

STATE OF MICHIGAN

FIFTH JUDICIAL CIRCUIT COURT (BARRY COUNTY)

THE PEOPLE OF THE STATE OF MICHIGAN,

v

File No. 21-800-FC

DEAN TERRY MYERS,

Defendant.

MOTION HEARING

BEFORE THE HONORABLE MICHAEL L SCHIPPER, DISTRICT JUDGE

Hastings, Michigan - Wednesday, May 31, 2023

APPEARANCES:

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Hastings, Michigan

Wednesday, May 31, 2023 - 1:40 p.m.

THE COURT: This is the People of the State of Michigan versus Dean Terry Meyers. It's our file number 21-800. May I have the appearances for the record please?

MR. ELSWORTH: Chris Elsworth, for the People.

MR. DOMAN: Good afternoon, your Honor. Tim Doman on behalf of Dean Myers.

THE COURT: Good afternoon, gentlemen. Good afternoon, Mr. Myers.

THE DEFENDANT: Sir.

THE COURT: We're scheduled this afternoon to hear a motion for new trial. It was requested by the defense in this case. Is that correct?

MR. ELSWORTH: Correct, your Honor.

MR. DOMAN: Yes sir.

THE COURT: Before we do the hearing, any exhibits that need to be marked? Have they already been marked?

MR. DOMAN: Just one, your Honor.

THE COURT: Okay.

MR. DOMAN: This is -- would be admitted by stipulation I believe. It's the city council minutes that were attached to my brief.

(At 1:41 p.m., defense exhibit A identified)

THE COURT: Okay. You can have that marked.

1 MR. ELSWORTH: That's attachment one for the two of
2 the brief that he submitted.

3 THE COURT: Okay. Mr. Elsworth, do you have any
4 exhibits?

5 MR. ELSWORTH: No, your Honor.

6 THE COURT: Okay. Do you have witnesses that you
7 intend to call, Mr. Doman?

8 MR. DOMAN: Yes, your Honor.

9 THE COURT: Okay, you can proceed.

10 MR. ELSWORTH: Before we do that, we do have one
11 stipulation to make.

12 THE COURT: Okay.

13 MR. ELSWORTH: To the extent that the trial
14 testimony of the victim was unclear. We are stipulating that
15 if the victim were to testify today, she would say that Mr.
16 Myers was driving down Green Street and turned right into Fish
17 Hatchery Park. That he did not get out, and go over to the
18 gate, take bungee cord off, and open it himself. Meaning that
19 the gate was open when he drove in.

20 THE COURT: Okay.

21 MR. ELSWORTH: I've called her, I've verified that
22 with Mr. Doman's permission. I've relayed that to him, and so
23 having that stipulation removes the need for having her to
24 testify to anything that might need to be clarified.

25 THE COURT: Okay, is that correct, Mr. Doman?

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MR. DOMAN: That's correct.

THE COURT: Okay. All right, you may proceed.

MR. DOMAN: All right. Thank you, your Honor. As my first witness, I would call Kristen Hoel. And would your Honor prefer if I question her from the podium, or --

THE COURT: Where ever you are comfortable.

MR. DOMAN: -- seated.

THE COURT: Doesn't matter.

MR. DOMAN: Okay. Thank you.

THE COURT: Raise your right hand for me please. You swear to tell the truth, the whole truth, and nothing but the truth?

MS. HOEL: I do.

KRISTEN HOEL

(At 1:43 p.m., called by the Defense and sworn by the Court, testified as follows)

THE COURT: Okay. Once you're seated and comfortable --

THE WITNESS: Excuse me.

THE COURT: -- although we know who you are, would you state your full name and spell both your first and last name please?

THE WITNESS: Sure, Kristen Hoel, K-R-I-S-T-E-N. Last name is H-O-E-L.

THE COURT: Thank you, you may proceed.

DIRECT EXAMINATION

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BY MR. DOMAN:

Q Thank you, Ms. Hoel. And just for the record, what is your profession?

A I'm an attorney.

Q Okay. Here in Hastings, correct?

A One of the locations, yes.

Q Okay. Could you just briefly describe your practice to me?

A You -- what the areas?

Q What kind of law you practice predominately?

A Criminal law, abuse and neglect, juvenile delinquency and domestic for the most part.

Q Okay. What percentage of your practice would you say is criminal defense?

A Probably about half.

Q Okay. And how did you come to represent Mr. Myers in this case?

A I was appointed.

Q Okay. And that was on or about in September of 2021. Is that accurate?

A If that's the date of the appointment, then I would not disagree with that.

Q Okay. And the case ultimately went to trial in June 2022, is that correct?

A Yes.

1 Q You recall what Mr. Myers was charged with?

2 A Multiple counts of criminal sexual conduct.

3 Q Okay. And just for the record, could you briefly state what
4 the allegations were in the case?

5 A That he had, driven a daughter of a friend from her home --
6 this is her allegations -- to McDonalds, picked up some
7 breakfast, and drove her to Fish Hatchery Park. Where he
8 engaged in some fondling and then drove her to work -- uh to
9 school, excuse me. I misspoke.

10 Q And, did Mr. Myers proclaim his innocence?

11 A If you're going to ask about conversations with Mr. Myers, I'd
12 ask that he be sworn in and waive any privilege.

13 MR. DOMAN: That's fine, your Honor. I mean raising
14 an effective assistance claim by his nature waives attorney
15 client privilege, but --

16 THE COURT: I'd still like him to do it for the
17 record.

18 MR. DOMAN: Sure.

19 THE COURT: Raise your right hand please, Mr.
20 Meyers. Do you swear to tell the truth, the whole truth, and
21 nothing but the truth?

22 THE DEFENDANT: I do.

23 (At 1:45 p.m. Dean Myers sworn in by the Court,
24 testified as follows)

25 DEAN MYERS

1 THE COURT: You can question him, Mr. Doman.

2 DIRECT EXAMINATION

3 BY MR. DOMAN:

4 Q Thank you. So, Mr. Myers, you understand we're here today on
5 a claim, of what's called an effective assistance of counsel?

6 A Yes, I do.

7 Q And, as part of that process, we need to ask your former
8 attorney, Ms. Hoel, about conversations that you would've had
9 with her. Which would ordinarily be protected by attorney
10 client privilege. Do you understand that?

11 A Yes, I do.

12 Q Do you waive that privilege?

13 A Yes, I do.

14 KRISTIN HOEL

15 THE WITNESS: Thank you.

16 THE COURT: Okay.

17 DIRECT EXAMINATION

18 BY MR. DOMAN

19 Q All right.

20 A Yes, he did proclaim his innocence.

21 Q Okay. And, were there any plea offers made in the case that
22 you were involved?

23 A Yes.

24 Q Do you recall --

25 A Yes.

1 Q -- what they were?

2 A I want to say, it was plead to a CSC third, as a -- was it a
3 second habitual?

4 Q Okay.

5 A But, I might be wrong on the habituals.

6 Q Okay. And he turned down all plea offers?

7 A Yes. Absolutely.

8 Q Okay. So, just in general, what was your strategy for the
9 trial in the case?

10 A I saw two potential issues. One is her time line did not fit
11 her school schedule, and the other was the potentiality that
12 the Fish Hatchery was not available.

13 Q Okay. And, so you were aware that the driveway in the Fish
14 Hatchery Park is traditionally closed in the winter?

15 A Well, I called the city, and yes, while -- Fish Hatchery Park
16 is closed, it's not inaccessible. Because, there's no lock or
17 latch and people tend to open the gate. Sometimes leave it
18 open. There was no one that could tell me that while
19 traditionally was closed, it was not inaccessible. Which I
20 explained to Mr. Myers.

21 Q Okay. Do you recall who you talked to at the city?

22 A Not at the top of my head. It was a women, but I don't
23 remember her name.

24 Q Okay. What -- do you recall what department of the city you
25 would've called?

1 A I just called the city.

2 Q Okay. So, is this, the closure of the driveway --

3 A Yes.

4 Q Is that something that, Mr. Myers brought to your attention?

5 A Yes.

6 Q Okay.

7 A And in fact, if I remember correctly, when Ms. Zuidema
8 testified that she was surprised to see the driveway was open.

9 Q Okay. So, is it fair to say that Mr. Myers saw that as
10 potentially important issue?

11 A Mm-hmm. Yes.

12 Q Okay. You recall how many phone calls you made?

13 A To the city?

14 Q To the city.

15 A They answered right away.

16 Q Okay. So, you just made one call?

17 A Yup.

18 Q Okay.

19 A Yes. Excuse me.

20 Q What -- did you make any other efforts to discern whether the
21 gate would've been locked or not?

22 A As I said, when I asked it was -- first of all, the person I
23 spoke with, said it not inaccessible. I asked if there was
24 anybody else that I could speak to regarding the accessibility
25 of the park during that time frame. And, I was told no.

1 Q Okay. So, do you believe it would've helped the defense to
2 show that the gate would've been latched?

3 A Again, my understanding is it's not a latch or a lock. It's
4 something that can be accessed. Like there's a bungee cord or
5 something like that.

