



NATIONAL  
ANIMAL LAW  
COMPETITIONS

CLOSING ARGUMENT  
COMPETITION

2012 PROBLEM

# TRIAL RECORD

## (Feb. 25, 2012)

---

State v. Theodore "Ted" Nugget  
Jeanneau County Circuit Court Case No. 11-1059  
State of Union Lake

### Charges:

- Count I: Aggravated animal cruelty (aggravating factor: with a firearm) as to Bess, a feline (class C felony)  
Count II: Aggravated animal (aggravating factor: with a firearm) as to Beverly, a feline (class C felony)  
Count III: Discharge of a Firearm within the City Limits (class C Misdemeanor)

### List of Received Exhibits:

State's No. 101 to 105

Defense's No. 201 to 202

The jury has been selected and sworn. The attorneys have presented their opening statements. After a short recess, court reconvened and the following events transpired:

CLERK: All rise.

JUDGE: Thank you. Please be seated. Is the State ready?

PROS. ATTY: Yes, Your Honor.

JUDGE: And is the Defense ready?

DEF. ATTY: We are, Your Honor.

JUDGE: Counsel for the State, you may call your first witness.

PROS. ATTY: Thank you, Your Honor. The State calls Kitty Fever.

CLERK: Please approach the witness stand and raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

FEVER: I do.

CLERK: Ms. Fever, please state your full name and spell your last for the record.

FEVER: My name is Kitty S. Fever, spelled F-E-V-E-R.

PROS. ATTY: Ms. Fever, where do you live?

FEVER: I live at 919 SW Taylor Street, in Cornvallis. You know, right there in the airpark community. I have a Pit Special I keep in a hangar on my property. It's kind of cool to have a stunt plane in the garage.

PROS. ATTY: You fly a stunt plane?

FEVER: Yes I do. I've been flying since I was 18 years-old. I worked at a diner and spent every dime I earned on flying lessons - drove my parents nuts, but I just had to scratch that itch. Met my husband then too. He was my flight instructor. We have been plane nuts ever since we met.

PROS. ATTY: What does your husband do?

FEVER: Well, that's a good question. He made a ton of money in the stock market back in the day, so he's never had to hold down a "real" job. After he hit it big with the stocks, he took up drumming. He got so good that he toured with Peter Frampton back in the 80's after Peter did that damn Sgt. Pepper movie with the Bee Gees - what a disaster that was. However, now he just manages our retirement fund, maintains my plane - and his. He's got a Sukhoi 26. Every now and then, he'll fly in the Reno air races.

PROS. ATTY: If I may, how old are you?

FEVER: Oh that's okay, I'm 62 years-old, but I can still pull 7-Gs positive and 4 negative.

PROS. ATTY: What do you do for a living, Ms. Fever?

FEVER: I work part time up at Good Samaritan Hospital. I am phlebotomist.

PROS. ATTY: How long have you been so employed?

FEVER: More than 25 years. I like to have a place to go that needs me, and to give back to my community. Believe it or not, flying around upside down all day can get a little boring unless you mix things up. So, I decided I'd learn how to stick people for fun. [Jury laughing]

PROS. ATTY: Ms. Fever, how long have you lived here in Cornvallis?

FEVER: My husband and I moved here in 1984, so that's 28 years now. All of it in the same house too.

PROS. ATTY: Do you and your husband have any children?

FEVER: No, just airplanes and our cats at our place.

PROS. ATTY: Let's shift the focus to the events leading to today's trial and talk about your cats for a moment. How many cats do you have now?

FEVER: Just two.

PROS. ATTY: How many cats did you have prior to May of 2011?

FEVER: We had four.

PROS. ATTY: What happened to the other two cats?

FEVER: The defendant [witness pointing at the defendant] shot them both!

DEF. ATTY: Objection.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, we can all appreciate how emotional it is to lose a family pet, but the jurors need to hear all of the evidence in this case so they can make a fully informed decision as to the defendant's innocence or guilt. With that in mind, let's just focus on telling the jury what happened.

FEVER: Alright.

PROS. ATTY: Let's focus on your two cats who are now gone. What were their names?

FEVER: Bess and Beverly. Bess was a tabby cat and Beverly was white and tan.

PROS. ATTY: With the Court's permission, I'm handing you what are marked as State's Exhibits 101 and 102. Can you identify them for the jury?

FEVER: Sure. Number 101 is Bess who is snuggling with my niece (Vicki) and number 102 is Beverly. They were both such love bugs.... [witness crying]

PROS. ATTY: How long had you had Bess and Beverly?

FEVER: Got them both when they were just kittens from the no-kill shelter over in Langford. I had Bess for just over five years and Beverly for just under eight years.

PROS. ATTY: State offers Exhibits 101 and 102.

DEF. ATTY: No objection.

JUDGE: Both State's 101 and 102 are received.

PROS. ATTY: Thank you. Ms. Fever, did either Bess or Beverly have any health issues that you were aware of?

FEVER: None. Both were healthy as a horse and lived the life of Riley. They could come and go as they pleased. Had plenty to eat, and that's not counting all the field mice, plus tons of love.

PROS. ATTY: When did you last see them alive?

FEVER: May 12, 2011, when my husband and I went to bed, which was around 10 p.m. They were both outside gearing up for their evening tour of their territories, something they did almost every night.

PROS. ATTY: Was there anything unusual about that evening?

FEVER: Nope, just a beautiful spring evening outside.

PROS. ATTY: How about your cats, was there anything unusual about the behavior of your cats?

FEVER: Oh no, they were just fine - playful, curious and full of life.

PROS. ATTY: What about your relationship with your neighbors?

FEVER: For the first 26 years of living here, we had nothing but delightful neighbors and absolutely no problems. We would fly together, have hangar parties, help each other fix the occasional stuck hangar door.... We had a genuine sense of community. However, that all changed about two years back when Evelyn Nugget passed away and her son Teddy [pointing at the defendant] inherited Evelyn's house and adjacent 30 acres at the south end of runway 35.

PROS. ATTY: What changed?

FEVER: Teddy...

JUDGE: Ms. Fever, I'm going to have to ask you to refer to the accused as Mr. Nugget or the defendant.

FEVER: Sorry Judge, I've known Ted - Mr. Nugget - since he was a boy and he's always been Teddy to me.

PROS. ATTY: Please continue.

FEVER: The defendant lived with his family as a boy, but then moved away in his teen years after his father died in a tragic plane crash. I don't think Evelyn and the defendant were too close as I never saw the defendant around the place much and Evelyn rarely spoke of him when she and I would visit. That all seems a bit ironic to me now, because once Evelyn died and the defendant inherited the house, the hangar and the land, he moved right on in acting like he'd owned the place his entire life. Such arrogance.

PROS. ATTY: After the defendant moved into the house at the end of runway 35, did you have much, if any, interaction with him?

FEVER: Not that much. To be honest, I don't care much for him these days. Our relationship became strained after I caught him out shooting his rifle out in the back 30-acre field at the end of the runway. He was making a lot of noise, scaring the kids in our community and spooking birds that were flying across the runway. After I saw him take a shot at an angle that appeared to be across the runway, I walked out in the field and yelled at him to knock it off. He didn't seem to appreciate my unsolicited advice and told me to go have sex with myself, and not in such nice words either.

PROS. ATTY: Would it be fair to say you and the defendant were not friends?

FEVER: I'd go one further and say that it's fair to say we were enemies.

PROS. ATTY: How so?

FEVER: Because he sued me for trespass.

PROS. ATTY: For walking out to confront him for firing a rifle?

FEVER: No, damage to his mom's - now his - landscaping because he thinks my cats were pooping in his bark dust in the flowerbeds around the house and hangar.

PROS. ATTY: What became of that case?

FEVER: My lawyer says it's delayed until this trial is over.

PROS. ATTY: Let's shift back to the night of May 12<sup>th</sup> and morning of May 13<sup>th</sup>. Did Bess and Beverly come home that next morning, on May 13<sup>th</sup>?

FEVER: No they didn't and I was immediately worried because they are always home when I get up to feed them in the morning. They'd never missed a meal, except that one time Beverly accidentally got stuck in Bob Mayo's hangar for a day.

PROS. ATTY: Not being home for breakfast - was there anything else about their absence the next morning that concerned you?

FEVER: Yes, though I didn't put two and two together until after the police recovered their bodies later that day.

PROS. ATTY: What was it?

FEVER: That night, May 12<sup>th</sup> - after midnight, so it would have been the 13<sup>th</sup> - I woke up at around 2 a.m. to a male voice yelling "You can run, but you can't hide you little..." [witness crying]

PROS. ATTY: Ms. Fever, it's okay to use the exact words you heard, as long as you make it clear to the Court that you are quoting someone else.

FEVER: I'm quoting: "You can run, but you can't hide you little mother fucker." I also heard what I thought was fireworks - more like firecrackers - 15 or 20 of them.

