

1 arrested?

2 A Exactly. To protect me.

3 Q To protect you from a prowler?

4 A From a prowler.

5 REDIRECT EXAMINATION

6 BY MR. FOGLEMAN:

7 Q This Delta situation -- were you ever charged?

8 A No, I was not.

9 Q In fact the day that you were in Mr. Bray's office -- is
10 that the day -- which day was that in relation to when the boys
11 --

12 A The boys were still missing at the time I was sitting in
13 his office, and he asked me -- I was obviously upset, and he
14 asked me why I was upset.

15 Q It was the day the boys were found?

16 A Yes, they were found Thursday.

17 Q It was that same day?

18 A Yes.

19 (WITNESS EXCUSED)

20 MELISSA BYERS

21 having been previously duly sworn to speak the truth, the whole
22 truth and nothing but the truth, then further testified as
23 follows:

24 REDIRECT EXAMINATION

25 BY MR. FOGLEMAN:

1 Q You are the same Melissa Byers that has previously
2 testified?

3 A Yes, sir.

4 Q I want to direct your attention to an incident that
5 occurred in February --

6 MR. CROW: Your Honor, may we approach the bench?

7 (THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH
8 OUT OF THE HEARING OF THE JURY)

9 MR. CROW: Your Honor, previously the Court ruled
10 that the parents would stay out of the courtroom until
11 they testified and then let them stay. She's been in
12 the courtroom ever since.

13 THE COURT: There is a specific statute that the
14 victims' family are permitted to be in the courtroom
15 --

16 MR. CROW: The Court excluded her.

17 THE COURT: I excluded her until her testimony in
18 chief but I then let her back in, and the statute
19 provides that you can so I'm waiving the rule in that
20 regard.

21 MR. STIDHAM: I anticipate that she's going to
22 testify about a photograph that someone may have taken
23 of her child.

24 THE COURT: I don't have any idea. Are you
25 objecting?

1 MR. STIDHAM: Yes, your Honor.

2 MR. FOGLEMAN: What it is, is that about --
3 sometime between the middle of March and the middle of
4 February the Byers say that they went to the store,
5 were gone about 15, 20 minutes, came home and their
6 son Chris says, "Somebody was taking my picture."

7 He described him as having black hair and all
8 black clothes and matches Damien's description.
9 Jessie said in his statement about the picture of the
10 boys.

11 THE COURT: What is your objection?

12 MR. STIDHAM: She cannot specifically identify
13 this person and this is something that is going to be
14 highly prejudicial.

15 MR. CROW: Your Honor, Jessie's statement --
16 that's what they're relating it to -- that's the
17 relevance -- it was three boys not just one picture of
18 one boy.

19 MR. FOGLEMAN: The kid didn't say who all was
20 present. He said they took a picture.

21 MR. CROW: Then that's all they've got, your
22 Honor --

23 MR. STIDHAM: There's a lot of speculation and
24 stuff --

25 THE COURT: I'm going to overrule the objection.

1 (RETURN TO OPEN COURT)

2 BY MR. FOGLEMAN:

3 O I want to direct your attention back to mid-February to
4 mid-March. Was there an incident about a picture involving your
5 son, a photograph --

6 MR. CROW: One more objection, your Honor. I'm
7 sorry.

8 (THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH
9 OUT OF THE HEARING OF THE JURY)

10 MR. CROW: This is hearsay, your Honor.

11 MR. FOGLEMAN: Your Honor, it meets Rule 824 --
12 present sense impression.

13 MR. CROW: Fifteen, twenty minutes later?

14 MR. STIDHAM: That's obviously hearsay.

15 MR. FOGLEMAN: Let me get the rule here. Eight
16 oh three one, your Honor, present sense impression
17 about a declarant explaining an event immediately
18 after the event.

19 MR. CROW: It was fifteen or twenty minutes.

20 MR. FOGLEMAN: As soon as they got back from the
21 store he runs up.

22 MR. CROW: If they are gone fifteen minutes, it
23 doesn't matter.

24 MR. STIDHAM: Keep in mind this is a young child
25 saying this stuff.

1 THE COURT: I don't think it qualifies as a
2 present sense --

3 MR. FOGLEMAN: Your Honor, it says, "made while
4 perceiving an event or immediately thereafter." They
5 come back --

6 THE COURT: It is usually the old concept of res
7 gestae, an event involving a crime or the
8 circumstances immediately thereafter. That is where
9 the present sense impression exception came into
10 being, circumstances involving the crime itself.

11 MR. FOGLEMAN: Can we -- it may qualify as an
12 excited utterance. The kid runs up --

13 THE COURT: That is usually contemporaneous with
14 the --

15 MR. FOGLEMAN: It is while he's under the stress,
16 stress and excitement, your Honor. "Hey, this guy is
17 taking my picture."

