

IN THE CRIMINAL COURT OF TENNESSEE AT MEMPHIS
THE THIRTIETH JUDICIAL DISTRICT

DIVISION I

STATE OF TENNESSEE

VS.

VERN BRASWELL,

Defendant

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) Cause No 05-03038
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PETITION FOR POST-CONVICTIO HEARING

Bifurcated Hearing

November 27, 2015

ORIGINAL

THE HONORABLE PAULA SKAHAN,
PRESIDING JUDGE

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(No exhibits entered.)

1 IN THE CRIMINAL COURT OF TENNESSEE AT MEMPHIS

2 THE THIRTIETH JUDICIAL DISTRICT

3 DIVISION I

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STATE OF TENNESSEE

VS.

Cause No 05-03038

VERN BRASWELL,

Defendant

This cause came on to be
heard and was heard on the 27th day of
November, 2015, before the Honorable
Paula Skahan, Judge, holding the Criminal
Court for Shelby County at Memphis,
Tennessee.

(Defendant present.)

THE COURT: All right. Are
we ready to get started?

MS. FUCHS: Yes, Your Honor.

1 THE COURT: Go ahead.

2 MS. FUCHS: Just first off,
3 Your Honor, I literally have three questions
4 that I omitted from Mr. Braswell's previous
5 testimony, if I could put him on the stand
6 to cover that very quickly.

7 THE COURT: All right, come
8 on around, Mr. Braswell.

9
10
11 **VERNON BRASWELL**

12 Having been first duly sworn, was examined
13 and testified as follows:

14 **DIRECT EXAMINATION**

15 **BY MS. FUCHS**

16
17 Q. Could you please state your name
18 for the record?

19 A. Vernon Braswell, I just want to
20 very tight focus, three questions. In Mr.
21 Walter Bailey's opening statement, had he
22 told the jury that he intended to establish
23 a pattern of choking in your sexual life?

24 A. That's correct.

25 Q. And then, during the proof, did

1 that occur?

2 A. No, it did not.

3 Q. Did that -- when Mr. Bailey spoke
4 about that in closing argument, did that end
5 up coming back to bite him?

6 A. Yes, it did.

7 Q. How?

8 A. He in closing arguments made the
9 statement that it did occur and it did not
10 occur. And I remember looking at one of the
11 jury members when he was saying it did occur
12 and that juror looked at him extremely
13 skeptical and shook their head like that
14 isn't what happened. And then, I think it's
15 in the final summation when General Weirich
16 did her closing, she specifically pointed
17 out to the jury that that did not occur, the
18 proof did not show that.

19
20 MS. FUCHS: That's all I
21 have, Your Honor.

22
23 **CROSS EXAMINATION**

24 **BY MS. STARK:**

25 Q. Now, Mr. Braswell, you testified

1 at trial, correct?

2 A. Yes, I did.

3 Q. And you testified to a pattern of
4 choking. That this was something that you
5 and your wife had participated in over a
6 lengthy period of time, right?

7 A. That's not what Mr. Walter Bailey
8 alluded to.

9 Q. I'm sorry. My question was, you
10 testified at trial that this was behavior
11 that you and your wife had participated in
12 over a period of time, correct?

13 A. That is correct.

14 MS. STARK: Nothing further,
15 Judge.

16 THE COURT: Anything further?

17 MS. FUCHS: No, Your Honor.

18 THE COURT: All right, thank
19 you very much, you can step down.

20
21
22 (The witness was excused.)

23
24 MS. FUCHS: Your Honor, we
25 would like to recall Mr. Jay Bailey.

XAVIER BAILEY

1 Having been first duly sworn, was examined
2 and testified as follows:
3

4 **DIRECT EXAMINATION**

5 **BY MS. FUCHS**

6 Q. Mr. Bailey, I know you've been up
7 there before, since the last time you've
8 testified, did you have an opportunity to
9 review your file in this case?

10 A. Yes, I had -- when I left here,
11 not like right away, but within a short
12 period of time, I did have a conversation
13 with my father Walter regarding what I --
14 some of the things I testified to. Not all
15 of it but some of the things that I had said
16 about the crafting of the defense and so
17 forth. And so, I needed to ask for
18 permission to look in what he calls his
19 WinWord System. It's an electronic, it's an
20 interoffice internal record keeping system
21 and communication system because I don't
22 have access to it. By virtue of the Supreme
23 Court Rules, I have no access to it. And
24 so, I asked for access to make sure that I
25

1 was correct about what I had testified to.

2 Because I thought I was but there were a
3 couple of things that I felt I had a duty to
4 make sure you know that that was correct.

5 Q. And those are the things that I
6 would like to talk to you about. First, I
7 would like to start off with, during your
8 testimony originally we had discussed
9 various statements. And one of the
10 statements after reviewing it, I believe on
11 your review you realized that there was a
12 statement that discussed Mr. and Mrs.
13 Braswell engaging in threesome activity.

14 A. Right.

15 Q. After reviewing your file, do you
16 recall anything about that statement?

17 A. Well, what happened was that -- I
18 think I testified to it and I think I told
19 the state that I was aware of you know
20 certain things regarding their sexual
21 behavior but that I could not remember or I
22 think I told you. I can't remember exactly
23 what I said exactly but whatever it was, the
24 gist of it was, it didn't have anything to
25

1 do with my defense anyway. Okay? And that
2 I didn't have access to it at that point,
3 and I don't have my file. And still don't
4 have my file. But when I went back and
5 checked, I did have some notations that I
6 had made regarding Mr. Braswell having
7 mentioned to me that there was a lady who
8 had been involved with them. I did not see
9 any notations -- and that would have been on
10 me. That would have actually been before
11 Walter was on the case.