PROS. ATTY: Could you recognize the voice?

FEVER: Not really, I was quite sleepy.

PROS. ATTY: What about the general direction?

FEVER: The entire incident sounded like it was all coming from the south end of the runway.

PROS. ATTY: Down by the defendant's property?

FEVER: Yes.

PROS. ATTY: That morning of May 13<sup>th</sup>, after you got up and noticed that Bess and Beverly hadn't come home, what did you do?

FEVER: I went for a walk around the neighborhood calling their names and rattling some of their favorite dry cat food in a bowl.

PROS. ATTY: Did it work?

FEVER: No.

PROS. ATTY: Did you have occasion to speak with the defendant that day?

FEVER: Yes, after I couldn't call them home, I began knocking on my neighbors' doors to see if anybody had seen Bess or Beverly but nobody had seen them. I didn't go to the defendant's door because my lawyer told me not to speak to him due to the pending lawsuit he filed against me. Oh, did I say this already? Guess how much money he wants for poop bark dust?

DEF. ATTY: Objection, relevance.

JUDGE: I'll overrule that one, Counsel, but Ms. Fever I need to ask you to please focus on the specific question asked of you.

FEVER: Of course, Your Honor, I'm sorry.

PROS. ATTY: How much does the defendant want for the alleged poop bark dust?

FEVER: \$19,750. Can you believe that?

PROS. ATTY: Ms. Fever, you went door-to-door, omitting the defendant's house, but did you have occasion to interact with the defendant on May 13<sup>th</sup>?

FEVER: Oh, yes, I forgot. When I was walking the neighborhood calling for Bess and Beverly with the cat food, the defendant was standing outside the front door of Evelyn's house smoking a cigarette and he yelled at me, "I hope you never find those little shit machines of yours."

PROS. ATTY: Did you respond to the defendant?

FEVER: No, I most certainly did not.

PROS. ATTY: What lead you to finding your cats' bodies?

FEVER: Later that afternoon, I was chatting with Gloria, my across the street neighbor, about Bess and Beverly. She's a retired probation officer and I hoped she might have some ideas on how to find them. I told Gloria about the yelling and fireworks I heard at around 2 a.m. and Gloria said she heard some of that too, but Gloria told me that I wasn't hearing fireworks, I was hearing gunfire. My heart just sank, because that's when I put two and two together and feared the worst - that somebody was shooting at Bess and Beverly while they were out trying to catch mice. My God!

PROS. ATTY: What did you do next?

FEVER: I headed out into the field at the south end of the runway - Evelyn's 30 acres that the defendant now owns.

PROS. ATTY: Did you find your cats?

FEVER: Yes, shot dead in the field.

PROS. ATTY: Did you pick them up or remove them from the field?

FEVER: Nope, I didn't have time. The defendant called the police and told them that I was trespassing on his land, so I got escorted out of there.

PROS. ATTY: How do you know this?

FEVER: Because Officer Credible came out to the field to escort me off the land and in doing so, Officer Credible told me he was responding to a trespass call placed by the landowner.

PROS. ATTY: Did you explain to Officer Credible what you were doing there?

FEVER: Yes, of course. That's why he didn't give me a ticket.

PROS. ATTY: What happened next?

FEVER: Once I got back to my place, Gloria and I explained to Officer Credible what we feared had happened the previous night. It was great having Gloria involved because she knows Officer Credible from when she worked with him back in her days as a probation officer. It was because of Gloria's urging that Officer Credible decided to go back out in the field and recover my cats' bodies.

By that time, the vultures were up, so it didn't take Officer Credible long at all to find the same spot in the field where my cats lay dead with bullets in them.

DEF. ATTY: Objection, facts not in evidence.

JUDGE: Sustained.

PROS. ATTY: Like you, Officer Credible found Bess and Beverly both dead, right?

FEVER: Yes, that's correct.

PROS. ATTY: Judge may I approach the witness?

JUDGE: You may.

PROS. ATTY: I'm handing you what are marked as State's Exhibits 103 and 104. Please take a moment Ms. Fever. Are these two photos a fair and accurate depiction of the condition in which you found Bess and Beverly?

FEVER: Yes, except there was no gun or beer cans when I found them.

PROS. ATTY: State offers Exhibits 103 and 104.



DEF. ATTY: I object. The witness stated that these photos do not accurately depict what she claims she found in the field.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, are the two cats depicted in Exhibits 103 and 104 Bess and Beverly, your two beloved cats?

DEF. ATTY: Objection, leading.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, do you know whose cats those are - the two cats in these Exhibits?

FEVER: Yes, they are my cats, Bess and Beverly.

PROS. ATTY: Thank you. Ms. Fever. Do you know the source of these two photos?

FEVER: Officer Credible told me that . . .

DEF. ATTY: Objection.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, do you know who killed your cats?

DEF. ATTY: Objection, assumes facts not in evidence. No cause of death has been established.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, do you know who shot your cats?

DEF. ATTY: Objection, assumes facts not in evidence. There's nothing in the record to suggest that these cats weren't killed by coyotes or died from inadvertent exposure to a toxin. Again, no causation at all, let alone proof of death by gunshot.

JUDGE: Sustained.

PROS. ATTY: Ms. Fever, I have no further questions for you at this time.

JUDGE: Cross?

DEF. ATTY: Yes, thank you. Ms. Fever, you testified that you couldn't identify the voices you heard the night of May 12<sup>th</sup> because you were "so sleepy" at 2 a.m., isn't that right?

FEVER: Yes.

DEF. ATTY: Ms. Fever, do you drink?

FEVER: Yes, but I don't believe that's any of your concern.

DEF. ATTY: Ms. Fever, how much alcohol had you consumed on May 12<sup>th</sup>, before you retired to bed.

FEVER: A couple of glasses of wine with dinner.

DEF. ATTY: What about before dinner?

FEVER: Well, I don't recall precisely.

DEF. ATTY: Ms. Fever, do you have a Facebook page?

FEVER: Yes.

DEF. ATTY: And are you the only person with access to your Facebook account?

FEVER: Yes.

DEF. ATTY: So, any posting on your Facebook page would have been by you and nobody else, right?

FEVER: Yes.

DEF. ATTY: Ms. Fever, do you recall your May 12, 2011 Facebook posting, with a time stamp of 9:15 p.m.?

FEVER: I suppose you have a copy there in your hand, don't you?

DEF. ATTY: Do you recall . . .

FEVER: Yes, I recall it in general terms.

DEF. ATTY: And?

FEVER: I posted a comment that I was enjoying the evening .... That I'd had great day followed by a drink before dinner and some wine with dinner.

DEF. ATTY: In fact, didn't you write, and I'm quoting here: "Wow, what a great day! I flew the pants off my Pit . Nailed the Hammerhead three times! Plane's in the hangar, bugs are off the windshield and I'm awash in Tanqueray, steak tartare and a bottle of 1989 Petrus—Petrus goes so well with beef."

FEVER: If that's what's on your sheet of paper, then I guess I wrote it.

DEF. ATTY: Ms. Fever, there's no crime in going to bed drunk. And that's just what you did isn't it? You went to bed drunk and when you woke up at 2 a.m. you were still drunk.

FEVER: I may have had a glow on.

DEF. ATTY: Ms. Fever, you can't be sure that anything you think you heard that night was real can you? I mean you were intoxicated and may just as well have dreamt the entire exchange?

FEVER: I suppose that's possible, but it all sounded so real. I'm sure I wasn't so drunk that I just imagined all of that.

DEF. ATTY: Thank you, Ms. Fever. Nothing further.

JUDGE: State, call your next witness.

PROS. ATTY: We call Officer Justin Credible.

CLERK: Please raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

CREDIBLE: Yes.

CLERK: Will you please . . .

CREDIBLE: My name is Officer Justin Credible, spelled C-R-E-D-I-B-L-E. I am a peace officer with the Cornvallis Police Department. I have been so employed for 9 years.

PROS. ATTY: Officer Credible, you've done this before.

CREDIBLE: Testify?

PROS. ATTY: Yes.

CREDIBLE: Many times. Just trying to speed things up a bit here is all.

PROS. ATTY: How many criminal cases have you investigated in your 9-year career with the CPD?

CREDIBLE: Well over 500.

PROS. ATTY: In how many cases have you investigated allegations of animal cruelty or abuse?

CREDIBLE: At least fifty, probably more, but to be safe, I'll go with fifty.

PROS. ATTY: Of the fifty or more animal cruelty cases you have investigated, how many resulted in an arrest or conviction.

CREDIBLE: About half. A lot of calls I get on the animal front involve old, lonely ladies with too many cats. Not much you can do about that.

PROS. ATTY: Have you received any specialized training that you applied during your investigation of this case?