18 MR. DAVIS: The way she testifies preliminarily
19 is going to gauge whether it fits or not.

20 MR. FOGLEMAN: Do you want us to make a proffer
21 and see -- out of the presence of the jury?

22 THE COURT: Yeah.

23 (RETURN TO OPEN COURT)

24 THE COURT: I need the jury to step back into the
25 jury room while the Court conducts a hearing. Again,

1 you're not to discuss the case.

2 (JURY LEAVING THE COURTROOM AT THIS TIME)

3 THE COURT: All right, let the record reflect
4 that this is a proffer of proof outside the hearing of
5 the jury.

6 PROFFER OF PROOF

7 BY MR. FOGLEMAN:

8 Q Directing your attention to the last of February or the
9 first part of March of 1993, was there an incident involving
10 your son where he said something about a picture being taken of
11 him?

12 A Yes, he told us a man had taken a picture of him.

13 Q Explain the circumstances of that, where you had been and
14 how long you had been gone.

15 A My other son Ryan was home and I needed some milk and
16 cigarettes so there's a little corner store right down Barton.
17 It's about two blocks from my house.

18 So Ryan was upstairs in his room. Chris was playing in the
19 carport, and I said, "I need to run to the store right quick."

20 So I left Chris at home. Ryan was there with him. Me and
21 my husband jumped in the car, ran down to the corner store,
22 bought cigarettes and milk and came right back.

23 When we pulled up in the carport, Chris come running out of
24 the house, and he said, "Mama, there was a man here and he took
25 a picture of me."

1 I said, "What do you mean, took a picture of you?"

2 He said, "He pulled up in the driveway and he scared me so
3 I ran out in the yard so I could get away from him, and he took
4 a picture of me."

5 And I said, "What did the man look like?"

6 He said, "He had black hair. He had on a black coat, black
7 shirt, black pants and black shoes, and he drove a green car."

8 The way he described it to me -- he was only an
9 eight-year-old child -- the way he described it to me was like a
10 suit, a man in a suit. That's what I thought -- a man in a
11 suit, you know, and I didn't go any further than that.

12 Q When he ran out of the house, I mean --

13 A He was under the carport playing.

14 Q Well, when he ran out of the house to tell y'all is what
15 I'm talking about. What --

16 A He had ran back into the house and had locked the door.

17 Q Okay. And when he ran out to tell you about this, what was
18 his demeanor?

19 A He was excited. He was frightened. And Ryan was upstairs
20 and, of course, supposed to be watching his baby brother.

21 MR. FOGLEMAN: That's our proffer, your Honor.

22 THE COURT: Any cross examination?

23 MR. STIDHAM: No, your Honor. We'd just like to
24 renew our objection as to relevancy and hearsay.

25 THE COURT: As far as relevancy, I wouldn't have

1 any problem in ruling and finding that the evidence is
2 relevant.

3 MR. STIDHAM: We'd also argue that its
4 prejudicial effect outweighs any probative value. She
5 can't say who it was for sure, and the inference is
6 very prejudicial.

7 MR. FOGLEMAN: Your Honor, in Mr. Hall's book he
8 says that, "The interval between the statement and an
9 event is governed by the particular circumstances of
10 each case. The trend is toward expansion of the time
11 interval after an exciting event. Some courts are
12 more liberal in expanding the time period following an
13 exciting event when the declarant is a child."

14 In this one it says, "The morning after the event
15 is sufficient where the declarant was three years
16 old." The statement next day is admissible in this
17 *Coe versus State*, but four days later is not. "A
18 relaxed standard for young victims is appropriate."

19 THE COURT: We have eight oh three twenty-five
20 that goes to sexual contact of a child, which is an
21 exception to the hearsay rule.

22 I'm not sure it is quite applicable, but it is
23 somewhat analogous.

24 MR. FOGLEMAN: Your Honor, here's another one
25 under -- that was under excited utterance. Under

1 present sense impression Mr. Hall refers to Tucker
2 versus State where it talks about the primary
3 justification is spontaneity -- "Spontaneous statement
4 is seen as reliable since there's not been time to
5 fabricate or misrepresent. It doesn't require that
6 the event be startling, but the statement must be
7 immediate to the event." And then it says, "Immediacy
8 is not present when identification is made three days
9 after a robbery."

10 We're talking about the people go to the store,
11 come back and the child tells --

12 THE COURT: My understanding of that rule
13 previous to this is that the observation or the
14 experience that would cause an excited utterance or
15 present sense impression usually were those events
16 that occurred simultaneous to or in conjunction with a
17 crime or the event itself, part of the res gestae of
18 it, in close proximity to the event that is the
19 subject matter of the trial, but I'm not sure that
20 that's completely accurate.

