

1 calls?

2 A. Yes, sir, I have.

3 Q. Alright, and are you able to get that type of record?

4 A. No, sir.

5 MR. FOGLEMAN: I don't have any further questions.

6 MR. STIDHAM: No questions, Judge.

7 (WITNESS EXCUSED.)

8 MR. DAVIS: Your Honor, at this time the State would
9 rest.

10 THE COURT: Have you got anything additional?

11 MR. STIDHAM: May we approach the bench?

12 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
13 OF THE HEARING OF THE JURY.)

14 MR. STIDHAM: I would prefer we renew our directed
15 verdict motion in chambers right before we do jury
16 instructions.

17 THE COURT: No, you can do it right here. Do you
18 want to add any additional matter not previously covered?

19 MR. STIDHAM: Oh, your Honor, I would like to
20 briefly go through it while -- if we can do that in
21 chambers while we're doing the jury instructions.

22 THE COURT: Well, just a minute. I'll just let the
23 jury go because we're going to have to go over the jury
24 instructions anyway.

25 (RETURN TO OPEN COURT.)

1 THE COURT: Alright, ladies and gentlemen, both
2 sides have rested their case and the testimony is
3 concluded. It's -- I'm getting ready to give you a
4 recess. It's still important that even though both sides
5 have rested their case that you not attempt to discuss
6 the case among yourselves or with anyone until it's
7 finally submitted to you. I'm going to give you a long
8 lunch break -- until one-thirty. And the reason for that
9 is is the Court will have to hear and rule on some
10 motions. I'll have to go over and discuss the jury
11 instructions with the lawyers. I don't anticipate that
12 to take too long, but I want to give them a little bit of
13 time to collect their thoughts because as soon as I read
14 the jury instructions then they'll argue their case. So
15 that's the reason for the two hour lunch break.

16 So, again, you're reminded of the admonition not to
17 discuss the case or allow anyone to attempt to discuss it
18 with you or in your presence. And you may stand in
19 recess until one-thirty.

20 (RECESS.)

21 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE
22 OF THE JURY.)

23 THE COURT: Let the record reflect that this is a
24 hearing out of the presence of the jury.

25 MR. STIDHAM: Your Honor, may I have just a moment,

1 please?

2 THE COURT: Yes.

3 MR. STIDHAM: Your Honor, we would like to -- to
4 renew our Motion for Directed Verdict.

5 THE COURT: Alright, let me make the announcement.
6 I need the door closed out there, please.

7 Let the record reflect that this is a hearing out of
8 the presence of the jury at the close of the case, both
9 the State, and the defendant, and rebuttal.

10 Alright, you may proceed.

11 MR. STIDHAM: Your Honor, again, we would renew our
12 Motion for a Directed Verdict and we would submit that
13 the State has not met its burden of proof with regard to
14 the defendant having committed the offense of capital
15 murder, three counts of capital murder. More
16 specifically, we would submit that there is no evidence
17 that Mr. Misskelley with the premeditated and deliberated
18 purpose of caused the death of another person, caused the
19 death of any of the three victims.

20 Secondly, your Honor, we would submit that the only
21 evidence the State has offered is the defendant -- is the
22 defendant's statements to the police in which if you
23 assume that they are true -- and we say that they're not
24 -- he said that he was only present and that he did not
25 hurt or kill anyone. The Supreme Court has ruled that

1 mere presence at the crime was not sufficient to attach
2 accomplice liability.

3 Your Honor, there's no proof that Mr. Misskelley
4 acted as an accomplice to the capital murders or any
5 homicide or any level of homicide. In order for the
6 State to prove Mr. Misskelley was an accomplice they must
7 show that he aided, assisted, or abetted in committing
8 the offense. Secondly, that Mr. Misskelley himself had
9 the required intent to commit the charge of capital
10 murder.

11 We would respectfully direct the Court to the
12 nineteen ninety-three decision of the Arkansas Supreme
13 Court in Fight versus State. It's cited at 314 Ark. 438,
14 and which provides "Our interpretation of the accomplice
15 liability statute, Five dash, Two dash, Four Oh Three
16 effectuates the policy that an accomplice's liability
17 ought not to extend beyond the criminal purpose that he
18 or she shares. Because accomplice liability holding an
19 individual criminally liable for actions done by another
20 it is important that the prosecution fall squarely within
21 the statute."

22 Your Honor, we would submit that there is nothing
23 that has been introduced by the State against the
24 defendant to suggest that he had the intent to commit any
25 homicidal act or aid or assisted in any homicidal act.