6 Q Okay.

7 A If it was locked, yes, it would've been. But that's not what
8 I was told. It was something that was accessible.

9 Q So, do you agree that it would've been helpful to the defense
10 to show that it was bungee corded at the time?

11 A Not necessarily, 'cuz a bungee cord can be taken off by
12 anybody.

13 Q So why did you call the city then?

14 A To confirm whether or not the park was accessible during the
15 winter months.

16 Q Do you know who with the City of Hastings was in charge of the
17 parks?

18 A The person's name?

19 Q Yes.

20 A No. Not at that time, no.

21 Q All right. Did you hire an investigator in the case to follow
22 up on this?

23 A No.

24 MR. DOMAN: Okay. Can I just have a moment with my
25 client?

1 THE COURT: You may.

2 MR. DOMAN: All right. I have no further questions
3 at this time.

4 THE COURT: Cross-examine, Mr. Elsworth?

5 MR. ELSWORTH: Thank you.

6 CROSS-EXAMINATION

7 BY MR. ELSWORTH:

8 Q Good afternoon.

9 A Good afternoon.

10 Q During the trial, were you still able to argue that the park
11 could've been closed at the time this happened?

12 A Yes.

13 Q And, during the trial did anything inconsistent come out, in
14 relation to what you'd been told by the city?

15 A No.

16 Q So, after there was trial testimony that the park was being
17 opened around this time, it could've been closed at this time.
18 Did you feel any need to call any rebuttal witnesses based on
19 your conversation that you had with the city?

20 A No.

21 Q Did you feel that based on the information that you gotten
22 from the city, that you had done an adequate investigation
23 into whether or not that issue should be pursued any further?

24 A Yes.

25 Q And then based on your investigation that you made the

1 strategic choice not to call any witnesses?

2 A Regarding --

3 Q Regarding the park.

4 A Yes.

5 Q Would having witnesses testify that the gate was fastened with
6 a bungee cord, which could be opened by anybody, have aided
7 your trial strategy in anyway?

8 A No.

9 Q Could it have highlighted the fact that anybody could have
10 come into this park, no matter what?

11 A Yes.

12 Q Even if the park was closed?

13 A Yes.

14 Q And, based on your investigation, were you informed that
15 closed -- you know the word closed, is kind of a loosely used
16 term in relation to that park during the wintertime? Meaning
17 if --

18 A They didn't use that language, but the language that was used
19 was a yes, it was traditionally closed but it was not
20 inaccessible.

21 Q Closed can mean closed with a barbed wire fence, with locks,
22 completely preventing access to individuals, correct?

23 A Correct.

24 Q Based on your investigation that was not the status of the
25 park.

1 A Correct.

2 Q Do you feel that based on your investigation that was a
3 reasonable judgement on your part?

4 A Yes.

5 Q In order to pursue that issue?

6 A Yes.

7 Q Could have calling witnesses to talk more about the bungee
8 cord and how it could be unfastened, could that have undercut
9 your ability to argue that the park was closed?

10 A Yes, absolutely.

11 MR. ELSWORTH: Thank you, I have no other questions.

12 THE COURT: Anything further, Mr. Doman?

13 MR. DOMAN: Briefly.

14 REDIRECT EXAMINATION

15 BY MR. DOMAN:

16 Q Is it fair to say that the complainant, there was no
17 allegation that Mr. Myers got out, undid the bungee cord, or
18 anything like that?

19 A No, in fact she testified that she was surprised when they
20 pulled in the park to find the park was -- the gate was open.

21 Q It was open -- okay. And, you did argue in closing that the
22 park could've been closed.

23 A Correct.

24 Q So you saw that as a potentially helpful fact to the defense?

25 A Yes.

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MR. DOMAN: No further questions.

THE COURT: Anything further?

MR. ELSWORTH: Nothing, thank you very much.

THE COURT: All right, you may step down.

THE WITNESS: Thank you.

(At 1:52 p.m., witness excused)

THE COURT: Any other witnesses Mr. Doman?

MR. DOMAN: Yes, your Honor.

MR. ELSWORTH: May Ms. Hoel be excused to go to her hearing upstairs?

THE COURT: Any reason she can't be excused?

MR. DOMAN: No reason.

THE COURT: Okay. You may be excused.

MR. ELSWORTH: Thank you.

THE COURT: Mr. Doman.

MR. DOMAN: This time I'll call Steve Marzolf. I'll just go grab him.

THE COURT: Okay. I'm assuming all the witnesses have been sequestered, Mr. Elsworth?

MR. ELSWORTH: Yes.

THE COURT: Okay.

MR. ELSWORTH: Yes, thank you. Mr. Doman took care of that.

THE COURT: Good. You can come up here. This is the witness stand over here. Before you're seated, I'll have

1 you raise your right hand so I can swear you in. You swear to
2 tell the truth, the whole truth, and nothing but the truth?

3 MR. MARZOLF: I do.

4 STEPHAN MARZOLF

5 (At 1:53 p.m., called by the Defense and sworn by
6 the Court, testified as follows)

7 THE COURT: Okay. That microphone moves so you can
8 push it out of your way.

9 THE WITNESS: Okay, thank you.

10 THE COURT: All right, we're recording all this so
11 we need verbal answers. If you happen to nod your head or say
12 uh-huh to one of the questions, not a big deal. One of us
13 will remind you, that we need a verbal, okay?

14 THE WITNESS: Thank you.

15 THE COURT: State your full name and spell both your
16 first and last name please.

17 THE WITNESS: Sure. It is Stephan S-T-E-P-H-A-N
18 Andrew Marzolf M-A-R-Z-O-L-F.

19 THE COURT: Thank you, you may proceed.

20 MR. DOMAN: Thank you, your Honor.

21 DIRECT EXAMINATION

22 BY MR. DOMAN:

23 Q Mr. Marzolf, where do you currently work?

24 A I work for Corewell Health, Pennock. Here in town.

25 Q Okay. What is your position?

1 A I'm the Chief Nursing Officer.

2 Q Okay. And, how long have you worked there?

3 A Thirteen years.

4 Q Okay. And what are just in general your job responsibilities?

5 A Just about anything, but it would be oversight of nursing and
6 then also administrative duties, and projects. Such as
7 building an O-R or something along that line.

8 Q Okay. And the hospital is adjacent to Fish Hatchery Park, is
9 that accurate?

10 A Correct.

11 Q Okay. Now going back to the winter of 2019, 2018. That time
12 frame. Do you know if the driveway into the park, Fish
13 Hatchery Park, was traditionally closed?

14 A I believe it was, and I'm going from memory on that.

15 Q Okay. And did there come a time when Spectrum, now Corewell,
16 negotiate with the City of Hastings to allow employees to park
17 there?

18 A We did.

19 Q Okay. And when was that?

20 A Well, we had two episodes, one was in '18 during the like May-
21 June time frame. We did park there for a while with a new
22 computer project going live. And then, we started working in
23 '19, it would've been past to the best of my memory -- past
24 May - June time frame that we would've been parking there.

25 Q Okay. Did you personally have any involvement with the

1 negotiations with the City?

2 A I was witness to them, it would've been our real estate
3 department that would've done all the official negotiations.

4 Q All right. And, I'm not looking for an exact date, but
5 roughly when would a formal agreement have been reached
6 between the city and Spectrum?

7 A Roughly, I believe it would've been the June or just after
8 June time frame, that we reached that agreement.

9 Q Is that June of 2019?

10 A I'm sorry, June of 2019.

11 Q Thank you. And so before that time, were Spectrum employees
12 parking in that lot?

13 A As I've said, episodically they would be. So when we did the
14 epic project, the city was good enough to allow us to park
15 there in May, June of '18. And before that time we would have
16 episodically done it, but we shouldn't have been parking there
17 before at least May of '19.

18 Q Okay. So December 2018, January 2019, that time frame. Would
19 there have been Spectrum employees parking there?

20 A To the best of my knowledge, there would not be.

21 MR. DOMAN: Can I just have a moment, your Honor?

22 THE COURT: You may.

23 MR. DOMAN: I don't think I have any further
24 questions.

1 THE COURT: Okay. Mr. Elsworth, any questions for
2 this witness?

3 MR. ELSWORTH: I'm going to ask you just a couple.

4 THE WITNESS: Sure. That's fine.

5 CROSS-EXAMINATION

6 BY MR. ELSWORTH:

7 Q Where do you live?

8 A I live in -- over by Shelbyville. So it's over by Gun Lake.

9 Q Okay. With your duties at the hospital, do you have any --
10 any supervisory authority over anything that happens at Fish
11 Hatchery Park?

12 A Not currently I don't. So, maybe clarify for me.

13 Q Are you on the park maintenance or anything like that?

14 A I was at the time that we started parking there, but I'm not
15 on the city.

16 Q The city -- that's what I meant. Your relationship to the
17 park is solely through its relationship to the hospital.

18 A That is correct.

19 Q Okay. So, on its own though, as a park and thing that people
20 use and go to. That's not your job.

21 A Correct.

22 Q Okay. You're just here to testify to what your understanding
23 is regarding Pennock Hospital employees using the park for
24 parking purposes.