12 Q. And that lady would have been
13 specifically Miss Monique Lane.

14 A. Yes. Now, I was aware of her mind
15 you, I've always said that. But what I did
16 not do, I thought we had followed up on
17 that, We had not -- I don't see any
18 notations where I had made any notations to
19 Walter or to the file with respect to that.
20 And so, you know, just being fair and
21 honest, I felt I had a duty to -- a
22 continuing duty to modify my answer so that
23 it reflected that. And so, he did tell us
24 about it, I don't see where I followed up on
25

1 it. In terms of calling her as a witness or
2 bringing her in to interview her or anything
3 of that nature.

4 Q. Okay. And then regarding the 9-1-1
5 tapes. You testified about the 9-1-1 tapes
6 the last time you testified, right?

7 A. Right.

8 Q. Okay. And you had contacted me
9 also about wanting to follow-up additionally
10 about the 9-1-1 tapes?

11 A. Yeah, that's another thing now, I
12 want the court to know and everyone else
13 here to know, I've never read the transcript
14 in this case, and so almost everything I'm
15 doing here is by memory. I wouldn't have
16 notes from the trial is what I'm saying,
17 other than what I remember that occurred. I
18 remember objecting to that and I remember
19 Miss Weirich telling Judge Dailey that these
20 tapes have been available to Mr. Bailey. We
21 made them available. And I did check that
22 also. Now, that's -- I have a list of
23 things that were made available and things
24 that I would have noted as important. I
25

1 would have been screaming bloody murder
2 about that. I know I would have. That
3 wouldn't have been the first time jail tapes

4 --

5 Q. And I think I said 9-1-1 tapes and
6 I want to correct myself.

7 A. Yeah, jail tapes is what you mean.

8 Q. I'm sorry.

9 Q. And that wouldn't have been the
10 first time I've run into jail tapes. And I
11 always raise all kind of Cain about jail
12 tapes because I personally think even though
13 there's some announcement there, that when a
14 lawyer is on there, they have a duty to cut
15 it off, you know. I don't have -- I can't
16 control when my client calls me or sometimes
17 like if he's in the hole or something, I
18 can't see him. But if he uses the phone and
19 they know it's an attorney call, I feel like
20 they ought to turn it off or they ought not
21 put it in with the recordings they give the
22 state. And they have an ability to do that.
23 And so my answer is this, I did object to
24 it, but the bottom line is, is that was not
25

1 given to me. I was not made aware of those.
2 And I stand by my position that I objected
3 to it, anyway. Okay? But it was not given
4 to us ahead of time.

5 Q. Now, during the hearing when you
6 testified previously, why did you not
7 testify that they had never been made
8 available to you?

9 A. Well on that -- on that particular
10 item, I'm not sure. On that particular
11 item, I will say this, that I don't remember
12 whether anybody asked me were they made
13 available. Did you all ask me that by the
14 way?

15 Q. I don't remember.

16 A. I don't think anybody asked me
17 that. I know that when I testified before I
18 said I objected to it, and Judge Dailey
19 said I objected to it, and Judge Dailey
20 allowed it in. That part I know is true. I
21 know I objected. I was the one did the
22 objection. However, as it relates to going
23 any further, I don't think you all asked me
24 on the jail tapes.

25 Q. Okay. Now, was there any part of

1 you that was holding back during the last
2 hearing?

3 A. Well, the answer is, yes. Was I
4 being dishonest, the answer is no, I was not
5 being dishonest. But there were some other
6 things. I had some other matters going on
7 that several of the people in the system had
8 been made aware of. When I say in the
9 system, it's a small community at 201
10 Poplar.

11 Q. Did those issues create any
12 pressure on you?

13 A. Yes.

14 Q. Okay. And I don't want you to go
15 into the specifics of anything, but can you
16 give the judge a general idea of what
17 happened?
18

19 A. Well, there was a matter that I
20 had been involved in, it was a multimillion
21 dollar transaction that was being reviewed.
22 I was told and not by this General, I will
23 say that, in fact it was way before she and
24 I -- I ever talked to her.

25 THE COURT: You're meaning

1 Miss Pam Stark.

2 THE WITNESS: Right, I'm
3 sorry, not by Miss Stark.

4 A. But nonetheless, it was a matter
5 that was being fought over in the civil
6 courts and I had been told that the attorney
7 general's office was looking at it in terms
8 of possibly indicting me or one of the other
9 parties involved.