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1 Again, your Honor, we would submit that there's
2 nothing without adding conjecture and speculation that
3 would make Mr. Misskelley an accomplice to this homicide.

4 THE COURT: Is the Fight case the one that involved
5 the loaning of an automobile to a person that---

6 MR. CROW: Yes, your Honor.

7 THE COURT: ---killed a person while -- while
8 intoxicated?

9 MR. CROW: Yes, your Honor, that's the case.

10 THE COURT: Well, I think that---

11 MR. STIDHAM: Your Honor, we would also---

12 THE COURT: ---considerably distinguished from the
13 present facts.

14 MR. STIDHAM: Your Honor, I think there is also some
15 logic that we could direct this way in regard to the
16 Fairchild decision in talking about the intent of an
17 accomplice, and we'd like to bring that to the Court's
18 attention as well, and when we submit our arguments for
19 each level of homicide that we anticipate the Court will
20 instruct the jury on.

21 THE COURT: Well, I think you've pretty well
22 enunciated the same objections at the proper stages
23 previously.

24 Does the State want to make a -- a response for the
25 record?

1 MR. DAVIS: Your Honor, for the record, the mental
2 intent required -- as the Court's well aware that mental
3 intent is something that can only be proved by
4 circumstantial evidence, and in this case basically what
5 the defense is arguing is that there -- the defendant is
6 not a credible individual in that what he said to the
7 police was a lie.

8 But basically what he said to the police that was
9 introduced is that he knew they were going out there to
10 hurt someone the night before, that he went out there,
11 that is clear from the record that at a very minimum --
12 even looking at the evidence in a light most favorable to
13 the defendant -- which is not what the measure is -- that
14 -- that Steven Moore -- or Michael Moore, excuse me --
15 would not be dead but for the defendant's actions in
16 aiding and assisting in bringing him back.

17 In addition to that, there's evidence that there
18 were three weapons used. There was evidence that there
19 was different type injuries caused. There's evidence
20 that a different type of knots on the ligatures which
21 would be consistent with more than one individual, and I
22 certainly think the jury can infer just from the very
23 nature of three eight-year-olds being killed that there
24 was more than one person actively involved in that, and I
25 think all of those things together -- primarily what the

1 defendant has said himself to police officers indicates
2 that he had that mental state necessary to amount to
3 capital murder.

4 THE COURT: Motion for Directed Verdict will be
5 denied. The Court's of the opinion that a jury question
6 has been established.

7 MR. STIDHAM: Thank you, your Honor.

8 THE COURT: Alright, gentlemen, I don't anticipate
9 us having a whole lot of problem on these instructions.
10 Do you want to tackle them now in the back?

11 MR. STIDHAM: I prefer that, your Honor.

12 THE COURT: Well, you know, there was one thing.
13 You and Mr. Crow offered an instruction on the diminished
14 capacity of -- what do we call it -- in capital murder.
15 There's a new statute -- a ninety-three statute -- that
16 where it's an allegation that a person is mentally
17 retarded that that -- that goes -- that goes on the death
18 penalty and only in the punishment phase, but I'm -- I'm
19 raising this now because as I recall, Doctor Wilkins'
20 testimony and the last psychologist that testified each
21 of them testified affirmatively that he was not mentally
22 retarded.

23 MR. STIDHAM: Your Honor---

24 THE COURT: So there is no evidence to the Court
25 that he was mentally retarded.

1 MR. STIDHAM: Your Honor, again, the Arkansas
2 Legislature has promulgated that definition and it is not
3 the same definition as used by -- the clinical
4 definition---

5 THE COURT: Well, we can argue that later, but I'm
6 just voicing my view of the status of the evidence that
7 there is no evidence to suggest that he is other than --
8 at the very worst a borderline functioning individual.

9 MR. CROW: We've used the term -- mostly, mentally
10 deficient. We've tried to stay away from the term,
11 mentally retarded.

12 THE COURT: Well, I think the statute uses the
13 term---

14 MR. CROW: Judge, again, the statute's definition of
15 mentally deficient or retarded is different.

16 MR. STIDHAM: It refers to sub-average general
17 intellectual functioning, and that's different than
18 saying somebody with this particular I. Q. is classified
19 as---

20 THE COURT: --Well, right now there's no testimony
21 to that effect at all other than the hearing that was
22 conducted in Osceola and I recall the testimony from that
23 hearing, but if it's to be submitted to the jury and it
24 may be talking about something right now that may never
25 come up. But if it does come up, I anticipate that

1 you'll have to then redirect that testimony to the jury
2 in the punishment phase.