25 A That's correct

1 MR. ELSWORTH: Okay. Thank you. Nothing further.

2 THE COURT: Anything further, Mr. Doman?

3 MR. DOMAN: No, your Honor.

4 THE COURT: Any reason this witness can't be
5 excused?

6 MR. ELSWORTH: No, you Honor.

7 THE COURT: Okay. Thank you very much for your
8 testimony. You may be free to leave.

9 (At 1:57 p.m., witness is excused)

10 MR. ELSWORTH: Thank you.

11 THE COURT: Other witnesses, Mr. Doman?

12 MR. DOMAN: Yes, your Honor. Nice to meet you.

13 MR. ELSWORTH: I believe you're going to have two
14 more.

15 MR. DOMAN: Two more.

16 MR. ELSWORTH: Two more witnesses, and then I'm
17 going to have one. Just so the Court can have a ballpark map
18 of what's going to go on.

19 THE COURT: Okay. Got it.

20 MR. DOMAN: I will call Jim James next, and I'll
21 step out.

22 THE COURT: Okay. Good afternoon, Mr. James.

23 MR. JAMES: Well, hello.

24 THE COURT: How are you?

25 MR. JAMES: I'm all right.

1 THE COURT: I'm going to have you come right up over
2 here before you're seated, I'm going swear you in. Okay?
3 Raise your right for me. You swear to tell the truth, the
4 whole truth, and nothing but the truth?

5 MR. JAMES: Yes sir.

6 JIM JAMES

7 (At 1:58 p.m., called by the Defense and sworn by
8 the Court, testified as follows)

9 THE COURT: Okay. Go ahead and grab a seat. Once
10 you're seated and comfortable you can pull the microphone up.
11 Yeah, it moves. Everybody tries to do the limbo.

12 THE WITNESS: There we go.

13 THE COURT: We're recording all this so we have to
14 have verbal answers. If you happen to nod your head or say
15 uh-huh to a question, one of us will remind you that we need a
16 verbal. Okay?

17 THE WITNESS: Yes, sir.

18 THE COURT: State your full name and spell both your
19 first and last name for me please?

20 THE WITNESS: Jim James. Last name J-A-M-E-S.

21 THE COURT: And is Jim common spelling J-I-M?

22 THE WITNESS: Yes sir.

23 THE COURT: Okay, thank you. You may proceed.

24 MR. DOMAN: Thank you, your Honor.

25 DIRECT EXAMINATION

1 BY MR. DOMAN:

2 Q Mr. James, where do you currently reside?

3 A In Hastings, Michigan.

4 Q All right. How long have you lived in Hastings?

5 A My entire life.

6 Q And how long would that be?

7 A That would be 54 years and probably 9 months and some odd
8 days.

9 Q Thank you for that. And, where do you currently work?

10 A Thornapple Manor.

11 Q Okay. And, where did you work before then?

12 A City of Hastings.

13 Q And what was your position there?

14 A Superintendent of [sic] Streets and Construction.

15 Q Okay. And when -- when did you start that job?

16 A 2015.

17 Q All right. And when did you leave?

18 A I left in 2000 -- let's see, there would be 2021.

19 Q Okay. And what were your responsibilities as Superintendent
20 of Streets?

21 A My responsibilities were to oversee the operations of our
22 department of public service staff. That would be the
23 distribution of water system throughout the city. The
24 collection of wastewater. The overseeing of the streets
25 construction. And also, overseeing our buildings, facilities,

1 and parks.

2 Q Okay. And, on that note let's talk about Fish Hatchery Park.
3 Can you describe it a little bit for the record?

4 A Fish Hatchery Park, I don't know, it's probably roughly 40
5 acres. That sits on Cook Road and Green Street. That some
6 wooded areas, has one building that sits up on the hill. That
7 used to be referred to as the hatchery house that I believe
8 now has been sold to a private family. There is two bathroom
9 facilities and a picnic area adjacent with one -- three ponds.
10 And, a hatchery building where it used to actually be a
11 hatchery building. That was formerly inhabited by the
12 Thornapple Arts Council.

13 Q All right. And, the parking lot I drove in on my way here
14 today, it's a pretty big parking lot, would you agree?

15 A Yeah. In comparable to what?

16 Q Well, roughly how many spots would you say there are?

17 A I do not know, I'm sure that you could easily put 40 plus or
18 greater cars in there.

19 Q Thank you. And, how many entrances are there to the park --

20 A There's one main --

21 Q -- or drive I should say.

22 A There's one main entrance off from Green Street that is paved
23 that goes into the park. There's an entrance off Green Street
24 that went up to the hatchery house. There's access to the
25 park through Pennock Village with three sides at the bottom of

1 the hill. There is not a designated road there, but it's
2 accessible through there.

3 Q Okay. Was there ever a time when the driveway into the park
4 would be closed?

5 A Seasonally, we would shut the gate, and it was bound with a --
6 like a rubber bungee cord. Reason we did that is because
7 there's ponds in there with ice on them in the winter. If
8 first responder needed to get in there, they could go in. We
9 also do periodic maintenance in there. Check on things. So,
10 that answer your question?

11 Q Yeah, so you give me a time frame of during the year when the
12 park, the driveway --

13 A Well, usually we'd close it down roughly around the 15th of
14 November, and open it up around the first week of April.

15 Q Okay.

16 A And, that would determine when the bathroom facilities were
17 turned on.

18 Q Okay. And, how long had that been the practice in Hastings?

19 A I think that's been a common practice since Fish Hatchery Park
20 has been there.

21 Q Okay. You had mentioned this before, but, how was the gate to
22 the driveway --

23 A It had a black bungee cord on it with a silver hook.

24 Q Okay. I think I saw, I think it's still there.

25 A I'm sure it is.

1 Q So, not Fort Knox, but it would keep people from driving
2 straight in?

3 A No, it'd keep the gate from swinging out into traffic.

4 Q All right. And would anyone ever access that driveway during
5 the winter?

6 A I would not have a clue unless I was to personally show up
7 there.

8 Q Okay.

9 A We had maintenance workers that would access it 'cuz we would
10 check, we have a fire hydrant that's in that part. That's at
11 the end of a water main. And, we'd make sure that we didn't
12 have any problems. Periodically, they would do some work in
13 the hatchery building that was formerly occupied by the
14 Thornapple Arts Council.

15 Q Okay. So, to your knowledge there would be city employees who
16 would undo the bungee cord and drive in. Is that fair to say?

17 A They could, yes. And, if we had a special event, they could
18 come in there.

19 Q And, just based on your personal knowledge, how often during
20 the winter would city employees be driving into the park like
21 that?

22 A Depending on snow, I would say probably a couple times a
23 month.

24 Q Okay. So, not frequent?

25 A Not daily, no.

1 Q Okay. Would there be any kind of documentation of when
2 employees would drive in?

3 A None.

4 Q Okay. So, if any employee, just to your personal knowledge,
5 if an employee would undo the bungee cord, drive in. Would
6 they then secure it behind them --

7 A No.

8 Q -- before going further?

9 A They would leave the gate open behind them, and then go in.

10 Q Okay, and they would close it on their way out, correct?

11 A Yes.

12 Q So, if a city employee did that, undid the bungee cord, drove
13 in to the park, there would be a city vehicle?

14 A More than likely, there would be a red city vehicle sitting
15 there.

16 Q Okay. Is there any particular time of day when city employees
17 --

18 A No. City of Hastings operated 24/7, seven days a week.
19 Standard hours of practice for department of public service
20 was seven a.m. to three p.m. And then we had a parks crew
21 that worked on Saturday and Sunday, when the parks were open
22 during the summer and early fall.

23 Q Okay. So, if an employee would -- in the winter -- would drive
24 into Fish Hatchery Park, they would -- the custom was to then
25 lock it or bungee cord it back up on their way out. Is that

1 accurate?

2 A I would say that would be accurate, yes.

3 Q Okay. Did you ever have problems with any third parties
4 getting into the park during the winter? Unlatching the
5 bungee cord?

6 A Periodically, I think that we could have the opportunity --
7 that we could go into there to do maintenance and somebody
8 would see 'em and say, hey you know the parks closed. We also
9 had, I'm sure, people that entered through the park you know,
10 by doing it themselves. Its, one person opens that gate,
11 especially on a summer day and early -- you know, there's
12 going to be people who follow. Who doesn't like to go to the
13 parks?

14 Q So, I'm just talking about in the winter, though. There was -
15 - was there ever a problem with, you know for example
16 teenagers getting into the park or anything like that?

17 A We had one break in to the Fish Hatchery house. That was
18 reported, and that person was found guilty for those
19 activities.

20 Q Okay.

21 A And, the date of that, I cannot recollect but that was at the
22 Fish Hatchery House at the top of the hill.

23 Q Okay. And, if you know, did they drive in or did they walk
24 in?

25 A I do not think they had automobiles.

1 Q Okay. Just as a general manager, in the winter months, would
2 you recall the gate being open, when it should have been
3 closed?

4 A No.

5 Q To your knowledge during December 2018, January 2019, was
6 there any reason why the gate would've just been left open?

7 A If someone was working in there, it's absolutely possible.

8 Q Okay. And, there would be a vehicle parked there?

9 A More than likely.

10 Q So, if there are city employees in the winter -- city
11 employees in Fish Hatchery Park. Let's say a civilian car
12 drives in, would the employees -- to your knowledge -- would
13 employees tell them to leave because the park wasn't open or?

14 A No, I think somebody, if they're working on something, they're
15 not out in the parking lot. They could be in the Hatchery
16 Building checking to see if there's a pipe broke in one of the
17 restrooms. If they were leaving the park and they seen a car
18 there, I would think that they would do a curtesy thing to say
19 hey, we're going to shut the gate behind ya'.