10 Q. When did the transaction occur?

11 A. In 2012.

12 Q. When did the investigation as to
13 you begin as far as you are aware?

14 A. I found out about it. Apparently
15 others knew and I didn't because I found out
16 about it in '14. And you know, I was
17 incredulous. I was dumbfounded trying to
18 figure out why anyone would be looking at
19 it, because it's very clearly a civil
20 matter. I mean, very clearly a civil
21 matter. But nonetheless, you know, in that
22 regard, and I'm here without a counsel, I'm
23 here without counsel today. You know, I'm
24 certainly watching my step, if you will.
25

1 Q. And did you end up having to hire
2 a criminal lawyer?

3 A. I did.

4 Q. Okay. Did you seek expert
5 consultations?

6 A. I did. Two criminal lawyers.

7 Q. Okay. Did the -- what was the
8 result of your funded investigation of your
9 case?

10 A. That I was excluded, that there --
11 what it was, there was an argument over
12 whether or not somebody had forged a
13 signature on a release of -- there was a
14 half a million dollars sitting in a bank
15 account and some of the money got released.
16 The question was, we were arguing on our
17 side of the table and there were several
18 lawyers involved with me, were arguing that
19 this was a transaction that everybody agreed
20 to. On the other side of the table, some
21 guys out of Ohio were trying to bail out of
22 it and were lying and saying that they never
23 agreed to release the funds. Now, that's a
24 civil matter if I've ever seen one. It was
25

1 a lawyer, not me, who released the money,
2 who is a central party, and so the question
3 is, it's a contract issue. Whose money is
4 it, you know?

5 Q. And you hired a handwriting
6 expert?

7 A. I hired one independently and
8 never told the state because I just wanted
9 to make sure I covered my bases and that was
10 at the advice of counsel. Howard Wagerman
11 was my lawyer.

12 Q. Did you submit to evaluation by a
13 state expert as well?

14 A. I did and both expert -- excuse
15 me. Both handwriting experts excluded me,
16 yet I still have not been told that, okay,
17 we're done with this. Let it go.

18
19 MS. FUCHS: May I have just
20 one moment, Your Honor.

21
22 (Pause.)
23

24 Q. (By Ms. Fuchs): Who asked you to
25 submit to the state expert?

1 A. I didn't talk to the state but I
2 was told that Mr. Winsett had -- well, it
3 was Mr. Winsett because I did it in his
4 office.

5 THE COURT: Mr. Bailey, just
6 for the record and this could very well go
7 up on appeal. Not everybody knows who Byron
8 Winsett is.

9 A. It was Assistant Attorney General
10 Byron Winsett. Assistant District Attorney
11 Byron Winsett who was over the white collar
12 crime unit and organized crime unit.

13 Q. Did he make any recommendations
14 about your case that you're aware of?

15 A. I haven't heard back from anybody.

16 Q. Okay. Do you know if prosecution
17 has pushed forward since you testified?

18 A. I haven't seen it.

19 Q. Prior to testifying had you been
20 told that you were possibly looking at
21 indictment?

22 A. Yes.

23 MS. FUCHS: That's all I've
24 got, Judge.
25

THE COURT: Miss Stark.

CROSS EXAMINATION

BY MS. STARK:

Q. Okay. Mr. Bailey, when you reviewed your notes on Monique -- what was her last name?

A. Can't remember the last name.

Q. Okay. You knew about her?

A. I did know about her. And I told you I knew about her.

Q. And in the supplements that you received, I think that was also noted that Miss Braswell had told people that she had participated in a threesome. That she hadn't wanted to but she eventually to please her husband had agreed to participate in a threesome. That was all in the police supplements.

A. It was.

Q. That detailed the interviews.

A. As I remember, there was.

Q. And you said you didn't interview her personally?

1 a. Did not.

2 Q. But you were aware of all that
3 information?

4 A. I was.

5 Q. I believe -- I'm sorry?

6 A. I said I was.

7 Q. Okay. And I'm sorry, before I ask
8 you anymore questions, I just need to make
9 sure, are you feeling any pressure from the
10 State of Tennessee right now as to how you
11 testify?

12 A. I didn't feel any pressure now nor
13 did I feel any pressure when I met with you.

14 Q. Okay. So when you testified last
15 time, you weren't pressured in your
16 testimony or didn't feel laboring under
17 pressure because you thought if you didn't
18 testify a certain way the state would rain
19 an indictment down on your head?

20 A. Well, no, the answer -- if you put
21 it like that, the answer is no.

22 Q. Okay.

23 A. You're correct. But a completely
24 honest answer --
25

1 Q. That's all we want.

2 A. A completely honest answer would
3 be that I certainly was concerned because I
4 had a lawyer -- this had nothing to do with
5 your office, this was my own lawyer, who
6 were saying to me that we didn't want to do
7 anything to trigger something against me.
8 Now, mind you, I've been around here long
9 enough to tell you and I'm telling you now,
10 and I told them then, you know, I'm not --
11 you know, I know when I've done something
12 wrong and when I haven't and I'm not worried
13 about that. You know, I mean, I know that
14 there's no proof to that effect, and anybody
15 who is serious about this would have looked
16 at this matter and called it a civil matter
17 from the beginning. And yet I kept being
18 told over and over again that I was the
19 subject of a potential indictment which to
20 this day I'm bewildered about that.

22 Q. Okay. And I guess the question
23 is, are you saying that you intentionally
24 didn't testify completely the last time we
25 were here because you were concerned that if

1 you didn't -- or your lawyers told you to
2 not testify completely because you were
3 concerned that my office, the AG's office,
4 would prosecute you for a crime?

5 A. No, I'm not saying that.

6 Q. Then I guess I'm not sure what the
7 heck you are saying.

8 A. What I am saying, well, I'm just
9 answering the question that's asked me.

10 Q. But you've said that it affected
11 your testimony. And so, if it affected your
12 testimony, you either intentionally lied
13 last time you were here or you intentionally
14 didn't fully disclose because you were
15 concerned?

