July 8th?

2 A. I remember what he looked like.

3 Q. And I believe you testified earlier that you had
4 at least a minute while you were up there at the
5 counter to look at him and study the appearance
6 of the Defendant; is that correct?

7 A. Yes, sir, I did.

8 MR. BAX: That is all I have.

9
10 RE-CROSS EXAMINATION

11
12 QUESTIONS BY MR. ELIZONDO:

13 Q. Sir, it is your testimony that State's Exhibit
14 No. 19 helped in your identification of the
15 Defendant?

16 A. Are you asking did it?

17 Q. Yes, sir.

18 A. Yes, sir. Like I said before, I did this because
19 of seeing the facial hair.

20 Q. Did you at any time ever see him with a gun?

21 A. Yes, sir.

22 Q. When was that?

23 A. In the gun store.

24 Q. At what point in time?

25 A. When I was being pushed to the door, he had a gun

1 then -- whenever they pushed us all to the back
2 room, to the door.

3 Q How about the older man? Did he have a gun
4 also?

5 A Yes, he did.

6 Q What kind of clothes was the Defendant wearing
7 at the time of the commission of the offense?

8 A He had on some type of T-shirt with a slogan on
9 it and blue jeans.

10 Q And what type of slogan did it have on the T-shirt?

11 A I don't remember.

12 Q And blue jeans?

13 A Yes, sir.

14 Q Did he have tennis shoes?

15 A Yes, sir. I believe they were orange, too, I
16 believe.

17 Q Orange?

18 A Yes, sir.

19 Q He had tennis shoes; is that correct?

20 A Yes, sir.

21 MR. ELIZONDO: Your Honor, that is all
22 we have.

23 MR. BAX: Nothing further.

24 THE COURT: Thank you, sir. You may
25 stand aside. Please return to the hallway.

1 MR. BAX: Judge, that is all the
2 witnesses we have here at this time.

3 As far as my understanding, this will
4 be the only witness that would attempt to make
5 any identification.

6 Before I put on other witnesses, I
7 will ascertain whether they will be able to make
8 identification, and I will inform the Court so
9 we can have another hearing at this time.

10 MR. ELIZONDO: Your Honor, and, of
11 course, we would object to the identification
12 because of the nature of the photo spread and
13 also, based upon what the witness testified to
14 in that State's Exhibit No. 19 helped him in
15 identifying the Defendant, and based upon that,
16 Your Honor, we would object to his in-court
17 identification at this time.

18 THE COURT: Your objection will be
19 overruled. The in-court identification of the
20 witness, Steve Earhardt, will be allowed.

21 It is the Court's opinion that his
22 identification of the Defendant in this case
23 is based upon having seen him during the robbery
24 of the Rebel Gun Store on July 8th, 1982, and
25 that the picture spread shown to him by the

1 Prosecution this morning is not impermissibly
2 suggestive nor the viewing of the mannequin
3 marked State's Exhibit 19 impermissibly
4 suggestive.

5 This in-court identification will be
6 allowed before the jury.

7 MR. ELIZONDO: For the record, we
8 renew our objection to having State's Exhibit
9 19 and State's Exhibit 20 in the position they
10 are in right now in front of the jury, ten feet
11 from the jury.

12 We would object on the grounds of
13 their being bolstering. We would also object
14 to their suggestibility, to the way they are
15 facing the jury. We would object to them being
16 present at this time, Your Honor.

17 Any other exhibit that's been offered
18 into evidence that's passed to the jury is put
19 in a box. These mannequins have stayed with us
20 during the whole trial, and we would object
21 again.

22 THE COURT: Your objection is overruled.

23 MR. ELIZONDO: Your Honor, for the
24 record, will you allow these mannequins to be
25 viewed by the jury during the trial?

1 THE COURT: Yes, sir.
2 Anything further?
3 MR. MOEN: Judge, that is it.
4 Do you want to go into testimony right
5 now or take a lunch break and start back
6 whenever?
7 THE COURT: Mr. Bailiff, make
8 arrangements to take the jury to lunch and
9 have them back at 1:30.
10 The case will be in recess until
11 1:30.
12 (At this time, a lunch recess was taken
13 by the court.)
14 THE COURT: Let's proceed.
15 MR. MOEN: Are you ready for the jury?
16 THE COURT: Bring out the jury.
17 (At this time, the jury returned to the
18 courtroom, and in their presence and hearing,
19 the following proceedings were had.)
20 MR. MOEN: Judge, we would call Terry
21 Delaney.
22
23
24
25

1 TERRY DELANEY,
2 was called as a witness on behalf of the State of
3 Texas, after having first been duly sworn, testified
4 as follows:

5
6 DIRECT EXAMINATION
7

8 QUESTIONS BY MR. MOEN:

9 Q Would you tell the ladies and gentlemen of the
10 jury your name, please, sir?

11 A Terry Delaney.

12 Q And, Mr. Delaney, would you tell the ladies and
13 gentlemen of the jury what connection you have,
14 if any, to the Rebel Gun Store located in the
15 18000 block of Kuykendahl?

16 A I own the store.

17 Q Did you learn back on July 8th of this year, 1982,
18 that your store at that location had been -- well,
19 the store and some of the people inside had been
20 the victims of a hijacking or a robbery?

21 A Yes, sir. I did.

22 Q Where were you, sir, at the time the robbery
23 of your store took place?

24 A I was in Colorado.

25 Q After the robbery took place, did you have

1 occasion to make an inventory of the guns and
2 ammunition and other items that are kept there
3 at the Rebel Gun Store for sale to the general
4 public?

5 A. Yes, sir. I sure did.

6 Q. Was that in an effort to make a determination of
7 what, if anything, was taken during the course of
8 the robbery?

9 A. Yes, sir.

10 Q. Did you bring some records with you to the
11 courtroom today?

12 A. Yes, I sure did.

13 (At this time, State's Exhibit No. 81
14 was marked for identification purposes by the
15 court reporter.)

16 Q. (By Mr. Moen) Mr. Delaney, let me show you what
17 has been marked for identification purposes as
18 State's Exhibit No. 81, and ask if you can
19 identify those two pages of paper and if you can
20 tell the ladies and gentlemen of the jury what
21 they are, please, sir.

22 A. Yes, sir. This is an inventory that I took
23 myself, a loss report of what was stolen during
24 the robbery.

25 Q. Now, State's Exhibit No. 31, are those exact

1 duplicates of the original records?

2 A. Yes, sir. Here are the originals right here.

3 Q. Now, the inventory that you made after the
4 robbery took place, can you tell the ladies
5 and gentlemen of the jury how you were able to
6 determine what, in fact, was taken during the
7 course of the robbery by your inventory and how
8 you were able to do that?

9 A. According to federal laws, I have to log in all
10 guns and log out all gun sales, so I went
11 through all my records and got all the guns that
12 I have sold and then I took a physical inventory
13 by serial number of my guns that I had left in
14 my shop, and what was left were the guns that
15 were determined stolen in the robbery.

16 Q. Okay. When was the approximate date that you
17 completed your inventory and made those records
18 of the loss that occurred during the course of
19 the robbery? When did you finish that inventory,
20 the approximate date, please, sir?

21 A. Initially, an inventory was made by my employees
22 the date of the robbery, that night, and then when
23 I got back about three days later, my wife and I
24 made a total, complete inventory of the store.

25 Q. Okay. The records that you have brought with you

1 to the courtroom today, are those records kept
2 by yourself in the capacity that you have in
3 relation to Rebel Guns? Are they kept in the
4 regular course of business?

5 A. Yes, sir. They sure are.

6 Q. Are the records that you brought with you to the
7 courtroom, are they and were they made by someone
8 who had personal knowledge of the items on the
9 records themselves?

10 A. Yes, sir.

11 Q. And is it the usual course of business to keep
12 such records?

13 A. Yes, sir. Mandatory.

14 Q. Of course, I guess in this case it was the
15 unusual course of business because of the robbery
16 that took place?

17 A. That is true.

18 MR. MOEN: Judge, at this time, I
19 offer into evidence State's Exhibit No. 31.

20 MR. ELIZONDO: Your Honor, I object to
21 the predicate.

22 THE COURT: What?

23 MR. ELIZONDO: I object to the predicate
24 being improperly laid.

25 THE COURT: Overruled. It will be

1 admitted.

2 Q (By Mr. Moen) I wonder if you might refer to the
3 records marked and identified as State's Exhibit
4 No. 81 and tell the ladies and gentlemen of the
5 jury, if you would, and read to the jury what
6 your list or records show was taken from the Rebel
7 Gun Store back on the robbery of July 8th, 1982.

8 A In general or specific items?

9 Q Be specific and tell them each item.

10 A A Gold Cup, 45ACP; a Gold Cup Custom --

11 Q Could you tell them what you are referring to
12 when you say "Gold Cup" to the ladies and
13 gentlemen of the jury? It almost sounds like a
14 serving dish of some type.

15 A A Gold Cup is a .45 automatic similar to what our
16 military uses.

17 Q A pistol?

18 A A pistol.

19 Q All these are handguns that were taken?

20 A Most of them were sitting on top of the counter
21 according to our employees there at the time.

22 They took a Smith & Wesson .38, Model
23 49, which is a .38 Special; a 539, which is an
24 automatic Smith & Wesson pistol which shoots
25 fifteen times; they also took a 439, nine-millimeter;

1 they took a Star PD .45. There again, that is
2 a .45 automatic pistol. It is just a smaller
3 version.

4 They took a Czeck-Po Daik 7.65, which
5 I think they only took that because it was handy.
6 It was also a pistol.

7 MR. ELIZONDO: I object to the witness
8 speculating as to why they took certain things.

9 THE COURT: Sustained.

10 MR. ELIZONDO: And I would ask the jury
11 to disregard the last comment of the witness.

12 THE COURT: The jury will disregard
13 the last comment of the witness.

14 MR. ELIZONDO: And I would ask for a
15 mistrial.

16 THE COURT: That will be denied.

17 THE WITNESS: Shall I continue?

18 MR. MOEN: Please.

19 A. They took a LLAMA-M nine-millimeter, which is a
20 pistol, which looks just like a government .45
21 except it shoots a nine-millimeter cartridge;
22 two Browning Hi-Power, which shoots fourteen
23 times, also nine-millimeter; took a Datonics
24 Combat Master, .45 caliber, again a .45 caliber
25 automatic pistol, very small.

1 Q Let me stop you for a second.

2 Datonics: Is that the brand name of
3 the pistol?

4 A Yes, sir.

5 Q Did you record for your records the serial number
6 of that gun taken from the store?

7 A Yes, sir.

8 Q Let me ask you, if you would, to compare the
9 serial number of your records with this handgun
10 marked State's Exhibit 43 that has been
11 introduced into evidence, and tell the ladies and
12 gentlemen of the jury whether that is the same
13 gun taken in the robbery of the Rebel Gun Store
14 back on July 8th.

15 A Yes, sir. This is the one taken.

16 Q This is one of the weapons taken in the robbery
17 of the Rebel Gun Store back on July 8th?

18 A Yes, sir.

19 Q Go ahead with your list, please.

20 A An R.G. .38 Special two inch, a snub-nose type
21 pistol; they took a Smith & Wesson Model 57, which
22 was a 41 magnum; an Uzi semiautomatic
23 nine-millimeter, which shoots thirty-two rounds.

24 Q Let me stop you right there for just a second.

25 (At this time, State's Exhibit No. 82

1 was marked for identification purposes by the
2 court reporter.)

3 Q (By Mr. Moen) Mr. Delaney, let me stop you on
4 your mention of that Uzi and ask if you
5 will examine this item marked State's Exhibit
6 82 and see if you can compare that with the
7 serial number of the Uzi taken from your gun
8 store.

9 THE COURT: I would feel a whole lot
10 better about that if you would check it first.

11 MR. MOEN: Yes, sir. It is clear.

12 A Yes, sir. It is the same one taken from my store
13 during the robbery.

14 Q Can you elaborate a little on this particular
15 weapon I am holding in front of the jury as to
16 what type of ammunition it fires?

17 A It shoots a nine-millimeter cartridge.

18 Q Does it come in semiautomatic and full automatic
19 versions?

20 A Yes, it does. That is a semiautomatic though.

21 Q For the ladies and gentlemen of the jury, would
22 you explain the difference between --

23 A There is no difference between a semiautomatic
24 Uzi and a full automatic Uzi except
25 right here on this side there

1 is going to be three positions for the switch.
2 The full automatic will have a third position.
3 You just pull the trigger back and hold it back
4 and it will continue firing. It will have a
5 short barrel like this. This is a dummy barrel.
6 The semi comes with a regular sixteen-inch
7 barrel which has to be in there for the gun to
8 be legal.

9 Q Thank you.

10 Would you continue with your list,
11 please, sir?

12 A. Another Model 57 Smith & Wesson, eight and three-
13 eighths inch, 41 magnum. They took two Model
14 12's, one a four inch and one a two inch.

15 Q These are handguns as well, when you say "Model
16 12's"?

17 A. Yes, sir. Again, these are all handguns.

18 Q Okay.

19 A. They took a Model 60, which is a stainless steel
20 .38 small concealable weapon; took a Remington
21 870 pump, twelve-gauge, which was a riot-type
22 shotgun. It holds eight shots.

