NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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| STATE OF NORTH CAROLINA | ) | |
| | ) | BUNCOMBE COUNTY |
| versus | ) | |
| | ) | 18 CRS 92442 |
| KAGAN FRANSWARD WILLIAMS | ) | 21 CRS 331 |

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TRANSCRIPT, Volume 1 of 6
Pages 1 - 33
October 25, 2021, Session

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Monday, October 25, 2021

Honorable Jacqueline D. Grant, Judge Presiding

Jury Trial

APPEARANCES:

For the State:
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For the Defendant:
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I N D E X

(*Proceedings commencing at 2:45 p.m.*)

**MS. BROUGHTON:** Your Honor, calling the Court's attention to State versus Kagan Fransward Williams. This matter is number two on the trial calendar. We're here for motions, Your Honor.

**THE COURT:** All righty. Let me take a look here at some of the motions real quickly.

All right. Looks like we have a couple motions to consider, so I will let -- it looks like all of these are the defendant's motion.

Does the State have any motions?

**MS. BROUGHTON:** Yes, Your Honor. I filed them in early September, and actually the vast majority of them correspond to an objection filed by the defense counsel. So, for example, you'll see a motion to join, defense counsel's objection to that motion.

**THE COURT:** Okay.

**MR. EDNEY:** Judge, before we begin, can I look at the court files? I want to look at the indictments. I actually haven't seen them.

**THE COURT:** I'm looking for myself right now and then I'll hand it over to you.

**MS. BROUGHTON:** There's two different file numbers, 18 CRS 92442, which is an assault by strangulation, and then a subsequent 21 CRS 00331.

**THE COURT:** Hmm-hmm.

(*Counsel reviews file.*)

**THE COURT:** Let's start with the defendant's motion to dismiss.

**MR. EDNEY:** If I can approach, Your Honor. I did a little index for our motions. And as to the motion to dismiss, there's the one case I cite, and it's under tab 2.

**THE COURT:** And so when you say that the -- this 2018 case stated it indicted the defendant for assault by strangulation, and are you saying that the plea offer -- a plea offer was made in this case to which you objected, and then I guess I'm trying to figure out are you saying that the 2021 charge is -- was filed inappropriately and -- I'm just trying to --

**MR. EDNEY:** The occurrence date is December of 2018. The 2018 case was indicted July 2020. At some time prior to August 30th of 2021, the State offered a plea to the defendant. The defendant exercised his constitutional right and rejected that plea.

Based on that rejection, the State indicted the attempted forcible second-degree rape on August 30th, 2021, basically because he refused to accept the plea.

Subsequent to that, there was a plea offer that if he will plead to the 2018 case, the State would dismiss the 2021 case.

Basically, Judge, I think the Court of Appeals and the Supreme Court have come to the point and conclusion that the State can't do that. They have done it for probably a thousand years, a hundred years, whatever, with these charges. Probably most of the time they file the charges together contemporaneously in the beginning. And in this case, I think, we have a more clearcut case of the presumption against the State because of the timing.

It's a 2018 case that was run through the system in their order and indicted in July of 2020. Because of these other circumstances, they come back in August of '21 with a much more serious charge. So I think that creates the presumption against the State, and based on that and based on the case in front of Your Honor, it should be dismissed.

**THE COURT:** Okay. What is the State's response to the defendant's motion to dismiss?

**MS. BROUGHTON:** The case that Mr. Edney presented is completely irrelevant and does not apply in this particular case.

So the allegation is against me specifically that I am engaging in vindictive prosecution.

The case that was presented was shallow. It actually arises out of Henderson County. In that particular case, the defendant in one case managed to overcome some

conviction, so then he was tried again for a greater charge. Something happened in that particular case which led yet on an even greater charge. So every single time he managed to either get through a case for a procedural issue, the State doubled down and went to an even greater number.

The cases that actually are on point -- may I approach, Your Honor?

**THE COURT:** Yes, ma'am.

**MS. BROUGHTON:** So all the cases that are cited in the motion and actually handed up are post-conviction remedies. So what we're actually talking about here is what happens prior to a conviction.

So, first of all, the defendant is not entitled to a plea offer. I don't think there's any particular argument about that. So if we look at the case of Bordenkircher versus Hayes. That's a 1978 case, and it seems to be the case that is on point, and I have highlighted the appropriate parts. They actually start on page 8 of 15.

