

RECORD ON APPEAL

The record on appeal will include a verbatim transcription by Language Quest of the original recording of all of the pertinent trial court proceedings in this matter concerning the jury trial conducted in this case, including a reporter's transcript of all pertinent pretrial motions, the hearing on all in limine motions, the opening statements of counsel, all testimony presented to the jury, the closing arguments of all counsel, the instructions read to the jury, the return of the jury's verdict, the hearing on the motion for new trial, and the sentencing. The originals of these reporter's transcripts will be filed with this court when completed. The record will also include a verbatim transcript of the first trial in this case of which the appellant requests this court to take judicial notice pursuant to Evidence Code sections 452 and 453.

ADDITIONAL RECORD FOR CERTIFICATION

In addition to the aforementioned Reporter's Transcripts, the appellant proposes the following additional facts for settlement by the court:

1. On January 7, 2006, the Saturday before the first day of trial on Monday morning, the prosecutor contacted defense counsel to inform him that [INSERT NAME] would not be available for trial. He said that [INSERT NAME] had not been subpoenaed to appear at trial. Previously, the prosecutor had asked if defense counsel would agree to a stipulation regarding the testimony of [INSERT NAME], who testified in the first trial of the case, so that [INSERT NAME] would not have to appear. [INSERT NAME], a medical doctor, had a sexual relationship with the purported victim, [INSERT NAME], and testified in the first trial of this case that he did not observe any physical injuries or bruising to [INSERT NAME]'s breast on the day that the defendant supposedly assaulted [INSERT NAME] injuring her breast. Given the amorous relationship between [INSERT NAME] and [INSERT NAME], defense counsel refused to stipulate to [INSERT NAME]'s testimony.

2. During the prosecutor's cross-examination of the defendant, notwithstanding defense counsel's refusal to stipulate to [INSERT NAME]'s testimony, the prosecutor elicited [INSERT NAME]'s testimony through the defendant by asking the defendant if he recalled [INSERT NAME]'s testimony at a prior proceeding regarding the uninjured condition of [INSERT NAME]'s breast.
3. Defense counsel objected, and the court and both counsel held an off-the-record discussion regarding questions asked of the defendant by the prosecutor.
4. During the off-the-record discussion, defense counsel, [INSERT NAME], argued that there had been no showing [INSERT NAME] was unavailable or that [INSERT NAME] had been properly served.
5. The prosecutor stated that it was not a matter of improper service, but rather that he had simply not chosen to call [INSERT NAME] as a witness. The court merely replied, "Okay." No further comment was offered by defense counsel. The prosecutor said he would "withdraw the question."
6. Defense counsel did not assign the prosecutor's line of questioning as prosecutorial misconduct or ask for a curative instruction or mistrial. He did not make the argument because he did not realize it was prosecutorial misconduct until he thought about it later. Further, he did not ask the court to strike the testimony or to instruct the jury to disregard it.
7. After the trial, defense counsel thought about the matter some more and realized that the prosecutor had committed misconduct. He also realized that the jury had heard this improper evidence again when it listened to the tape recording of the defendant's testimony during the requested readback. Thereafter, he drafted a motion for new trial arguing that the prosecutor committed misconduct.
8. The People submitted a declaration of the prosecutor in opposition to the Motion for New Trial, in which the prosecutor stated that on the Friday before trial, he spoke with [INSERT NAME] who informed him she had told [INSERT NAME]

that he did not need to testify at the trial. This was the first time the defense or the court had heard from the prosecution that the purported victim had instructed a witness not to testify.

9. Defense counsel requested, and the court gave, a pinpoint instruction on self defense as follows: “If you just find based on the evidence presented that [INSERT NAME] was offended, upset or exasperated due to the fact that [INSERT NAME] was talking to [INSERT NAME] on the phone, that in, in and of itself is not sufficient to justify her striking of [INSERT NAME]. If it is found that [INSERT NAME] struck [INSERT NAME], [INSERT NAME] is allowed to defend himself in accordance with the self-defense instructions that will be given.”

EXHIBITS

The defense exhibits will also be considered a part of the appellate record.

Dated: September 18, 2006

[INSERT NAME]
Attorney for Defendant