23 They took two Model 66 Smith's, which
24 are handguns, one a two inch and another one a
25 four inch.

1 They took a Model 10 Smith & Wesson
2 .38 Special, four inch; took a Model 19 four
3 inch which is also a handgun.

4 They took a Colt Government nine-
5 millimeter just like the .45 automatic except
6 it shoots a nine-millimeter shell.

7 Okay. Then to the automatic weapons.
8 They took a MAC 10 .45 caliber submachine gun.

9 Q Would you go on with the next item and stop at
10 that one, please, sir, in addition?

11 A With this .45 submachine gun now, they took a
12 silencer that goes on the end of it. They took
13 a Thompson submachine gun.

14 Q Let me stop you at those MAC items you have talked
15 about and let me show you --

16 (At this time, State's Exhibit No. 83
17 was marked for identification purposes by the
18 court reporter.)

19 Q (By Mr. Moen) Let me show you what has been
20 marked strictly for comparison purposes as
21 State's Exhibit No. 83, and I will ask you first
22 of all --

23 I think you can satisfy the ladies and
24 gentlemen of the jury and Your Honor that it is
25 not loaded?

1 A. It is not loaded.

2 Q If you might, for comparison purposes, would you
3 hold that weapon up and identify it for the
4 ladies and gentlemen of the jury, and tell them
5 what comparison or similarities there are, if
6 any, between that and the .45 caliber MAC 10?

7 A. Yes. The .45 caliber MAC 10 looks just like
8 this weapon. In fact, you can't tell them apart
9 just by looking at them on the outside. The
10 only way to tell them apart is the magazine.

11 See, the magazine -- this is a nine-
12 millimeter -- the .45 would be fat because the
13 rounds are bigger. Otherwise, the guns weigh
14 basically the same, are designed the same way.

15 This is just like the gun they took
16 from my store, except mine was a fully automatic
17 and they took a silencer. This is fake silencer.
18 They took a real silencer.

19 Q. How does a real silencer compare to that fake
20 one on State's Exhibit No. 83?

21 A. Like this one. This is a fake, but the one they
22 took was shaped like this. The real silencer
23 will have what they call the guts inside it to
24 quiet the noise.

25 Q. When you say "silencer," some of the ladies I know

1 don't carry this weapon on a day-to-day basis.

2 Could you explain to them what we mean
3 by the word "silencer"?

4 A. A silencer on this type of weapon is real quiet.
5 The person shooting the gun can hear the noise,
6 but forty feet away, you can't hear the gun
7 fired. You'd never hear it.

8 Q. Do you know or are you familiar with the rate
9 of fire of that MAC 10 .45 caliber submachine
10 gun? How many bullets will it fire?

11 A. Eleven hundred eighty rounds a minute.

12 Q. Of .45 caliber ammunition?

13 A. Yes, sir.

14 Q. Any other submachine guns taken from the Rebel
15 Gun Store during this robbery?

16 A. I believe I mentioned the Thompson submachine
17 gun. That was taken also. It's a .45 caliber.

18 (At this time, State's Exhibit No. 84
19 was marked for identification purposes by the
20 court reporter.)

21 Q. (By Mr. Moen) Let me show you what's been marked
22 for identification purposes as State's Exhibit 84
23 and ask you if you can identify State's Exhibit
24 84. What is that a picture or diagram of, please,
25 sir?

1 A Of the gun that was taken from my store.

2 Q Is the gun stolen from your store exactly similar
3 to this in State's Exhibit No. 84?

4 A Exactly the same gun.

5 MR. MOEN: We would offer into evidence
6 State's Exhibit 84.

7 MR. ELIZONDO: Your Honor, for the
8 record, we would object to this exhibit, as the
9 State is trying to prove up an extraneous offense
10 that has not been adjudicated.

11 THE COURT: Overruled. The exhibit is
12 admitted.

13 Q (By Mr. Moen) If you know, Mr. Delaney, if you
14 know, what is the rate of fire of this particular
15 weapon?

16 A Five hundred fifty to six hundred rounds a minute.
17 Considerably slower than your MAC.

18 Q Every minute, this gun is possibly or is capable
19 of firing five hundred to six hundred rounds?

20 A If belt fed, yes, it is.

21 Q Any others?

22 A An Inland .30 caliber Paratrooper model. It shoots
23 a .30 caliber carbine about that long. It was
24 used in World War II and had a folding stock.

25 Q What is the rate of fire?

1 A. Eight hundred fifty rounds a minute.

2 Q. And that shoots a .30 caliber rifle cartridge?

3 A. A rifle cartridge, but a carbine cartridge, shorter
4 than a .30 caliber.

5 Q. Anything else?

6 A. Two cases of ammo, CCI.

7 Q. Let me stop you.

8 How many rounds of ammunition are
9 in two cases of the ammunition that you mentioned?

10 A. Since it is CCI, I only pack it two hundred fifty
11 rounds in a case.

12 Q. We are talking about five hundred rounds of
13 nine-millimeter ammunition as well?

14 A. Yes, sir.

15 Eight boxes of Winchester .357; twenty
16 boxes of .45 ACP.

17 Q. How many rounds are in one box of ammunition?

18 A. Fifty.

19 Q. When you say .357 Winchester, explain to the jury
20 what that means, the .357.

21 A. The .357 ammo would fit some of your handguns
22 taken in the robbery like your Model 19. Some of
23 them fire .38 as well as .357.

24 Q. There were four hundred rounds of .357 ammo taken?

25 A. Yes, sir.

1 Q And twenty boxes of .45's?
2 A Yes, sir.
3 Q How many rounds come in one box of .45 caliber
4 ammunition?
5 A Fifty.
6 Q So, one thousand rounds of .45 caliber ammunition
7 was taken?
8 A Yes, sir.
9 Q Anything else?
10 A Twelve boxes of 12-gauge ammo.
11 Q Okay.
12 A And a Rolex watch that was in the counter.
13 Q And the total amount of the loss during the course
14 of this robbery from your store?
15 A Fifteen thousand eight hundred seven dollars
16 thirty-one cents, and that is at cost.
17 Q To date, how many of the pistols or machine guns
18 have been recovered and returned to you since
19 this robbery on July 8th?
20 A None.
21 Q Would it be fair to say today is the first time
22 you have laid eyes on these two guns taken in the
23 robbery, this Datonics and this Uzi
24 semiautomatic?
25 A First time.

1 Q Let me ask you to look over here on the board,
2 if you would, and for the purposes of identifying
3 this diagram --

4 Let me mark it.

5 (At this time, State's Exhibit No. 85
6 was marked for identification purposes by the
7 court reporter.)

8 Q (By Mr. Moen) Did you have occasion to draw this
9 on the blackboard early yesterday?

10 A Yes.

11 Q Explain for the ladies and gentlemen of the jury
12 what this is a diagram of.

13 A It is a diagram of a shopping center my shop is
14 located in. The Minimax supermarket is in the big
15 area right there and right where I've got my
16 store drawn, there is a veterinarian's clinic
17 on one side and construction on the other side.

18 Q Which side is the vet clinic on?

19 A That side.

20 Q Up here?

21 A Yes, sir.

22 Q Is this a strip shopping center where your store
23 is located at?

24 A Yes, sir.

25 Q Where would the Minimax be?

1 A At the top.

2 Q Right here?

3 A Yes, sir.

4 Q And on the side of your store?

5 A It's construction going on. Now there are shops
6 there.

7 Q But at the time this robbery took place --

8 A There was just construction.

9 Q In the course of a business day -- let's refer
10 to July 8th. How many employees were working
11 at the store?

12 A Two.

13 Q Do you know who the employees were that were
14 present at your shop back when this robbery took
15 place?

16 A Yes, sir.

17 Q Who are they?

18 A Jay Carrell and Dennis Zastrow.

19 Q And Jay is here today?

20 A He will be back in a little bit.

21 Q How about Dennis? Do you know where he is at?

22 A No, sir. Today is his day off.

23 Q Have you had contact with him? Do you know where
24 his whereabouts are at all?

25 A No, sir.

1 Q You haven't seen him down at the courthouse,
2 have you?

3 A No, sir.

4 Q Mr. Delaney, thank you for coming here and taking
5 time out to testify.

6 MR. MOEN: I will pass you to the
7 Defense attorney.

8

9 CROSS EXAMINATION

10

11 QUESTIONS BY MR. ELIZONDO:

12 Q Just a few questions.

13 Was Dennis Carrell (sic) subpoenaed
14 to come to court?

15 A I don't know.

16 Q How about Jay Zastrow (sic)? Was he subpoenaed?

17 A Jay Carrell?

18 Q I am sorry. Jay Carrell and Dennis Zastrow.

19 A I don't know.

20 Q Is it Dennis Zastrow and Jay Carrell?

21 A Yes, sir.

22 Q Were they subpoenaed?

23 A I don't know, sir.

24 Q You weren't present when the robbery occurred?

25 A No.

1 MR. ELIZONDO: Nothing further, Your
2 Honor.

3 THE COURT: Anything from the State?
4

5 RE-DIRECT EXAMINATION
6

7 QUESTIONS BY MR. MOEN:

8 Q So the ladies and gentlemen of the jury can know,
9 do you have to be licensed by the Federal
10 Government to be in the business there at Rebel
11 Gun Store?

12 A Yes, we do.

13 Q Are you licensed to sell automatic weapons as well
14 as regular handguns?

15 A Yes, sir.

16 Q And rifles?

17 A Yes, sir.

18 Q Who is minding the store when you and Jay are
19 here?

20 A That is a problem. There is nobody. Jay's at
21 the store now and he's got to wait until I get
22 back.

23 MR. MOEN: Thank you, Mr. Delaney.

24 That is all I have.

25 THE COURT: Thank you, Mr. Delaney.

1 Do you have anything else?

2 MR. MOEN: No, Your Honor.

3 THE COURT: Call your next.

4 MR. MOEN: Robert Dawson, please.

5
6
7
8 ROBERT DAWSON,

9 was called as a witness on behalf of the State of
10 Texas, after having first been duly sworn, testified
11 as follows:

12
13 DIRECT EXAMINATION

14
15 QUESTIONS BY MR. BAX:

16 MR. BAX: May I proceed?

17 Q. (By Mr. Bax) Tell us your name, please.

18 A. Robert Dawson.

19 Q. Also known as Dan, Robert Daniel, right?

20 A. Right.

21 Q. Would you tell the members of the jury how you
22 are employed, please?

23 A. I am employed as tax assessor-collector for the
24 Klein Independent School District.

25 Q. How long have you been employed in that capacity?

1 A About two and a half years..

2 Q Let me call your attention back to July 8th of

3 this year. Do you recall going to the Rebel Gun

4 Store located on Kuykendahl Road here in Harris

5 County, Texas?

6 A I did go there that day.

7 Q Would you tell the members of the jury, as best

8 you can recall, what time of the day or night it

9 was that you went to the Rebel Gun Store?

10 A About a quarter to 4:00.

11 Q In the afternoon?

12 A Correct.

13 Q Tell us why you went to the Rebel Gun Store on

14 that date, sir.

15 A I went to purchase a can of powder to load some

16 shells for the deer season.

17 Q Are you a hunter?

18 A Yes.

19 Q Do you have any other interest in guns or

20 ammunition other than for hunting purposes?

21 A I also shoot in competitions, bench rests and

22 silhouettes.

23 Q Had you been to the Rebel Gun Store on Kuykendahl

24 other than this occasion?

25 A A couple of times when it first opened I did go in.

1 Q On July 8th, were you by yourself or was someone
2 with you?

3 A I was by myself.

4 Q Do you recall what day July 8th was?

5 A It was Thursday.

6 Q Do you recognize the diagram that is on the
7 blackboard? I don't believe you have had a
8 chance to see it before, State's Exhibit 85.

9 A I am quite familiar with that, being the tax
10 assessor, yes, sir.

11 Q Where would Kuykendahl Road be in relation to this
12 diagram?

13 A It would be at the bottom of the blackboard, yes,
14 sir.

15 Q And do you recognize this as the general area of
16 the shopping center where the Rebel Gun Store
17 is located?

18 A Yes.

19 Q And just for the purposes of the record, would
20 the front door to the Rebel Gun Store be somewhere
21 in here?

22 A Yes. It would be facing the parking lot, just
23 like there.

24 Q When you went to the Rebel Gun Store on July 8th,
25 where did you go specifically inside that store?

1 A. I went through the doors, and without stopping to
2 talk to salespeople, I went all the way to the
3 rear of the showroom.

4 Right about where that line is drawn,
5 there is a used gun rack, and I stopped there
6 momentarily to look at a 12-gauge over-and-under
7 shotgun.

8 Q. This line we have drawn, is that --

9 A. That would be about where the gun rack was.

10 Q. Let me just draw you an arrow.

11 You said that was a used gun rack?

12 A. Yes, sir.

13 Q. Let me indicate it by writing that there.

14 What were you doing when you arrived
15 at the used gun rack in the back of the store?

16 A. I paused and picked up an over-and-under Luger
17 shotgun. I paused to inspect it, actually had
18 it broken open.

19 Q. It wasn't loaded, I assume?

20 A. No.

21 Q. When you walked in, you said you didn't stop to
22 talk to any of the salespersons or anyone else
23 there.

24 Did you see anyone in the sales area
25 when you first walked in the door?

1 A. There were two employees of the store plus another
2 customer, and he was at the time being shown a
3 pistol, an automatic pistol.

4 Q. Where were the two salespersons inside the store?

5 A. The manager of the store was talking on the phone,
6 and the other salesperson was showing this
7 pistol to the other customer.

8 Q. Do you recognize -- I will draw through like
9 this -- what this area is here?

10 A. The store owner -- not the owner, the manager --
11 was sitting down toward the end closest to the
12 door, probably about two or three feet from the
13 end.