So the Supreme Court of the United States says, "In those cases," which is actually referring directly to the cases that defense counsel has shown the Court, "In those cases, the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction, a situation which the Supreme Court says is very

different from the give and take negotiation common in plea bargaining between the prosecution and the defense, which arguably possesses relatively legal bargaining power. The Court emphasized that due process violation in cases such as Pearce and Perry lay not in the possibility that the defendant might be deterred from the exercise of a legal right, but rather in danger that the State might be retaliating against the accused for lawfully attacking his conviction."

Obviously we don't have a conviction here. "But in the give and take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. Plea bargaining flows from mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial."

"Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process."

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable and permissible attribute of any legitimate system which tolerates and encourages negotiation of pleas."

"It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."

And a little bit further down, "To hold that the prosecutor's desire to induce a guilty plea is an unjustifiable standard, which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge, which would drive the practice of plea bargaining back into the shadows."

So that's the case that's on point. Following that, we have United States versus Goodwin, which is just three years -- four years later. It's a 1982 case. And it's even more clear where the U.S. Supreme Court states,

"We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause."

"The outcome in Bordenkircher," which is the case I just cited, "was mandated by this Court's acceptance of plea negotiation as a legitimate process. In declining to apply a presumption of vindictiveness, the Court recognized that additional charges obtained by a prosecutor could not necessarily be characterized as impermissible penalty. Since charges brought in an original indictment may be abandoned by the prosecutor in the course of a plea negotiation - in often" -- "what is in the context of a plea negotiation are an inaccurate measure of improper prosecutorial vindictiveness. An initial indictment - from which the prosecutor embarks on a course of plea negotiation - does not necessarily define the extent of legitimate interest in prosecution. For just as a prosecutor may forego legitimate charges already brought in an effort to save time and expense for trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to a lesser charge proves unfounded."

And the Court goes on -- I'm not going to read

that out loud, but the Court patently states that a presumption of vindictiveness is not appropriate in pretrial negotiations.

So, North Carolina -- in State versus Ford, which is a 2000 case, actually relies on both of the cases that I handed up. In that particular case, the State says on page 6 of 9, "Prior to trial, defendant moved to dismiss the charge of first degree sexual offense on the basis of prosecutorial vindictiveness, which was denied by the trial court. Defendant contends that the trial court's denial of his motion was error. Defendant was initially charged with taking indecent liberties with a child."

"When plea negotiations broke down, the defendant was additionally indicted for first degree sexual offense. In denying the defendant's motion at trial, the Court relied on Bordenkircher/Hayes and Goodwin," which are the cases that I handed up.

"An initial indictment from which the prosecutor embarks on a course of plea negotiation does not necessarily define the extent of legitimate interest in prosecution. For just as a prosecutor may forego legitimate charges, a prosecutor may file additional charges if an initial expectation" -- so it's the same language as the previous case.

Here, the decision to charge the defendant with

first degree sexual offense was made before trial on the present charge. "The defendant argues that since the State's indictment for first degree sexual offense was added only after plea negotiations broke down, a showing of vindictiveness was made."

"The State contends that elements of first degree sexual offense have always been present and denies the failure to negotiate a plea played a part in the State. To presume that every case is a complete" -- excuse me, "is complete at the time an initial charge is filed is to presume that every prosecutor is infallible, an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources."

"Additionally, it must be remembered that nothing else appearing, a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. Finding Goodwin controlling, the defendant's assertions, without more, do not establish a showing of prosecutorial vindictiveness."

So both of the United States Supreme Court and North Carolina have adopted this rule that pretrial negotiations, however harsh, do not arise to vindictiveness, coercion.

But for the Court's information, Mr. Edney is actually this defendant's fourth attorney. The first one

was Ms. Allison, who's with the Public Defender's office. She had to recuse herself for a conflict.

Then it was Mr. Sigmon. I don't actually remember why he had to get out. Then it was Mr. Dow. He was fired. And now we have Mr. Edney.

So much of the time spent in this case was spent simply making sure that all the attorneys had the discovery. The defendant wasn't, I believe, indicted out of District Court until last year, last July, so we're looking at about a year. The majority of which was dealt with COVID. Four different attorneys.