21 MR. FOGLEMAN: Your Honor, the rule doesn't say
22 that.

23 THE COURT: That's what I'm saying. It could
24 very well be some other event that in itself has
25 independent relevancy to the crime itself.

1 Do you want something in the record other than
2 your objection as to hearsay?

3 MR. CROW: Your Honor, the child was no longer --
4 if the child was ever in danger. He had already been
5 inside the house. That part of the excitement's over.
6 He came out to tell mom and dad what happened. That's
7 the whole purpose of the hearsay rule is that we can't
8 cross examine. We can't bring out --

9 THE COURT: The exception is that the declarant
10 is not available. Obviously the declarant is not
11 available.

12 MR. CROW: That's why it has to be limited in
13 scope.

14 THE COURT: The issue is not whether or not there
15 was any danger at all, but the issue is whether or not
16 contemporaneous to that event, the photograph taking,
17 or very shortly thereafter he made that statement.
18 That is the question and whether or not that alone if
19 it has independent relevancy, which I am ruling it
20 does, based upon the testimony of Inspector Gitchell
21 from the statement of the accused. There was some
22 reference to a briefcase and photographs. So it has
23 relevance.

24 I'm going to rule that it's admissible, if not as
25 a present sense impression or excited utterance, that

1 it falls under the gamut of eight oh three twenty-four
2 in that the statement is more probative on the point
3 for which it's offered than any other evidence which
4 the proponent could procure through reasonable efforts
5 and that the interest of justice allows it.

6 MR. CROW: Your Honor, on that basis I would
7 strenuously point out that the statement talks about
8 one photograph of three boys. That is not what this
9 is about.

10 THE COURT: That is again a point of argument.

11 MR. CROW: I understand that, your Honor --

12 (THE COURT AND MR. CROW SPEAKING AT THE SAME TIME

13 UNINTELLIGIBLE)

14 THE COURT: You both can argue that --

15 MR. CROW: -- twenty-four argument. I think
16 that's more apropos.

17 THE COURT: The only question I've got is you
18 were aware of this potential testimony and that had
19 been made known to you prior to today?

20 MR. STIDHAM: Yes, your Honor, but its
21 reliability was certainly an issue.

22 THE COURT: I'm going to rule that it's an
23 exception to the hearsay rule, either eight oh three
24 one or two or eight oh three twenty-four.

25 (JURY RETURNING TO THE COURTROOM)

1 (RETURN TO OPEN COURT)

2 CONTINUED REDIRECT EXAMINATION

3 BY MR. FOGLEMAN:

4 Q Miss Byers, directing your attention to the end of February
5 or early part of March of 1993, was there an incident where your
6 child Chris said something about his photograph being taken?

7 A Yes, sir. He told us that a man had pulled up in the
8 driveway and had taken a picture of him.

9 Q Tell the jury the circumstances about where you had been
10 and that kind of thing.

11 A My older child Ryan was home and Chris was playing on the
12 carport. Ryan was upstairs in his bedroom. I needed milk and
13 cigarettes so me and my husband jumped in the car. There's a
14 little corner grocery that is like two blocks from the house.
15 Chris was busy and playing. We left him playing on the carport.
16 Ryan was in the house upstairs in his bedroom. Ran down to the
17 corner grocery. Got a gallon of milk and two packs of
18 cigarettes and ran right back to the house. We weren't gone
19 fifteen minutes.

20 When I came pulling up in the driveway, Chris came running
21 out of the door. He said, "Mommy, there was a man here and he
22 took a picture of me." I said, "What did the man look like?"
23 He said, "He had on a black coat, black pants, black shoes and a
24 black shirt and he was in a green car."

25 Q Did he say anything about his hair?

1 A He said he had black hair.

2 (WITNESS EXCUSED)

3 MR. FOGLEMAN: We call Glen Massengale.

4 Your Honor, I think we're going to have a
5 stipulation about this. I want to make sure what
6 exhibits I need to get a stipulation on.

7 (THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH
8 OUT OF THE HEARING OF THE JURY)

9 MR. STIDHAM: Your Honor, I don't want to make a
10 big deal about stipulating to the chain of custody.
11 We just don't want to require him to call the officer
12 --

13 MR. FOGLEMAN: Well, I think for the record we'll
14 need a stipulation. Well, I'll just put him on.

15 MR. CROW: We don't mind stipulating for the
16 record that there's no chain of custody problem.

17 MR. DAVIS: You can do that at the bench.

18 THE COURT: Yes, if you are stipulating that you
19 waive any objection to the chain of custody, then he
20 might be able to eliminate witnesses if that's what
21 you want to do.

22 MR. CROW: Yes, your Honor.

23 THE COURT: It may be so stipulated.

24 MR. FOGLEMAN: We call Bryn Ridge.

25 BRYN RIDGE