14 Q. In this area here?

15 A. Yes.

16 Q. Is this a counter I have drawn these lines
17 through, the sales counter?

18 A. That is a sales counter and display case also.

19 Q. And this was the manager, where he was at the
20 time on the telephone?

21 A. Correct.

22 Q. Where was the other employee located?

23 A. He was about ten feet toward the back of the
24 building -- maybe not quite that far -- maybe
25 seven feet from the manager -- showing his pistol

1 to the customer who was right across the counter
2 from him.

3 Q Is it fair to say then the other employee was in
4 this area here?

5 A Well, it is kind of out of scale. I would be
6 closer to the manager. The counter is much longer
7 than portrayed there.

8 Q The two employees then are behind the counter?

9 A Correct.

10 Q And the customer was on the opposite side of the
11 counter?

12 A Yes.

13 Q Do you know the names of any of the people that
14 were behind the counter, the employees there?

15 A At the time, no, but I know them now.

16 Q Who are those people, if you can tell us?

17 A The store manager's name is Dennis.

18 Q Let me do this -- I know it is awfully small, but
19 I am just going to -- Dennis was the one on the
20 phone?

21 A And the other employee's name was Jay. I don't
22 know if that is his correct name, but that is

23 --

24 Q That is what you call him?

25 A Yes.

1 Q Have you ever come to know the name of the
2 customer that was being waited on?

3 A Not that well.

4 Q Did anything happen as you were out by the used
5 gun rack inspecting the shotgun you were telling
6 us about?

7 A Yes. As I was inspecting the shotgun, a Latin
8 American male about thirty-five years old entered
9 the front door and pulled a pistol on the manager.
10 I did not see him pull the pistol. The first
11 awareness I had was that there was a commotion
12 toward the front of the building and I heard
13 someone say, "No move. No move."

14 MR. ELIZONDO: May it please the Court,
15 I object for the record to the admission of any
16 extraneous, unadjudicated offenses as being a
17 violation of Section 37.07-3 of the Code of
18 Criminal Procedure.

19 THE COURT: Overruled.

20 Q (By Mr. Bax) Let me make sure we understand
21 each other.

22 Did you actually perceive the thirty- to
23 thirty-five-year old Mexican American male come
24 into the store?

25 A No.

1 Q Did something cause you to direct your attention
2 away from the gun rack to the counter of the
3 store?

4 A That is when he told us not to move.

5 Q Repeat again how he said that.

6 A "No move. No move."

7 Q And when you turned around and saw this Mexican-
8 American male, thirty to thirty-five years old
9 saying, "No move. No move," tell the members of
10 the jury what you saw at that time.

11 A He had his automatic pistol with an extended clip
12 that would hold, I would say, probably thirty
13 rounds, trained on the owner or the manager,
14 Dennis, as he was talking on the phone.

15 Q Was he on the same side of the counter at this
16 point in time that the customers were?

17 A That's correct.

18 Q And would he be almost just directly across from
19 where Dennis was?

20 A He was standing back towards the door at an angle.
21 I would say approximately seven to eight feet
22 away from Dennis.

23 Q I know this is not to scale, but if I put --

24 A More out in the middle of the display room.

25 Q About in this area here?

1 A. That is about right.

2 Q And that person at that time had this automatic
3 handgun pointed in the direction of Dennis who
4 was on the telephone?

5 A. That's right.

6 Q Did you see what Dennis did at that time?

7 A. Dennis dropped the telephone and -- or he didn't
8 drop it. He was holding it to his ear, and he
9 said --

10 MR. ELIZONDO: I object to hearsay.

11 MR. BAX: It is res geatae of the
12 events.

13 THE COURT: Overruled.

14 Q (By Mr. Bax) Go ahead. You may answer.

15 A. "Don't shoot. Don't shoot. We will do what you
16 say," and he dropped to the floor.

17 Q Did he say it as softly, Dennis, or how?

18 A. He said it about the same as I am talking right
19 now.

20 Q What happened after that?

21 A. Then two young Latin American males, which I had
22 not seen earlier, came out from behind the display
23 racks. The display racks run in the same
24 direction as the gun rack, the used gun rack,
25 and there is an aisle between the wall and the

1 display racks, so I, being toward the top of the
2 gun rack, had not seen them because they were
3 obscured by the displays.

4 Q. Maybe it would be easier if you came down here
5 for a second. It is a little difficult for me
6 to try to assume where you were and what not.

7 Show us where you were.

8 A. There is an aisle here and there's several display
9 racks like this, and I was right here and these
10 two Latin American males -- I did not see the men
11 -- I assume they went up here and went on the
12 side. I could not see them because of the display
13 racks.

14 Q. You put an "X" here.

15 A. That is where I was standing.

16 Q. That is where you were standing in examining
17 the shotgun?

18 A. Right.

19 Q. At the time you were examining the shotgun, would
20 you be facing the front of the store or towards
21 the rear of the store?

22 A. I was facing the used gun rack, which would put
23 me facing the door.

24 Q. And that is when you first heard the commotion
25 and saw the Mexican-American male, thirty to

1 thirty-five years old standing up there?

2 A Yes.

3 Q The next awareness of anyone being in the store

4 is when you were approached by two Latin American

5 males right here?

6 A They came out from between the gun racks, and one

7 approached me from this way.

8 Q This way? Which direction did the other one come

9 from?

10 A He came from the same way and went behind the

11 counter.

12 Q And one came around the counter this way?

13 A That's correct.

14 Q Now, besides yourself, the other customer, and

15 the two store employees that were there, we have

16 one Mexican male you saw in the front of the

17 store with a pistol?

18 A Right.

19 Q One approached you in the area by the used gun

20 rack?

21 A Yes.

22 Q And one kept going by your area and the counter

23 where the two employees were?

24 A That's right.

25 Q Did you notice where the two Mexican males, one

1 approaching you and one around the counter, did
2 you notice whether or not they had weapons on
3 their person?

4 A. They had no weapons on their person that I could
5 see.

6 Q. What happened after this Mexican-American male
7 approached you?

8 A. Okay. He approached me and took the over-and-under
9 shotgun away from me and pushed me.

10 Q. You say he pushed you.

11 Show me how he pushed you --

12 A. Well, he nudged me.

13 Q. -- as long as you promise not to knock me down
14 and hurt me.

15 A. Well, he took the gun away and he turned and
16 bumped into me like this.

17 Q. What did he do then?

18 A. He took the shotgun and laid it behind the
19 counter on the floor and went and took Dennis
20 and Jay and herded them back. He threw the store
21 manager -- he grabbed him by the shirt and threw
22 him on the floor.

23 Q. Is this the same man who had approached you and
24 taken the shotgun away from you?

25 A. Exactly.

1 Q After he did that, he went back behind the counter
2 where the other Mexican-American male had gone?

3 A Right. He grabbed the store manager and sort of
4 threw him down.

5 Q How did he do that?

6 A He grabbed him by the shirt.

7 Q Let's go over here.

8 A He grabbed him by the shirt and as he turned --

9 Q Just threw him down?

10 Was anything being said by the man
11 in there at this time? Do you recall whether
12 they were --

13 A You mean the man with the weapon?

14 Q Right.

15 A They repeated several times, "No move. No move,"
16 and they said, "No joke," to let us know that
17 they were serious. It was kind of -- it was
18 really unusual in that when they came in, we
19 didn't realize at first it was an armed robbery.
20 The first time I looked up, I saw the man with
21 a pistol, and it's not unusual to see someone
22 in a gun shop holding a pistol.

23 Q And you had the shotgun?

24 A Yes.

25 Q And I believe you testified the customer over here

1 had a pistol?

2 A. He was examining a gun at the same time, so at
3 first, I didn't realize the store was being held
4 up, and the second time, there was a more
5 threatening sound to his voice.

6 Q. Talking about the first man?

7 A. This is the one with the pistol, and I looked up
8 and when the man came back to me and turned, he
9 was pointing the gun in my direction.

10 Q. What was going through your mind when you had that
11 gun pointing in your direction?

12 A. I hoped he didn't want to kill anybody was my
13 main thought. There was nothing anyone could do
14 with an unloaded gun, and if I had had a loaded
15 gun, if I was a police officer, I don't think I
16 could have done anything.

17 Q. He had you pretty well covered?

18 A. He had someone covered at all times.

19 Q. After they had thrown the man to the ground behind
20 the counter, Dennis, what was done at that
21 time?

22 A. The two younger guys herded everyone behind the
23 counter, and the older man with the pistol herded
24 the customer in front of the counter and myself,
herded us back to the storeroom. There is a door

1 right in the middle to the storeroom, right there.

2 They herded us through that door back
3 in the storeroom and made us lay down on our
4 stomachs in the back of the room in the storeroom,
5 put our hands behind our backs, and took athletic,
6 white athletic tape and taped our arms behind us.

7 Q Adhesive tape?

8 A Adhesive tape. Right.

9 Q Did someone have a gun on you at that time?

10 A The man still had the gun trained on us when we
11 were laying on our stomachs telling us not to
12 move or they would shoot.

13 Q You had your hands behind you such as this?

14 A Yes.

15 Q What was going through your mind at that time after
16 you had been herded and taken to the storeroom?

17 MR. ELIZONDO: I object to what was
18 going through his mind, Your Honor.

19 THE COURT: Sustained.

20 Q (By Mr. Bax) What happened then?

21 A Well, after that, they talked about -- they
22 discussed among themselves in Spanish something.

23 Q What kind of voices were they using when they were
24 doing this?

25 A When they were talking, they were whispering to

each other, and then they left one of them there. They all armed themselves also after they got -- after they had us tied up.

Do you know where they received -- got the guns from?

From the display case.

Do you know whether they had those guns loaded?

I could not swear to that. I do not know. They left one in there with us -- I don't know which one it was -- to watch us, and the others went out and riffled the store.

Q. You may take your seat.

(The witness complied.)

(By Mr. Bax) Dan, could you give us some idea of how long all this lasted?

A. A long time.

Q. I know.

A. About fifteen to twenty minutes.

Q. Before they left, did they cut the tape on your hands?

A. They left us laying on the floor and told us that if we moved at all within the next five minutes, that they would kill us.

Q. Was anything taken from your person?

Nothing was taken from me or anyone else that I

1 could see.

2 Q Did you have a billfold on you?

3 A I had my wallet and my checkbook.

4 Q Did you have any cash?

5 A Not much.

6 Q Did anyone even attempt to look and see how much

7 cash you may have had in your pocket?

8 A No.

9 Q Did you have credit cards with you?

10 A I had credit cards.

11 Q None of the credit cards were taken?

12 A No.

13 Q Did you have any jewelry?

14 A I had rings and a watch on.

15 Q Did anyone take any of those items?

16 A No, sir.

17 Q I take it the only items taken out of the store

18 were guns and ammunition, as best you could tell?

19 A As best I could tell.

20 Q If you would, do you see in the courtroom --

21 Let's talk about the first man -- okay?

22 The Mexican-American male thirty to thirty-five

23 years old saying, "Don't move. Don't move."

24 A Okay.

25 Q The one you saw with the pistol.

1 Do you see that person in the courtroom
2 or a facsimile of that person?

3 A Yes.

4 Q Would you point to that facsimile or person?

5 A It would be the mannequin farthest from me now.

6 Q That would be identified as State's Exhibit No.
7 20?

8 A Yes. That is the one.

9 Q That is the exhibit number. You may take my word
10 for it.

11 That is the man that had the pistol
12 with the extended clip, the semiautomatic pistol
13 with the extended clip?

14 A That is a fairly good likeness. He did have a
15 beard and mustache, razor stubble.

16 Q It wasn't a beard, just razor stubble?

17 A Looked like he hadn't shaved -- razor stubble.

18 MR. ELIZONDO: I object to counsel
19 leading the witness.

20 THE COURT: Don't lead your witness.

21 Q (By Mr. Bax) When you came to the courtroom today,
22 did you recognize anyone in the courtroom today
23 as being a participant in this robbery that took
24 place on July 8th?

25 A Yes, I did.

1 Q Where was that person seated in the courtroom
2 when you noticed him?

3 A He was seated among the spectators.

4 MR. BAX: Your Honor, at this time,
5 may we have Enrico Luna Torres, the brother of
6 Jose Manuel Torres, for identification purposes?

7 MR. ELIZONDO: Objection, Your Honor,
8 to the unsworn testimony.

9 THE COURT: Don't volunteer information.

10 MR. ELIZONDO: May we have a ruling,
11 Your Honor?

12 THE COURT: Sustained.

13 MR. MOEN: Judge, that is part of the
14 record. Jose Manuel Torres identified Enrico
15 Torres as his brother during part of the trial
16 yesterday, in the morning.

17 MR. ELIZONDO: I object again, Your
18 Honor.

19 THE COURT: I have made my ruling.

20 MR. ELIZONDO: May the jury be asked
21 and instructed to disregard the last comment
22 from the prosecutor?

23 THE COURT: Disregard it.

24 MR. ELIZONDO: We would ask for a
25 mistrial, Your Honor.

1 THE COURT: Overruled.

2 Don't make any comment while this
3 individual is in the courtroom.

4 (Enrico Luna Torres entered the
5 courtroom briefly and then left after which the
6 following proceedings were had:)

7 THE COURT: All right, sir. You may
8 proceed.

9 Q. (By Mr. Bax) And did you recognize that person
10 just brought into the courtroom?

11 A. Yes.

12 Q. What role did that person play in the robbery back
13 on July 8th?

14 A. He was one of the younger of the two, of the three
15 suspects. He participated in the herding and the
16 taping of our hands behind us and the actual
17 taking of the weapons.