16 A. No, that's not what I'm saying. I
17 must be giving the wrong impression.

18 Q. Okay.

19 A. So let me go backwards a little
20 bit, okay?

21 Q. Thank you.

22 A. What I'm saying is this, I called
23 Mr. Massey's -- I called them, they didn't
24 call me. I called Mr. Massey, Bill Massey,
25

1 and I said, listen I got a couple things
2 that I need to bring to your attention. One
3 is I did go back and check and I did not
4 have -- I did not follow-up on the Monique,
5 whatever her last name is, and I'm sorry,
6 I'm not trying to be flippant.

7 Q. I don't remember it either.

8 A. But I didn't follow-up on that.
9 And two, I talked about the jail tapes and I
10 said that I felt that I have a continuing
11 duty to tell them that. And he asked me at
12 that point. He said, well, you sound like a
13 man trying to do the right thing, is there
14 something else that's bothering you. And
15 then I told him, well, you know, and I
16 explained to him this whole situation that I
17 just told you about. Okay? So my call to
18 him was not prompted by that. I wasn't
19 calling saying that I didn't tell the truth.
20 I called to say that I told you that it may
21 not have affected our defense after going
22 back and looking, I did not follow-up on it
23 so I can't say that. Okay? That's number
24 one. Number two, when asked, well, you
25

1 know, what's going on with you. Because
2 Bill's knowing me thirty years, really, and
3 I think he would expect a little more of me
4 than that. And I explained to him that
5 situation that we just talked about and I
6 said that I'm being very cautious here. And
7 I was being very cautious in my conversation
8 with him. I'm being very cautious with you
9 at this point because I feel like in all
10 honesty, I feel like that I don't understand
11 why I haven't been told that investigation
12 is over with after -- you know, I don't
13 know, I don't understand why that's still
14 hanging out there. But mind you, it doesn't
15 change what I have to say here, okay?

16
17 Q. Did it change what you had to say
18 the other day?

19 A. No, I testified as best I knew how
20 when I first -- when I was on the stand
21 before. When I say best I knew how, I
22 testified to what I thought was the truth.
23 But in going back and checking, there are
24 those two matters, I can say today, after
25 looking at them again, I'm of the impression

1 that my testimony needed to be supplemented.

2 Let's put it like that.

3 Q. And I guess that's what I'm asking
4 you. Are you trying to tell this court that
5 you were distracted because of the things
6 that were going on in your life and that
7 affected your testimony because you were
8 distracted or are you saying that because
9 this criminal matter was hanging over you or
10 potential criminal matter, it affected your
11 willingness to testify?

12 A. It didn't affect my willingness.
13 I could have just taken the Fifth and walked
14 up out of here. I mean in all honesty. I
15 mean, if I felt like there was something --
16 if I felt like I shouldn't testify at all,
17 trust me, I wouldn't have testified.

18 Q. Okay. So that's what I'm wanting
19 to be clear on. That you didn't
20 intentionally say something that was
21 incorrect and you did not intentionally
22 withhold testimony or limit your testimony
23 because you were concerned about actions
24 that the district attorney general's office
25

1 might bring against you?

2 A. No.

3 Q. Okay. Now you testified last time
4 that it was your conscious trial strategy
5 that other people not testify about I think
6 -- I think these were your words and maybe
7 not the ones I would have chosen -- the
8 kinky or atypical sexual behavior of or what
9 the jury would see as the kinky or asexual
10 [sic] behavior of your client?

11 A. That's true.

12 Q. That you wanted that to only come
13 from him and not from other folks?

14 A. That sums it up. I don't think
15 that's how I said it, but that sums it up.
16 That would be the gist of what I testified.

17 Q. Well, and when I say that, I said
18 you testified before. But that was your
19 trial strategy. You intentionally limited
20 anybody else bringing this up because you
21 didn't want people, the jury to repeatedly
22 hear about --

23 A. That's correct.

24 Q. -- what they might characterize as

25

1 unusual sexual activity from other people.

2 You wanted it to be from Mr. Braswell in his
3 status as you tried to portray him, grieving
4 husband and hear it altogether where they
5 didn't already have a picture of him before
6 he testified?

7 A. That's correct.

8 Q. Okay. So it really wouldn't have
9 made any difference what Monique said in the
10 interview because she would have been
11 somebody who would have been testifying to
12 that type of behavior?

13 A. I guess that's correct. I did not
14 interview Monique.

15 Q. Okay.

16 A. And because I did not interview
17 her in all honesty, I don't know what she
18 would have said. But you are correct in
19 that, at that point in time, I think I told
20 everybody who has talked to me, whether it
21 was in the interview or in court that you
22 know, it got to a point, we had gone
23 backwards and forwards on defenses, and it
24 got to a point where we knew this was going
25

1 to trial, and so we had to lay down a
2 defense. We had to start preparing and
3 going down a certain road and at the point
4 you're talking about, you're correct. I
5 mean, at that point, I had decided on the
6 defense that we were going to prepare.

7 Q. And initially, in fact, up until
8 just a week or so before trial, the defense
9 was she drowned in the bathtub?

10 A. Yes.

11 Q. And that you just realized a week
12 before trial was just absolutely unviable
13 given what your experts were going to say?

14 A. Yes. Well, that she had drowned.
15 My own experts were going to kill us on
16 that.

17 Q. Okay. And in fact, you even had a
18 bond hearing for Mr. Braswell where you told
19 the court that same thing with Mr. Braswell
20 in the courtroom that she basically drowned
21 in the tub.