3 MR. CROW: We fully anticipate that.

4 THE COURT: These are the ones I'm going to give in
5 the first batch and then these are the verdict forms that
6 accompany it. They're exactly like yours with a
7 exception of that one language and I did add Two Oh Two.
8 The only reason I'm using that set rather than yours is
9 because you included manslaughter and I'm not going to
10 give manslaughter.

11 MR. STIDHAM: You are or you're not?

12 THE COURT: Not. I don't think there's any -- any
13 factual scenario at all that I've heard that would
14 justify giving the manslaughter charge as a lesser
15 included.

16 MR. CROW: Your Honor, I have reviewed the
17 instructions which the Court will submit. The objection
18 I have, I have as to the A. M. C. I. Four Oh One,
19 Accomplice Liability, in and of itself it's appropriate
20 if accompanied by another instruction which the Court is
21 refusing, I have no objection.

22 However, without the accompanying instruction I do
23 object and that I will submit my accompanying
24 instruction. The accompanying instruction I would
25 request has been labeled Defense Instruction Number One

1 and proffered as follows: I would also like to proffer
2 it in the alternative, too, your Honor. First off, the
3 proffer I have -- I'm submitting now.

4 An accomplice is criminally responsible for the act
5 of others only to the extent he has a shared criminal
6 purpose with the others. If you ultimately find that
7 Jessie Lloyd Misskelley, Junior was an accomplice you may
8 find him guilty only of a crime you determine that he had
9 a conscious object to engage in or a conscious object to
10 cause such a result. And I've cited the case of Fight
11 versus State. That would be Arkansas cite 314 Ark. 438
12 -- I do not have the Southwest cite. It wasn't on there.

13 THE COURT: Okay. The Court has considered
14 defendant's offered instruction number one and refused it
15 for the following reasons. I believe it's covered by A.
16 M. C. I. Four Oh One. That this is not an approved
17 modification and quoting from the Fight case, the Court
18 there held that if one's purpose was to promote or
19 facilitate the commission of an offense then they were
20 accomplices of that criminal offense, and the Court
21 distinguishes Fight from the present case for the
22 following reasons.

23 In the Fight case the passenger in the automobile
24 was merely a bystander. He did nothing in the operation
25 of the car, did not direct the operation of the car, did

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not in any way -- at least from what the facts report -- influence the operation of the vehicle in any way or any matter, and therefore did nothing whatsoever to aid, assist or promote in the operation of a vehicle that caused the death of an individual. And I would have come to the same conclusion. Had that been the facts in this case there would have been a directed verdict.

MR. CROW: Yes, your Honor.

THE COURT: And so to me that the facts before the Court are entirely different and distinguishable from Fight. In the present case there is testimony -- if it's believed -- from the defendant himself indicating that he knew and had knowledge of and was aware of his accomplices' intent to do harm to some boys -- hurt some boys I believe was the quote -- on the day before. That he then accompanied them -- or went to the location where they were and met with them and at and during the course of the conduct that we're here for, he assisted in holding, retaining, and retrieving one of the young victims -- specifically Moore -- and brought him back after having observed violence being done to the others and those -- those are indications clearly that a jury could find and conclude that the defendant, Jessie Misskelley, was an accomplice and that he did not only agree to aid, but that he had prior knowledge of the

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1 possibility of a person being hurt and, secondly, that he
2 participated in the actual retention of one of the
3 persons who ultimately died. And but for that act that
4 young man may very well have been alive. For that
5 matter, all three of them could have if he escaped to a
6 safe refuge.

7 MR. CROW: Your Honor, if I may respond---

8 THE COURT: For those reasons I'm denying the
9 submission.

10 MR. CROW: If I may respond briefly to that, your
11 Honor?

12 THE COURT: Sure.

13 MR. CROW: Of course, in our directed verdict motion
14 we discussed that. I don't intend to change anything
15 about my directed verdict motion.

16 My contention is this: At this point after the
17 Court's ruling of directed verdict for the sake of
18 argument I will acknowledge what you just stated.

19 However, it is not the -- the jury is not required
20 to find that he had -- those intentions. I think the
21 jury could by -- by his -- by the statements that have
22 been given in testimony earlier could find less. I think
23 the jury is -- it's critical that the jury finds --
24 understands that if they don't find that he had that
25 intention, that he personally had an intention, I don't

1 want the jury confused that the intention of Damien or
2 the intention of Jason was Jessie's intention. Arguably
3 they could find that was -- that he had this intention at
4 all -- up to this point. But I think it's critical that
5 if the jury believes that he -- you know -- if the jury
6 believes the story to some extent but takes the lesser
7 case scenario -- that's what they decide -- they're back
8 in the jury room, your Honor, and they decide, I think
9 the story is somewhat credible. I think he was there. I
10 don't think he intended to do any of this. I don't think
11 he did anything that happened to these boys, but I know
12 Jason and Damien intended, therefore, we are going to
13 find him guilty of capital murder.