CREDIBLE: Yes, I have 25 hours of forensic crime scene investigation training and 40 hours of computer and cell phone forensic training as well. My crime scene training

was presented by Dr. Bill Ray Beeper, the director of the Union Lake Crime Lab, which is a division of the State Police. In that training, I learned the proper evidence collection and handling techniques to ensure that the lab can work its magic on the trace, latents and genetics we find at a given crime scene. We learned the basics on how to store bodies as well as the less obvious stuff like how to prevent cross contamination when collecting or drying DNA buccal swabs.

Prosecutors for Animal Welfare (PAWS) taught the week-long computer and cell phone - I should really say smart phone - training. I learned so much about computers and smart phones, that it almost scared me how much information we leave out there in the ether with these devices. But, I digress. It was my smart phone training that I applied in this case as it was my examination of the defendant's iPhone that lead to the discovery of the two exhibits you can't seem to get admitted.

PROS. ATTY: Thanks for the great segue, please tell the jury how you came to have access to the defendant's iPhone in the first place.

CREDIBLE: As Ms. Fever stated, I was dispatched to a trespassing complaint at the defendant's property, which is at the south end of the airpark. There I encountered Ms. Fever who was standing in the defendant's field. I asked her what she was doing and she told me she had been looking for her missing cats & that she just found them, both dead. I looked and saw what looked like two dead cats, but I didn't get real good look and my attention was focused on Ms. Fever, who was pretty agitated.

PROS. ATTY: You defused the trespass situation and went back out into the field to look for Ms. Fever's cats, right?

CREDIBLE: That's about it. After I escorted Ms. Fever off the land and I got her side of the story, I spoke with the defendant and asked him if he would give me consent to see what those vultures were scouting out in his field. I'd seen the vultures circling over the area where I saw Ms. Fever standing out in the field.

PROS. ATTY: Did the defendant agree?

CREDIBLE: Yes, he said, "Knock yourself out, dude."

PROS. ATTY: So you found Ms. Fever's two missing cats, Bess and Beverly?

CREDIBLE: Yes. Both dead and both appeared to have been shot.

DEF. ATTY: Objection.

JUDGE: Overruled, Officer Credible is capable of assessing an entry wound as a gun shot.

PROS. ATTY: What did you do next?

CREDIBLE: I collected the two dead cats and put them into my lunch cooler in the trunk of my car - I'd already had my lunch and I wanted to keep the bodies cool to preserve them better for the necropsies.

PROS. ATTY: Did you take any photos of what you found that day?

CREDIBLE: No, I am embarrassed to say this, but no I did not. But I did get some photos from the defendant's iPhone.

PROS. ATTY: And just how did you get a hold of the defendant's iPhone?

CREDIBLE: After I found the cats, I went back to the defendant's house and knocked on the door. I thanked him for the cooperation and told him I didn't find anything except a dead skunk. I told the defendant that, when I was escorting Ms. Fever off of his property that she reported to me that he'd been making harassing and vulgar calls to her house. That angered the defendant and he animatedly denied ever calling her. I told the defendant that I had no way to know for sure, but if he wanted to prove that Ms. Fever was a liar, the best evidence was right there in his hand - he was holding his iPhone.

PROS. ATTY: What did he do?

CREDIBLE: With a can of Old Milwaukee in one hand, he used the other to hand me his iPhone and said, "Have a look!" I thanked him and told him it would only take a few minutes. I walked back to my patrol car, where I have a laptop that I use while on duty, along with my cell phone forensics kit. Using the cell phone cloning protocol I learned from the PAWS training, I created a new directory on my laptop's desktop called "suspect cell dump." I connected Nugget's iPhone (didn't even need to use the special connecting harness I have that allows me to access just about every phone on the market) to my laptop. I ran the SNOOP software developed and used by the FBI. And I should note here that all data recovered using SNOOP has been ruled as "admissible" in federal criminal court. Running SNOOP, I burned a complete image of the defendant's iPhone data into that new "suspect cell dump" directory.

PROS. ATTY: Did the defendant object to any of this?

CREDIBLE: Nope, not at all. In fact, he just stood there on the porch, smoking and stewing about Ms. Fever being such a lying drunk and how he's never called her in his life.

PROS. ATTY: How long did it take you to copy the defendant's iPhone?

CREDIBLE: He only had a 16 gig 3GS, so it took about 16 minutes. When I was done, I walked back up to the porch and handed the defendant his phone back and thanked him for his cooperation. I told the defendant that I had made a copy of his phone and that I would have a good look at his data to help him prove that Ms. Fever was a liar. The defendant nodded his head up and down in approval and said, "You know she's full of crap on this one, dude."

PROS. ATTY: To be clear, Ms. Fever never claimed that the defendant was harassing her by phone, right?

CREDIBLE: Right. I just did that to get a copy of his phone. Those iPhones are an absolute goldmine of information and I had a feeling I'd find some good stuff on there.

PROS. ATTY: What next?

CREDIBLE: I went back to the office, put the two dead cats in the evidence fridge, where they were later delivered to Dr. Moss for necropsy. I went upstairs to my office and banged out a search warrant for the contents of the defendant's cell phone.

PROS. ATTY: You got a copy of the defendant's data with his consent, but you waited to search that data until you had the Court's permission?

CREDIBLE: You know it. Search warrants are the key to any quality investigation.

PROS. ATTY: In your affidavit for the search warrant, did you disclose the fact that you had used false pretenses to get the defendant's consent to hand over his iPhone?

CREDIBLE: Of course.

PROS. ATTY: Armed with a court order in the form of a search warrant, you searched the cloned copy of the defendant's iPhone - what did you find?

CREDIBLE: This was a fascinating phone dump case. I found all kinds of kink . . .

DEF. ATT: Objection.

JUDGE: Sustained. Mr. Credible, I caution you to stay focused on the specifics of this case and I instruct you all to disregard that last comment and I'll strike it from the record.

PROS. ATTY: Officer Credible, what did you find relevant to this case?

CREDIBLE: In the unallocated disc space of the hard drive of the defendant's iPhone, I found the full images that are in your two exhibits numbered 103 and 104.

PROS. ATTY: Okay, before I offer those two exhibits, I need you to explain just what unallocated disc space is.

CREDIBLE: Most operating systems, be they on a desktop computer, a tablet computer or a smart phone manage files in a rather simple fashion. They create an index that points the system to the location on the drive where the file resides. When a user deletes that file, the actual file with the data isn't automatically erased. Rather, the reference to its location is removed and the computer thinks that the space previously assigned to the old file is now free, which it is, though the old file is still "living" there. If nothing new gets overwritten in that spot on the drive, the old "deleted" file can be recovered from this unallocated disc space. And that's what happened here. The defendant tried to delete these photos, but only deleted the index reference leaving the photos intact and sitting in the unallocated space. Since nothing new has been written over that data, I could pull those photos off the defendant's phone with ease, but it gets even better.

PROS. ATTY: How so?

CREDIBLE: These photos were tagged with both date/time data and also geo data, so I was able to establish that these two photos, State's Exhibits 103 and 104 were taken at 2:14 a.m. and 2:15 a.m. on May 13, 2011 and lat/long coordinates that put this phone within 30 feet of where I found Bess and Beverly.

PROS. ATTY: Judge, we offer State's 103 and 104.

JUDGE: These two exhibits are received.

PROS. ATTY: How do you know the lat/long of the location of Bess and Beverly's bodies?

CREDIBLE: I carry a GPS on me at all times. Don't say it: I know. No camera and no scene photos, but at least I had the GPS on me.

PROS. ATTY: Did you confront that defendant with what you found on his phone?

CREDIBLE: Nope. By that point in time . . .

DEF. ATTY: Objection.

JUDGE: Sustained. Counsel, approach. [sidebar, where the Court cautioned the prosecutor and the witness that the State is getting dangerously close to a mistrial by tendering evidence of the defendant's invocation of his constitutional rights]

JUDGE: Counsel, step back. Proceed.

PROS. ATTY: Thank you your honor. No further questions.

DEF. ATTY: Officer, what version of the iPhone operating system was running on my client's phone when you lied to him about your intentions to copy it?

CREDIBLE: IOS 3.8.2a.

DEF. ATTY: My client's iPhone was not passkey locked was it?

CREDIBLE: Nope.

DEF. ATTY: So anybody who was in possession of it could use any and all of the features of that phone, including the camera, right?

CREDIBLE: Yes.

DEF. ATTY: And what about the location services. When you duped my client into giving you his phone, was the GPS location feature enabled or disabled?

CREDIBLE: When I did the data dump, the GPS location feature was set in the "OFF" position.

DEF. ATTY: Yet to get the geo-tagging of a photo taken with an iPhone, that feature has to be turned on, right?

CREDIBLE: Correct.

DEF. ATTY: Are you familiar with the "Find My iPhone" feature that Apple offers to it's iPhone customers?