18 Q. And was he the same person that when you came to
19 court today you noticed was seated in the front
20 row?

21 A. He was.

22 Q. Is there any question in your mind that was the
23 second person or one of the two out of the three
24 now that was in the store back on July 8th?

25 A. No question in my mind.

1 Q. Are you able to identify the third person that was
2 in the store?

3 A. No.

4 MR. BAX: That's all the questions I
5 have of this witness, Your Honor.

6

7 CROSS EXAMINATION

8

9 QUESTIONS BY MR. ELIZONDO:

10 Q. Did you give a statement to the police in regards
11 to this case?

12 A. Yes, I did.

13 MR. ELIZONDO: Your Honor, could I see
14 it now?

15 MR. BAX: May I ask a voir dire question
16 or two?

17

18 VOIR DIRE EXAMINATION

19

20 QUESTIONS BY MR. BAX:

21 Q. Was that an oral statement or written statement?
22 I mean, did you actually sit down and have a
23 statement written out to which you had your
24 right hand raised and sworn?

25 A. I am pretty sure it was an oral statement.

1 MR. BAX: Judge, I have no written
2 statement in my file whatsoever concerning this
3 witness or any other witness to this robbery.

4 THE COURT: All right, sir.

5
6 CROSS EXAMINATION, CONTINUED

7
8 QUESTIONS BY MR. ELIZONDO:

9 Q And at that time, did you identify the three
10 suspects to the police?

11 A I gave a description, the best we could.

12 Q How did you describe the older man, the thirty-
13 five-year-old man?

14 A I described him as being approximately five-eight,
15 unshaven, light mustache, dark hair, dark eyes,
16 Latin American male.

17 Q Dark hair and dark eyes?

18 A Correct.

19 Q Did you say unshaven or with a beard?

20 A Unshaven.

21 Q Did you tell the police about how much he weighed?

22 A I don't remember if I gave a weight estimate.

23 Q How did you describe the number two suspect?

24 A I described him as a Latin American male
25 approximately twenty-two years old, with kind of

1 a shaggy haircut. He was clean shaven at the
2 time.

3 Q. You say he was clean shaven and he didn't have a
4 mustache or beard?

5 A. No.

6 Q. About how tall was he?

7 A. He was approximately five-seven, five-eight.

8 Q. What color hair did he have?

9 A. Dark hair.

10 Q. And about how long was his hair?

11 A. It was shaggy, not shoulder -- you know, cut
12 shaggily, not shoulder-length.

13 Q. And this robbery occurred on July the 8th? Is
14 that correct?

15 A. That is correct.

16 Q. Of '82?

17 A. Right.

18 Q. How would you describe the number three suspect?

19 A. As being younger, slightly smaller, Latin American
20 male, dark hair, dark eyes, clean shaven.

21 Q. Didn't have a beard or mustache, the number three
22 suspect? Right?

23 A. No.

24 Q. And of those three, the thirty-five-year-old is,
25 you say, the mannequin over here marked State's

1 Exhibit 20; is that correct?

2 A. That is correct.

3 Q. And I suspect that the younger one, the number
4 three suspect is the man that walked in the
5 courtroom a little while ago; is that right?

6 A. That's correct.

7 Q. So the only one that had any kind of mustache
8 or facial hair was what has been marked as State's
9 Exhibit 20; is that correct?

10 A. That is the only one I noticed. Yes, sir.

11 Q. Did any of them have a tattoo or any facial
12 markings?

13 A. One of the employees in the store mentioned a
14 tattoo. I did not see it.

15 Q. Which employee in the store was that?

16 A. Dennis.

17 Q. Is Dennis in the court today?

18 A. I don't see him.

19 Q. Do you recall what kind of tattoo he mentioned?

20 MR. BAX: Your Honor, I object to that
21 as hearsay.

22 MR. ELIZONDO: I believe that is res
23 gestae of the events.

24 MR. BAX: Not what someone else says
25 about a description of somebody.

1 THE COURT: That will be sustained.

2 Q (By Mr. Elizondo) Did you see any tattoos?

3 A No, sir.

4 Q How many people had guns?

5 A One had a gun. One person had a gun initially.

6 Q The thirty-five-year-old?

7 A Initially, yes, sir.

8 Q And how did he carry it into the store?

9 A I did not see him when he came into the store.

10 Q Did you ever see him with a gun?

11 A Oh, yes.

12 Q Do you know where he got that gun from?

13 A Just what I was told. I did not see him come in

14 with a gun. When I saw him, he had the gun

15 drawn.

16 Q Now, who tied you up?

17 A The second suspect and the younger suspect.

18 Q The second one and the third one, right?

19 A That's correct.

20 Q And both of them were clean shaven with no

21 mustache or beard; is that correct?

22 A That's right.

23 Q What kind of shirts did they have on?

24 A I hardly noticed. Anything I would tell you about

25 that would be what I heard the other employees

1 say.

2 Q Would Dennis be one of them?

3 A Dennis knew the shirts and shoes. He gave a
4 pretty accurate description.

5 Q Do you recall what kind of pants they had on?

6 A They were all dressed casually, T-shirts and
7 jeans.

8 Q Do you recall that?

9 A I recall that, yes.

10 Q All right. Do you know where the tape came from
11 that was used to tape you up?

12 A It was in a bag.

13 Q It was in a bag?

14 A They had a shopping bag.

15 Q I suspect the bag came into the store with the
16 suspect; is that correct?

17 A The pistol came in in the bag from what I hear,
18 so I imagine the bag contained everything.

19 MR. ELIZONDO: Okay. We will pass him,
20 Your Honor.

21 THE COURT: Anything further?

22

23

24

25

RE-DIRECT EXAMINATION

QUESTIONS BY MR. BAX:

Q Were you able to tell what kind of pistol the man had that you have now identified as State's Exhibit 20?

A. It was a Russian automatic pistol.

Q Let me show you what has been marked and introduced in evidence as State's Exhibit 44. Would that have been the same pistol he had?

A. One very similar.

Q But is it the same? You know what kind of pistol that is?

A. That is a 7.35 Russian pistol built on a Browning pattern, most of them.

Q The pistol that you saw the man in the front of the store have would have been a pistol very similar to State's Exhibit 44?

A. Very similar, except it had an extended clip on it.

Q It had a longer clip?

A. He held it like that.

Q Now, the adhesive tape, did you see how the adhesive tape was contained or the container of the adhesive tape?

1 A. It was in metal canisters, regular Johnson &
2 Johnson canisters.

3 MR. BAX: May I have this marked as
4 State's Exhibit 86, and on the inside, mark these
5 as State's Exhibits 86A and B.

6 (At this time, State's Exhibit Nos.
7 86, 86A, and 86B were marked for identification
8 purposes by the court reporter.)

9 Q. (By Mr. Bax) I have removed from State's Exhibit
10 86, which is an envelope, State's Exhibits 86A
11 and 86B, and I will ask you -- and I know you will
12 probably agree there is no way you can tell us
13 these are the same tape cans used back on July
14 8th, but do they appear to be the same or
15 similar to the tape cans, adhesive tape cans
16 used to bind your hands by the two younger
17 Mexican-American males?

18 A. They look very similar.

19 Q. The way those work, the spool with the tape fits
20 inside; is that correct?

21 A. That is correct.

22 Q. Do you know what happened? Did you actually see
23 the tape being removed from these types of
24 containers?

25 A. No, but I heard them hit the floor. They were

1 A. Absolutely sure.

2 Q. In the course of your twelve years as a member
3 of the Latent Print Identification Division of
4 the Houston Police Department and during the course
5 of your training and experience that you have
6 outlined to the jury, have you ever had the
7 occasion to run across two individuals with the
8 same fingerprints?

9 A. No, sir.

10 Q. In the course of your experience and training,
11 have you ever heard or read of such a thing
12 happening?

13 MR. MOEN: Judge, at this time, we
14 would offer into evidence -- and I don't believe
15 they have been offered yet -- we would offer
16 State's Exhibits Nos. 86A and 86B and would also
17 offer into evidence State's Exhibits Nos. 87,
18 88, and 89.

19 MR. ELIZONDO: Your Honor, the only
20 objection we have for the record is we would
21 object to the admission of any evidence that could
22 result in any extraneous offenses alleged to have
23 been proven or have not been proven in this court
24 as a violation of Article 37.07-3 of the Texas
5 Code of Criminal Procedure.

1 scattered after the tape was taken out of them.
2 Q After the tape was taken out, they were thrown
3 on the floor?

4 A Thrown on the concrete floor.

5 Q And these appear to be the same or similar to
6 those, 86A and 86B?

7 A Right.

8 MR. BAX: Pass the witness.

9 THE COURT: Anything further, Mr.
10 Elizondo?

11 MR. ELIZONDO: No questions.

12 THE COURT: Thank you, Mr. Dawson.
13 You may step aside.

14 Call your next.

15 MR. BAX: We would call Steve
16 Earhardt.

17

18

19

20

21

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25

1 STEVE EARHARDT,
2 was called as a witness on behalf of the State of
3 Texas, after having first been duly sworn, testified
4 as follows:
5

6 DIRECT EXAMINATION
7

8 QUESTIONS BY MR. BAX:

9 Q Tell us your name, please.

10 A Steve Earhardt.

11 Q How are you employed?

12 A I am a machinist.

13 Q What hours do you work right now?

14 A 4:30 in the afternoon to 3:00 in the morning.

15 Q Did you receive a call from us last night at work
16 about coming and testifying here today?

17 A Yes, sir.

18 Q Other than that phone call last night, have you
19 had any conversations with anyone from the
20 District Attorney's Office concerning any
21 knowledge you may have about this case?

22 A No, sir.

23 Q Steve, back on July 8th of this year, did you
24 have occasion in the afternoon to be in the Rebel
25 Gun Store?

1 A Yes, sir.

2 Q Would you tell the people here on the jury about
3 what time it was that you arrived at the Rebel
4 Gun Store?

5 A About 3:30.

6 Q What was your purpose in going to the Rebel Gun
7 Store on that date?

8 A I was going to buy a holster.

9 Q Do you have a pistol you were going to buy a
10 holster for?

11 A Yes, sir.

12 Q Do you have an interest in guns and ammunition?

13 A Yes, sir. I do.

14 Q Would you just briefly tell us about your
15 interest in guns and ammunition so we will have
16 a better idea about your expertise in that area?

17 A I am into shooting sports, target shooting and
18 hunting, plus I collect handguns and rifles,
19 too.

20 Q How long have you been doing that?

21 A Since I turned twenty-one.

22 Q How old are you now?

23 A Twenty-three.

24 Q Are you living at home with your parents?

25 A Yes, sir.

1 Q When you were in the Rebel Gun Store back on
2 July 8th, can you tell us as best you can what
3 portion of the store you were in?
4 A I was about midways in the store standing at the
5 counter.
6 Q At the customers' counter?
7 A Yes, sir.
8 Q What were you doing at the counter?
9 A I was looking at a .45 automatic pistol.
10 Q Do you recall what kind of pistol it was?
11 A Yes, sir. It was a Colt .45.
12 Q Were you having a conversation with anyone at that
13 time?
14 A Yes, sir. Jay, one of the employees at the store.
15 Q Besides yourself and Jay, did you notice any
16 other employees there inside the Rebel Gun Store?
17 A Just Dennis. He was talking on the phone.
18 Q Is that phone located toward the front end of the
19 counter, towards the front end of the store?
20 A Yes.
21 Q And you and Jay would have been having your
22 conversation about this Colt .45 about the middle
23 of the counter?
24 A About ten feet down.
25 Q When you were talking with Jay about the .45,

1 at that time, were there any other customers
2 in the store to your knowledge?

3 A. Nobody other than the other witness that was in
4 here.

5 Q. The man who just left --

6 A. Yes, sir.

7 Q. -- just before you came in?

8 Tell the members of the jury what, if
9 anything, unusual happened while you were having
10 this conversation there at the counter.

11 MR. ELIZONDO: Your Honor, again we
12 would object and renew our objection to the
13 admission of any extraneous, unadjudicated
14 offenses as being a violation of Article 37.07-3
15 of the Code of Criminal Procedure.

16 THE COURT: Overruled.

17 Q. (By Mr. Bax) You may answer.

18 Did anything unusual happen while you
19 and Jay were having this conversation?

20 A. Yes, sir. I heard somebody walking in, but I
21 didn't pay any attention to them, and apparently
22 they went to the rear of the store, but I didn't
23 pay any attention to them because I was looking
24 at this gun and --

25 Q. Is there any type of bell or buzzer or anything

1 that goes off when somebody enters the Rebel
2 Gun Store?

3 A Yes, sir. A buzzer whenever the door opened.

4 Q Could you hear footsteps?

5 A Yes, sir.

6 Q Could you tell whether they were the footsteps
7 of one or more persons?

8 A I really didn't pay that much attention.

9 Q Did the footsteps go right behind you?

10 A Yes, sir. To the rear of the store.

11 Q After you heard the footsteps and the buzzer
12 went off indicating someone had entered the
13 store, what happened after that?

14 A Someone else walked in. Whoever that is in the
15 purple shirt, he walked into the door carrying
16 the paper sack and walked up to Dennis at the
17 counter while he was talking on the phone and
18 pulled out a Russian Tecara (phonetic) pistol,
19 and stuck it in Dennis' face and told him not to
20 move, it was a stickup.