I do not actually begin in earnest to meet with witnesses, to talk to Mr. Dow, until earlier this summer. And after I met with the victim and reviewed the evidence in earnest, it became very, very clear to me that the initial charge, which was issued by an officer who is being trained, not even a detective, that the appropriate charge would be the attempted second-degree rape.

I consulted with members of my office. And I sent Mr. Dow an e-mail on August 19th that said, "Please find an amended Transcript of Plea for defendant Kagan Williams. If Mr. Williams executes this plea transcript by next Friday," which would have been August the 28th, "and the plea is entered the following week, the State will decline to indict the defendant on the charges of attempted second-degree

forcible rape and sexual battery, which, in addition to a lengthier prison sentence, will require registration. The State intends to proceed on the added charge." We actually were at a trial point at that point. "Please assure Mr. Williams that the victim has been cooperative with my office, and we are taking steps to locate Zoe Chestnut," who is another witness.

I followed up on Friday the 27th, indicating to him that, "As you know, I am submitting an indictment for attempted second-degree rape to the Grand Jury. If they return a true bill, I won't object if you want to have Mr. Williams turn himself in on the warrant, I will not be asking for any additional bond." So I think that this undercuts any finding of vindictiveness.

And then we started talking about how the victim was understandably terrified of the defendant, and that I was asking him to speak to his client about that.

So, Your Honor, the timing I agree is lengthy, but I believe that, first of all, there's no presumption of vindictiveness. The cases are very clear about that. The timing is fully explainable, and I can give the Court a synopsis of the facts which will explain that the defendant -- excuse me, that the additional charge is very clearly supported by probable cause for both charges.

And I would further note that, you know, at that

point it looks like I was also considering sexual battery, which I did not appear -- excuse me, I did not proceed on. I don't hear the defendant clamoring to have that charge added on on all these charges, so I think the defendant wants to have it both ways.

There's probable cause. There is no vindictiveness. I would ask the Court to deny this motion in its entirety.

**THE COURT:** Okay. Mr. Edney, what's your response? It does appear that the cases submitted by the State regarding pretrial additional charges is directly on point, and it does appear that the State also notified Mr. Williams' counsel at the time that they had reviewed and saw there were actual elements and probable cause to support the attempted second-degree forcible rape.

What is the defendant's response to the State's argument, if any?

**MR. EDNEY:** Obviously, given time, I can pick apart some of the different factual situations, but you can do that in many cases.

Bottom line, though, we're charged with an offense we're told to plead guilty to it. We say, "No." They say plead guilty or else. And we say, "No." So they do the "or else." So if we did plead guilty to it, there's no court in the country that could find that as a freely,

voluntarily-made plea, because it's made under the coercion of additional charges.

**THE COURT:** Okay. The Court does find the Bordenkircher versus Hayes, the United States versus Goodwin, and State versus Ford to be directly on point and controlling. The Court will deny the defendant's motion to dismiss.

I believe the next motion is the defendant's objection to joinder of the two cases for trial. The Court will hear the defendant on that motion.

**MR. EDNEY:** Well, Judge, the State has made the motion to join, and obviously the facts are what the facts are. They're alleged all to have occurred on the same date, so I can't go anywhere with that.

As has been pointed out, I'm the fourth lawyer in it. I've been in it about a month. These are serious, serious charges. I would ask, Your Honor, just as a matter of due process and the right to effective assistance of counsel to proceed on the 2018 case, and we'll do the other cases when I've had more time to prepare.

**THE COURT:** And just to be clear, the facts for the 2018 and 2021 case are the same; correct? They arrive out of the same incident, the exact same facts. You're just talking about two different charges, one being the assault by strangulation, and the other one attempted second-degree

forcible rape.

**MR. EDNEY:** That's correct.

**THE COURT:** So with regards to -- and considering that the -- I did notice that the defendant has went through several attorneys, and for some of these I don't see that there was a reason provided, other than there was a request to change counsel. And so considering that the defendant has been -- the defendant has been represented, it looks like, by three prior attorneys. And the defendant, it looks like, in these is simply the defendant and counsel are unable to have a meeting of the minds.

I'm not going to allow the defendant to drag these cases out by just changing lawyers. So the Court is going to deny the defendant's motion objecting to joinder. And the State's motion to join the two will be granted.