CREDIBLE: Yes.

DEF. ATTY: Did you even bother to check to see if this "Find My iPhone" feature had been invoked during the 24-hours prior to when you lied to my client to unconstitutionally search his iPhone.

PROS. ATTY: Objection.

JUDGE: Sustained. Members of the jury, disregard that last question by State's Counsel and do not concern yourselves with procedural issues associated with the lawfulness or unlawfulness of methods used during the investigation of this case. It's my job to tend to those issues.

DEF. ATTY: Well, did you check it?

CREDIBLE: No.

DEF. ATTY: And you could have easily done so and at multiple sources too - through logs on the iPhone itself or via my client's iTunes logs and backup files, right?

CREDIBLE: Correct.

DEF. ATTY: Back to the passkey matter. With the phone configured in this fashion, if my client had lost his phone, or had it stolen, the person in possession of my client's phone would have had full access to all features, including the camera, right?

CREDIBLE: Right.

DEF. ATTY: And had you bothered to check, you could have proven beyond a reasonable doubt that my client's phone was lost simply by checking the logs to see if he'd used the "Find My iPhone" service?

PROS. ATTY: Objection.

JUDGE: Overruled.

CREDIBLE: No, that's not correct. I've seen tech-savvy criminals try and manufacture a bogus alibi by invoking that feature to create a false tech-trail that might support the inference that they lost or misplaced their phone or computer.

DEF. ATTY: But there's not one shred of evidence to support that accusation here, is there?

CREDIBLE: And there's not one shred of evidence to disprove it either.

DEF. ATTY: And just who here has the burden of proof?

PROS. ATTY: Objection, argumentative.



JUDGE: Overruled.

CREDIBLE: The State of course, and we certainly don't shy away from that fact, but when you sit there in your shiny suit and try to manufacture a defense from thin air, I'll be more than happy to clarify the record, Counsel.

DEF. ATTY: You never checked, did you? And it's your burden to prove this case, right?

CREDIBLE: As I said before, I did not check because there was no...

DEF. ATTY: Thank you, you've answered the question. I'm done with this witness.

JUDGE: Redirect?

PROS. ATTY: Yes, thank you. Officer Credible, the defendant never reported his iPhone lost or stolen, did he?

CREDIBLE: No, he most certainly did not.

PROS. ATTY: And when did you first learn that the defendant was hinting at the fact that somebody else had had his phone when Bess and Beverly were executed?

CREDIBLE: Yesterday, when you showed me what the defense finally produced, the day before trial, as discovery.

PROS. ATTY: In your experience as a peace officer, what information has more value to you during the course of an investigation: information disclosed contemporaneously with the triggering event, or information that is disclosed months after the triggering event.

DEF. ATT: Objection, inviting the witness to comment on credibility of the hearsay declarant.

JUDGE: The question is phrased properly - overruled.

CREDIBLE: The former - information disclosed contemporaneously with the events under investigation. The latter - information that comes as delayed disclosures - is less reliable, in my experience, because it can often be the product of a concocted story.

PROS. ATTY: And, to your knowledge, the very first time the defendant ever asserted or even hinted at a claim that he wasn't in possession of his iPhone on May 12-13, 2011, was yesterday, right?

CREDIBLE: That is absolutely true.

DEF. ATTY: Objection, judge. This is absolutely outrageous. I move for an immediate mistrial because the State is overtly . . .

JUDGE: Sit down, Counsel. The time when an asserted fact or event is disclosed to law enforcement is relevant in assessing the credibility of claim, so I'll overrule your objection and deny the motion. Proceed.

PROS. ATTY: One last point. Officer Credible, when you secured the defendant's permission to inspect his phone, how was his demeanor?

CREDIBLE: He expressed anger at the allegation of false telephonic harassment, but he wasn't otherwise upset and he certainly made no mention of his phone having gone missing.

PROS. ATTY: Thank you, nothing further.

JUDGE: Does the Defense have any other questions for this witness?

DEF. ATTY: No.

JUDGE: State, call you next witness.

PROS. ATTY: We call our veterinarian, Dr. Moss.

CLERK: Dr. Moss, please come on up to the witness stand. Please raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

MOSS: I do.

CLERK: Please state your name and spell your last name for the record.

MOSS: My name is Peter Moss. M-O-S-S.

PROS. ATTY: Dr. Moss, how long have you been practicing veterinary medicine?

MOSS: Fourteen years.

PROS. ATTY: Where did you train before going into practice?

MOSS: NYU vet school. Graduated in the top 5% of my class.

PROS. ATTY: Have you ever testified as an expert witness prior to today?

MOSS: Yes, I have, in several cases. All of them civil vet malpractices cases. This is my first criminal case.

PROS. ATTY: But other Union Lake courts have recognized you as an expert witness, right?

MOSS: Several times, and twice on "cause of death" issues in small animal cases.

PROS. ATTY: Judge, I would ask that the Court so recognize Dr. Moss in this case: as a qualified expert to render an opinion on the cause of death in these two cats.

DEF. ATTY: No objection. We'll stipulate to that.

PROS. ATTY: Thank you, Counsel. Dr. Moss, did you do the necropsies of Bess and Beverly, the two cats depicted in Exhibits 101-104?

MOSS: Yes, I did. I acquired possession of their bodies from Officer Credible on May 14<sup>th</sup> and did the necropsies later that same day.

PROS. ATTY: What did you find?

MOSS: In Bess' case, I found that she had been shot once in the neck. The projectile hit her spinal cord and severed it, killing her almost instantly. The bullet was not recovered. However, judging from the size of the entry wound and the amount of tissue damage, I estimate that the gun used was a small caliber weapon. There was no stippling or powder burns around the entry wound, so the range of the shooter is greater than 4 meters. There was no cavitation in the tissue surrounding the bullet's path, so I have to conclude that this was a lower velocity round. In all, it is my opinion that this cat, Bess, died of a gunshot wound inflicted by a small caliber handgun at a range of more than 4 meters.

PROS. ATTY: What about Beverly? What did you find there?

MOSS: I have to admit that I was somewhat surprised in that I found an entirely different type of ammunition had been used. Unlike Bess - where one bullet caused the damage - in Beverly's case, scatter or "rat" shot was used. While you can't see the entrance wound in Exhibit 104 because she is posed on her left side, the radiograph I took, that you have marked as Exhibit 105 shows what I found.

PROS. ATTY: Judge, to aid the jury in following Dr. Moss' testimony, I offer State's 105.

DEF. ATTY: No objection.

JUDGE: State's Exhibit 105 is received.

PROS. ATTY: Walk us through what is depicted in this exhibit, number 105.

MOSS: As you can see, Beverly's chest is full of lead. Much of it is warped or misshaped suggesting very soft projectiles, and the distribution is wide which is consistent with something other than a contact wound. And that conclusion matches with the amount of powder burns and stippling I found on the left side of Beverly's body. She was killed by a gunshot to the chest with a rat shot round.

PROS. ATTY: So this gunshot wound is what killed Beverly?

MOSS: Absolutely and what a painful way to go. Unlike Bess with a severed spinal cord, in Beverly's case, she would have languished and suffered a great deal of pain before finally succumbing to her wounds.

PROS. ATTY: Not killed by coyotes, not killed by poison, but killed by gun shots?

MOSS: That's correct.

PROS. ATTY: Nothing further.

DEF. ATTY: Two different types of ammunition used, right?

MOSS: Correct.

DEF. ATTY: That means two different guns.

MOSS: Incorrect. Could just as likely be that the person who is accused of these despicable acts - in this case, your client - loaded two different types of ammunition in the same firearm. For example, one can load a .22 caliber revolver with three rounds of solid lead ammunition and three rounds of rat shot & the gun will function just fine, firing which ever round happens to be in the chamber at the time the trigger is pulled.

DEF. ATTY: You can't say that a revolver was used here.

MOSS: Common sense and reason suggest, when one looks at Exhibit 103, that a revolver was used, Counsel.

DEF. ATTY: You think you can render an expert opinion from two highly staged photographs?

MOSS: No doubt the monster who killed these cats clearly staged these photos but that fact doesn't negate a reasonable inference that the gun used to kill the cats depicted in the photos is the same gun - in this case, a revolver - depicted in Exhibit 103.

DEF. ATTY: One can load a semi-auto pistol with different types of ammunition, true?

MOSS: I'm a veterinarian, not a ballistics expert, but I would think that while one could do so, that such a stunt would contribute to jamming the action in a semiautomatic pistol due to the differing weights of the projectiles, dissimilar power loads and the casing materials.

DEF. ATTY: You're right, you're not a ballistics expert. Judge, I ask that the Court strike that last question and response.

PROS. ATTY: What? Counsel steps in the mud and wants this Court to clean it up. Waiver and invited error are the controlling concepts here, not to mention that the Defense opened the door here.