21 Q Did he say it just like that? It was a stickup,
22 or how would you describe the way the person
23 talked?

24 A He said it with a heavy accent like, "No move.
25 Stickup." That's about what he said.

1 Q With a Mexican accent?

2 A Yes, sir.

3 Q Did you see where the person whom you've now
4 indicated there's a facsimile of in the courtroom,
5 State's Exhibit 20, could you see where he
6 retrieved the pistol from that he used and stuck
7 in Dennis' face?

8 A Yes, sir. A paper sack he carried in with him.

9 Q Let me show you State's Exhibit 44, and I will ask
10 you if you know what type of pistol State's
11 Exhibit 44 is?

12 A It looks like a Browning nine-millimeter.

13 Q Does that have any similarity to the pistol that
14 you saw the man walk into the store with, the
15 Russian automatic pistol I believe you testified
16 to?

17 A It is similar to it, but it is not it.

18 Q So you are certain in your own mind that the
19 person that walked in and pulled the gun out of
20 the bag did not have with him at that time State's
21 Exhibit 44, but it was a different pistol?

22 A Yes, sir.

23 Q And are you very familiar with this type of
24 Browning automatic, semiautomatic pistol, and also
25 the Russian pistol you have just described to us?

1 A Yes, sir. Very much.

2 Q And is there any question in your mind this is
3 a different pistol from that?

4 A No.

5 Q After the person depicted in State's Exhibit 20,
6 the mannequin with the purple T-shirt, said, "Don't
7 move. Stickup," what happened after that?

8 A What happened after that?

9 Q Yes, sir.

10 A Well, I thought it was a joke and I asked Jay,
11 the other employee who was showing me the .45,
12 I turned to him and said, "Is this a joke," and
13 he said, "No."

14 MR. ELIZONDO: I object to hearsay,
15 Your Honor.

16 THE COURT: Overruled.

17 Q (By Mr. Bax) Go ahead.

18 A And he said, "No, it is not a joke. Better put
19 it down," and I laid it down and he turned and
20 pointed the gun at me and told me, "No joke.
21 Stickup."

22 Q He told you, "No joke. Stickup"?

23 A Yes.

24 Q Tell us what happened after that.

25 A Well, the other two guys that had walked in had

1 gone to the rear of the store and got the witness
2 who was here right before me, and they took a
3 shotgun away from him which he was looking at
4 and had brought him to the back of the counter
5 and went down there and got Dennis off the phone,
6 which was sitting in a chair there, and stood
7 him up, searched him, and then they threw him to
8 the floor.

9 Q Threw Dennis to the floor?

10 A Yes, sir. And pointed a pistol at him like he
11 was going to shoot him.

12 Q Show us how he did that.

13 A Just threw him down to the floor and pointed the
14 pistol to his head like he was going to shoot
15 him.

16 Q And the other two men that had gone and gotten
17 the other witness from the back of the store --
18 and I believe his name was Dan?

19 A Yes.

20 Q -- had gone to the store and gotten Dan and taken
21 him behind the counter, did you notice anytime
22 whether they had weapons?

23 A He had a gun, but I didn't pay a whole lot of
24 attention to what it was. It looked like a
25 nine-millimeter.

1 Q Do you know where that pistol had come from or
2 where he had retrieved that?

3 A No, sir.

4 Q You pointed to someone in the courtroom. I will
5 come back to that in a few moments. Okay?

6 After Dennis had been thrown to the
7 floor and a pistol had been pointed at him like
8 he was going to be shot, tell the members of the
9 jury what took place next.

10 A They said something back and forth to each other
11 in Spanish, and then they got him up off the
12 floor and started pushing us all to the rear
13 of the store, to the back room.

14 Q And when you say "started pushing us all," tell
15 the members of the jury who was being pushed
16 to the back of the store.

17 A Well, myself and Dennis and Jay and Dan.

18 Q What happened to you when you got to the back
19 of the store?

20 A Well, by the time we got to the door, they stopped
21 and was talking to each other.

22 Q In English or Spanish?

23 A In Spanish. They never spoke English other than
24 just the few words that the guy in the purple
25 shirt said.

1 Q No one else said anything in English other than
2 the original statement, "Don't move. Stickup,"
3 something like, "No joke"?

4 A Yes.

5 And when we got to the back of the
6 store, they said something to each other, and
7 that is when I had the opportunity to look at the
8 Defendant and these other -- well, to get a look
9 at all of them, and that was, like I said, a
10 minute to two minutes.

11 Q So there y'all were at the back of the store,
12 and apparently discussing something in Spanish
13 what is going to take place, I assume --

14 A Yes, sir.

15 Q -- and you had an opportunity, I take it, at that
16 time to observe all three persons that had come
17 into the store?

18 A Yes.

19 Q After they had this discussion for a minute or so
20 and after you had an opportunity to look at the
21 three Mexican-American males for that period of
22 time, what was done with yourself, Jay, Dennis,
23 and Dan?

24 A We were all pushed through the door and taken
25 in the back room and they shoved us all down,

1 facedown on the floor back there.

2 Q. When you say "shoved you down," did they ask you

3 to get down on the ground?

4 A. No, they pushed us.

5 Q. How would you describe the manner in which they

6 pushed you to the ground?

7 A. Very rude. I mean --

8 Q. Were you in fear of your life at that time?

9 A. Very much.

10 Q. After they had pushed you very rudely to the

11 ground, tell the members of the jury what they

12 did to you then.

13 A. They pulled our arms up behind our backs and taped

14 our hands together with medical -- medical first

15 aid tape.

16 Q. Adhesive tape?

17 A. Yes, adhesive tape, and taped our arms together

18 real tight.

19 Q. Did that make you feel more or less fearful than

20 you were?

21 A. More.

22 And they kind of rummaged through the

23 back room back there and they had a big old

24 tow sack and they filled it up with sawed-off

25 shotguns and dumped a bunch of cases of ammunition

1 out all over the floor back there.

2 Q Were you laying faceup or facedown on the floor?

3 A Facedown.

4 Q How long had you been laying down on the floor

5 while they were loading up all this ammo and guns

6 and what not?

7 A A total of about ten to fifteen minutes while

8 they was back there, and I would say ten minutes

9 while they was rummaging through the stuff.

10 Q While they were rummaging through the stuff in

11 the storeroom, were they saying anything to one

12 another? Not whether you could understand it

13 or not, but was there any conversation going on?

14 A Yes, it sounded like, "Hurry up. Hurry up. Hurry

15 up," you know, in Spanish.

16 Q To each other?

17 A Yes.

18 Q At any time, did they leave or one stay behind?

19 A Yes, sir.

20 Q Explain to us how that took place, if you will.

21 A They left one in there, and the other two went

22 up front and they came back, I would say two

23 times, and I heard the door open and they said

24 something back and forth to each other, and then

25 the door closed and then they all went out front

1 and it got -- we could hear them talking, and it
2 just got real quiet and we could hear them going
3 through the gun counters, hear, you know, stuff
4 rattling, ammunition, guns rattling, and it got
5 very, very quiet, and at that time, at least I
6 was very fearful for my life as I thought they
7 would probably come back in and shoot us.

8 Q Did you have any money on your person that day?

9 A Yes, sir. About nine hundred fifty dollars.

10 Q What was the reason you were carrying that much
11 cash on your person?

12 A I just had cashed my check.

13 Q Your paycheck?

14 A Yes.

15 Q Did anyone try to search your person?

16 A No.

17 Q Did you have a billfold?

18 A Yes, sir.

19 Q Did they take jewelry or rings or anything?

20 A No, sir.

21 Q Did any one of the men seem concerned about the
22 money you had?

23 A No.

24 MR. ELIZONDO: Your Honor, I object to
25 the form of the question, style of the question.

1 THE COURT: Restate your question.

2 Q (By Mr. Bax) Was any money taken from you?

3 A. No, sir.

4 Q The adhesive tape you have told us about, Steve,
5 could you hear anything about how it was contained
6 or did you see the containers in which it was
7 kept or anything?

8 A. Yes, sir. It was in metal containers. It is
9 on a spool and has got a metal case snapped around
10 it.

11 Q The tape is inside?

12 A. Yes, sir. It slides up and snaps in.

13 Q Let me show you also the contents of State's
14 Exhibit 86, and ask you if these, 86A and 86B,
15 appear to be the same or similar to you to the
16 containers that were used back on July 8th?

17 A. Yes, sir.

18 Q What was done with these, if you know, 86A and
19 86B, the ones that were similar to these?

20 A. After they took the tape out, they threw them on
21 the floor.

22 Q After the men left and after you were set free,
23 did you have occasion to see those containers
24 there in the store?

25 A. Yes, sir. I did.

1 Q And where were they?

2 A They were on the floor in the back room.

3 Q The men left them behind, I take it?

4 A Yes, sir.

5 Q How were you set free? How did you get loose?

6 A I think it's S.I.P. or S.C.P. The security
7 officer came in the store and he walked in and
8 said, "Is anybody here?" He said, "Is anybody
9 here," and we said, "Yes," and he said --

10 MR. ELIZONDO: I object to hearsay,
11 Your Honor.

12 THE COURT: Sustained.

13 Q (By Mr. Bax) Was there a door between you and
14 the security guard when he first came in?

15 A Yes, sir.

16 Q When you heard somebody come in, did you call out
17 to them or anybody else that you were bound in
18 the storeroom back there?

19 A Yes, sir.

20 Q And I take it after the security guard found you
21 back there, he freed you from your bindings and
22 what not?

23 A Yes, sir.

24 Q Did you talk to the police officer out there
25 that day?

1 A Yes, sir. I did.

2 Q And did you tell him basically what you knew at
3 that time?

4 A Yes, sir. I did.

5 Q When you came here, from that date back on July
6 8th until today, have you had contact with anyone
7 concerning the robbery that took place on July
8 8th?

9 A None, other than Dennis and Jay at the gun store.

10 Q Was that talk, when you would go now and again,
11 about what had happened that y'all were sort of
12 together on, I guess?

13 A Yes, sir.

14 Q Now, other than your contact with the law
15 enforcement officer back on July 8th, was your
16 first contact with the law enforcement last
17 night when you were talking with Mr. Moen on
18 the telephone?

19 A Yes, sir.

20 Q And did you come and meet with us at our office?

21 A Yes, sir. I did.

22 Q Had you up to that point in time been shown any
23 photographs of any persons and asked whether or
24 not you could identify anyone from those
25 photographs?

1 A. No, sir.

2 Q. Had you appeared at any lineup or any show-up
3 where people were displayed in front of you and
4 asked if you could identify anybody?

5 A. No, sir.

6 Q. When you came in court today, and in front of
7 this jury identified State's Exhibit 20 as being
8 the first person that came in with the pistol
9 with the extended clip, is there any question in
10 your mind that is, in fact, the same person?

11 A. No, sir.

12 Q. Or a facsimile of the same person?

13 A. No, sir.

14 Q. When you came into the courtroom this morning,
15 did you notice anyone seated in the audience that
16 you recognized?

17 A. Yes, sir. I did.

18 Q. And who did you recognize that to be? I know he
19 is not here now.

20 A. It was one of the three that was -- three of the
21 team that robbed us.

22 Q. Tell the people on the jury how many people were
23 in the courtroom this morning as best you can
24 say when you walked in and noticed one of the
25 three men seated in the audience.

1 A I would say about fifteen.

2 Q Had anyone told you to expect to see someone
3 seated in the courtroom and to be on the lookout
4 to see if you noticed anyone seated in the
5 audience section of the courtroom?

6 A No, sir.

7 MR. BAX: Your Honor, may we have at
8 this time Enrico Luna Torres brought into the
9 courtroom for identification purposes?

10 Steve, if you would, don't make a
11 comment when he is in here.

12 (At this time, Enrico Luna Torres was
13 brought into the courtroom and removed, after
14 which time the following proceedings were had.)

15 Q (By Mr. Bax) Steve, did you recognize that person
16 that was just brought into the courtroom?

17 A Yes, sir.

18 Q And was that one of the three men that came into
19 the Rebel Gun Store and robbed you and the other
20 people back on July 8th?

21 A Yes, sir. It was.

22 Q Steve, was that the same person you noticed when
23 you came into the courtroom today, this morning,
24 as being a spectator in the courtroom?

25 A Yes, sir.

1 Q Is there any doubt in your mind, Steve, that was
2 one and the same person you saw back in the Rebel
3 Gun Store back on July 8th?

4 A No, sir.

5 Q A little while ago, you pointed to a person
6 sitting at counsel table here.

7 Do you recognize someone seated at
8 counsel table?

9 A Yes, sir. I do.

10 Q Point that person out for us, please.

11 A Yes, sir. The guy in the white shirt there.

12 Q If I am number one and Mr. Moen is number two,
13 would he be number four?

14 A Yes, sir.

15 Q How do you know him? Where did you see him
16 before?

17 A He was one of the guys also.

18 Q Was he the third person inside the Rebel Gun
19 Store, the third Mexican-American male inside the
20 Rebel Gun Store back on July 8th?