20 Q Okay. That -- perfect. Thank you. And then, to your
21 knowledge, was there an agreement reached between the hospital
22 and the city to allow Spectrum employees?

23 A Absolutely.

24 Q Okay. Do you know when that was roughly?

25 A No, I do not. That was handled through our community

1 development.

2 MR. DOMAN: Okay. Can I just have a moment with my
3 client?

4 THE COURT: You may.

5 MR. DOMAN: All right. No further questions.

6 THE COURT: Cross-examine, Mr. Elsworth?

7 MR. ELSWORTH: Thank you.

8 CROSS-EXAMINATION

9 BY MR. ELSWORTH:

10 Q Good afternoon, I'm just going to ask you just a couple
11 questions.

12 A Yes, sir.

13 Q So never a lock on that gate?

14 A No, sir. Not that I'm aware of.

15 Q And, part of that reason is you want first responders to be
16 able to get in there quickly if they need to get in quickly.

17 A Correct.

18 Q It's just one bungee cord, correct?

19 A It -- one bungee cord, there's like a lock clasp on it. That
20 would go around the two devices that came together.

21 Q The hooks?

22 A Correct. I'm sure it's probably down there right now.

23 Q Is there a sign that says park closed or no entry?

24 A Not put up seasonally. There may be a sign that says park is
25 open dusk to dawn.

1 Q Okay. There's nothing that during the winter when it's quote-
2 unquote closed, that says keep out.

3 A That park was never closed to human traffic. The park was
4 closed to vehicular traffic.

5 Q And, that was my next question. Even during the winter when
6 the gate was closed, anybody could walk down there?

7 A Absolutely, people recreate, if you had snow they would cross-
8 county ski. We'd see people fishing down there. You know,
9 it's a park just like Tyden Park, people can use it.

10 Q And so, with foot traffic, anybody and I'm not saying you saw
11 this happen, but anybody who's walking on foot could unlatch
12 the bungee cord on the gate if they felt like it.

13 A Absolutely, we do not have somebody on patrol, or have a
14 surveillance system, or any of that.

15 Q You had said that periodically that you even know during the
16 summertime's, when the gates are closed with the bungee cord,
17 people will open 'em up to get in.

18 A Absolutely.

19 Q Is there anything different about the gates being bungee
20 corded in the summertime as compared to bungee corded in the
21 wintertime?

22 A Nothing that I know of. Other than the agreement with
23 Spectrum Health, that the gates were left open later, because
24 they took on the responsibility to patrol that.

25 Q I appreciate it, I think in my head my question was more like,

1 if someone can do it in the summertime, you know, unfasten the
2 gate. Someone could do it in the wintertime too.

3 A Yes, sir.

4 Q Okay. You had mentioned that it was, you know, the common --
5 I don't think you used the word protocol, but the custom.
6 That's what the word was, that the park employees would latch
7 the gate as they were leaving.

8 A Yes, sir.

9 Q People aren't perfect.

10 A No, they are not.

11 Q Sometimes employees can be sloppy.

12 A Sometimes employees can have things of higher priority,
13 admittedly, if you witness it at our compost site.

14 Q Is it impossible for an employee to drive into the park and
15 then leave without closing up the gate behind them?

16 A Oh, it's absolutely possible. Their human beings.

17 MR. ELSWORTH: Correct. Thank you, I have no
18 further questions.

19 THE COURT: Anything further, Mr. Doman?

20 MR. DOMAN: No further questions.

21 THE COURT: Any reason why Mr. James can't be
22 excused?

23 MR. DOMAN: No.

24 THE COURT: Okay, Mr. James, thank you very much for
25 your testimony.

1 THE WITNESS: Thank you.

2 THE COURT: You're free to stay and watch if you
3 want, or you're free to leave, your choice.

4 THE WITNESS: Thank you.

5 (At 2:11 p.m., witness excused)

6 THE COURT: Next witness.

7 MR. DOMAN: All right. My last witness will be
8 Steve Wales, and I will go grab him.

9 THE COURT: Good afternoon. I'm going have you come
10 up over here. Before you're seated, I'll swear you in. Yup.
11 You may. Raise your right hand for me. You swear to tell the
12 truth, the whole truth, and nothing but the truth?

13 MR. WALES: I do.

14 STEPHEN WALES II

15 (At 2:12 p.m., called by the Defense and sworn by
16 the Court, testified as follows)

17 THE COURT: Okay. You can go ahead, the microphone
18 moves, so you don't have to. Good, we're recording all this,
19 so we have to have verbal answers. If you happen to nod or
20 say uh-huh, one of us will remind you for verbal, okay?

21 THE WITNESS: Okay.

22 THE COURT: State your full name and spell both your
23 first and last name please.

24 THE WITNESS: Stephen H. Wales II. First name is S-
25 T-E-P-H-E-N. Last name W-A-L-E-S.

1 THE COURT: All right, thank you. You may proceed.

2 MR. DOMAN: Thank you, your Honor.

3 DIRECT EXAMINATION

4 BY MR. DOMAN:

5 Q Mr. Wales, where do you currently reside?

6 A I reside in Barry County, out by Algonquin Lake is my address.

7 Q Okay. And how long have you lived in Barry County.

8 A I've lived in Barry County for 36 years.

9 Q Okay. And where do you currently work?

10 A I work at Corewell Heath, here at Pennock Health -- also known
11 as Pennock Health.

12 Q Thank you for that. What is your job title?

13 A I'm the Security Officer Lead at that location.

14 Q Okay. And, when did you start that job?

15 THE WITNESS: So sorry.

16 MR. ELSWORTH: For the record, Mr. Wales is probably
17 on duty right now and so. Anything being picked up by the
18 microphone right now is his work.

19 THE WITNESS: Apologize. I apologize. So sorry.

20 THE COURT: It's okay.

21 BY MR. DOMAN:

22 A I've been on, in that position -- I started on January 7th of
23 2019, is when I started with the company.

24 Q Okay. And, I believe you didn't come onsite until February
25 2019, is that correct?

1 A That is correct, yes. I had some training up in Grand Rapids
2 both FTO training and -- you know basically some classroom
3 training to prepare for the position. And then, was on shift
4 at Pennock on nights from 6 p.m. to 6 a.m.

5 Q Okay. And previous to that job, where did you work?

6 A Worked at a few different jobs. Currently have been a reserve
7 officer with the City of Hastings for seven years. And then
8 prior to that, I was working at a local ophthalmology practice
9 as a practice manager. And then, a short time, there was a
10 short gap in employment before I started working with Corewell
11 Health.

12 Q Okay. You had mentioned that you were a reserve police
13 officer, is that with the City of Hastings?

14 A That is with the City of Hastings, yes.

15 Q Okay. And, are you currently a reserve police officer?

16 A I am.

17 Q Okay. And how long have you done that?

18 A Seven and a half years.

19 Q Okay. And, in general can you tell me what your duties and
20 responsibilities are as a reserve officer?

21 A As a reserve officer, usually what we do, is we function under
22 the authority of an active officer, like a full-time police
23 officer. So, as a reserve officer, basically I'm accompanying
24 a full-time officer on whatever we're working on. Whether
25 it's patrol, whether it's anything like that. The exceptions

1 to that are sometimes when we do like parade detail, special
2 events, things like this. Then, there are times when we kind
3 of act independently without an officer right by our side.
4 But, when we're on patrol there's always an officer that's in
5 the vehicle.

6 Q Okay. And Fish Hatchery Park --

7 A Mm-hmm.

8 Q What is your understanding of the driveway there in the winter
9 there?

10 A Yup. I'm pretty familiar with that because as a reserve
11 officer, I usually would work on nights. And so, one of our
12 responsibilities for the officers that were on during that
13 shift from the Hastings City Police Department was they were
14 responsible for closing all of the gates to the parks. Both
15 Fish Hatchery and Tyden Park at dusk. And then, they were
16 responsible for opening those up in the morning at dawn.

17 Q Okay. So 2018, 2019, during the winter with the driveway into
18 the park had been bungee corded?

19 A It would've been closed for the season, yeah. Yeah, they
20 typically -- the City closes that in the fall and then opens
21 that at some point in the spring when the weather gets nice
22 and they're able to open up bathrooms. Usually, it's -- I'm
23 sure it's -- there's maybe some set date, but usually it's
24 typically where the -- you know, there's no more freezing
25 temperatures so they have to worry about toilets busting and

1 things like that down there. But typically at that point,
2 they'll set out -- you know, the picnic tables, things like
3 this, and then that's when they start normal operations on the
4 Fish Hatchery Park.

5 Q Okay. And during the winter, was it common for cars to be
6 going in and out of Fish Hatchery Park?

7 A At that time, no. Those -- that would be basically, it's
8 closed down. There's no snow removal that was happening at
9 that time. Nobody was down there doing anything so basically
10 the parks are closed in Hastings from the fall until the
11 springtime.

12 Q Okay. And, when you started your job with Spectrum, what was
13 the status of that parking lot in relation to the city.