**MS. BROUGHTON:** Your Honor, just to ensure that the Court has all the information. Defense counsel actually withdrew -- the first defense counsel actually withdrew for a conflict, so certainly I wouldn't impute that to the defendant.

**THE COURT:** Okay.

**MS. BROUGHTON:** Beyond that, I'm not entirely sure. I actually do believe that Justin Sigmon, the second attorney, likewise withdrew. I'm not sure of the reason, but I just wanted to ensure the Court knew that at least the

very first attorney, that withdraw should not be imputed to the defendant.

**THE COURT:** Okay.

**MR. EDNEY:** And just so we're not dragging things out, the case was indicted two months ago.

**MS. BROUGHTON:** Before Mr. Edney became part of the case, yes.

**THE COURT:** And I'm just looking at Mr. Sigmon's motion and order to withdraw that was entered February 2nd of this year where it talks about the defendant and counsel are unable to effectively have a meeting of the minds is the only thing. And then I just see the order allowing the withdraw.

His initial attorney, Ms. Allison -- so it looks like Ms. Allison was due to a conflict. I'm not seeing a reason for Mr. Dow's.

**MS. BROUGHTON:** Mr. Dow just advised me in late -- no, in mid-September that he was being fired, for lack of a better word, and that the defendant had elected to hire Mr. Edney. So I do believe there was a choice in that case and not a conflict.

**THE COURT:** Okay. So the last one --

**MR. EDNEY:** And all three were appointed, and they chose to retain private counsel, so I hope Your Honor would not hold that against him.

**THE COURT:** No, that's not being held against him on that one. But since there is the same facts and issues arising out of both indictments, the Court does not believe that the defendant would be prejudiced by moving forward with the trial.

So the Court will grant the motion for joinder of the two in 18 CRS 92442, assault by strangulation, and 21 CRS 331, attempted second-degree forcible rape, both coming out of the offense that occurred on December 3rd, 2018.

I think that takes us next to it looks like the defendant has an objection to the notice of expert witnesses that the State intends to call.

It looks like there's an objection to Dr. Scott Ramming and Jacqueline Maillet. And it looks like the basis of the objection is the State has not furnished to the defendant the expert's curriculum vitae, the expert's opinions, the underlying basis for that opinion within a reasonable time prior to trial to allow the defendant and counsel to adequately prepare.

Is there anything in addition to the objection to the State's notice of expert witness that the defendant would like to add other than the grounds already cited?

**MR. EDNEY:** Just the fact that he's entitled to a fair trial. That would include counsel having time to prepare. I've had less than 30 days. He does have a right

to a fair trial, and I should have more than 30 days to digest all the discovery, and then go out and perhaps find my counter experts.

**THE COURT:** So one question for you, Mr. Edney. When Mr. Williams retained you, did he tell you that there was a pending trial date, or was there a pending trial date?

**MR. EDNEY:** Absolutely, and I've done everything humanly possible to get ready. The prosecutor and I discussed the short time frame, yes, ma'am.

**THE COURT:** Okay. And with regards to the State, have you furnished defense counsel the -- or any defense counsels, any of the defendant's attorneys the expert witnesses' curriculum vitae, opinions, so that Mr. Edney can properly prepare?

**MS. BROUGHTON:** Yes, Your Honor. Before I get to that, I just wanted to tell the Court that when I found out that Mr. Dow was thinking of withdrawing and in favor of Mr. Edney, I was immediately concerned, because we did have a trial date. So when I asked Mr. Edney to stay -- before I was willing to agree to the withdrawal, we actually put the case on for a hearing in front of Judge Warren.

I was present. The defendant was present. Mr. Dow was present. Mr. Edney appeared by telephone and confirmed for the Court that he would be ready for trial. This was only two or three weeks ago.

But with respect to the first notice of expert witness, Jacqueline Maillet, that was actually filed September 2nd, so long before defense counsel was even in the case. Her CV was sent roughly that same time. Her opinion was actually in the notice, which was filed with the Court. And the basis of her opinion actually appears in the medical records and the photographs which were filed.

Dr. Scott Ramming's name, he was the emergency room doctor. I actually did not file that notice of expert witness until just a few weeks ago. Now that I think about it, I'm not entirely sure it's required that he be admitted as an expert. His testimony is going to be the same whether we call him expert or whether we just call him a doctor.

That said, medical records have been provided to defense counsel.