21 A Yes, sir.

22 Q Does he look the same here today as he did back
23 on July 8th?

24 A No, sir. He doesn't.

25 Q Tell these people how he looks different today.

1 A His hair was longer, and he had a facial beard.
2 Q Do you see a facsimile of that person in the
3 courtroom?
4 A Yes, sir. I do.
5 Q Point to that or identify it for us.
6 A The one in the green shirt.
7 Q I believe it says State's Exhibit 19 right here.
8 A Yes, sir.
9 Q Did anyone tell you or suggest to you that third
10 person would be in the courtroom today and you
11 were to identify him?
12 A No, sir.
13 Q Are you identifying him because you see State's
14 Exhibit 19 or because you remember the Defendant
15 from how he appeared back on July 8th, 1982?
16 A Because I remember how he looked.
17 Q Could you do me a favor, Steve?
18 A Yes, sir.
19 Q Could you come down off the witness stand and
20 get as close to the Defendant right now as you
21 were to him back on July 8th for, I believe you
22 testified, for a minute or so, while you were
23 back at the Rebel Gun Store while the men were
24 deciding what to do? Would you do that?
25 A Yes, sir.

1 Q Would you look at him at the same angle you looked
2 at him then? :

3 A About this distance right here.

4 Q You would have been more on his level eye-to-eye?

5 A He is sitting down.

6 MR.. BAX; Could we have him stand,
7 Your Honor?

8 THE COURT: Have the Defendant rise.

9 (The Defendant complied.)

10 A About that distance there.

11 Q Looking at him from the same distance right now --
12 of course, he doesn't have the beard and the
13 mustache -- is there any question in your mind
14 he was one of the three men who was back in the
15 Rebel Gun Store on July 8th?

16 A No.

17 MR. ELIZONDO: I object, Your Honor,
18 to counsel bolstering his own witness.

19 THE COURT: Overruled.

20 MR. BAX: You may take your seat, Steve.

21 May I have one moment, Your Honor?

22 Pass the witness.

23

24

25

1 CROSS EXAMINATION

2
3 QUESTIONS BY MR. ELIZONDO:

4 Q Did you talk to the police on July 8th, 1982,
5 in regards to this robbery, sir?

6 A Yes, sir. I did.

7 Q Did you give the police a description of the three
8 suspects at that time?

9 A Yes, sir. I did.

10 Q Did you give a written statement to the police in
11 regards to this robbery?

12 A Yes, sir.

13 MR. ELIZONDO: Could I see a copy of that
14 statement, Your Honor?

15 MR. BAX: May I ask this witness also
16 the same question?

17 THE COURT: Yes.

18
19 VOIR DIRE EXAMINATION

20
21 QUESTIONS BY MR. BAX:

22 Q Steve, did you have someone write down and write
23 out a written statement and tell them what was
24 true or tell them what happened?

25 A I just told them what happened.

1 MR. BAX: Judge, I have no written
2 statement of this witness.
3

4 CROSS EXAMINATION, CONTINUED
5

6 QUESTIONS BY MR. ELIZONDO:

7 Q You gave them an oral statement; is that right?

8 A Yes, sir.

9 Q And how did you describe the first suspect, the
10 number one suspect?

11 A I -- I guess he is number one.

12 Q The older one; is that right?

13 A Yes, sir.

14 Q How old did you tell the police he was?

15 A I told him he was -- at the time, he had a light
16 -- he had a mustache, about four days' growth
17 of beard, short hair, about five foot-seven or
18 five foot-eight, somewhere in that vicinity.

19 That is about the best I can remember
20 of what I told them.

21 Q About how old would you say he was?

22 A It is hard to say with that beard. I would say
23 probably in his thirties.

24 Q Is that what you told the police?

25 A Yes, sir.

1 A. I interviewed the two employees on duty or the
2 two witnesses or two customers in the store.
3 Q. Who primarily did you rely on for in your opinion
4 those descriptions that you used to complete
5 your offense report? Which one of the four
6 witnesses did you rely on primarily?
7 A. The manager of the store, and his name was Dennis.
8 I remember his first name to be Dennis.
9 Q. Why did you primarily rely on his description
10 for completing your offense report? Why did you
11 decide to do that?
12 A. He was more collected.
13 MR. ELIZONDO: Your Honor, I object to
14 the form of the question.
15 THE COURT: Overruled.
16 Q. (By Mr. Moen) Go ahead, please, sir.
17 A. He wasn't as excited as the other three at the
18 time. He was shook-up.
19 MR. MOEN: Okay, Larry. Thank you.
20 Pass the witness.
21 THE COURT: I'll tell you what; the
22 coffee shop is going to close in twenty minutes.
23 Members of the jury, you may be
24 excused to go to the coffee shop and get you a
25 cup of coffee. Please remember the admonitions

1 Q Mid-thirties, low thirties?

2 A I just said somewhere around thirty.

3 Q And this man, suspect number one, came in the

4 store with a bag; is that right?

5 A Yes, sir.

6 Q What kind of door do they have at the Rebel Gun

7 Shop?

8 A It's just a plain glass push type --

9 Q A push type?

10 A -- door like they have in supermarkets.

11 Q You would use your hands to push it?

12 A Yes, sir.

13 Q Is there a counter there at the Rebel Gun Store?

14 A Yes, sir.

15 Q Did the three suspects ever go to the counter?

16 A Yes, sir. They did.

17 Q Did they ever put their hands on the counter?

18 A Yes, sir.

19 Q Just like this?

20 A No, not like that.

21 Q How?

22 A Just walking by, walking by touching the counter.

23 Q Touching the counter?

24 A Yes, sir.

25 Q Did they ever touch any boxes that were there?

1 A Yes, sir.

2 Q Did the boxes stay there at the store after they
3 had left?

4 A Yes, sir. They did.

5 Q Would you describe to the jury the number two
6 suspect?

7 A Well, I guess that is number two there, the
8 Defendant.

9 Q How did you describe him to the police back on
10 that day?

11 A I told them that he had fairly long hair, a
12 mustache, a light beard, and then I described
13 his clothes. He had a T-shirt, blue jeans,
14 some type of odd-colored tennis shoes; I believe
15 it was orange.

16 Q About how old did you tell the police he was?

17 A Somewhere in his twenties, about twenty-two,
18 something like that.

19 Q How about the number three suspect?

20 A I figured that he was fairly young. I figured
21 he was somewhere around seventeen years old, no
22 facial hair, short black hair, kind of medium
23 build and black hair, brown eyes, black eyes.

24 Q Black hair, you say?

25 A Yes.

1 Q. Curly?

2 A. Yes.

3 Q. You are sure?

4 A. As best I remember.

5 Q. Is that what you told the police?

6 A. That's all I remember.

7 Q. Did you tell the police he had curly hair?

8 A. I didn't say.

9 Q. Did you tell the police he was seventeen years

10 old?

11 A. Somewhere around there.

12 Q. Did you tell the police he had no facial hair?

13 A. Yes, sir.

14 Q. Did you tell the police he had short black hair?

15 A. Yes, sir.

16 Q. And a medium build?

17 A. Yes, sir.

18 Q. What kind of clothes did he have on?

19 A. I don't remember now.

20 Q. Did any of them have tattoos?

21 A. Yes, sir. One of them did. I don't remember

22 which one.

23 Q. Do you recall what kind of tattoo it was?

24 A. No, sir. I just got a glimpse of it.

25 Q. Was it a cowboy, a man?

1 A. No, no. I really don't remember. All I remember
2 was a tattoo.

3 Q. Did they ever strike you with the weapons?

4 A. No, sir. Just pushed.

5 Q. Pushed you down?

6 A. Yes, sir.

7 Q. Kind of like a hurry-up push?

8 A. Yes, forceful.

9 Q. Forceful?

10 A. Forceful, hurry-up push.

11 Q. Did they ever strike or harm you in any way?

12 A. No, sir.

13 MR. ELIZONDO: Pass the witness.
14

15 RE-DIRECT EXAMINATION
16

17 QUESTIONS BY MR. BAX:

18 Q. They didn't strike or harm you? Is that correct?

19 A. No, sir.

20 Q. Did you cooperate with them all the way?

21 A. Yes, sir. I did.

22 MR. BAX: No further questions.

23 THE COURT: Anything further?

24 MR. ELIZONDO: Nothing further, Your
25 Honor.

1 MR. BAX; May this witness and also
2 Dan Dawson be excused at this time?

3 I believe he had got to be at work.

4 MR. ELIZONDO: No objections.

5 THE COURT: Thank you, sir. You may be
6 excused.

7 MR. BAX: Thank you, sir.

8 May we approach the bench?

9 (Discussion at the bench out of the
10 hearing of the court reporter.)

11 THE COURT: Call your next.

12
13
14
15 LARRY SHIFFLET,
16 was called as a witness on behalf of the State of
17 Texas, after having first been duly sworn, testified
18 as follows:

19
20 DIRECT EXAMINATION

21
22 QUESTIONS BY MR. MOEN:

23 (At this time, State's Exhibits 87, 88,
24 and 39 were marked for identification purposes by
25 the court reporter.)

1 Q (By Mr. Moen) Larry, for the ladies and gentlemen
2 of the jury who don't know you, tell them what
3 your name is and what police agency you are with.

4 A Larry Shifflet.

5 I am a deputy of the Patrol Division
6 of Harris County Constable's Office, Precinct
7 Number 4.

8 Q Larry, did you have occasion back on July 8th
9 of this year to investigate a Rebel Gun Store
10 located in the 18000 block of Kuykendahl?

11 A Yes, sir. I did.

12 Q About what time did you get to the store on that
13 day?

14 A I got there at 3:59.

15 Q Did you have occasion to talk to the people there
16 in that store?

17 MR. ELIZONDO: For the record, Your
18 Honor, I renew our objection to the admission of
19 any extraneous, unadjudicated offenses as being
20 a violation of 37.07-3 of the Code of Criminal
21 Procedure.

22 THE COURT: That will be overruled.

23 Q (By Mr. Moen) Who all did you talk to? Do you
24 remember their names, the people you talked to
25 at the store?

1 A. No. I don't remember their names. I talked to
2 the two employees on duty and the two customers
3 inside the store.

4 Q. Did you have occasion to see those two customers
5 back at the courthouse today?

6 A. Yes, sir.

7 Q. Are those the same two individuals, customers,
8 you talked to back on July 8th?

9 A. Yes, sir. They were.

10 Q. In addition to talking to all those people, did
11 you have occasion to make efforts to locate any
12 other people who might have witnessed what had
13 taken place at the Rebel Gun Store?

14 A. Yes, I did.

15 Q. What efforts did you make?

16 A. I interviewed people in the strip shopping center,
17 and I went to interview people to see if they
18 had heard or seen anything unusual in that area.

19 Q. Did you have any luck in that area, finding any
20 people who might have seen or heard anything
21 take place in the Rebel Gun Store?

22 A. No, sir.

23 Q. What kind of on-scene investigation did you make
24 as far as conducting any investigation into the
25 recovery of any items of evidence, fingerprints,

1 or anything else there at the scene of the
2 robbery at the Rebel Gun Store? What efforts
3 did you make in that regard?

4 A. I tried to get fingerprints, which I was able to
5 do. There was an empty carton that had several
6 boxes of ammunition in it, plus three automatic
7 weapons, handguns. I tried to print those also
8 and tried to print -- well, I tried to print the
9 guns and the ammunition boxes with no luck.

10 Q. Did you have any luck lifting any fingerprints
11 from the counter area there in the store?

12 A. No, sir. Not from the counter area.

13 Q. How come? Can you tell the jury why you didn't
14 have much luck in being able to lift fingerprints
15 from that surface area?

16 A. The areas I was told the suspects might have come
17 in contact with, I tried to dust them and the
18 prints I lifted were smudged in a manner that
19 nothing could be made of them.

20 Q. What kind of practical experience have you had in
21 that area of lifting fingerprints from some type
22 of crime scene? What type of experience have
23 you had in that regard?

24 A. Nothing than on-the-job training from other
25 officers that have been to technical school to

1 learn fingerprinting.

2 Q Other people have taught you to do it?

3 A Yes, sir.

4 Q How long have you been a police officer?

5 A Starting the twenty-fourth year.

6 Q You are not exactly characterized as a rookie
7 anymore, I guess?

8 A No, sir.

9 Q Do you think you might make a career out of it?

10 A I am trying.

11 Q Did you have any luck at all getting any prints
12 you were able to lift out there at that gun
13 store?

14 A Yes, sir.

15 Q Where did you lift the prints from?

16 A I lifted the prints from the canisters there on
17 your desk in front of you.

18 I lifted the prints from a small plastic
19 type sign that said "closed" on it, and I think,
20 if I remember correctly, those were the only two
21 areas we had been able to lift anything readable
22 from.

23 Q Let me show you these two items marked for
24 identification purposes as No. 86A and 86B and
25 ask if you can identify those for the ladies and

1 gentlemen of the jury, please, sir.

2 A. Yes, sir. That is the same two I recovered in
3 the storeroom of the Rebel Gun Store there.
4 They were in the back room where the employees
5 and two customers had been bound.

6 Q. How are you able to identify those? Can you tell
7 the ladies and gentlemen how you are able to
8 make that identification?

9 A. After we printed them, we put tape on there that
10 says "item number two" and "item number three."

11 Q. Let me show you this envelope marked State's
12 Exhibit 86 and ask you if you can recognize that
13 envelope?

14 A. Yes, sir. This is the envelope and the evidence
15 tag I placed on it.

16 Q. Okay. After you recovered these canisters there
17 at the scene of the robbery at the Rebel Gun
18 Store, did you keep them in your possession?

19 A. I kept them in my possession and placed them
20 in our evidence room.

21 Q. When you say you placed them in your evidence
22 room, before we get to that, did you place them
23 inside anything before you placed them in the
24 evidence room?