14 A That parking lot was closed at that point. There was no
15 affiliation with Pennock. And, having staff park in that
16 parking lot, until much later in the summer when we resurfaced
17 the whole parking lot and then painted some lines. We put in
18 some lighted paths that went up to the hospital for staff to
19 use. So, at that time -- the timeframe that you're speaking
20 of -- it was closed to the best of my knowledge.

21 Q All right. So December 2018, January 2019, they adopted an
22 agreement between the city and Spectrum to allow employees to
23 park that, is that accurate?

24 A No, sir. It's -- it's my belief that that was actually
25 solidified later on in the summer, I can't remember what month

1 it was. I wasn't involved in the legal proceedings, but
2 that's what I was told.

3 Q Okay. And, in your experience as a resident reserve police
4 officer, in the winters, going back 2018, 2019, and
5 previously; how often would you see that gate open to Fish
6 Hatchery Park?

7 A During the wintertime, not at all.

8 MR. DOMAN: No further questions, your Honor.

9 THE COURT: Cross-examine.

10 MR. ELSWORTH: Thank you.

11 CROSS-EXAMINATION

12 BY MR. ELSWORTH:

13 Q Good afternoon, Mr. Wales.

14 A Hi.

15 Q Just going to ask you a couple questions.

16 A Okay, sure.

17 Q You started at the building, Pennock. I call it Pennock.

18 A Sure that's fine, we all do.

19 Q Started at the building in February of 2019?

20 A 2017 -- or 2019, sorry, so sorry.

21 Q I don't mean to mess you up.

22 A No, that's ok.

23 Q All right. 2019. Started at nights?

24 A Yup. I started, actually employment started on January 7th.

25 Went through some training in Grand Rapids and my first shift

1 would've been nights at the hospital from 6p to 6a.

2 Q In February?

3 A Mm-hmm.

4 Q Is that a yes?

5 THE COURT: Is that a yes?

6 BY MR. ELSWORTH:

7 A Yes it is, sorry. Sorry.

8 Q No, that's fine. And, then you went into days in March of
9 2019?

10 A Yeah, it was sometime after that when the hospital decided to
11 up the staffing to 24/7 and then at that time, I moved over to
12 days.

13 Q And we've -- we've talked before.

14 A Mm-hmm. Yes we have.

15 Q And, you would agree that you are more familiar with -- you
16 don't have as much familiarity with the daytime aspect of what
17 was going on in January of 2019 as you do with the night time
18 aspect of what was going on.

19 A That would be correct.

20 Q Okay, because you worked nights.

21 A Exactly.

22 Q And, especially since you weren't even actually working at the
23 building in January, it was nights in February, correct?

24 A Correct.

25 Q All right. You had said, when you testified that no one was

1 down there doing anything at Fish Hatchery.

2 A Mm-hmm.

3 Q Is that correct?

4 A Yes.

5 Q So, because you're more familiar with what goes on at night,
6 you're less familiar with, perhaps if park maintenance people
7 are coming down there and doing stuff like that during the
8 day?

9 A Correct.

10 Q Because you're not there during the day.

11 A Mm-hmm.

12 Q Correct?

13 A Yeah. Yeah, the only thing I would -- you know be able to
14 know for a fact is did I see activity, was there activity from
15 tracks in the snow and that kind of stuff. I -- I never
16 remember anything going on down there when it was closed.

17 Q Correct. And if there's no snow, there's no tracks.

18 A Correct.

19 Q And so, since you're more involved with the hospital than the
20 parks --

21 A Correct.

22 Q Would you defer to the park individuals, the heads of the
23 parks, to talk more about what the day-to-day of the park was
24 during the day?

25 A Would the -- so for instance --

1 Q The park -- the parks department.

2 A Yes. Yeah, the City of Hastings was responsible for the parks
3 and yeah, typically during the day, once the parks would open
4 up, they would be responsible for like lawn care, and making
5 sure the garages were empty. Things like that.

6 Q They're the ones who are going to be more familiar with what's
7 going on at the park's than you are.

8 A Absolutely, yes.

9 MR. ELSWORTH: Thank you. I have no other
10 questions.

11 THE COURT: Anything further, Mr. Doman?

12 MR. DOMAN: No, your Honor.

13 THE COURT: Any reason this witness can't be
14 excused?

15 MR. DOMAN: No, your Honor.

16 MR. ELSWORTH: No, your Honor.

17 THE COURT: Thank you very much for your testimony,
18 you're free to stay and watch if you want, or you can leave.
19 Your choice.

20 THE WITNESS: Okay. Thank you.

21 (At 2:22 p.m., witness excused)

22 THE COURT: Mr. Doman, is that your last witness?

23 MR. DOMAN: Yes it is, your Honor.

24 THE COURT: Mr. Elsworth, any witnesses?

1 MR. ELSWORTH: I have one witness, it will be
2 similarly brief, Officer Sensiba.

3 THE COURT: Okay.

4 MR. ELSWORTH: Do you mind if I stay seated too,
5 since we've been sitting the whole time?

6 THE COURT: That's fine, yup.

7 Swear to tell the truth, the whole truth, and
8 nothing but the truth?

9 OFFICER SENSIBA: Yes.

10 OFFICER JOSH SENSIBA

11 (At 2:22 p.m., called by the People and sworn by the
12 Court, testified as follows)

13 THE COURT: State your full name and spell both your
14 first and last name please.

15 THE WITNESS: Josh Sensiba. J-O-S-H, Sensiba S-E-N-
16 S-I-B-A.

17 THE COURT: Thank you. You may proceed.

18 DIRECT EXAMINATION

19 BY MR. ELSWORTH:

20 Q Good afternoon.

21 A Good afternoon.

22 Q Where do you work?

23 A Hastings City Police Department.

24 Q What do you do for the Hastings City Police Department?

25 A I'm a patrol officer.

1 Q How long have you been a patrol officer?

2 A Over 25 years.

3 Q All for the Hastings City Police?

4 A Yes.

5 Q Do you live in the City of Hastings?

6 A No.

7 Q Where do you live?

8 A I live about two miles outside of the City of Hastings.

9 Q Familiar with the area though.

10 A Yes.

11 Q Are you familiar with Fish Hatchery Park?

12 A I am.

13 Q So, you're not -- we're here to talk about the park in
14 December 2019, January 2019. Have we tried as best we can
15 recreate whether -- you know what the weather was like that
16 day? Did we look anything up?

17 A We did. We looked up on the internet, I don't remember what
18 the site was, but it showed little to no snow for the month of
19 December and January.

20 Q Okay. There has been testimony that the park was closed
21 during -- Fish Hatchery Park was closed during December 2018,
22 January 2019.

23 A Correct.

24 Q Are you in agreement that closed means that the gate was
25 fastened with a bungee cord?

1 A Yes.

2 Q No lock?

3 A No.

4 Q Are you aware of why there's a bungee cord?

5 A Yeah. So I've been with Hastings for over 25 years, it's
6 always been a bungee cord and in fact, it's still the same one
7 to be honest with you. There is always pedestrian traffic in
8 Fish Hatchery Park, even in the wintertime. There are
9 activities that go on. There's 3 or 4 ponds in there. Kids
10 are told to stay off of the ponds as they ice skate, however
11 some don't listen. And, it's more for the first responders,
12 for EMS, fire or law enforcement if they need to get in there
13 in a hurry. They can open the gate.

14 Q So even if closed, there are people that are using the park.

15 A Absolutely.

16 Q Have you ever, during the wintertime opened the gate to Fish
17 Hatchery Park?

18 A Yes.

19 Q Is it hard?

20 A No.

21 Q Why would you have opened the gate to Fish Hatchery Park
22 during the wintertime?

23 A Well, for many reasons. If there's a complaint that come in,
24 whether the Thornapple Arts Council Building got vandalized,
25 damaged. If there was any other issues in the park. Lot of

1 times we would get directed patrol from either a sergeant or
2 my administration to make sure that we check -- check on the
3 park. And, at that point we would go in the park, and take a
4 look around and make sure everything was fine.

5 Q And this would be during the wintertime?

6 A Yes.

7 Q Kids sometimes will do drugs places.

8 A I'm sorry what was that?

9 Q Kids will do drugs some places, sometimes.

10 A Sometimes.

11 Q Might be doing it in the park too.

12 A Yes.

13 Q Sometimes at night, you gotta' check it out. Right?

14 A Correct.

15 Q When you've been down there, do you always -- down there in
16 the wintertime, do you always secure the gate back up with the
17 bungee cord when you leave?

18 A No.

19 Q Okay. And why would that be?

20 A Well, I -- I can promise you there are time when I've
21 forgotten. There are other times where I will be checking a
22 building and a priority call comes in to where I need to get
23 to this location as soon as possible.

24 Q There are other officers at HPD, besides yourself?

25 A Yes.

1 Q Do you think that is a similar experience as other officers
2 would have as well?

3 A Yes.

4 Q Is there anything impossible an allegation that someone drove
5 a vehicle into that park, during the daytime or early morning
6 hours in the wintertime.

7 A No.

8 Q Is there any signs that say no entry.

9 A There is not.

10 MR. ELSWORTH: No other questions, your Honor.
11 Thank you.

12 THE COURT: Cross-examine, Mr. Doman?

13 MR. DOMAN: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. DOMAN:

16 Q So, talking about December 2018, January 2019 in that area,
17 how often would you go into Fish Hatchery Park?

18 A That's hard for me to answer, to be honest, because I don't
19 remember that time frame. I don't know if there's any
20 complaints that got called in during that time or not. But,
21 with there being not a lot of snow, I'm only going to speak
22 for myself, not the other officers. I would probably go in
23 there at least two, maybe three times a week.