14 If that's their thought process, your Honor, I think
15 that's an incorrect statement of what the thought process
16 should be.

17 THE COURT: I think everything you're saying are
18 reasonable inferences that can be argued from the facts
19 and argued to the jury. However, the law on accomplice
20 liability states simply and simply put. We've done away
21 with---

22 MR. CROW: Yes, your Honor.

23 THE COURT: ---accessories before and accessories
24 after the fact and we have one broad statute on
25 accomplice liability and what a jury must find in order

1 to find that one was an accomplice of another in any
2 criminal event is that it was their purpose of promoting
3 or facilitating the commission of any offense. And that
4 they aided, agreed to aid, or attempts to aid the other
5 person in the planning or committing of the offense.

6 So the gravestone of the offense of accomplice
7 liability is the purpose to aid and facilitate---

8 MR. STIDHAM: The offense, your Honor.

9 THE COURT: ---the offense. That's exactly right.

10 MR. CROW: So if the offense is capital murder he
11 has -- he has to have the purpose and aid -- to
12 facilitate capital murder.

13 THE COURT: Well---

14 MR. CROW: If the offense is first degree murder he
15 has to have a purpose to aid or facilitate---

16 THE COURT: Well, I'm not sure that that's an
17 accurate statement. I -- I think that if it can be shown
18 that one's intent -- intends to aid and assist another
19 person in a criminal endeavor and it results in death,
20 that the element of transferred intent applies and that's
21 not something that we normally argue by way of jury
22 instructions to a jury. I mean it's a concept of law
23 that you know and I know---

24 MR. CROW: Yes, your Honor.

25 THE COURT: It's also the concept of a felony murder

1 rule. on the evidence or the weight of the evidence.

2 MR. CROW: That's my response to that, your Honor.
3 I apologize for -- I don't mean to cut you off. proffered

4 THE COURT: Yes. it back to the Court -- on the

5 MR. CROW: Is that if we want to get the transferred
6 intent in -- if you want to say there was a crime going
7 on here and a murder -- and a death resulted, therefore,
8 you're guilty. That's felony murder. The prosecution
9 has not chosen to bring this -- to bring the information
10 in couched in terms of felony murder. He could have
11 chosen to do so. He did not. We would -- we would

12 THE COURT: You know, felony murder used to be the
13 capital murder statute and it would be my finding that
14 there is basically no difference. to manslaughter being

15 MR. FOGLEMAN: Your Honor---

16 THE COURT: The transfer of intent still applies.

17 MR. FOGLEMAN: ---the accomplice liability the record.
18 instruction covers exactly what Mr. Crow's talking about
19 and I don't see what would prevent him from arguing
20 exactly what he's arguing to the Court based on the
21 accomplice instruction.

22 THE COURT: Well, that's what I just said. I said
23 he could argue those and those are reasonable inferences
24 that could be argued, but they're not subject to -- to a
25 specific jury instruction. In fact it would almost be a

1 comment on the evidence -- or the weight of the evidence.

2 Alright, anything else?

3 MR. CROW: Your Honor, we also -- we also proffered
4 -- you know -- I'll get it back to the Court -- on the
5 lesser included offense all the way down to manslaughter
6 and for the -- object to that not being submitted---

7 THE COURT: Are you making a generic objection to
8 manslaughter not being---

9 MR. CROW: No---

10 THE COURT: ---given?

11 MR. CROW: Yes, your Honor. We would -- we would
12 request that manslaughter be given and the statute on
13 manslaughter--- So, your Honor, I didn't say that, I

14 THE COURT: Are you objecting to manslaughter being
15 given?

16 MR. FOGLEMAN: (NODS HEAD.)

17 THE COURT: Can't get the nod. We're on the record.

18 MR. FOGLEMAN: Yes.

19 THE COURT: Okay.

20 MR. STIDHAM: Your Honor, on manslaughter -- a
21 person commits manslaughter if he causes -- that's the
22 wrong one.

23 Okay. He recklessly causes the death of another
24 person. I think possibly the jury could confirm under
25 the circumstances that he didn't know what was going to

1 happen. That maybe he was reckless in bringing the child
2 back if that was the situation. I think he can -- the
3 jury could find that he recklessly caused the death of
4 the child that he was alleged to have brought back.