25 A. You mean the canisters?

1 Q The canisters themselves.

2 A They were placed inside this envelope.

3 Q Okay. Did you make any type of identification

4 on the outside of the envelope to be able to

5 identify it as being the envelope you placed those

6 items marked 86A and B in?

7 A This is my writing and my tag and signature.

8 Q Where did you deposit that envelope in the evidence

9 room that you have told us about?

10 A The evidence room in the Cypresswood courthouse

11 and the constable's office.

12 Q What type of cabinet or area there at the evidence

13 room did you place those items in?

14 A It's a closet-type area that has shelves, and it

15 has a -- one entrance to the door is locked, kept

16 under lock and key.

17 Q Not open to the general public, that room, is it?

18 A No, sir.

19 Q What connection does that room have with your

20 duties as a police officer?

21 A That room is where the evidence in pertinent cases

22 is stored.

23 Q Did you make any request for this particular item

24 to be processed by any other police agencies?

25 A Yes, sir.

1 Q What type of request did you make in that
2 regard?

3 A It was requested by H.P.D. to see if they could
4 match these prints with any suspects they might
5 have in their computer.

6 Q Okay. If I wanted to get into that lockbox out
7 there at Cypress -- what courthouse?

8 A Cypresswood courthouse.

9 Q Whose permission would I have to get to be able
10 to get in?

11 A There's only one man in control of that, and that's
12 Captain Don Lacy.

13 Q Okay, and what is his position with your agency?

14 A He is captain of patrol and he is also the evidence
15 officer.

16 Q So he is in charge of that area or that room where
17 these items of evidence were kept?

18 A That's correct, sir.

19 MR. MOEN: Would you mark this?

20 (At this time, State's Exhibit Nos.
21 90 and 91 were marked for identification purposes
22 by the court reporter.)

23 Q (By Mr. Moen) Larry, let me show you an envelope
24 that has been marked for identification purposes
25 as State's Exhibit No. 90 and ask if you could

1 identify that for the ladies and gentlemen of
2 the jury.

3 A. That was the same envelope I marked on the scene,
4 that they said there was a tag on.

5 Q. What items were placed in the envelope that was
6 marked State's Exhibit No. 90?

7 A. This was the tape that was used to bind the
8 employees and the two customers that was at the
9 store.

10 Q. Let me show you State's Exhibit 91 which I removed
11 from that envelope and ask you does that appear
12 to be similar or the same as the tape you
13 recovered from the Rebel Gun Store?

14 A. Yes, sir. It appears to be the same.

15 (At this time, State's Exhibits Nos.
16 92 and 93 were marked for identification purposes
17 by the court reporter.)

18 Q. (By Mr. Moen) Larry, let me show you this
19 envelope marked State's Exhibit 92 and ask you
20 if you can identify that envelope, please, sir.

21 A. Yes, sir. This is the envelope that we placed
22 the closed sign into.

23 Q. Okay. What significance did that closed sign have
24 to the robbery of the Rebel Gun Store?

25 A. This sign had been placed --

1 MR. ELIZONDO: Your Honor, I object
2 to his answer as being based on hearsay.

3 THE COURT: Sustained.

4 Q (By Mr. Moen) Well, during the course of your
5 investigation, I take it you interviewed the
6 witnesses at the scene?

7 A. Yes, sir.

8 Q And you talked to all the four people in the
9 store?

10 A. Yes, sir.

11 Q What significance would that have to the robbery
12 of the gun store?

13 MR. ELIZONDO: Your Honor, we renew
14 our objection.

15 THE COURT: In that context, it is
16 overruled.

17 A. They told me this sign was placed --

18 MR. ELIZONDO: I object to that. He
19 is going into what they said.

20 THE COURT: Sustained as to what they
21 said.

22 Q (By Mr. Moen) Okay. Don't tell me what anybody
23 told you about the sign, but you recovered that
24 at the scene?

25 A. I recovered this sign attached to the front door

1 with the closed portion facing where anybody
2 approaching the store would see this sign was
3 taped on the door and it said "closed."

4 Q. Was it actually taped on the door when you
5 recovered it?

6 A. Yes, I actually removed it from the door.

7 Q. Did you attempt to remove any prints from that
8 closed for business sign?

9 A. Yes, sir, I did.

10 Q. Did you have any success in that regard?

11 A. I got one print.

12 Q. Let me ask you and show you a couple of other
13 items that are here, and I will ask you if you
14 recognize those items, please, sir?

15 A. Yes, sir. These I also recovered from the back
16 room of the store where the employees and the two
17 customers had been bound.

18 Q. Okay. All of these items, did you make any
19 request as to all of the items I have placed in
20 front of you?

21 Let me limit it to these you have
22 already testified to, the actual tape rolls and
23 the "sorry, we are closed for business" sign.

24 Did you make any request of any other
25 police agency to do anything to these signs?

1 A Yes. H.P.D.

2 Q And what did you want them to do?

3 A I wanted them to check them also and see if they
4 could match the prints if there were any on there
5 that could be matched with likely suspects.

6 Q When you say you lifted some prints, I wonder if
7 you might explain for the ladies and gentlemen
8 of the jury exactly the process of how you would
9 go about lifting prints from the scene.

10 How would you do it in this case?

11 A I have a small kit that contains a jar of black
12 powder, a brush, three by five cards, and this
13 tape, and I took the brush and dipped it in the
14 powder and we'd go over the areas where we'd think
15 there might be fingerprints, and if there are
16 fingerprints, you can see it, and then I used
17 the clear tape to mash down on that portion where
18 I think the print is at or I see the print, and
19 I rub it out, lift it off and place it onto a
20 three by five card.

21 Q Let me show you three three by five cards that
22 have been marked for identification purposes
23 as State's Exhibits 87, 88, and 89, and I will
24 ask you if you can identify those cards for the
25 ladies and gentlemen of the jury and tell them

1 what they are, please, sir, if you can.

2 A Okay. This is a print that I removed from the
3 closed sign.

4 This is a couple of prints that I removed
5 from this tape can here.

6 This also is a print or prints that I
7 removed from one of the tape canisters.

8 Q Okay. So, from 86A and B you were able to lift
9 off of these items two prints which you then
10 placed on the three by five cards?

11 A That's correct, sir.

12 Q And also you lifted or tried to lift one print
13 from the "sorry, we are closed" sign, and placed
14 that on one of the three by five cards?

15 A Yes, sir. That is this one right here.

16 Q So, State's Exhibit 89 has the print you tried
17 to lift off the "sorry, we are closed for
18 business" sign?

19 A That is one I did remove from that sign.

20 Q And State's Exhibit 87 and State's Exhibit 88 are
21 the prints you had lifted off the exhibits marked
22 for identification as 86A and B?

23 A That's correct.

24 Q What did you do with these cards, Larry? What
25 did you do with these cards after the prints were

1 lifted?

2 A. They were also placed in the envelope and placed
3 in the evidence room.

4 Q. You placed them in one of the envelopes I have
5 shown you here? Would it have been State's Exhibit
6 86 you placed them in?

7 A. Yes, sir. This one right here. This bag right
8 here. I had marked on this card "latent prints."

9 Q. You placed them in the envelope marked 92?

10 A. 92.

11 Q. All of the items that have been placed in the
12 envelope marked 92, the "sorry, we are closed for
13 business" sign, 86A and 86B, the three by five
14 cards, State's Exhibit No. 90, the tape inside
15 marked 91, this envelope marked 86, where did
16 you take these envelopes and items of evidence?
17 Where did you lock them up?

18 A. At 8641 Cypresswood in the courthouse.

19 Q. In the evidence room you have already described
20 to the ladies and gentlemen of the jury?

21 A. That's correct.

22 Q. Now, as far as getting a description of the
23 individuals or suspects involved in this robbery
24 of the Rebel Gun Store, what steps did you take
25 in that regard? Who did you interview?

1 I have given you in the past.

2 Be back in about twenty, twenty-five
3 minutes.

4 (At this time, a recess was taken by
5 the court.)

6
7 CROSS EXAMINATION

8
9 QUESTIONS BY MR. ELIZONDO:

10 THE COURT: Go ahead.

11 MR. ELIZONDO: Thank you, Your Honor.

12 Q. (By Mr. Elizondo) Officer Shifflet, did you prepare
13 a report in regards to this case?

14 A. Yes, I did.

15 Q. May I see a copy of that, please, sir?

16 (The document was handed to Mr.
17 Elizondo.)

18 MR. ELIZONDO: Thank you.

19 Q. (By Mr. Elizondo) Officer Shifflet, did you
20 print the door of that establishment?

21 A. I don't remember, sir, if I did or I didn't.

22 Q. Did you spray any of that black powder on the
23 door or do you remember?

24 A. I printed the closed sign that was attached to the
25 door, and I don't remember if I tried to lift any

1 prints off the frame of the door itself or not.

2 Q. Do you recall what kind of door that was?

3 A. It was a glass door with an aluminum frame, I
4 believe.

5 Q. A push door, sort of?

6 A. Yes, sir. It opened out.

7 Q. How big is that counter at the Rebel Gun Store?

8 A. I would say probably twenty-four inches wide and
9 four foot high and it extends -- it is an "L" shape
10 and it extends from the east wall out five or
11 six feet and then extends to the south wall
12 probably fifteen, eighteen feet..

13 Q. Did you print that whole counter?

14 A. No, sir. I didn't.

15 Q. What kind of counter is that?

16 A. It's a glass counter, the bottom portion being
17 wood.

18 Q. Now, based upon your experience, some surfaces
19 are more conducive to being --

20 A. I am sorry, sir. I can't hear you.

21 Q. Based upon your experience, some surfaces are
22 more conducive, would you say, to getting
23 fingerprints?

24 A. Yes, sir.

25 Q. And would you say glass would be more conducive

1 to lifting fingerprints?

2 A. I don't know, sir.

3 Q. As compared with or contrasted with, let's say,
4 clothes or a rug?

5 A. You mean easier to get?

6 Q. Sure. Yes.

7 A. Sure.

8 Q. Did you print any boxes out there?

9 A. Yes, sir. Ammunition boxes and there was a
10 cardboard carton that ammunition comes in, twelve
11 or fifteen boxes or whatever, and that one box
12 that contained the three pistols, I believe it
13 was -- two or three pistols, plus several boxes
14 of ammunition and some clips, if I remember
15 correctly.

16 Q. Did you talk to the people there at the Rebel
17 Gun Store?

18 A. Yes, sir. I interviewed them.

19 Q. Did they give you a description of the three
20 suspects?

21 A. Yes, sir.

22 Q. Would you tell the jury how they described the
23 number one suspect?

24 A. Well, the number one suspect, I believe, he was
25 described as five foot-five, thirty-five to

1 thirty-eight years old, Mexican male.

2 Without referring to my report, that
3 is about all I can remember.

4 Q Let me show you a copy of your report and see if
5 you can refresh your memory.

6 MR. ELIZONDO: Can I see a copy of that?

7 MR. MOEN: Do you want to use our copy?

8 MR. ELIZONDO: Sure. I don't have one.

9 Q (By Mr. Elizondo) Go ahead and look at your
10 report and refresh your memory.

11 A. Okay. Okay.

12 The number one suspect was described
13 as Mexican male, five foot-five, one hundred
14 twenty-five to one hundred thirty pounds,
15 approximately thirty-five to thirty-eight years
16 old, slim, unshaven, trimmed mustache, and
17 spoke broken English.

18 He was wearing a brown T-shirt, blue
19 jeans, high-top, dark brown running shoes, and
20 had dark brown hair with gray streaks and dark
21 brown eyes and a dark complexion.

22 Q So they didn't describe him as being light
23 complected, did they?

24 A. Dark complexion.

25 Q Okay. The number two suspect, can you describe or

1 tell the jury how they described him?

2 A. He was described also as a Mexican male, five
3 foot-ten, one hundred eight-five pounds, medium
4 build, light skin, dark brown hair, dark brown
5 eyes, medium-length hair, styled, trimmed
6 mustache, wearing a light blue T-shirt with the
7 number 80 printed on the front, blue knit pants,
8 blue tennis shoes, spoke no English, and he had
9 a tattoo of a caballero on the right arm biceps
10 approximately three to four inches, and he was
11 described as approximately nineteen to twenty-one
12 years of age.

13 Q. And the number three suspect?

14 A. Number three suspect: Mexican male, five foot-
15 five, one hundred twenty to one hundred thirty
16 pounds, approximately fifteen to seventeen years
17 old, dark skin, dark blue T-shirt, powder blue
18 slacks with pink tennis shoes, spoke broken
19 English, dark brown hair, and dark brown eyes.

20 Q. How tall was he again?

21 A. Five foot-five.

22 MR. ELIZONDO: We will pass him.

23

24

25

RE-DIRECT EXAMINATION

QUESTIONS BY MR. MOEN:

Q. And I believe you said, Larry, that primarily the description that you used to fill out your report was given by Dennis Zastrow, the store manager?

A. The store manager. I know his first name is Dennis.

MR. MOEN: That is all we have.

MR. ELIZONDO: That is all we have.

THE COURT: Any reason why he may not be excused?

Thank you, Officer. You may be excused.

MR. MOEN: Judge, we would call Leonard Cooper.

1 LEONARD COOPER,
2 was called as a witness on behalf of the State of
3 Texas, after having first been duly sworn, testified
4 as follows:

5
6 DIRECT EXAMINATION

7
8 QUESTIONS BY MR. MOEN:

9 MR. MOEN: May I proceed, Judge?

10 THE COURT: Go ahead.

11 Q (By Mr. Moen) Mr. Cooper, for the record, you are
12 the same Leonard Cooper who has testified in
13 this case already and been sworn as a witness
14 in this case, are you not, sir?