I actually learned from Mr. Dow that he was thinking of withdrawing in favor of Mr. Edney. I contacted Mr. Edney, found out that he was going to likely represent the defendant. That was on September 20th. And by September 21st, I had submitted to him all of the discovery, including a litany of e-mails with additional supplemental discovery.

So except for the actual requests to call Dr. Ramming an expert, defense counsel has been in possession of the records, which contain all the things that he did, as

well as his diagnosis. I provided his CV just a few weeks ago with this notice.

**THE COURT:** Okay.

Mr. Edney, what is your response to the hearing that was held before Judge Warren where there was a discussion about the trial date before Mr. Dow was allowed to withdraw where you entered your appearance?

**MR. EDNEY:** I'm sure I said I would be here and I would be ready, and I am. I'm just asking you not to let in the experts so we can go forward.

**THE COURT:** Okay. So with regards to Maillet, I think I understood, Ms. Broughton, that the State did previously produce the CV for Ms. Maillet?

**MS. BROUGHTON:** Yes, Your Honor. I produced the CV, and then the medical records were both part of the regular discovery. And then I produced her opinion and basis for her opinion actually in the notice which was filed with the Court.

**THE COURT:** Okay. But you did not do that with Dr. Scott Ramming. It looks like that one was just filed.

**MS. BROUGHTON:** Right, but the medical records are basically the opinion, and those were made available prior to defense counsel's engagement in this case.

**THE COURT:** Okay. And do I understand that Dr. Scott Ramming actually was the treating provider, so even if

he's not designated as an expert, he can testify as the treating provider?

**MS. BROUGHTON:** Yes, Your Honor, he's a fact witness.

**THE COURT:** Okay. So the Court -- since it looks like the notice for Dr. Scott Ramming was just filed on October 13, the Court will not permit Dr. Ramming to testify as an "expert witness" in that sense, but he is permitted to testify as a treating provider and a fact witness, and all that entails as far as his findings, his treatment, his opinions, which would be part of your -- what any treating provider would be permitted to testify to.

**MR. EDNEY:** Thank you, Your Honor.

**THE COURT:** Okay, and it looks like your next one is a motion in limine under Rule 404(b).

**MR. EDNEY:** My assumption on this one, Judge, is Your Honor is going to have to hear it, the actual testimony. So we would just hold it at bay until that time at trial.

**THE COURT:** Yes.

**MR. EDNEY:** I would just ask that the State not be allowed during opening statement to use any of that.

**THE COURT:** Yes. And -- yes, because I'm not exactly sure what the purported testimony is going to be. So that would need to be heard outside the jury's presence

as an offer -- proffer of evidence.

Does the State wish to be heard further at this time on that motion?

**MS. BROUGHTON:** No, ma'am, the State had no intention of referring to that during opening.

**THE COURT:** Okay. And then, I believe, the last motion was an objection to the defendant's -- motion to suppress the defendant's statements.

**MR. EDNEY:** They filed a notice, so I filed an objection, Judge. And, again, I think that's one that during trial, if the State is going be offering depending on the circumstances of those statements --

**MS. BROUGHTON:** That's actually not quite accurate under the statute.

So I filed, in accordance with G.S. 15A-975(b), notice of evidence of statement or statements made by the defendant.

Now, that specific statute doesn't say that any statements made to a law enforcement officer, so I was just, out of an abundance of caution, including all statements.

The statements in this case made by the defendant were actually made to the victim's roommate. It's alleged that he said something to her to the effect of, "It's a mistake, a misunderstanding."

The defendant actually went to one of the

witness's places of business, told her not to come to court. So -- oh, and then, of course, the defendant sent a text message to the victim referring to the incident. So those are actually the statements I'm referring to. They're not actually statements made by the defendant to law enforcement.

That said, anything of that regard according to North Carolina General Statutes 15A-976, the objection, if it was on the basis of 975, would have to be made 10 working days prior to the trial since I gave more than 20 days notice. That said, there may be other objections at trial.

**THE COURT:** Okay. Does the -- we're going to take that up when we get in trial. If you're going to call that person as a witness, then we'll -- I'll hear at that time what the witness intends to testify to.

Although it looks like -- it looks like the objection was to the extent these were statements given to law enforcement. If I just understood, the statements you're referring to were not statements that were made to law enforcement but to the victim's roommate.