22 A. That's what we thought at the
23 time.

24 Q. Okay. And as far as the jail
25

1 tapes, now I'm not sure what you're saying
2 because --

3 A. Well, Miss Weirich testified --
4 not testified, I'm sorry.

5 Q. I'm sorry. I know as attorneys
6 we're used to talking but let me finish what
7 I want to ask you.

8 A. I apologize. My mistake.

9 Q. You testified about what your
10 previous testimony was and I just want to
11 know what happened. Are you saying that you
12 did not know about the jail phone calls?

13 A. I didn't know about the jail phone
14 calls.

15 Q. Okay. Did you have supplements
16 that detailed jail phone calls?

17 A. I'm going to tell you, if you had
18 asked me that two months ago, I would tell
19 you yes. But I don't -- in all honesty now,
20 it's not anywhere in my notes at all that
21 there were jail phone calls which means that
22 I didn't see it.

23 Q. You're saying you didn't receive
24 the supplements?
25

1 A. I'm not saying I didn't receive
2 the supplements.

3 Q. The supplements have the jail
4 phone calls detailed in them.

5 A. There could be. I'm not saying
6 it's not true. What I'm saying to you is I
7 didn't know about those jail phone calls.

8 Q. So you're saying you didn't read
9 the supplements?

10 A. I'm saying -- you're telling me
11 that it was in the supplements and I'm
12 accepting that as being true. If that is
13 true, then it had to have been overlooked
14 because we were surprised by the content of
15 the jail phone calls.

16 Q. Are you saying you're surprised by
17 the content of the jail phone calls or
18 you're surprised by the fact there were jail
19 phone calls?
20

21 A. That's an interesting question
22 because I know in every case that they
23 listen to phone calls. And I tell all
24 clients not to -- to try not to discuss
25 anything substantive on the phone. And so I

1 would have probably -- the way you posed
2 that question, I would assume -- I would
3 have assumed that there were. Every call he
4 made was heard, you know, and that's just an
5 assumption. But I never received the tapes
6 in evidence and I did not -- I think what
7 Miss Weirich told Judge Dailey was that the
8 tapes had been available or made available
9 but I went back and checked and I also
10 talked to my dad about it. Mind you, he
11 hadn't been on the case as long as I had,
12 but neither one of us remembered that we had
13 received them.

14 Q. Okay. Now, if you were about to
15 start trial and jail phone calls are being
16 discussed and you had no idea there were any
17 jail phone calls, you wouldn't have said
18 that on the record when General Weirich said
19 that these had been made available to Mr.
20 Bailey, you wouldn't have said, Judge, I
21 didn't even know there were jail phone
22 calls?
23

24 A. I don't remember what was said.

25 Q. I'm not asking you what was said.

1 I'm asking you what you would have done.
2 A. I would hope I would have.
3 Q. Okay. And if the record doesn't
4 reflect that you did that, that would seem
5 unlikely then?
6 A. Yes.
7 Q. If you were just ambushed at trial
8 with jail phone calls?
9 A. I felt we was ambushed. I ain't
10 never said that we weren't ambushed.
11 Q. Well, if you didn't know there
12 were any jail phone calls and on the day of
13 trial somebody is talking about playing jail
14 phone calls, the conversation would have
15 been much more instead of --
16 A. I disagree with you on that. Let
17 me tell you why. Here's the deal. You
18 know, from a defense standpoint in trial
19 work. Sometimes you know that the judge is
20 wrong. Forgive me, judge, but you really
21 feel deep that the judge's ruling is wrong.
22 But if you continue jumping up and saying I
23 object or if you make a really big deal
24 about it, even though you may be up here at
25

1 the bench whispering, it becomes very
2 obvious to the jury that there's something
3 important there that could hurt you. And so
4 very often times what experienced trial
5 lawyers, defense lawyers do, what we're
6 taught to do is to you know, you make your
7 objection, you preserve your record, but if
8 you don't want them focusing on it, you move
9 on. And so, the answer to your question is
10 that even if I had felt, and I know I did
11 feel like we had been ambushed, we were
12 caught off guard by those jail phone calls
13 to be honest with you. But I wouldn't have
14 raised hell about it in front of the jury
15 other than to object, strenuously object,
16 but I would have moved on because I didn't
17 want them to think that that was important
18 to us. What was in the jail phone -- what
19 was in -- the content of the phone calls was
20 what we thought was -- what everybody I
21 think thought was, some verbiage that was in
22 code if you will. And you know, talking
23 about rabbits and going in the hole and
24 soldiers and things of that nature. It was
25

1 code language. And so, what I would not
2 have wanted was for the jury to think that
3 that was that important to us if you will.
4 And so, in answer to your question, I would
5 think that I would have said to the judge, I
6 don't remember what I said, but I would
7 think that I would have told the judge,
8 Judge, we weren't given those. But had
9 Judge Dailey said, I made my ruling, move
10 on, that would have been it, because I
11 wouldn't have wanted the jury to think that
12 those phone calls were the end all to be
13 all.

14 Q. But there was a very lengthy
15 conversation about the jail phone calls
16 where you, if you will recall, there was
17 even a conversation about whether or not the
18 defendant had access to free phones to just
19 call his attorney. There was a lengthy one.

20 A. I don't remember that.

21 Q. You don't remember the
22 conversation about --

23 A. I'm not telling you that it didn't
24 happen, I'm saying I don't remember.
25

1 Q. And you're saying that you would
2 have that kind of lengthy conversation and
3 never at any time say, Judge, we didn't even
4 know there were jail phone calls?