24 Q So you said, two or three times a week?

25 A Yes.

1 Q Okay.

2 A That's if -- I mean that's besides any calls that may have
3 come in. You know, vandalism or -- or whatever may have
4 happened.

5 Q Okay, what time of day would that have been?

6 A Six in the morning, 'til 6 p.m.

7 Q Okay. And, do you recall ever arriving to check on the park
8 where the gate was already undone?

9 A Yes.

10 Q When was that?

11 A I couldn't tell you -- I mean the exact day or date, it
12 happens frequently. Well, I wouldn't say frequently, I --
13 it's not uncommon for me to see the gate open during the
14 winter, when the park is officially closed. It wouldn't be
15 uncommon for me to see it open two -- two times a week.

16 Q Okay. And, so normal practice though was to close the gate on
17 the way out?

18 A Yes.

19 Q All right. Do you recall any major criminal incidents
20 happening at Fish Hatchery Park during this time frame?

21 A I don't. I don't recall any.

22 MR. DOMAN: Can I just have a moment with my client?

23 THE COURT: You may.

24 BY MR. DOMAN:

25 Q So, if you were to come across someone in Fish Hatchery Park

1 during the winter, did you ever come across any civilians in
2 Fish Hatchery Park when you would go down in the winter, who
3 had driven in?

4 A Who had driven -- yes.

5 Q Can you describe that?

6 A Which one -- I mean I've worked 25 years here. I'm not trying
7 to be difficult, but it happens.

8 Q Was it a common occurrence?

9 A It depends on what you say is common. It didn't happen all
10 the time. I would say it happened less -- less than probably
11 40% of the time, 30% of the time maybe. But that's just a
12 guess.

13 MR. DOMAN: Okay. I don't think -- I have no
14 further questions.

15 THE COURT: Anything further, Mr. Elsworth?

16 MR. ELSWORTH: No redirect, thank you.

17 THE COURT: All right. Thank you for your
18 testimony.

19 THE WITNESS: Thank you.

20 (At 2:30 p.m., witness excused)

21 THE COURT: Mr. Elsworth, any other witnesses?

22 MR. ELSWORTH: No further witnesses.

23 THE COURT: Any rebuttal witnesses, Mr. Doman?

24 MR. DOMAN: No, your Honor.

25 THE COURT: Okay. Are you prepared for arguments?

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MR. DOMAN: Yes, your Honor.

THE COURT: Okay, you may proceed.

MR. ELSWORTH: Can I suggest -- may I defer to the Court, there are two issues raised in his motion. Can we separate the arguments from issue to issue?

THE COURT: Absolutely, yup.

MR. DOMAN: Is it all right if I remain seated then?

THE COURT: Absolutely, you may.

MR. DOMAN: Thank you. All right, so I think, your Honor, we have established at this point that it would've been unusual, there's been some discrepancies between Officer Sensiba and some of the other witnesses. But, at a minimum, it would've been unusual for the gate to Fish Hatchery Park to be undone in the winter of 2018, 2019. Basically, if a city employee had gone in or police officer, for it to remain unlatched would've been either some kind of mistake on the part of the employee or you know some urgent call, it sounds like. There's no testimony that there was a huge problem with you know third parties coming in, unlocking the gate and driving in or anything like that.

And so, again, at a minimum, I think we established that it would've been an unusual occurrence to have the gate unlatched in the winter of 2018, 2019. Having this case, where this where the alleged assault is supposed to have taken place, this is the kind of objective detail that jurors in a

1 CSC case latch onto, in a he-said, she-said situation.
2 Obviously it was important to Mr. Myers. Ms. Hoel testified
3 and she even argued that, hey it's possible that this was
4 closed. Clearly at least, part of her strategy and she
5 acknowledged it would've been helpful to the defense to
6 establish that the park -- the park would've been closed. And
7 I think her efforts to flush that out fell short. She made
8 one phone call to the city, did not hire an investigator.

9 THE COURT: So, what did she not learn, that you
10 learned in all your time investigating? 'Cuz what I heard was
11 no more than what she found.

12 MR. DOMAN: I respectfully disagree, I think --

13 THE COURT: What she found was that it was locked
14 with a bungee, it was technically closed to car traffic, not
15 people traffic, in the winter. Right? And that it was, what
16 I heard the testimony was, not common but not rare. That it
17 would be open either 'cuz someone was down there, or
18 accidentally not bungeed back when someone left. So, what in
19 all of your time investigating did you learn, did you come up
20 with that you could've definitively argued to a jury that she
21 didn't?

22 MR. DOMAN: Couple things, your Honor.

23 THE COURT: 'Kay.

24 MR. DOMAN: Obviously, I think we all agree the
25 default is the gate would've been closed in the winter. And so

1 what we learned is what circumstances that it would've been
2 open. Either a city employee goes in or a police officer goes
3 in, and importantly --

4 THE COURT: Or a person decides to open it and go
5 in. 'Cuz people like to go to the park.

6 MR. DOMAN: I didn't hear any testimony that there
7 had been, to the personal knowledge of these witnesses. Was
8 it possible, of course it's possible.

9 THE COURT: Well, they said they went down. Officer
10 Sensiba said he'd been down there before, not rarely, not
11 common, but not rare, and there would be a vehicle down there.
12 Not a city vehicle.

13 MR. DOMAN: Correct, and I --

14 THE COURT: So he did say that.

15 MR. DOMAN: All due respect to Officer Sensiba, his
16 testimony really does not line up with the park officials
17 about how infrequently, you know, how cars would be in there.
18 The other thing is -- the other point is that we don't need to
19 establish definitively that the gate was locked at the time.
20 I think the burden's on them to prove that it was open, right?

21 THE COURT: But, Ms. Hoel argued that, right? That
22 the -- the park was closed. So, she made that argument, it's
23 not like she didn't make this argument.

24 MR. DOMAN: Oh correct, yeah absolutely. She saw
25 this as a valid defense that, hey the park could've been

1 closed at the time. And again, we've gone that step further
2 and showed default closed, only would've been opened on these
3 instances and really the instances where it would not have
4 been closed back up. Either neglect of the city employee, or
5 some kind of urgent police matter. So, very limited
6 circumstances where you would have the gate unlocked. So, I
7 think this was an important point. I think one call to the
8 city was not -- not enough to flush this out.

9 So really, to me this becomes a question of
10 prejudice. You know, is there a reasonable pro -- 'scuse me
11 probability of a different outcome. And, the prosecutors made
12 the argument that calling all these witnesses like we did
13 would've just highlighted the possibility that the gate
14 could've been unfastened. But again, the burden's on them to
15 prove beyond a reasonable doubt that it was impossible. So,
16 it's not -- the burdens not on us to show that it was opened.
17 It's on them to show that it was.

18 THE COURT: But it does cut two ways. Because, it
19 could be strategic that, you leave it at that, it was closed.
20 And that's what you leave them with. Because when you open up
21 the testimony, then you get Officer Sensiba who don't like his
22 testimony, but it's credible to me. And he's been here, and
23 worked here, a lot longer than anybody else who testified. I
24 mean five times longer than anybody else who testified. And
25 he says, I go in there several times a week. Three times a

1 week in the winter to check out the park. And yeah, I've left
2 it with the gate open, and yeah, I've gone there and the
3 gate's been open. So now you open up that. Now your strategy
4 may have hurt you more than helped you.

5 MR. DOMAN: Well, I would say with one call to the
6 city, she does not learn all those details that we've learned.
7 So, the case laws says you have to make a reasonable
8 investigation. If you don't make a reasonable investigation,
9 sufficient performance. And I -- I take the Court's point,
10 but Ms. Hoel didn't have enough information to make that
11 educated choice. So, I think it does come down to prejudice.
12 And so, the idea that this testimony would've been more
13 helpful to the prosecution to show a possibility. To me -- it
14 brings to mind the DNA cases where you have DNA found at a
15 crime scene and then the expert comes up and testifies that
16 it's a million and one that it came from someone other than
17 the defendant, right? I'm sure, your Honor's heard testimony
18 like that. And, to suggest that that would be helpful to the
19 defense because it shows a possibility that it was someone
20 else. It's just -- absurd. And so, I don't think any
21 reasonable person would see this as hurtful to the defense.
22 And, again, the evidence that -- it's unlikely that the gate
23 would've been unlatched casts out on the complainant's story
24 here. And, remember that the jury did not credit her 100%.
25 They acquitted my client the CSC one he was accused of. So,

1 we already have credibility problems here. And, if we hear
2 testimony that there's -- I would say a strong possibility if
3 not probability that the gate was locked. You can have one
4 juror say, you know what, I'm just not sure. And that's all
5 it takes for an acquittal.

6 THE COURT: But, you're assuming that, again --
7 that's the assumption that the argument wasn't made. That the
8 gate was closed. That the park was closed for the winter, and
9 that argument was made.