JUDGE: State, I agree. Defense, your request is denied. Move on.

DEF. ATTY: Dr. Moss, you have not one shred of evidence that my client is the person who shot these two cats do you?

MOSS: My exam was limited to proving the factual cause of death.

DEF. ATTY: Nor do you have any proof that these cats were killed in the location where they were found.

MOSS: That's not entirely correct. Officer Credible's report notes blood at the scene where the bodies were recovered—a fact consistent with the injuries being inflicted at that location. However, I have to concede that the definitive way to prove or disprove this issue is by comparing the location of the blood in the cats' tissues (we call that postmortem lividity or livor mortis) with the bodies' positions when recovered. Blood in the body of a deceased mammal pools rapidly after

death and settles or “fixes” there and if the location of the pooled blood in the bodies is inconsistent with the position of the bodies when found by law enforcement, then there is reason to believe the bodies were dumped after being killed.

DEF. ATTY: And there’s no way for you to make that key analysis here because Officer Credible failed to properly document the crime scene, right?

MOSS: That’s overstating it. I can’t do that analysis in this case, as I don’t have the necessary comparators.

DEF. ATTY: One final point. You are in private practice and this is your first criminal case, right?

MOSS: Right.

DEF. ATTY: How much did the State pay you for your testimony?

MOSS: Ninety dollars an hour for my time in the lab on the necropsies, for a total of two hours, so that’s \$180 – plus \$150 an hour for my time in court.

DEF. ATTY: Any other compensation?

MOSS: No, none.

DEF. ATTY: Are you sure?

MOSS: Yes, that’s what I’m being paid on this case.

DEF. ATTY: Do you have any other agreements with the State?

MOSS: Not in this case.

DEF. ATTY: Now you and I both know that’s not entirely true.

PROS. ATTY: Objection.

JUDGE: Overruled.

MOSS: What are you insinuating, Counsel?

DEF. ATTY: Is it not true that after you performed the necropsies in this case, the State signed a retainer agreement with you promising you a flat annual fee of \$10,000 for all future cases over the next two years, and that’s on top of the hourly fees you’ve already admitted to?

MOSS: That’s accurate, but a separate transaction.

DEF. ATTY: So you were lying to this Court about not receiving any other compensation from the State weren’t you?

PROS. ATTY: Objection.

JUDGE: Overruled.

MOSS: How am I supposed to answer that question?

DEF. ATTY: I think you just did. Thank you, nothing further.

JUDGE: State?

PROS. ATTY: Dr. Moss, neither I nor anybody in my office or any other law enforcement officer has ever asked you to color your testimony in exchange for contract work with the State, isn't that true?

MOSS: That's absolutely true.

PROS. ATTY: Thank you, doctor. Nothing further.

JUDGE: Call your next witness.

PROS. ATTY: We recall Officer Credible.

CLERK: Officer, please approach & take a seat. You're still under oath.

PROS. ATTY: Officer Credible, when a citizen buys a handgun, does the State of Union Lake require the purchaser to register that handgun with the state?

CREDIBLE: Yes.

PROS. ATTY: Do you have access to that database, as a sworn law enforcement officer?

CREDIBLE: Yes, it's called the "UGLY" system. Short for "Union lake Gun Location Yielder."

PROS. ATTY: And can you search or trace guns in that database?

CREDIBLE: Yes. Until last year, we could only search serial numbers pulled off of guns known or reasonably believed to have been used in the course of committed crimes. However, last legislative session, the Governor signed into law an amendment that allows us to search on a suspect name to see what guns they might have registered to them, provided we have probable cause to believe that said suspect used a gun in the commission of a crime.

PROS. ATTY: And did you search on the defendant's name in the UGLY system in this case?

CREDIBLE: Yes, once I learned the necropsy results from Dr. Moss, I did just that.

PROS. ATTY: And what did you learn from the UGLY system?

DEF. ATTY: Objection, hearsay.

PROS. ATTY: Both a record of regularly conducted activity under rule 803(6) and a public record under rule 803(8).

JUDGE: Overruled.

CREDIBLE: That the defendant has three handguns registered in his name.

PROS. ATTY: Are any of them consistent with the gun described by Dr. Moss?

CREDIBLE: Yes, one. An H&R 922, which is a .22 caliber revolver. I know from my training and experience that an H&R 922 looks very much like the gun in Exhibit 103.

PROS. ATTY: Thank you. Nothing further.

DEF. ATTY: No questions.

PROS. ATTY: Judge, the State rests.

DEF. ATTY: Your Honor, I have a matter for the Court.

JUDGE: Ladies and gentlemen, the Court will take a short break to attend to some procedural matters that do not concern you this afternoon. We will reconvene as soon as I am able to tend to these other issues.

[Jury is escorted to the jury room]

JUDGE: Counsel, make your motion.

DEF. ATTY: We move for a judgment of acquittal on the grounds that the State has failed to prove venue. As the Court knows, a careful review of the record will reveal that nowhere during this proceeding did the State prove venue - that the alleged crimes were committed in Jeanneau County. The only testimony elicited on this issue was from Officer Credible, who noted that the evidence of this incident was collected in the field south of the Cornvallis airport. We know from Ms. Fever that she lives adjacent to that field in the Cornvallis airpark neighborhood. That's it. There is no direct evidence of venue in this case. Nowhere did the State put on any direct evidence that these alleged crimes were committed in Jeanneau County. As the Court knows, in State v. Sr. Mixalotte, 344 UL 207 (2002) the Court held that venue is a material element in every criminal case and the failure to prove it must result in an acquittal.

JUDGE: State, what do you say in response?

PROS. ATTY: Judge, I can't believe that I didn't expressly cover that. However, my oversight is not fatal to this case. The Defense fails to note that the Sr. Mixalotte opinion also expressly notes that venue can be proven through circumstantial evidence and the record here is replete with more than sufficient circumstantial evidence. Anybody who lives in this area of Union Lake knows that the Cornvallis airport and the surrounding areas are well within the Jeanneau County limits, so for that reason, the Court should deny the motion. Construing the evidence in a light most favorable to the prosecution, which is required when considering such a motion, the Court should find that the record is sufficient to go to the jury. If, however, the Court isn't willing to do so, I respectfully ask the Court to take judicial notice of this very fact: that all locations relevant to this case are within Jeanneau County - this per Union Lake Rule of Evidence 2.02. Lastly, the Court

has the discretion to grant leave so that I may reopen my case to tender this all but undisputed direct testimony. Officer Credible is right out in the hall, available to testify. I apologize for the oversight in not expressly defusing this issue, but there is no reason to deny the jury a chance to decide the matter.

JUDGE: State, I'm tempted to "teach you a lesson" as Judge Dickerson did to me some 30 years ago in a drunk driving case. However, because the Court of Appeals has hinted in no uncertain terms that it doesn't like dealing with this issue when the trial court can preclude the appeal by invoking Rule 2.02 or exercising its discretion by allowing the State to reopen its case, I'm going to take judicial notice that all locations material to this case - including the location of the dead cats and the home of Ms. Fever - are located within Jeanneau County, City of Cornvallis. However, if the facts of this case were such that the incident location were close to the county line, my ruling would have been different.

Does the Defense intend to put on a case?

DEF. ATTY: Yes, Your Honor, we do.

[Jury is escorted back into the courtroom]

DEF. ATTY: The Defense calls Dr. James Short.

CLERK: Dr. Short, please come on up to the witness stand. Please raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

SHORT: Yes.

CLERK: Please state your name and spell your last name for the record.

SHORT: My name is James Short. Short is spelled S-H-O-R-T.

DEF. ATTY: Dr. Short, what's your professional background?

SHORT: I have my Doctorate in Veterinary Medicine and I am a practicing veterinarian here in Cornvallis. I've been practicing now for about three years.

DEF. ATTY: Dr. Short, have you ever testified in court before as an expert witness?

SHORT: Only twice. Both times in divorce cases related to pet custody disputes between soon to be former spouses.

DEF. ATTY: And before you went vet school what did you do for a living?

SHORT: I was a ballistics analyst for the New Jersey State Crime Lab for 12 years.

DEF. ATTY: How many cases did you handle as a ballistics analyst for the New Jersey State Crime Lab?

SHORT: Well over 1,000.

DEF. ATTY: Why the change of career?



SHORT: I love animals and grew tired of the bureaucratic overhead that comes with working for a state agency, so I decided I'd go to vet school and help animals.

DEF. ATTY: In addition to your practice as a vet, what other community involvement do you have?

SHORT: I volunteer 25 hours each month for the local animal shelter, providing free spay/neuter services.

DEF. ATTY: In both your capacity as a veterinarian and as a ballistics expert, have you had occasion to examine the facts of this case, including the police incident report, Dr. Moss' necropsy report with lab notes and the physical evidence?