5 A. I think I would have said --

6 Q. It seems like that would have been
7 the first thing you would have said. If you
8 didn't know there were jail phone calls, the
9 very first thing, even as a -- most
10 inexperienced lawyers --

11 MS. FUCHS: Judge, I'm going
12 to object, argumentative.

13 THE COURT: Well, I'll allow
14 her to explore it a little bit. I mean, if
15 he didn't say it --

16 Q. (By Ms. Stark): The very first
17 thing you would have said is we didn't even
18 know there were jail phone calls.

19 A. Probably. I would hope I would
20 have said that. But I don't know that I
21 didn't say that. I don't remember what.

22 Q. I understand. I'm just asking
23 since that would have been closer in time,
24 obviously, what happened at trial --
25

1 A. I'm usually pretty aggressive, and
2 so, I think I would have said something.

3 Q. And you would have gone over any
4 evidence receipts that you received in
5 discovery as well?

6 A. Say what?

7 Q. When you get discovery in a case,
8 there's usually a copy of evidence receipts?

9 A. Oh, yes.

10 Q. And you would have looked at
11 everything that was in evidence, right?

12 A. I'm sure I would have, yes.

13 Q. Not necessarily gone and looked at
14 the evidence, but you would have looked at
15 the evidence receipts to see what the state
16 was saying they had in evidence against your
17 client?

18 A. I'm trying to remember did I have
19 evidence receipts in this case.

20 Q. And I'm not asking you to remember
21 if you did or not. I'm asking that if you
22 received discovery --

23 A. And the evidence receipts was in
24 it?
25

1 Q. Would you have reviewed it?

2 A. Oh, absolutely.

3 Q. Okay. There's no way you wouldn't
4 have reviewed those.

5 A. No way I wouldn't.

6 MS. STARK: Nothing further,
7 Judge.

8 THE COURT: Redirect?
9

10 **REDIRECT EXAMINATION**

11 **BY MS. FUCHS:**

12 Q. Did you object to the admission at
13 the trial -- to the jail phone calls at the
14 trial?

15 A. Yes.

16 Q. Do you remember adamantly
17 objecting?
18

19 A. Vehemently objecting. Loudly
20 objecting.

21 Q. Did you know that the phone call
22 -- that the jail phone calls were available
23 to you?

24 A. No.

25 Q. Did anyone ever reach out to you

1 and say, hey, I've got these. Come and get
2 them if you want them?

3 A. No.

4 Q. Why did you object at trial?

5 A. I think I testified to that
6 before, if I didn't, I had some discussions
7 with one of you all about it. First of all,
8 I thought it was wrong for Judge Dailey to
9 admit phone calls with counsel on the phone
10 calls. Number two, unless there was
11 somebody who could corroborate or give some
12 foundation as to what those conversations
13 were actually about, I just felt that it was
14 wrong. I thought it was 403, 404 material.
15 I did not think that it had any probative
16 value. To this day I think that it was
17 damaging and I did not think it should have
18 been admitted. I don't think today that it
19 should have been admitted.
20

21 Q. I want to touch base with you on
22 two other topics real quick. When you
23 testified before, did you answer the
24 questions that you were asked?

25 A. Yes.

1 Q. Now whether from the district
2 attorney's office or not, did you feel
3 pressure during your testimony due to these
4 outside concerns of a pending indictment?

5 A. Yeah.

6 Q. While you were on the stand, did
7 you feel like you had to walk a very careful
8 line?

9 A. I walk a very careful line anyway.
10 I mean, that doesn't have anything to do
11 with --

12 Q. Particularly because of the
13 concerns of the potential indictment?

14 A. Yeah, but again, keep in mind I've
15 testified more than once, I think I've
16 testified more than once. I started and
17 then came back I believe. I think the first
18 time I would have been. Now on the second
19 time I came back, I think I was a lot more
20 comfortable in all honesty.
21

22 MS. STARK: For the record,
23 that was the only time I was here, was the
24 second time.

25 THE WITNESS: That's why I

1 said it had nothing to do with --

2 A. But see, here's what happened, I
3 mean, you all are asking, let me just lay
4 this down, first of all, I started this out
5 with Brian Davis. I gave Brian Davis, I
6 went over my file with him and we were
7 working late one evening, and I left and
8 left my file here. It was a long period of
9 time before somebody else got back in touch
10 with me. You all weren't on the case at
11 that time. When I say you all, for the
12 record, I mean the Massey firm was not on
13 the case at the time. And so then I started
14 calling and asking where my file was because
15 I knew I was going to have to talk to
16 somebody. And I was told that defense
17 counsel I think had the file. Well at that
18 point, I think he was between defense
19 counsel. He being Mr. Braswell. And so I
20 couldn't find the file. And so I never got
21 an opportunity to review anything in writing
22 or to look at any of my notes that would
23 have been in the file from trial or any of
24 that before I testified the first time.
25

1 Okay? And from the state's office, Mr.
2 Marquis Young had met with me. I know
3 Marquis very well. I go to church with
4 Marquis. Used to at least. And I've known
5 him since he was in high school. I'm a lot
6 older than he is. And so you know, he
7 wasn't doing anything. I say that just so
8 you will understand, it wasn't anything that
9 he was doing. I've never mentioned to Mr.
10 Young or to Miss Stark about that other
11 matter because I didn't think I should. I
12 think that I felt that I should have allowed
13 these proceedings to go forward regardless
14 of my personal feelings. Okay? I testified
15 honestly and I testified the best I knew.
16 However, I was troubled when I left here
17 because you all both had -- well, you
18 mentioned something to me that I know I had
19 not looked at. I can't remember exactly
20 what it was and then one of you all asked me
21 about had I reviewed the records and I said
22 I've gone over it but there are some records
23 I don't have access to. And so the Supreme
24 Court Judge outside of the order of
25