10 MR. DOMAN: It was made, but it was not backed up
11 with what I presented here today. Again --

12 THE COURT: And what you presented here today,
13 didn't convince me more likely that the park was closed. What
14 I heard today, and you don't like his testimony. What I
15 heard, when I listen to all this is huh, 'cuz I never go there
16 in the winter. I don't live in the City of Hastings. After
17 I heard all the testimony, I thought huh, pretty easy to get
18 in and out of the park. Park is opened occasionally in the
19 winter, I'm sure if the gate's open, people go in there. I
20 wasn't -- you didn't convince me more, then not, today. From
21 my perspective. If I were a juror, I wouldn't have felt more
22 sure that Mr. Myers could not, did not get into the park.

23 MR. DOMAN: And, I think that brings up a good
24 point, your Honor. It's not necessarily do you personally
25 believe this, it's should a jury have heard this. Could a

1 juror come to a different decision? So I respect, your
2 Honor's position, but I think, a different juror could
3 disagree and say --

4 THE COURT: Sure.

5 MR. DOMAN: So, I'll leave it at that and we'll
6 address the vouching issue after, I suppose.

7 THE COURT: Okay.

8 MR. ELSWORTH: Thank you. Yup, so the standard is
9 that the failure to call a particular witness at trial is
10 presumed to be trial strategy. Appellate Court does not
11 substitute its judgement for that of counsel in matters of
12 trial strategy. But you have to have, at least a reasonable
13 investigation to begin with. If Ms. Hoel had called the city,
14 which she did, and they said, oh you know, it's not
15 inaccessible. It could happen. It's a bungee cord. She
16 would've gotten the same answer if she had called Mr. James.
17 If she had called Officer Sensiba, if she had called anybody
18 that was actually familiar with the park, right? 'Cuz Mr.
19 Wyle -- Wales, whom, I'm not critiquing in any way, but he's
20 not even on site during the day in that winter time period.
21 And, Mr. the other Steven, Mr. --

22 MR. DOMAN: Marzolf.

23 MR. ELSWORTH: -- Marzolf. Marzolf is more
24 associated with the hospital. And he's not -- he's not from
25 here. So, if she --

1 THE COURT: No, the two people that testified that
2 had actual knowledge of the park are Mr. James and Officer
3 Sensiba.

4 MR. ELSWORTH: Officer Sensiba, who's doing the
5 daily patrols, for 25 years. And, Mr. James who is familiar
6 with all the maintenance and everybody going down there. So,
7 if she had called those other two people who have any
8 knowledge, they would have said basically the exact same thing
9 that her phone call had gotten. So, that is a reasonable
10 investigation at that point. Because, the person she called
11 gave more or less identical information to these other two
12 witnesses. And, that's important because really to make this
13 defense of it couldn't have happened at Fish Hatchery Park
14 that gate needs to be locked. Then, there needs to be a
15 barrier there that prevents anybody from getting in. Because
16 as soon as someone says oh yeah, it's possible, then it's
17 possible that anybody could go down there and do it. And so
18 when you're looking at it, from her perspective and trial
19 strategy, why am I going to bring people in here that are just
20 going to say, it's just a bungee cord, anybody could drive
21 down there.

22 So that's a reasonable trial strategy, you're kind
23 of undercutting yourself if you putting on a weak defense. It
24 would allow me to get up there and say, oh her defense is
25 Officer Sensiba, who says, that oh yeah, it should be closed,

1 but sometimes it's not. And so, that's her defense, a weak
2 defense doesn't do her any good there. So, it's a reasonable
3 trial strategy, and she's presumed to have done reasonable
4 trial strategy.

5 So, I think you can deny it under the first prong of
6 ineffective assistance of counsel, but then you get to the
7 second prong too, is there any prejudice? You know, so let's
8 say, even if, she could have made the extra phone calls,
9 what's the prejudice? The prejudice has to be is that their
10 testimony would have made it that more likely that no one
11 could have driven down there. And, their testimony is that it
12 was open to foot traffic constantly. That it's not unheard of
13 for people to unlatch the gate. It's specifically designed to
14 be easily accessible so first responders can get down there.
15 And Officer Sensiba testified that -- somewhere between rare
16 and common that cars drive down there. That's basically the
17 argument that -- it's basically similar to what the trial
18 testimony was. That it could've been closed. So, there is no
19 prejudice. And, the prejudice also has to be -- you know --
20 dealt with in relation to all the other evidence in the trial.
21 And so, sometimes you have just a pure he-said, she-said, with
22 no corroboration what so ever.

23 In this case, you're recreating something that
24 happened years and years ago. Right, because there was a
25 delayed disclosure in this case. Which also hurts Ms. Hoel's

1 ability to investigate it because it happened so far in the
2 past. And, which makes her investigation all that much more
3 reasonable because, she's gotta look back, four years, right?
4 But, in this case, you have Mr. Myers confirming that he was
5 with her that morning. You have Mr. Myers confirming that he
6 was up all night long using meth. You have him confirming all
7 these sexual statements and feelings about the victim that he
8 had. You have him confirming that he took her to McDonald's,
9 confirming that he dropped her off at school.

10 So the exact timeline she says, we have school
11 records that confirm she was dropped off late this one day.
12 And then, you have the friend that sees her in a ball in the -
13 - on the floor in the bathroom crying her eyes out because she
14 was just sexually assaulted by him. And, the friend came in
15 and testified to that. So you have all this other
16 corroboration. Which, makes it that much more believable that
17 it happened. Which makes it that much less prejudicial that
18 you don't have an extra witness to come in and say, well, yeah
19 it's closed, but anybody could undo the bungee cord. Right?
20 How does that undercut all that other -- all that other
21 information?

22 So, there is no prejudice here meaning, that there
23 isn't a reasonable probability that the outcome would be
24 different if Officer Sensiba or Jim James had testified.
25 Because, all that other corroborating details as to what the

1 victim in this case said happened. And, I think that's
2 important because it's not a he-said, she-said. A lot of
3 CSC's are, where it's just you should believe the victim
4 because she doesn't have any motive to lie, right? This
5 victim didn't, but she had all these other details that backed
6 up her story. And a lot of them came from the defendant as
7 well. So, I would ask you to deny it under both prongs of the
8 ineffective assistance of counsel for that issue.

9 THE COURT: Okay. Any follow up?

10 MR. DOMAN: Just very briefly. One detail that I
11 neglected to mention. According to the complainant, when they
12 drove into Fish Hatchery Park, there were no other cars there.
13 They were the only car in the lot. So, this would've been an
14 instance where you know -- there was not someone down there,
15 there wasn't a third party who had opened the gate and come
16 in. You're relying on a city employee having forgotten it.
17 And, they would rarely go in, once or twice a month. Or, a
18 police officer going in and being called away or forgetting.
19 Again, not a common occurrence so I think -- I just wanted to
20 highlight that one detail.

21 THE COURT: Okay, thank you. Do you want me to rule
22 on this before I go to the second --

23 MR. ELSWORTH: Whatever the Court prefers.

24 THE COURT: -- issues? I'm prepared to rule on this
25 one, so I might as well do it now. And then you can make your

1 second argument.

2 MR. DOMAN: That's fine, your Honor.

3 THE COURT: Okay. I do not find that attorney Hoel
4 was ineffective. And, I agree with Mr. Elsworth, I believe on
5 both basis. Number one, I do think it was a reasonable trial
6 strategy that she used. I think she did her inquiry, and she
7 called and found that it was closed. It was closed with a
8 bungee. And she even said today and again -- we're all Monday
9 morning quarterbacking this of course. She said it was a
10 strategy, she said I didn't want to get farther into it
11 because exactly what happened today could've happened at
12 trial. And like I said, I found today to be more compelling
13 that it -- it's open more than I maybe thought it would've
14 been open. Or, opened more easily than I thought it would've
15 been opened. Clearly once somebody opens it -- I know when I
16 go through gates, I worked on farms and so forth. I forget
17 half the time when I leave the field to close the gate.
18 Because it's not what I'm used to doing, just driving. So, I
19 think under the first prong that what she did was reasonable.
20 She did the inquiry and I think it was a reasonable trial
21 strategy. Of course, it's always easier -- we always do that,
22 we always question that later. That's your job.

23 The prejudice here, I think again, is, everything is
24 prejudicial. Every single thing is prejudicial. The weight
25 of the prejudice in this case in miniscule in my mind, if

1 existent at all. And, it doesn't have a factor. The weight
2 of the other evidence in this case, again, if it were a he-
3 said, she-said, then -- there was so much other stuff in this
4 case that corroborated what happened. The additional
5 testimony, I don't think would've strengthened the defendant's
6 case at all. In fact, I found it to have potentially weakened
7 the defendant's case.

8 So I think both prongs of the ineffective have been
9 satisfied or haven't been satisfied for finding the -- Ms.
10 Hoel to be ineffective counsel in the case. Second argument
11 is regarding vouching, is that correct?

12 MR. DOMAN: Yes, your Honor.

13 THE COURT: Okay.

14 MR. DOMAN: All right. I'll rely mostly on my
15 brief. I do think the analysis from Hawkins Thorpe applies
16 here. Obviously this case is different than the facts of
17 Hawkins or Thorpe, but holdings in a case don't only apply to
18 actually identical settings, that's not how the law works.
19 And, I think this case is really an amalgam of Thorpe and
20 Hawkins in my mind. You have a police officer who kind of
21 assumed the mantle of an expert, in testifying that number one
22 that false allegations are rare. And number two, that in
23 these rare instances where false allegations do happen,
24 there's going to be demonstrably false.