SHORT: Yes.

DEF. ATTY: As to Dr. Moss' conclusions as to the cause of death, do you share his opinion?

SHORT: No.

DEF. ATTY: Why not?

SHORT: Dr. Moss failed to document his necropsy work with photographs or tissue samples. Further, I was shocked to learn that Dr. Moss didn't even dictate his necropsy report until three weeks after he did the necropsies on the cats. This shoddy work is further aggravated by the fact that Dr. Moss did no toxicology testing to rule out disease or toxins as causal or contributing factors. The bottom line, after I reviewed his lab notes and report, is that there is no way to conclude, as he did, that the gunshot wounds observed in the bodies of these two cats were inflicted while the animals were still alive. That conclusion is entirely unsupported by this forensic record, such that it is.

DEF. ATTY: And what about Dr. Moss' opinion about the metal found in the cat named Beverly?

SHORT: In my opinion, that's not a rat shot load at all. I've seen 100 or more cases where a .22 caliber bullet basically disintegrates on impact with a bone and scatters throughout the chest cavity or abdomen. Heck, just look at Exhibit 105. Do any of you see a piece of metal in that cat that isn't deformed? With a rat-shot load, just like a shotgun blast, you're invariably going to see at least a few pellets that retain their original shape, but that's just not the case here. Further, the dramatic size differential between the pieces of metal is consistent with a bullet coming apart.

DEF. ATTY: Dr. Short, have a look at Defense Exhibit 201 and please tell the jury what that is.

PROS. ATTY: Objection, relevancy

JUDGE: Overruled.

SHORT: That's a picture of a .22 caliber "rat-shot" load.

DEF. ATTY: Offer Defense Number 201.

PROS. ATTY: We object, it's not relevant in this context.

JUDGE: Overruled. Defense Exhibit 201 is received.

DEF. ATTY: No further questions.

PROS. ATTY: Dr. Short, you've only been a vet three years, correct?

SHORT: That's right.

PROS. ATTY: In that time, just how many forensic necropsies have you performed?

SHORT: None.

PROS. ATTY: And, in both of the prior cases where you appeared in court - those divorce cases - you were retained by the same attorney, right?

SHORT: Yes.

PROS. ATTY: And that attorney is Mr. Smith, the defense attorney in our case, correct?

SHORT: Right.

PROS. ATTY: Your office sign right there on 9<sup>th</sup> street notes that your practice focuses on dogs, horses and dairy cattle doesn't it?

SHORT: It does.

PROS. ATTY: When is the last time you've seen or treated a cat for anything?

SHORT: I deal with feline cases in my volunteer spay and neuter work.

PROS. ATTY: But you don't treat cats in your everyday practice and, more importantly, you have never performed a necropsy on a cat before have you?

SHORT: No I have not.

PROS. ATTY: As to the shell fragmentation claim versus a .22 rat-shot load issue, in your capacity as a veterinarian, you've never had to make that diagnosis in any case you've seen other than this one, true?

SHORT: Ignoring all of my work in New Jersey, then yes, that's true.

PROS. ATTY: How much is Mr. Smith paying you today?

SHORT: \$2,500.

PROS. ATTY: And how much did he pay you in the two prior divorce cases?

DEF. ATTY: Objection - relevancy.

PROS. ATTY: Shows an ongoing economic interest and thus a lack of objectivity in this case.

JUDGE: Objection sustained.

PROS. ATTY: No further questions.

JUDGE: Does the Defense have another witness?

DEF. ATTY: We call my client, Mr. Nugget.

CLERK: Raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

NUGGET: I do.

CLERK: Please state your full name and spell your last.

NUGGET: My name is Theodore Nugget, but I go by "Ted." My last name is spelled N-U-G-G-E-T.

DEF. ATTY: Mr. Nugget, how old are you?

NUGGET: 32.

DEF. ATTY: Where do you live?

NUGGET: On my mom's place at the end of the runway, next to Ms. Fever.

DEF. ATTY: How much education have you had?

NUGGET: Tons. I dropped out of high school, but then I attended truck-driving school and got my commercial driver's license. After that, I went to chef school and learned to cook. I've been trained as a baker and I work a part-time gig at the Safeway bakery now, but my real job is coming as I'm in school right now to be a sound engineer for live rap shows. I'm a huge gangsta rap fan.

DEF. ATTY: And you lost your father in a tragic plane crash when you were young, tell the jury about that.

NUGGET: I was only 5. My dad loved to fly. He was damn good at it too. He dusted in the summer...um, sorry, we would fly for the local farmers as a crop duster. One morning he was up early with a load of Roundup when he must have misjudged his airspeed, angle of attack and altitude - he clipped a power line with his left landing gear strut, pulled the transformer off the poll and stalled. Dropped out of the sky like a rock. Busted both tanks: fuel and spray. Of course the power line was arching and sparking around like an angry snake. The sparks ignited the fuel and the plane went up like a 4<sup>th</sup> of July BBQ with my dad still in it. I watched the entire thing go down.

DEF. ATTY: Would it be fair to say that you were scarred by this tragic loss?

PROS. ATTY: Objection. Counsel is pandering for jury sympathy here and this is all irrelevant to the factual disputes of this case.

JUDGE: Sustained. Counsel, let's move along here.

DEF. ATTY: Of course, Your Honor. Thank you.

DEF. ATTY: You are suing Ms. Fever. Why is that?

NUGGET: Her damn cats keep coming into my yard and pissing all over my strawberries and crapping in my bark dust. I sell my strawberries during the summer to make some extra cash and I'm pretty proud of the yard and I like to maintain the landscaping that my Mom worked so hard to perfect.

DEF. ATTY: Mr. Nugget, did you ever agree to let Officer Credible copy the entire contents of your iPhone?

NUGGET: I most certainly did not.

PROS. ATTY: I object to this line of questioning. These procedural issues are outside of the jury's purview.

JUDGE: Agreed. Sustained.

DEF. ATTY: Let's cut to the chase. Did you kill these two cats?

NUGGET: No I did not.

DEF. ATTY: Did you take those photographs?

NUGGET: Nope.

DEF. ATTY: Do you know who did kill the cats and take those photos?

NUGGET: Not for 100% sure, but I have a hunch it could have been Gary Pike.

DEF. ATTY: Let's focus back on the night of May 12<sup>th</sup> and the early morning of May 13<sup>th</sup>. Why do you believe it was Gary Pike?

NUGGET: That night, I was getting pretty drunk as I was still grieving the death of my Mom. I remember Gary coming over right after Letterman came on TV. Gary was pissed at his girlfriend, Michele, but she wasn't taking his calls no more, so Gary asked to use my iPhone and I let him.

DEF. ATTY: What happened next?

NUGGET: Gary went outside and was screaming at Michele on the phone, saying stuff like "You can run, but you can't hide." He was pissed off.

DEF. ATTY: How long was this Gary Pike outside using your phone?

NUGGET: At least half an hour.

DEF. ATTY: In addition to his yelling, did you hear anything else?

NUGGET: I heard gunshots.

DEF. ATTY: Did that concern you?

NUGGET: Not really, Gary gets real mad at Michele, but he'd never shoot her or nothin'. He just sometimes likes to shoot his gun in the air to scare her, so I figured that's what he was up to - phone gunning as it were.

DEF. ATTY: Did Gary say anything to you when he returned your phone?

NUGGET: Not that I recall, but I wasn't paying him much attention by that point in the evening.

DEF. ATTY: Judge, may I approach?

JUDGE: Yes.

DEF. ATTY: I am handing what is marked as Defendant's Exhibit Number 202. Can you identify the person in this photograph?

NUGGET: Yes, that's Gary Pike.

DEF. ATTY: Offer Defendant's 202.

PROS. ATTY: Objection. This is nothing short of outrageous. The defense drops discovery on us yesterday knowing full well that we can't get Pike served for trial today and then...

JUDGE: Counsel, approach. [sidebar, where the Court cautioned the prosecutor about "speaking objections" in front of the jury and refused to grant the State's motion to strike all late defense discovery as untimely - out of concern for judicial economy and avoiding post-conviction relief proceedings]

JUDGE: The State's objection is overruled. Defense Exhibit 202 is received.

DEF. ATTY: Thank you, Your Honor. Mr. Nugget, how long have you known Mr. Pike?

NUGGET: About 6 years.

DEF. ATTY: To your knowledge, does Mr. Pike like cats?

PROS. ATTY: Objection, soliciting hearsay.

JUDGE: Sustained.

DEF. ATTY: Have you ever seen Mr. Pike interact with cats?

NUGGET: Yes, he kicks them every chance he gets.

DEF. ATTY: That night of May 12 - 13, did Mr. Pike have a new toy he was boasting about?

NUGGET: Yes, he told me he'd just won a pair of night vision binoculars at an NRA event.