**MS. BROUGHTON:** Yes, to the victim's roommate, to the victim, and to another witness as well. So there are three different people who were the recipients of statements by the defendant either addressing the incident or referring to it.

**THE COURT:** Okay.

**MR. EDNEY:** And if Your Honor please, paragraph four of my objection refers to the non-law enforcement statements.

**THE COURT:** Okay. So the Court will reserve ruling on that until we get to trial to see who's testifying and what the proposed testimony will be. Okay.

Are there any other pretrial motions?

**MS. BROUGHTON:** There is, Your Honor. Last Friday I filed a notice of intent to use photographs during the opening statement. I want to just put the Court on notice so that way there wasn't an objection during opening.

I didn't attach the photographs to the motion because it is public record, but I have provided them to defense counsel both in discovery, and then reference the specific photographs. If I may hand them up for Your Honor to see?

**THE COURT:** Yes, please.

**MS. BROUGHTON:** There are about 30 photographs, and those are the two that I would like to use during opening statement, Your Honor.

I have a reasonable belief that they are admissible. For example, the first picture in your left hand was actually the victim. I can actually authenticate that's a photograph that was taken on December 2nd of 2018,

identify herself and the defendant.

Then the photograph in your right hand can be authenticated by any number of medical professionals. That was taken December 3rd of 2018, just hours after the first photograph. I don't think that they are irreparably prejudicial.

There's actually very little case law on this particular issue. It's surprising. From what I could see from the judicial Benchbook, prosecutor's guides, things like that, there's really only three cases that really address this in North Carolina, 20 NC App. 114. It's a 1975 case where it references that counsel used exhibits during the case, but doesn't comment on it. So clearly it was not a problem, and it was not found to be error in any way.

U.S. versus Burns, it's a 2002 6th Circuit case. The Court found no error where the prosecutor had used photographs, finding that any prejudicial effect was not so great as to overwhelm the jury's ability to follow the Court's instructions not to consider the opening statement as evidence. And I think that by curating these photographs carefully, I'm able to illustrate the points I'm making in opening with evidence that will clearly be admissible in a way that doesn't overwhelm the jury.

**THE COURT:** The concern is always when you use exhibits in an opening statement and always give a

cautionary that opening statements are not evidence, not to be considered evidence by the jury, it's really just a roadmap and outline what you expect to prove, but there's always the risk that you show an exhibit in an opening statement that you end up not using for some reason, and then it becomes a problem. So I'll hear from the defendant.

What does the defendant say with regards to the State's intention to use these two photographs during opening statement? Because at that point they have not been authenticated or a proper foundation laid.

**MR. EDNEY:** I will say I've done this -- been doing this for 35 years. I've tried numerous capital murder trials. I've never in my life even heard of it. The prejudicial effect would be overwhelming would be our argument.

**THE COURT:** The Court is going to deny the State's motion to use these photographs during an opening statement. Obviously you can use them in closing argument once they have been admitted, but it's just always a concern when you use exhibits during an opening statement that anything can happen in a jury trial that they don't end up being used, and then we're stuck there a little bit. So I will deny the State's request to use that -- those photographs during opening statement.

**MS. BROUGHTON:** Your Honor, and finally, I filed a

request for a reciprocal discovery and motion for discovery on September 3rd. I have not received anything from defense counsel that would -- I haven't received anything from defense counsel. But I'm specifically requesting the Court to inquire as to whether or not there's anything discoverable under North Carolina General Statute 15A-905, which would be rightly discoverable to the State.

**THE COURT:** Okay. Mr. Edney, what is the response from the defense side of reciprocal discovery pursuant 15A-905?

**MR. EDNEY:** Again, I've had a month to get ready, but I've not found anything that I think would apply.

**MS. BROUGHTON:** So can the Court grant that, Your Honor?

**THE COURT:** Yes, the Court will grant the State's motion for request for reciprocal discovery and motion for discovery. The Court will grant that request. And to the extent the defendant does have any discovery that would be discoverable and should be turned over pursuant to North Carolina General Statute 15A-905, the defendant is directed to do so.

**MR. EDNEY:** And we will, Your Honor.

**MS. BROUGHTON:** Your Honor, I didn't file a motion in writing, but the State is respectfully requesting that the Court allow the prosecutor and defendant to switch

tables for the purposes of this trial. It happened in a trial last week with no problem.