25 So, putting those things together, the takeaway for

1 the jurors was this was not a case of a false allegation. And
2 so, this is what I would refer to as circumstantial vouching.
3 You have direct vouching where a witness says I believe so and
4 so is telling the truth. And then you also have, again, what
5 I refer to as circumstantial vouching, where testimony about
6 the supposed rarity of false allegations. The Supreme Court
7 has been very clear that that counts as vouching as well. And
8 also, in terms of prejudice, the case law especially in the
9 past few years has been very strong on this. The vouching is
10 especially pernicious error that occurs that makes a
11 difference in these he-said, she-said cases. So, we would
12 ask, your Honor to grant a new trial.

13 THE COURT: Okay.

14 MR. ELSWORTH: Similarly, I'll rely primarily on my
15 brief. Just want to hit a couple points. Obviously, as I
16 argued in my brief this is not the same -- I don't even think
17 it's even the same ballpark as the fending testimony in
18 Hawkins and Thorpe. None of the testimony was directly
19 related to anything that the victim in this case said.
20 'Specially the three redirect questions that I asked Detective
21 Larson. Think it's important to note that Tom Cottrell, the
22 expert, had testified about these issues. Through cross-
23 examination, and I think his statements might even be a little
24 bit more stronger than Detective Larson's and their not even
25 objected to. So, at minimum though, the concepts are already

1 in evidence through the defense with her cross-examination of
2 Tom Cottrell. No statistics were mentioned, there's been no
3 vouching. I think it's important to note that neither
4 Detective Larson nor Tom Cottrell even interviewed the victim.
5 There was no testimony about their interviews. So, nothing
6 that they said could be related to their impression of the
7 victim that they spoke to because they didn't do the
8 interviews of the victim. No one mentioned the victim in
9 their testimony. I think it's important to note that these
10 were concepts that were introduced by the defense. So, they
11 brought them up. And, these were reasonable follow up
12 questions to a -- to a theme that was introduced by the
13 defense through two witnesses.

14 Mr. Doman referenced the case law, I attached two
15 unpublished cases. I did that because they are post Thorpe
16 and Hawkins. And, they are -- I would say the testimony in
17 this case is even less offensive than the testimony in those
18 two unpublished cases. And, those convictions were upheld in
19 those unpublished cases. I would note then, that you have to
20 then go into whether there was any prejudice and that relates
21 back into -- well first there's no defective performance
22 because these weren't objectionable questions to begin with.
23 So, you can't say that there was ineffective assistance of
24 counsel because any objection would've been meritless. So,
25 that's one.

1 Then you go to step two. So let's say, maybe there was
2 some merit to it, and there should've been an objection. Then
3 you look at was there any prejudice? That brings us back to
4 the same point I was making in the last issue about all the
5 other overwhelming evidence in this case. So, there's not
6 defective performance and there's no prejudice based on the
7 fact that these were valid follow up questions that were not
8 objectionable and there wasn't prejudice even if there were.

9 And for those reasons also, there's no plain error,
10 Mr. Doman did it correctly. Sometimes appellate attorneys
11 argue either plain error or ineffective assistance of counsel.
12 He did it correctly and he's arguing both. So, I would ask
13 that you find that there was no ineffective assistance of
14 counsel and for the same reasons that there was no plain
15 error. Plain error is a higher standard. We don't need to
16 get into the weeds on it, because I don't think these are
17 objectionable questions, so.

18 THE COURT: Response, Mr. Doman.

19 MR. DOMAN: Yes. Thank you, your Honor. I'm just
20 going to jump around here. So again, case law says that
21 vouching doesn't need to be I believe so and so is telling the
22 truth. Thorpe, it was statistics, just anything that conveys
23 the rarity of false allegations. Cottrell's -- Mr. Cottrell's
24 testimony in this case, I do see as different. Then Detective
25 Larson's which is why I didn't raise that issue. I don't see

1 it as problematic. The problematic part of Detective Larkins'
2 (*sic*) testimony is that you have her claims about how rare it
3 is to have these false allegations. And then, in those rare
4 instances, you're going to see these tell-tale signs. Which
5 again, were not present in this case. So, like in Thorpe, the
6 takeaway for the jury was that there was no way this was a
7 false allegation. At least, that's what the detectives
8 telling us. The fact that Detective Larkins (*sic*) didn't
9 interview the complainant. That's the same situation as what
10 happened in Thorpe where Mr. Cottrell's testimony was
11 reversible error. He never interviews any of the complainants
12 in these cases. And yet, the Supreme Court found that
13 problematic. The idea that the defense opened the door,
14 that's addressed in Thorpe too. What opens the door is
15 different than what comes through it. I think is some of the
16 language in there. And --

17 THE COURT: But it still does create -- I mean, and
18 I get that. That doesn't -- just 'cuz they open the door,
19 doesn't mean anything in the world comes through. We all know
20 that. But, when you open the door, it does allow for natural
21 questions. And I think the question here, what kind of
22 questions, how much? What's the extent? And, I think that's
23 what all the case law. The cases you cite, they're not the
24 same as our case. I get why you cited them, I would've too.
25 But, I think it's all a continuum. And, I can tell you when I

1 heard this -- I think about vouching. I didn't -- it didn't
2 raise red flags with me. I didn't get a ooh, that was -- you
3 know. 'Cuz sometimes I'll get that in a case, like somebody
4 just said something like ooh, what was that? Or what was that
5 question. And I usually stop things or ask -- you know, the
6 attorneys to approach, just to see if I heard something wrong,
7 or heard it the same way. 'Cuz I want it to be clean. And
8 vouching is -- is a real potential problem. I didn't get that
9 feeling. And, I don't think I was sleeping. But I didn't get
10 that feeling when this came up. It didn't feel like that to
11 me. You know what I'm saying?

12 MR. DOMAN: Sure. I think perhaps it's because --
13 if it's -- really you put the two questions together. Wasn't
14 one bad answer, a non-responsive answer. It was really the
15 combination of the two questions. And, what inferences that
16 could've created in the mind of the jury. But I --

17 THE COURT: Yup I --

18 MR. DOMAN: -- respect your Honor's point.

19 THE COURT: Yup, and I get that. I just don't think
20 this rises to the level of the vouching that would -- would
21 create plain error here. And, so I don't find plain error.
22 And, I do appreciate the fact, Mr. Elsworth is right. And, I
23 don't know if it's just confusion, or they don't do it cleanly
24 or they don't. But, you did this the right way. Which just

1 makes it easier, doing it that way. But, I don't find plain
2 error here.

3 Any other rulings you need from me, Mr. Elsworth?

4 MR. ELSWORTH: Correct. And, can I clarify that?

5 THE COURT: Absolutely.

6 MR. ELSWORTH: If I misstate something, let me know.

7 THE COURT: Yes, I'll come back to you also.

8 MR. ELSWORTH: So, if you don't find plain error then
9 your --

10 THE COURT: We're clean today.

11 MR. ELSWORTH: Yeah, then the Court's finding that
12 the questions and answers were not objectionable.

13 THE COURT: They were not objectionable.

14 MR. ELSWORTH: So, then since they're not
15 objectionable, there can't be deficient performance or
16 prejudice.

17 THE COURT: That's correct.

18 MR. ELSWORTH: And, there also can't be plain error.

19 THE COURT: That's correct.

20 MR. ELSWORTH: Okay, thank you.

21 THE COURT: Yes. Anything you'd like clarified
22 regarding that?

23 MR. DOMAN: No. No, your Honor. I'm good.

24 THE COURT: Okay. Anything else I need to address
25 today?

1 MR. ELSWORTH: No. If Mr. Doman would prefer to
2 draft an order that he sees fit, he can email it to me and I
3 can then submit it to the court.

4 MR. DOMAN: That works.

5 MR. ELSWORTH: Both issues are denied.

6 THE COURT: Yes.

7 MR. ELSWORTH: Thank you.

8 THE COURT: Okay. Good, we're all set. Thank you
9 very much for your work this afternoon gentlemen. Nice to meet
10 you, Mr. Doman.

11 MR. DOMAN: Thank you, your Honor.

12 MR. ELSWORTH: Thank you.

13 THE COURT: Court's adjourned.

14 (At 2:57 p.m. proceedings recessed)

15 (At 2:58 p.m. proceedings reconvene)

16 THE COURT: Go ahead, Mr. Doman.

17 MR. DOMAN: Thank you, this was my mistake. At the
18 beginning of the hearing, we had identified and marked defense
19 exhibit A, which is the city council minutes from January 14th
20 of 2019. And, that was an exhibit admitted by stipulation.

21 THE COURT: And it was stipulated. So, it's
22 admitted.

23 (At 2:58 p.m. exhibit A admitted)

24 MR. ELSWORTH: Perfect, thank you.

25 MR. DOMAN: Thank you, your Honor.

1

THE COURT: You're welcome.

2

(At 2:58 p.m. proceedings conclude)

I certify that this transcript, consisting of 69 pages, is a complete, true, and accurate record of the motion hearing of People versus Dean Terry Meyers and testimony taken in this case as recorded on Wednesday, May 31, 2023.

Date: 6/19/2023

S Burmania

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