1 disbarment which was a voluntary disbarment,
2 it was something we -- there was an
3 agreement reached with us. I asked for
4 clarification sometime after that as to
5 whether or not I had access to my records in
6 that office because there was some business
7 deals and so forth that I had been involved
8 in that I would have rather had my records
9 for. You know, I could follow up on it
10 without being a lawyer. And I was told that
11 I was not -- under their ruling I could not
12 be at that office or have access to those
13 files. So just out of safety I didn't do
14 it. I didn't go up there looking for
15 anything. You know I felt like what was in
16 my trial records, I took those with me,
17 should have been there. But I didn't have
18 it. And so, after testifying, I decided to
19 go back and ask my father regardless of what
20 anybody else thought because I feel like I
21 had a duty and I was very troubled by the
22 fact that I couldn't remember some of this
23 and so I went and asked him could I look
24 through their computer system so that I
25

1 could review it, and I did. I have a son
2 that works up there and of course my brother
3 is there so you know I had access that way
4 and so I did review it and that's how I am
5 able to say what was in my electronic notes
6 and what was not. What would have been
7 scanned in and I think that's what we were
8 talking about last time was I said, well, if
9 I had it, I would have scanned it in. But I
10 couldn't remember and I went back and looked
11 and I did not have those we might have
12 scanned in and we were scanning everything
13 at that time.

14 Q. Next I would like to talk to you
15 just very briefly about the trial strategy
16 that Miss Stark was discussing with you. In
17 opening statements, the jury was told that
18 you intended to establish a pattern of
19 choking with Miss Woods, right?
20

21 A. I don't remember.

22 Q. Do you remember knowing that Miss
23 Woods and Mr. Braswell engaged in choking?

24 A. Yes.

25 Q. Now, during trial, if your dad --

1 I mean --

2 A. We decided on him being the one to
3 do the opening statements, kind of like the
4 night before. We were at my dad's house and
5 kind of revamping everything and it's my
6 case. It wasn't my dad's case. I was lead
7 counsel. But we had decided kind of at the
8 last minute that I think I used the term to
9 put a little gray hair up front because of
10 the nature of the case. The case was
11 something that was, you know, at least at
12 that time, it was ten years ago, it was kind
13 of odd. And different. And I think that
14 considering the defense we were doing, I
15 thought that people would be a little more
16 settled hearing that from an older man than
17 they would have from me. That's how he
18 ended up doing the opening.

19 Q. Now, that same pattern that you
20 knew about with Miss Woods. Miss Lane would
21 have testified to that also had you had the
22 information that has come out in post-
23 conviction, right?

24 A. From what I hear now. I didn't
25

1 know about Miss Lane. Monique? Is that
2 Monique Lane?

3 Q. Monique Lane.

4 A. Oh, yeah, I had not seen her
5 statement but I did know about -- Mr.
6 Braswell had told me about Miss Lane and I
7 was -- see I'm mixing up names here. Mr.
8 Braswell told me about a lady who went to a
9 convention with them in Vegas and he had
10 told me about -- he had told me about some
11 of the sexual encounters with a third
12 person. I think I told you all that I had
13 even gone to this place called the Treehouse
14 and you know following up on -- he didn't
15 tell me about the Treehouse. Somebody else
16 told me about it and thought that he had
17 been a member. He later discussed it with
18 me when I discussed it with him. But he did
19 tell me about that and when I went back
20 after hearing the testimony -- not
21 testimony, but hearing the questions here
22 and also reading some of the stuff I read in
23 the news, I went back and tried to review
24 those records to see whether or not I had
25

1 any of that and I didn't. About Miss Lane.

2 Q. You mean you didn't have a police
3 statement?

4 A. I did not have a police statement,
5 nor had I sent anyone to talk with her.

6 Q. Okay.

7 MS. FUCHS: That's all I
8 have, Judge.

9 THE COURT: Anything else,
10 Miss Stark?

11 MS. STARK: Just briefly on
12 follow-up.

13
14 **RECROSS EXAMINATION**

15 **BY MS. STARK:**

16
17 Q. Now, again, as far as how the
18 defense laid out. Up until days before the
19 trial, the trial strategy was she drowned in
20 the bathtub?

21 A. That's correct.

22 Q. Not choking, not part of sexual
23 asphyxiation?

24 A. That's correct.

25 Q. That's something with your

1 investigation plus talking to your experts,
2 you figured that must have been what
3 happened. I think you said last time you
4 created that defense and you went and
5 confronted Mr. Braswell with what the
6 experts said and what you thought had
7 happened?

8 A. Yes.

9 Q. And that was again days before the
10 trial?

11 A. Yes. I mean within a week. Right
12 at -- I'm sorry, I don't mean to cut you off
13 but let me be clear about that. It was
14 probably a little more than two weeks before
15 the trial when we started going -- when I
16 made that statement but when we really
17 hammered in on it was like a week before
18 trial which is why the expert that was from
19 Johnson & Johnson was brought in so late in
20 the game.

