

1 what he didn't do. I will trust you to come back with
2 the proper verdict. Thank you.

3 MR. FOGLEMAN: Was there a circumstantial evidence
4 instruction?

5 THE COURT: No. There should have been but I don't
6 remember giving it.

7 MR. FOGLEMAN: Ladies and gentlemen---

8 THE COURT: Approach the bench.

9 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
10 OF THE HEARING OF THE JURY.)

11 THE COURT: I didn't give it, but I don't know
12 whether it would be inappropriate at this time. Is it
13 circumstantial evidence? I probably should have given
14 it but nobody requested it.

15 MR. DAVIS: We would request it if it was not given.

16 THE COURT: Did I give it? Do you remember?

17 MR. DAVIS: No, you did not, your Honor. I know.

18 THE COURT: Well, in this case it sure should have
19 been given.

20 MR. DAVIS: We had it prepared.

21 MR. CROW: They didn't offer it.

22 THE COURT: I didn't read it. Alright, I think it's
23 probably appropriate at this time for me to read it.

24 MR. CROW: I would object since it wasn't in the
25 original, your Honor---

1 MR. STIDHAM: We're talking about punishment.

2 MR. FOGLEMAN: Your Honor, part of their argument is
3 what he did or didn't do. They're now arguing what he
4 did or didn't do.

5 MR. STIDHAM: We've maintained throughout the course
6 of the trial that he didn't do anything. Now we're in
7 the punishment phase---

8 THE COURT: Well, they've heard the facts already
9 and now -- but they're going to have to consider the
10 facts again. This should have been read initially. I
11 didn't realize I hadn't done it.

12 If you're objecting to it though, I won't give it.

13 MR. STIDHAM: Well, we object, your Honor.

14 THE COURT: Alright.

15 (RETURN TO OPEN COURT.)

16 MR. DAVIS: It's almost over for you all and in
17 about a month it'll be over for me. The Moores, and the
18 Branches, and the Byers, it's not ever going to be over.
19 What this is talking about is responsibility. You heard
20 the defendant's own expert say, Warren Holmes, that it is
21 common, it's usual for a person who confesses to a crime
22 to lessen their involvement. You are not restricted to
23 what this defendant says that he did. You're entitled to
24 look at the evidence -- all of the evidence -- the number
25 of weapons, all of the circumstances, the type of knots,

1 and decide that he was more involved than what he said he
2 was.

3 If we did not have -- if we didn't have a
4 confession, let's say, we didn't have a confession,
5 instead all you had -- all you had was a fingerprint of
6 this defendant on Michael Moore's arm. Would you say,
7 "Well, oh my gosh, we don't know exactly what he did."?
8 No. I would submit to you that you would be entitled
9 from all of the evidence in the case, every bit of the
10 evidence, to look at the evidence and draw your -- a
11 reasonable conclusion from that evidence as to what this
12 defendant did.

13 Now, we know -- we know from this defendant's own
14 mouth in the interview before he admitted being there
15 that he had a phone call the day before from Jason
16 Baldwin saying that they were going -- their intention
17 was to go and beat up some boys. He went there knowing
18 that was the intention. They went there and they did it.

19 He referred to his -- his -- his borderline I. Q.
20 He's not retarded. He is not retarded. You've got the
21 picture of the real defendant. That's not something that
22 we're showing in trying to make you made at him or angry
23 at him or prejudice you against him. It's to show you
24 that what you see is not necessarily what you get when
25 you look at this defendant. It's not necessarily what

1 you get. What you see is not -- you can't always take
2 everything at face value and the expert testified that
3 this defendant -- how did he function? Not as for as
4 book learning, but how did he function? Do you remember
5 the testimony? He says that he functions on an average
6 level -- his performance I. Q. -- how he functions.
7 Apart from verbal things and book learning things, he
8 functions on an average level.

9 When you go back there and you consider the
10 punishment, there are a number of things to consider.
11 The punishment that was served to deter this defendant
12 from doing something like this again. And even more
13 importantly, what effect will your verdict have on other
14 people who might engage in similar type behavior? Is it
15 going to be a message that "Well, it's a bad thing, but
16 it's not so bad?" I don't believe you all could find
17 that way.

18 In this case Michael Moore, he won't ever go to
19 Scouts again. Stevie Branch and Chris Byers and Michael,
20 they won't play ball. They won't play basketball. They
21 won't play baseball. They won't grow up. Their lives
22 are gone. But your verdict -- it can't -- it can't bring
23 them back. Nothing you do can bring them back and
24 really, honestly, when you look at it, nothing you do is
25 going to make the families feel all that much better. It

1 might make them feel good for a minute if you gave him
2 the maximum, but it's not to -- in the long time, it's
3 not going to make that much difference. But what can
4 your verdict do? It can stop this kind of junk. It can
5 stop these kids doing these stupid, crazy things and it
6 can put an end to it. And that's what we're asking you
7 to do.

8 THE COURT: Alright, ladies and gentlemen, you may
9 now retire to the jury room to consider your verdicts
10 with regard to punishment and I'll read those verdict
11 forms for you. The first reads:

12 "We, the jury having found Jessie Lloyd Misskelley,
13 Junior guilty of first degree murder in the death of
14 Michael Moore fix his sentence at a term of" -- with a
15 blank that you would complete -- "not less than ten nor
16 more than forty years or life in the Arkansas Department
17 of Correction" with a signature space for the foreman.

18 You must unanimously agree upon the punishment that
19 you complete in the blank. And whatever your unanimous
20 **finding is** should be reflected in the blank provided and
21 **then** the foreman would sign. The next verdict form reads
22 **as follows:**

23 "We, the jury having found Jessie Lloyd Misskelley,
24 Junior guilty of second degree murder in the death of
25 Steven Branch fix his sentence at" -- you have three

1 alternatives, A, B, and C -- "A, a term of" -- a blank --
2 "not less than five nor more than twenty years in the
3 Arkansas Department of Correction" or "B, a fine of" --
4 with an appropriate blank -- "not exceeding Fifteen
5 Thousand Dollars" or "C, both a term of not less than
6 five nor more than twenty years in the Arkansas
7 Department of Correction and a fine not exceeding Fifteen
8 Thousand Dollars" -- again, with the appropriate blank.

9 In order to fix any punishment your finding must be
10 unanimous and you would fill in the appropriate blanks
11 that represent your finding and the foreman would sign.
12 The third verdict form reads identically to the last with
13 the exception that this is for Count Three in the death
14 of Christopher Byers on the second degree murder charge.

15 So you may now retire and consider your verdicts
16 with respect to punishment.

17 Alright, Court will be in temporary recess.

18 (JURY EXITING COURTROOM AT 2:00 P. M.)

19 (JURY ENTERING COURTROOM AT 2:30 P. M.)

20 **THE COURT:** Alright, ladies and gentlemen, have you
21 arrived at a verdict or verdicts, Mr. Foreman?

22 **FOREMAN:** Yes.

23 **THE COURT:** Alright, if you would hand it to the
24 Sheriff, please -- or hand them to the Sheriff.

25 **FOREMAN:** (COMPLIES.)