PROS. ATTY: Objection, hearsay.

DEF. ATTY: Not offered for the truth of the matter.

JUDGE: Sustained.

DEF. ATTY: I'm handing you what is marked as Defense Exhibit 203. Can you identify the two images depicted here?

NUGGET: Sure, that's Pike's truck and those are the night vision binocs he showed me that night.

DEF. ATTY: Offer Defendant's 203.

PROS. ATTY: Objection. Relevance, improper impeachment of a hearsay declarant and an ongoing discovery violation.

JUDGE: Sustained, but Counsel this is your last warning about speaking objections.

DEF. ATTY: Have you heard from or seen Gary Pike since May 12<sup>th</sup> or 13<sup>th</sup> 2011?

NUGGET: No, it's like he dropped off of the face of the planet.

DEF. ATTY: But it is your testimony that you never harmed Ms. Fever's two cats?

NUGGET: That's right. I would never do such a thing.

DEF. ATTY: One last matter. Please tell the jury how it is you came to be convicted of felony distribution of marijuana.

NUGGET: I was in a jam for cash. Out of work in a tough economy and not many job prospects out there for a guy like me - with no college degree. I was up against it and about to lose my apartment, so I made a really dumb call and decided to sell some weed to make enough money to pay my rent. But that was back in 2008 and I've not been in trouble since.

DEF. ATTY: Nothing further.

PROS. ATTY: You were drunk that night, right?

NUGGET: Yes, sir, but I was still grieving the passing of my mom.

PROS. ATTY: You and Ms. Fever don't get along well do you?

NUGGET: That's a matter of opinion.

PROS. ATTY: Isn't it true that you, via your attorney, withheld your witness list and witness statements until yesterday afternoon?

NUGGET: Don't know for sure about when all that pre-trial stuff went down.

PROS. ATTY: You never once mentioned Gary Pike as a person whom you suspected in this case until yesterday, isn't that true?

NUGGET: Not my fault the cops don't know how to do their jobs.

PROS. ATTY: Really, you honestly think this is about the cops not doing their jobs? And I suppose that this has nothing to do with you being afraid of the truth here...

JUDGE: Move on.

PROS. ATTY: Let's focus on the phone call you say Mr. Pike made. He used your phone, right?

NUGGET: Yep, that's what I said.

PROS. ATTY: So proof of that call will be in your call log.

NUGGET: I don't know.

PROS. ATTY: The very call log that is saved on Officer Credible's computer as part of a copy of your entire iPhone.

NUGGET: I, um, I guess you'd have to...I don't...

PROS. ATTY: For the record, judge I'd like to note that the witness's face just turned red and he appears to be sweating.

NUGGET: I'm not feeling well. My stomach is hurting - I think I'm going to puke. That clam chowder I had at lunch must have been rancid.

JUDGE: We'll take a short recess.

[after a 30 minute break, court reconvened]

JUDGE: Counsel, you may resume your cross.

PROS. ATTY: Feeling better now, Mr. Nugget?

NUGGET: Enough to be back up here for now, but I'm still ill.

PROS. ATTY: You're in luck, Mr. Nugget, I checked with Officer Credible and due to a subsequent hard drive failure on his laptop, the copy of your iPhone is no longer available to him, so there's no way to corroborate your story using that old copy of your phone. I don't suppose you brought any of your old phone bills here to prove that Mr. Pike used your phone to call Michele's number did you?

NUGGET: Nope.

PROS. ATTY: Let's back up a bit. Do you concede that Ms. Fever heard gunshots that night?

NUGGET: I don't concede anything, to anybody, ever.

PROS. ATTY: Do you concede that you are a convicted drug dealer?

NUGGET: Pot's no drug, you make it sound like I was slinging smack or something.

PROS. ATTY: Do you agree that Ms. Fever's cats were shot?

NUGGET: Like I said, I am not going to agree with you about anything, you're just out to get me that's all.

PROS. ATTY: You're a gun owner, right?

DEF. ATTY: Beyond the scope of direct, I object.

JUDGE: Agree, sustained.

PROS. ATTY: Judge, how can you rule that way? On direct, the defendant expressly denied shooting Ms. Fever's cats, and that opens the door to this line of cross.

DEF. ATTY: I was careful to word my question as "kill" not "shoot" to avoid this exact issue.

JUDGE: I've ruled. The objection is sustained.

PROS. ATTY: You know that your attorney's investigator has access to the UGLY system, just like Officer Credible does, right?

NUGGET: I suppose.

PROS. ATTY: Did your team even bother to check to see if Mr. Pike has any registered handguns in his name?

NUGGET: I don't know.

PROS. ATTY: Well, if Mr. Pike did have pistols in his name, that would help sell your story wouldn't it?

DEF. ATTY: Argumentative.

JUDGE: Sustained, rephrase or move on.

PROS. ATTY: If Mr. Pike had a record of owning a small caliber pistol, that would support your theory of this case would it not?

NUGGET: I guess.

PROS. ATTY: And don't you think that if Mr. Pike had owned such a gun, your lawyer would offer that evidence?

NUGGET: Isn't that a secret? Attorney client secrets and all?

DEF. ATTY: Judge, I object and move to strike this entire line of questioning.



JUDGE: Overruled, the State hasn't crossed the line into privileged communications.

PROS. ATTY: Mr. Nugget, care to answer the question now?

NUGGET: What was the question?

PROS. ATTY: If Mr. Pike owned a gun like the one believed used here, your team would certainly want the jury to know that, right?

NUGGET: How should I know?

PROS. ATTY: Okay, Mr. Nugget, I have nothing further for you.

DEF. ATTY: Your Honor, I have no further witnesses. The Defense rests.

JUDGE: Rebuttal?

PROS. ATTY: In an effort to save time, and with Counsel's stipulation after speaking with Officer Credible over the phone during the last break, the parties agree to formally enter into the record that if Officer Credible were recalled to the stand he would testify that his ability to reexamine the copy of the defendant's iPhone he acquired on May 13, 2011, has been compromised by the failure of his office-issued laptop hard drive, and his inability to access the online backup data due to a service interruption in that subscription service that resulted in a loss of his backup data.

JUDGE: Thank you, Counsel. That stipulation is received. The Court will take a short recess and then we'll hear closing arguments.

\*\*\*\*\* END \*\*\*\*\*

# STATE'S EXHIBIT 101

(Bess)



# STATE'S EXHIBIT 102

(Beverly)



# STATE'S EXHIBIT 103

(Bess)





# STATE'S EXHIBIT 104

(Beverly)



# STATE'S EXHIBIT 105

(Beverly -- Necropsy Radiograph)



# DEFENDANT'S EXHIBIT No. 201



# DEFENDANT'S EXHIBIT No. 202

(Gary Pike)





# DEFENSE EXHIBIT 203

(Truck & Night Vision Binoculars)



## **STIPULATED JURY INSTRUCTIONS**

*State v. Theodore "Ted" Nugget*  
*Jeanneau County Circuit Court Case No. 11-1059*  
*State of Union Lake*

### **Charges:**

- Count I:**      **Aggravated animal cruelty (aggravating factor: with a firearm) as to Bess, a feline (class C felony)**
- Count II:**    **Aggravated animal (aggravating factor: with a firearm) as to Beverly, a feline (class C felony)**
- Count III:**   **Discharge of a Firearm within the City Limits (class C Misdemeanor)**

<b>Instruction Number</b>	<b>Instruction Description</b>
1.	Preliminary Instructions
2.	Functions of the Court and Jury
3.	Presumption of Innocence of Defendant and Proof Beyond a Reasonable Doubt
4.	Definition of Direct and Circumstantial Evidence
5.	Testimony of Witnesses (Deciding What to Believe)
6.	Defendant's Statements
7.	Witness False in Part
8.	Defendant's Prior Conviction
9.	Absence of Evidence
10.	Expert Witnesses
11.	Non-expert Witnesses
12.	Definition of Intentionally
13.	Criminal Charges
14.	Lesser Included Charge of Second Degree Animal Abuse
15.	Exceptions to Animal Cruelty Laws

**INSTRUCTION No. 1**  
**PRELIMINARY INSTRUCTIONS**

*(Note: Instruction No. 1 was given by the Court to the members of the jury prior to taking testimony)*

*Introductory Paragraphs*

Ladies and gentlemen: You are now the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions.

At the end of the trial, I will give you more detailed instructions. Those instructions will control your deliberations.

One of my duties is to decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision. You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be.

*Order of Trial*

The trial will proceed in the following manner:

First, the State's attorney may make an opening statement. Next, Defendant's attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

After the opening statements, the State will call witnesses and present evidence. Then, the Defendant will have an opportunity to call witnesses and present evidence. After the parties' main cases are completed, the State may be permitted to present rebuttal evidence. After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. After that, you will go to the jury room to deliberate on your verdict.