The victim is terrified of the defendant. She's been calling me to raise that issue, and I think that having the State seated at this table might just put some of that -- alleviate some of that fear. And I don't think that, because of the way the courtroom is currently set up, it would have any prejudicial effect.

**THE COURT:** I was going to say since we have reconfigured the courtroom such that you both are equal distance to the jury -- usually, you know, the State is closest or the defendant -- plaintiff is closest to the jury, but this case you're equal distance.

So does the defense have any response to the State's request to switch tables? Of course everything is going to be wiped down and everything tonight when you come in in the morning.

**MR. EDNEY:** As long as no mention is made of it as to the reasons to the jury.

**THE COURT:** Correct. I agree. I don't think the State is going to -- I mean, I don't think the jurors know who sits when it's reconfigured, but I will agree with that.

So the Court will grant the State's motion to switch tables, the defense and the State to switch tables for trial with the State being closest to the witness box,

and no mention is to be made during trial to the jurors about the change.

**MS. BROUGHTON:** Yes, ma'am. It wouldn't be relevant in any way.

**THE COURT:** Correct, correct.

**MS. BROUGHTON:** That concludes the State's presentation.

**THE COURT:** Yes.

**MR. EDNEY:** If we're at this table and I'm crossing the witness, I would prefer to be closer, not having to look through my client. I don't know if the Court would be uncomfortable if he's closer to you.

**THE COURT:** That's fine.

**MS. BROUGHTON:** No further motions on behalf of the State, Your Honor.

**THE COURT:** Okay. Does the defendant have any motions?

**MR. EDNEY:** Can I assume 9:30 to 12:30, 2:00 to 5:00?

**THE COURT:** Correct, yes.

**MR. EDNEY:** Fine. Then we'll be --

**THE COURT:** Wait, I'll have to ask. What time are we having the jury coming in tomorrow?

(*Discussion with clerk.*)

**THE COURT:** Okay, so for tomorrow we'll start at

10:00. But yeah, after that, it will be starting at 9:30. We'll go to 12:30, then recess for lunch until 2:00, and go from 2:00 until 5:00.

**MR. EDNEY:** I just have to be able to tell my wife what to do with my daughter, so I wanted to make sure what we were doing.

**THE COURT:** No, not a problem.

Are there any -- how long do the parties anticipate this case will last?

**MS. BROUGHTON:** It will depend largely on the Court's rulings with respect to the 404(b) evidence. I have nine witnesses. There's the victim, the roommate, the arriving officer, the SANE nurse, the expert in strangulation, the doctor, Zoe Chestnut, who is a fact witness, as well as the 404(b) witness.

And then the two officers who actually saw her injuries and the 404(b) cases. So I anticipate it will take all week. That was a long way of saying all week.

**THE COURT:** That's okay. So I'm understanding that the victim from the 2014/15 case is a witness in this case?

**MS. BROUGHTON:** Yes. She actually -- she was friends with the victim in this case, and she was working at their shared place of employment when the defendant came in and addressed this case.

**THE COURT:** Okay.

**MR. EDNEY:** So I would say we'll be here next week, Your Honor, just to be honest.

**THE COURT:** That's okay.

All right, and just so we can get this on the record ahead of time, do you want 12 jurors and 2 alternates, or are you stipulating to a verdict of 10 or more? What's your preference?

**MS. BROUGHTON:** Twelve and two alternates, Your Honor.

**MR. EDNEY:** Same, Your Honor. And if I could get the jury list tonight so I can go over it, if at all possible.

**COURT CLERK:** She won't have it until the morning. She prints it out once she scans them when they come in.

**THE COURT:** So I don't have any control over that one. Sorry about that. But they will provide that to you as soon as you get -- as soon as we have it so that you can take a look through there.

**MS. BROUGHTON:** Thank you, Your Honor. See you tomorrow.

**THE COURT:** Thank you. I will see you two tomorrow. And why don't we plan on being here at 9:30 so if there's anything last minute that we need to take up before we bring the jury in.

**MS. BROUGHTON:** That would be great.

**MR. EDNEY:** I'll try to come up with some weird motions. Thank you, Your Honor.

**THE COURT:** Thank you.

(*Court recessed at 3:47 p.m. and reconvened at 9:47 a.m. on Tuesday, October 26, 2021.*)