22 Q. And you did indeed know about
23 Monique Lane?

24 A. Yes.

25 Q. Okay. That wasn't something that

1 you didn't have access to that person, you
2 knew about her?

3 A. Yeah. I didn't put that on you
4 all. I'm putting that on me.

5 Q. Okay.

6 MS. STARK: Nothing further,
7 Judge.

8
9 **REDIRECT EXAMINATION**

10 **BY MS. FUCHS:**

11 Q. Regarding the crafting of your
12 defense, part of your defense, you attempted
13 to call Mr. -- now, Judge Glen Wright, is
14 that correct?

15 A. Yes.

16 Q. And that was to show that Mr.
17 Braswell had told an attorney the day after
18 this happened that it was the product of
19 erotic asphyxiation, right?

20 A. Yes.

21 Q. Choking?

22 A. Yes.

23 Q. And he was part of your proof?

24 A. He became a part of the proof.
25

1 See here's what the deal is, the bottom line
2 is -- and I don't mean to cut you off, but I
3 just want to be clear with respect to Mr.
4 Wright. Here's what we were facing and I
5 think I said this before and that is, is
6 that this woman was choked, pure and simple.
7 Okay? It wasn't a drowning. So at that
8 point, I had to -- the defense had to --
9 whatever it was going to be, had to include
10 that. I mean, you got to admit it. Your
11 own experts say this is what happened. The
12 state's experts say this is what happened,
13 and so, that's where we are. And so what we
14 tried to do, you know, was to go back and
15 let's look, let's see, you know, how this
16 fits? Do you understand? Because this is a
17 fact. Dr. Chancellor came in here you know
18 and was going to -- I'm glad I stopped her,
19 she would have -- that would have been a
20 nuclear explosion. And so the bottom line
21 is, is that we were right in my opinion in
22 saying, okay, we got to shift this defense
23 to now include admitting that she was choked
24 because no matter what we do, there's no
25

1 evidence to the contrary, you see what I
2 mean?

3 Q. So just to be clear, from the
4 beginning, you knew that this was a choking?

5 A. When I first came on this case,
6 Vern Braswell -- I knew that Vern Braswell
7 had engaged in that kind of behavior. Okay?
8 I'm going to -- I've got to at some point
9 say there's some privileged matters here I'm
10 not going to break unless he says break
11 them, I knew that there had been some prior
12 choking before. With respect to Mrs.

13 Braswell, when I came on the case, I was
14 told that there had not been any dissection
15 of the neck. It was me and Leslie Ballin
16 together. We were able to obtain the -- I
17 hope I'm answering your question -- we were
18 able to obtain the autopsy in General
19 Sessions and Leslie called me and said, hey,
20 man, I need you to stop by here. It looks
21 like we're going down the wrong road. I
22 said okay. Mr. Braswell in answer to your
23 question, told me that he had told Glen
24 Wright early on that he had -- that they had
25

1 engaged in that kind of behavior.

2 Q. So was it your position as far as
3 the defense that they had engaged in erotic
4 asphyxiation and then subsequently may have
5 lost consciousness or whatever but
6 subsequently potentially drowned?

7 A. No. Kind of. It was my position
8 originally. Now this is because of my
9 client. Was that she drowned. He said he
10 woke up and she was in the bathtub. That
11 was all I knew. I mean that was all I knew.
12 He told me -- Mr. Braswell had been my
13 client before and so as it relates to Mrs.
14 Braswell, I had not followed a defense of
15 any erotic asphyxiation. I was following a
16 defense that she had drowned until a certain
17 point and that was after I hired, I
18 personally hired my own forensic pathologist
19 who agreed with the state that there had
20 been digital manipulation, strangulation,
21 causing asphyxiation.

23 Q. Okay. And you also knew that Mr.
24 Braswell and Miss Christi Woods engaged in
25 choking during sex?

1 A. Yes.

2 Q. And with Monique Lane, you had
3 known about her but you didn't investigate
4 it?

5 A. Yes, that's an accurate way to put
6 it.

7 MS. FUCHS: Okay. That's all
8 I have.

9 THE COURT: Thank you very
10 much, Mr. Bailey, you're excused.

11
12 (The witness was excused.)
13

14 THE COURT: All right. Does
15 that conclude the defense's proof?

16 MS. FUCHS: That's the
17 defense's proof.
18

19 MS. STARK: Judge, I'm going
20 to need to ask for a recess, I need to
21 consult with somebody about something before
22 I go any further, it shouldn't take long.

23 THE COURT: Oh, okay.
24 Because I know you've got two of the former
25 prosecutors I thought -- Is Mr. Young here?

1 MS. STARK: Mr. Young is
2 going to be here today because he has
3 commitments for tomorrow, but like I said, I
4 just need to do a consultation before I go
5 any farther.

6
7 (Recess.)

8
9 THE COURT: Let's go ahead
10 and adjourn.

11
12 (Court adjourned.)

13
14 (End of proceedings in this
15 cause, November 27, 2015.)


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C E R T I F I C A T E

I, VIRGINIA ZISSON, Official Court Reporter, do hereby certify that the foregoing is a true, accurate, and complete transcript, to the best of my knowledge and ability, of all the proceedings had and evidence introduced in the hearing of the captioned cause, in the Criminal Court for Shelby County, Tennessee, on the 27th day of November, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Dated this 8th day of December, 2015.



Virginia Zisson
Official Court Reporter