*Charges and Defenses*

The positions of the parties can be summarized as follows:

This case involves criminal charges by the State of Union Lake against the Defendant, Theodore "Ted" Nugget. The Defendant has been charged with aggravated animal cruelty (Counts I and II of the Indictment) and Discharge of a Firearm with the City Limits (Count III of the Indictment).

Defendant has pleaded not guilty to each of these three charges.

### *Evidence in the Case*

The evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any facts that I may instruct you to find or that the parties may agree or stipulate to. A stipulation is an agreement between both sides that certain facts are true.

### *Credibility of Witnesses*

You will have to decide whether the testimony of each of the witnesses is truthful and accurate – in part, in whole, or not at all. You also have to decide what weight, if any, you give to the testimony of each witness.

### *Inferences*

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this “inference.” A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

### *What is Not Evidence; Evidence for Limited Purpose*

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case: the attorneys’ statements, arguments, questions, and objections of the attorneys; any testimony that I instruct you to disregard; and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

### *Rulings on Objections*

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any ruling or other comment I may make that I have any opinions about how you should decide this case. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been, and you should not draw any inferences or conclusions from the question itself.

### *Objections of Counsel*

The lawyers for the parties in this trial have a duty to object to what they feel are improper questions asked of the witnesses. You should not draw any conclusion for

either side from the fact that an objection was made to any question, and that the witness may not have been permitted to answer it.

### *Jury Conduct*

All jurors must follow certain rules of conduct, and you must follow them, too.

First, you must not discuss this case with anyone – including your fellow jurors, members of your family, people involved in the trial, or anyone else. You must not let others discuss the case with you. If anyone tries to talk to you about the case please let me know about it immediately.

Second, you must not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it.

Third, you must not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own.

Fourth, you must not make up your mind about what the verdict should be until after you have gone to the jury room to decide this case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

## **INSTRUCTION No. 2 FUNCTIONS OF THE COURT AND THE JURY**

Members of the jury, you have seen and heard all the evidence and arguments from the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are, or about what your verdict should be.

**INSTRUCTION No. 3**  
**PRESUMPTION OF INNOCENCE OF DEFENDANT**  
**AND PROOF BEYOND A REASONABLE DOUBT**

The defendant is presumed innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on the State to prove the guilt of the defendant beyond a reasonable doubt.

Reasonable doubt is doubt based on common sense and reason. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. Reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you are not convinced to a moral certainty that the defendant is guilty. The defendant is never required to prove his innocence or to produce any evidence at all.

**INSTRUCTION No. 4**  
**DEFINITION OF “DIRECT” AND “CIRCUMSTANTIAL” EVIDENCE**

You may have heard the phrases “direct evidence” and “circumstantial evidence.”

Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

**INSTRUCTION No. 5**  
**TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)**

You must decide whether the testimony of each of the witnesses is truthful and accurate – in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, including any party to the case, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about
- the witness's memory
- any interest, bias, or prejudice the witness may have
- the witness's intelligence
- the manner of the witness while testifying
- the reasonableness of the witness's testimony in light of all the evidence in the case

### **INSTRUCTION No. 6** **DEFENDANT'S STATEMENTS**

When a witness testifies about statements made by the defendant, you should consider such testimony with caution.

In reviewing such testimony, you should consider, among other things, the following:

- (1) Did the defendant make the statement, and, if so, did the defendant clearly express what [he / she] intended to say?
- (2) Did the witness correctly hear and understand what the defendant said?
- (3) Did the witness correctly remember and relate what the defendant said?
- (4) Did the witness intentionally or mistakenly alter some of the words used by the defendant, thereby changing the meaning of what was actually said?

If, after weighing such factors, you conclude that the defendant said what [he / she] intended to say and that the witness to the statement correctly understood, remembered, and related to you what the defendant said, then you are authorized to consider such statements for what you deem them to be worth.

### **INSTRUCTION No. 7** **WITNESS FALSE IN PART**

A witness who lies under oath in some part of his or her testimony is likely to lie in other parts of his or her testimony. Therefore, if you find that a witness has lied in some part of his or her testimony, then you may distrust the rest of that witness's testimony.

Sometimes witnesses who are not lying may give incorrect testimony. They may forget matters or may contradict themselves. Also, different witnesses may observe or remember an event differently.

You have the sole responsibility to determine what testimony, or portions of testimony, you will or will not rely on in reaching your verdict.

**INSTRUCTION No. 8**  
**DEFENDANT'S PRIOR CONVICTION**

If you find that the defendant has been convicted of a crime, you may consider this conviction only for its bearing, if any, on the believability of the defendant/witness's testimony.

**INSTRUCTION No. 9**  
**ABSENCE OF EVIDENCE**

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

**INSTRUCTION No. 10**  
**EXPERT WITNESSES**

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

**INSTRUCTION No. 11**  
**NONEXPERT OPINION EVIDENCE**

Although a witness may be allowed to state his or her opinion, you are not required to accept that opinion. To determine what value, if any, you will give to a witness's opinion you should consider such things as the witness's opportunity and ability to form the opinion, the witness's believability, and how the witness reached the opinion.



**INSTRUCTION No. 12**  
**DEFINITION OF INTENTIONALLY**

**INTENTIONALLY AND WITH INTENT**

A person acts “intentionally” or “with intent” when that person acts with a conscious objective either (a) to cause a particular result; or (b) to engage in particular conduct.

**INSTRUCTION No. 13**  
**CRIMINAL CHARGES**

**THE CHARGE - THE INDICTMENT**

The indictment in this case is the formal method of accusing the defendant of an offense and placing the defendant on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is charged with the two counts of aggravated animal cruelty (Count I as to Bess, a cat and Count II as to Beverly, also a cat) and one count of Discharging a Firearm within the City Limits of Cornvallis. The defendant has pleaded not guilty to each of these three charges.

**AGGRAVATED ANIMAL CRUELTY IN VIOLATION OF STATE STATUTE**  
**(Count I)**

In the State of Union Lake, it is unlawful for any person to intentionally kill an animal (and “animal” is defined as all nonhuman vertebrates) in such a manner as to cause the animal to feel, experience or otherwise suffer exceptional pain for a protracted period of time. Use of a Firearm in the commission of this crime is an aggravating factor requiring a separate jury finding on that issue.

If you find from your consideration of all the evidence that each of the above elements are satisfied beyond a reasonable doubt, then you should find the defendant guilty of Aggravated Animal Cruelty (Count I) in violation of state statute. The defendant is otherwise presumed innocent.

**AGGRAVATED ANIMAL CRUELTY IN VIOLATION OF STATE STATUTE**  
**(Count II)**

In the State of Union Lake, it is unlawful for any person to intentionally kill an animal (and “animal” is defined as all nonhuman vertebrates) in such a manner as to cause the animal to feel, experience or otherwise suffer exceptional pain for a protracted period of time. Use of a Firearm in the commission of this crime is an aggravating factor requiring a separate jury finding on that issue.

If you find from your consideration of all the evidence that each of the above elements are satisfied beyond a reasonable doubt, then you should find the defendant guilty of Aggravated Animal Cruelty (Count II) in violation of state statute. The defendant is otherwise presumed innocent.

### **DISCHARGING A FIREARM WITHIN THE CITY LIMITS (Count III)**

In the State of Union Lake, the crime of Discharging a Firearm within the City Limits is defined as the unlawful discharging a firearm within the municipal boundary of any incorporated city within the State of Union Lake.

If you find from your consideration of all the evidence that each of the above elements are satisfied beyond a reasonable doubt, then you should find the defendant guilty of Discharging a Firearm within the City Limits (Count III). The defendant is otherwise presumed innocent.

### **INSTRUCTION No. 14 CRIMINAL CHARGES—LESSER INCLUDED OFFENSES**

As to Counts I and II, when you deliberate, you should first consider the charged offense of Aggravated Animal Cruelty (with a firearm). As to each count, individually, only if you find the defendant not guilty of the charged offense may you consider the lesser included offense of Second Degree Animal Cruelty.

The crime of Second Degree Animal Cruelty is a lesser included offense of Aggravated Animal Cruelty (with a firearm). Second Degree Animal Cruelty is defined as the unlawful and unjustified killing of an animal (and “animal” is defined as all nonhuman vertebrates) not owned or possessed by the actor. The defendant is otherwise presumed innocent.

This concludes the instruction phase of the case and after the clerk administers the oath prior to deliberations, you will be escorted into the jury room to begin your work. A unanimous verdict, meaning all twelve of you must agree on a verdict, is required in this State. The Court thanks you for your attention to this important matter.

### **INSTRUCTION No. 15 EXCEPTION TO ANIMAL CRUELTY LAWS**

The laws of Union Lake regulating the humane treatment of animals and defining criminal animal cruelty do not apply to reasonable activity undertaken and intended to control pests or vermin.

END