15 A. I am.

16 Q For the ladies and gentlemen of the jury who
17 -- I don't know how they could -- but who might
18 have forgotten you, tell them how you are employed.

19 A. I am a latent print examiner with the Identification
20 Division of the Houston Police Department.

21 Q How long have you been employed in that
22 capacity?

23 A. Approximately twelve years.

24 Q Would you tell the ladies and gentlemen of the
25 jury what type of experience and training you

1 have had in that area at latent print examiner
2 in the Identification Division?

3 A. I have worked with fingerprints on a daily basis
4 for the last twelve years, preserving, eliminating,
5 and identifying. I am a graduate of the Academy
6 for Identification Officers, the Academy for
7 Latent Print Examiners, and the Department of
8 Public Safety in Austin, Texas.

9 I also am a graduate of the Advanced
10 Administrative Latent Print School.

11 I am sponsored by the Federal Bureau
12 of Investigation and am member of the Southeast
13 Texas Association for Identification and
14 Investigation, the Texas Division of the
15 International Association for Identification,
16 and I am a certified latent print examiner for
17 the International Association for Identification.

18 Q. Have you ever had occasion in the course of your
19 twelve years in the capacity in which you have been
20 employed to take fingerprints from a known
21 individual and compare them with the fingerprints
22 of an individual whose identity is unknown to
23 you to make a determination as to whether or not
24 those fingerprints came from one or the same
25 person?

1 A I have.

2 Q Have you done that few or many times?

3 A On many occasions.

4 Q Would it be fair to say literally thousands and
5 thousands of times?

6 A Yes, sir.

7 Q Have you had occasion to see these exhibits
8 marked for identification purposes as State's
9 Exhibits 87, 88, and 89, and I would ask if you
10 would to examine those, please, sir.

11 A I have.

12 Q How can you identify those exhibits I have handed
13 you, 87, 88, and 89?

14 A This one here has my name and the date on it,
15 Exhibit No. 88.

16 Q Okay. Earlier you testified in this case that
17 you had the opportunity to compare the known
18 fingerprints of the Defendant, Ricardo Guerra,
19 with some fingerprints that you lifted from this
20 vehicle that appears in this photograph marked
21 State's Exhibit 24; is that not correct?

22 A That is correct.

23 Q And you also told the jury you were able to reach
24 a conclusion based on your comparison of the
25 Defendant's known fingerprints with those you

1 lifted from this vehicle?

2 A. That's correct.

3 Q. Did you have occasion to, using the known prints
4 of the Defendant, Ricardo Guerra, to conduct an
5 examination in regards to these prints that are
6 contained on State's Exhibit 87, 88, and 89?

7 A. I did.

8 Q. When did you conduct that examination, if you
9 can remember, please, sir?

10 A. July 21st, 1982.

11 Q. Can you tell the ladies and gentlemen of the
12 jury what conclusion you were able to reach, if
13 any, in regard to the known fingerprints of the
14 Defendant, Ricardo Aldape Guerra, and those prints
15 that are contained on State's Exhibits 87, 88,
16 and 89?

17 A. Exhibit No. 88 has the left middle finger of
18 Ricardo Aldape Guerra on it.

19 Q. And in your expert opinion, sir, did those prints
20 come from one and the same person?

21 A. Those prints on State's Exhibit 88 and the
22 Defendant in this case, they are one and the
23 same.

24 Q. And how sure are you of that conclusion and
25 opinion?

1 THE COURT: Your objection is overruled.
2 The exhibits are admitted.

3 Q (By Mr. Moen) Were you able to make a
4 determination concerning the fingerprints that
5 are contained on State's Exhibits 87 and 89, as
6 to whether or not those are, in fact, the
7 fingerprints of the Defendant in this case?

8 A. Those are not.

9 Q Are the prints contained on 87 and 89 good enough
10 to allow you to make an identification?

11 A. On 87, probably not, but there is a good print
12 on Exhibit 89 that is suitable for
13 identification.

14 Q Okay. Did you also, pursuant to a request from
15 Mr. Bax and myself, make an effort in regards to
16 State's Exhibit No. 91 to see if you could find
17 any fingerprints on that adhesive tape?

18 A. Yes, sir.

19 Q Would you explain for the ladies and gentlemen of
20 the jury how it is possible to be able to even
21 lift fingerprints or find fingerprints on adhesive
22 tape? How do you do that?

23 A. Yes, sir.

24 When the sticky side of the tape is
25 touched and you pull your finger off, you leave

1 dead skin cells on that tape. We use a process
2 called Gentian violet, and it is a very strong
3 purple dye and it dyes skin cells, so we processed
4 the tape by just dipping it into the Gentian
5 violet and letting it sit for a while and taking
6 it off and washing it, and anywhere it may have
7 touched, that renders the print visible, and we
8 compare it to the other prints.

9 Q Did you have any luck in regards to that tape,
10 finding fingerprints suitable for identification?

11 A I found no prints suitable on that tape.

12 Q How about some of these items that are contained
13 in this envelope marked State's Exhibit 92? Have
14 you ever seen this before?

15 A Yes, sir. I have.

16 Q Without having been marked for identification
17 purposes, did you make any efforts in regards to
18 those items? Did you make any efforts?

19 A Yes, sir. I did.

20 Q What results did you find?

21 A I found no prints suitable.

22 Q Okay. Let me show you what's been marked for
23 identification purposes as State's Exhibit 93
24 and ask if you had occasion to come in contact with
25 that exhibit?

1 A Yes, sir.

2 Q Were you able to find any fingerprints on this
3 exhibit marked State's Exhibit 93 that were
4 suitable for identification purposes?

5 A No, sir.

6 Q Not any at all?

7 A Well, I didn't examine this here. I just looked
8 at this. I can still work with the tape on that,
9 but I haven't done it.

10 Q You just have not made any examination of the
11 tape that appears on State's Exhibit 93?

12 A That is correct.

13 Q But you have examined the sign itself?

14 A I just looked at it. I didn't print that sign.

15 Q Okay. How do you get your hands clean at the end
16 of the day?

17 A Lava soap.

18 MR. MOEN: Pass the witness.

19 Thank you, Mr. Cooper.

20

21 CROSS EXAMINATION

22

23 QUESTIONS BY MR. ELIZONDO:

24 Q You found some prints suitable on State's Exhibit
25 19 -- I'm sorry -- I mean 89; is that correct?

1 A. Yes, sir. There is one print suitable. Yes, sir.
2 Q. And which one was that?
3 A. This fingerprint card here.
4 Q. And this is No. 89?
5 A. Yes, sir.
6 Q. And that was taken from the closed sign?
7 A. It is marked "taken from closed sign," yes, sir.
8 Q. And did you fingerprint that closed sign?
9 A. No, sir. I did not.
10 Q. Did you compare a set of known fingerprints
11 to a set of unknown prints in that closed sign?
12 A. I compared this latent print with some known
13 prints; yes, sir.
14 Q. That was taken off the closed sign?
15 A. This print was developed on the closed sign.
16 Q. Could you tell the jury how long prints can stay
17 on an object?
18 A. No, you cannot tell how long a print will stay on
19 an object.
20 Q. They can stay there indefinitely, can they not?
21 A. Yes, sir. They could.
22 Q. Anywhere from a day to a matter of years; isn't
23 that right?
24 A. Yes, sir.
I believe the F.B.I. has got a set number of

1 characteristics that can be obtained from a
2 fingerprint; is that correct?

3 A. Would you try that question again?

4 Q. How many possible characteristics can you get from
5 a fingerprint?

6 A. A normal fingerprint has between a hundred and
7 a hundred fifty characteristics.

8 Q. And that is shown by the loops and whirls and
9 endings, et cetera? Right?

10 A. That is determined by the characteristics.

11 Q. And the characteristics are the loops and whirls?

12 A. No, sir.

13 Q. What are the characteristics?

14 A. The characteristics: On the palm or surface of
15 your hand or where you have friction skin, if you
16 look at it, you have lines. These lines are called
17 ridges. These ridges are not continuous lines, but
18 rather may start and stop abruptly. They may slip
19 into two lines and come into one line again.

20 These characteristics, this is what we
21 look for in effecting an identification.

22 Q. And how many characteristics did you find on
23 State's Exhibit No. 89?

24 A. Well, we don't count characteristics. I can't
25 give you the exact number without sitting down and

1 counting them, but there are more than a sufficient
2 number of characteristics on Exhibit 89 to effect
3 an identification.

4 Q Do you recall how many characteristics you found
5 on that exhibit?

6 A On Exhibit 89, no, sir. I do not.

7 MR. ELIZONDO: Pass the witness.
8

9 RE-DIRECT EXAMINATION
10

11 QUESTIONS BY MR. MOEN:

12 Q Of course, State's Exhibit 88 is where you found
13 the fingerprint of the Defendant, Ricardo Guerra,
14 and not 89?

15 A Yes, sir. 88 is the one that has been identified.

16 Q And 88 were the prints that came from the adhesive
17 cans, that was lifted from the tape cans?

18 A That's correct.

19 Q How good a print was that that was lifted, as far
20 as identification is concerned?

21 A It's suitable; more than suitable.

22 MR. MOEN: That is all I have, Your
23 Honor.
24
25

RE-CROSS EXAMINATION

QUESTIONS BY MR. ELIZONDO:

And you don't recall how many characteristics you were able to get from State's Exhibit 88?

On 88, fourteen or fifteen characteristics.

Out of one hundred fifty possibilities?

Well, a latent print is just a partial or piece of a print to begin with. On a fully rolled ink print, you may get one hundred fifty characteristics.

MR. ELIZONDO: Thank you.

Pass the witness.

MR. MOEN: That is all we have.

You will excuse the officer?

THE COURT: Yes, sir. Thank you. You may be excused.

MR. MOEN: Mr. Bax and I reoffer all the evidence heard at the guilt-or-innocence phase and we rest our case.

THE COURT: What says the Defense?

MR. ELIZONDO: Your Honor, may I have one moment?

We call Mrs. Guerra to the stand.

THE COURT: Mrs. Guerra, please.

1 She needs to be sworn.
2
3
4

5 FRANCISCA GUERRA DE ALDAPE,
6 was called as a witness on behalf of the Defense,
7 after having first been duly sworn, testified as
8 follows through Interpreter Linda Hernandez:
9

10 DIRECT EXAMINATION
11

12 QUESTIONS BY MR. ELIZONDO:

13 THE INTERPRETER: May I tell her she
14 will only answer what she is asked?

15 THE COURT: Yes.

16 (The interpreter did so.)

17 THE COURT: Proceed.

18 MR. ELIZONDO: Thank you, Your Honor.

19 Q. (By Mr. Elizondo) Tell the jury your name,
20 please.

21 A. Francisca Guerra de Aldape.

22 Q. And are you related to Ricardo Aldape Guerra?

23 A. He is my son.

24 Q. Where do you live, Mrs. Guerra?

25 A. Monterrey.

1 Q And when did you come to the United States?

2 A Right now.

3 Q How long have you been here?

4 A A month; that is, the 12th of September. I have
5 been here a month.

6 Q How many children do you have?

7 A Four.

8 Q Do you know when your son, Ricardo Aldape Guerra,
9 came to the United States?

10 A Yes.

11 Q When?

12 A In May.

13 Q Of this year?

14 A Yes.

15 Q How old a man is he?

16 A Twenty years.

17 Q Prior to his coming to the United States in May
18 of 1982, had he come here previously?

19 A Never.

20 Q Where did he live when he lived in Mexico?

21 A Right now since I have been here I have been living
22 there one year, and I have lived at Caracas, 410
23 Caracas San Nicolas de los Garza Neuvo, District
24 of Monterrey.

Q Where did your son live when he lived in Mexico?

1 A With us.

2 Q Had he ever been convicted of any felonies?

3 A Never. Never.

4 Q Are you here on a visa?

5 A Yes. We have a permit, a permit. Here it is for
6 you to see.

7 Q And when does your permit expire?

8 A It says right here the 31st of October.

9 MR. ELIZONDO: Pass her, Your Honor.
10

11 CROSS EXAMINATION
12

13 QUESTIONS BY MR. MOEN:

14 Q Mrs. Guerra, I am sorry you had to be here for
15 this.

16 No further questions.

17 THE COURT: You may stand aside.

18 Call your next.

19 MR. ELIZONDO: We will rest, Your
20 Honor.

21 THE COURT: Members of the jury, you
22 have now heard all of the evidence you are going
23 to hear in this case, and again as was the case
24 the other day, I will need to prepare the charge
25 to submit to you, and because of the hour of the

1 day and the length of time it would take us to
2 do that, I am going to recess now until 10:00
3 o'clock in the morning, at which time I will read
4 you the charge and the argument of counsel will
5 be given and you will deliberate on the second
6 phase of this trial.

7 Please remember the admonitions I have
8 given you. Do not -- and again, I repeat -- do not
9 listen to, watch, or read anything that may be
10 in any form of media concerning this case.

11 Once again, your judgment on this phase
12 of the case must be determined by what you have
13 heard in this courtroom for the last week and a
14 half and nothing else.

15 Again, do not visit the scene of this
16 offense. Do not visit with your family or friends
17 or anyone else concerning what you have heard
18 or what they may have heard or read in the media.

19 With that, we will see you at 10:00 a.m.
20 in the morning.

21 (At this time, court recessed for the
22 day.)