5 THE COURT: Do you want to respond to that?

6 MR. FOGLEMAN: Your Honor, I thought influence was
7 exhibited. That what he said was untrue.

8 MR. CROW: That's certainly our defense, your Honor.
9 But we have to take into consideration the jury may not
10 chose to believe our defense. I mean---

11 MR. FOGLEMAN: He also said out of his own mouth,
12 your Honor, that he knew they were going to hurt---

13 MR. CROW: No, your Honor, I didn't say that. I
14 said---

15 MR. FOGLEMAN: I didn't say you said that. I said
16 the defendant did.

17 MR. CROW: Your -- as your Honor is well aware that
18 the jury can pick and choose what it chooses to believe.
19 Somebody can believe some evidence and not believe other.
20 That is what it's going to have to do in this case. You
21 can't believe all of the evidence.

22 THE COURT: Well, the evidence to the Court is that
23 if he did anything based on his statement that whatever
24 his conduct was, was certainly intentional and therefore
25 not reckless.

1 Reckless conduct is I guess the fourth level of
2 conduct -- what is that -- knowingly, -- purposely,
3 knowingly -- your Honor.

4 MR. FOGLEMAN: Negligently.

5 THE COURT: ---negligently, and recklessly.

6 MR. FOGLEMAN: Well, then recklessly and then
7 negligently.

8 THE COURT: Okay, reck -- okay.

9 Alright, I just don't see any fact or circumstance
10 that could be interpreted as reckless conduct so I'm not
11 going to give that.

12 MR. CROW: Thank you, your Honor.

13 For the record we would also submit the affirmative
14 defense of capital murder. I recognize that that
15 affirmative defense is normally be submitted only on a
16 felony murder situation, but by the Court's ruling that
17 there's basically no difference between felony -- it's
18 not the transferred intent of doctrine between this
19 capital murder and a felony murder situation, then we
20 would offer the affirmative defense that would be offered
21 in the felony murder situation.

22 THE COURT: Do you object to this instruction on the
23 affirmative defense?

24 MR. FOGLEMAN: Yes, that's not applicable unless we
25 have charged felony murder. We have not charged felony

1 murder. or -- once I start reading the jury instructions,

2 I don't. MR. CROW: I acknowledge they have not charged first
3 felony murder, your Honor. anybody wants to come in they'd

4 better. MR. FOGLEMAN: It's only applicable to felony
5 murder. right, Court will be in session.

6 THE COURT: Well, you've charged strictly that he
7 was an accomplice in the commission of capital murder, he
8 first degree murder, or second degree murder. been

9 MR. FOGLEMAN: Right. Premeditated. to take a copy

10 THE COURT: One of the elements of this affirmative
11 defense is that he did not counsel or aid in its
12 commission. And I think the facts of this case -- again,
13 if his statement is believed is that he did just exactly
14 that. thing. I hope I don't, but if I do, you do have a

15 copy MR. CROW: Well, your Honor, I understand---

16 THE COURT: He counseled with and he aided. to do

17 before MR. CROW: I understand that that's something the
18 jury could get from the facts, but, again, your Honor,
19 we're talking about jury instructions. We're not -- this
20 is not the worst -- we're not looking at this like we did
21 the directed verdict from a most favorable benefit to the
22 State. id to the administration of justice. It is my

23 duty THE COURT: I'm not going to give it. applicable to this

24 case MR. STIDHAM: Thank you, your Honor. accept and

25 follow THE COURT: Tell him after I start reading -- at the

1 back door -- once I start reading the jury instructions,
2 I don't want anybody going in and out. I probably ought
3 to announce out there if anybody wants to come in they'd
4 better do it now. I didn't think to tell you that.

5 Alright, Court will be in session.

6 Alright, ladies and gentlemen, I'm about to read to
7 you the instructions of law that you are to apply to the
8 facts that you've heard in this case. They've been
9 reduced to written form and you'll be able to take a copy
10 of the instructions to the jury room with you and they
11 should answer your questions on point of law. I'll
12 attempt to read them where you can understand them.
13 Obviously, I might read them too fast, or stumble over
14 something. I hope I don't, but if I do, you do have a
15 copy in the jury room to refer to.

16 Was there anything else you gentlemen need to do
17 before I proceeded reading the instructions?

18 MR. DAVIS: No, sir.

19 MR. STIDHAM: No, sir.

20 THE COURT: Alright.

21 The faithful performance of your duties as jurors is
22 essential to the administration of justice. It is my
23 duty as judge to inform you of the law applicable to this
24 case by instruction and it is your duty to accept and
25 follow them as a whole, not singling out one instruction