IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

STATE OF WASHINGTON Plaintiff, vs. TALBOTT, William, Defendant.	Case No: 18-1-01670-31 MOTION TO ARREST JUDGMENT PURSUANT TO CrR 7.4(a)(3), AND ALTERNATIVELY, A MOTION FOR A NEW TRIAL PURSUANT TO CrR 7.5 (a) (2), (5), (6), and (7).

MOTIONS

A. The defendant moves the trial court, pursuant to CrR 7.4(a)(3) to arrest judgment regarding the jury's finding of guilt as to the two charges of aggravated murder, as there is insufficiency of proof of a material element that Mr. Talbott caused the death of either Jay Cook or Tanya Van Cuylenborg.

B. The defendant moves the trial court, pursuant to CrR 7.5 (a)(2), (5), (6), and (7) for a new trial based on the following four points: (i) prosecutorial misconduct during closing argument, to wit: burden shifting and appealing to jury's passion and prejudice and burden shifting; (ii) irregularity in the jury proceedings involving a juror drawing a map of Western Washington from memory and the jury relying on it as evidence; (iii) error of law based on defense objections to the prosecutorial misconduct being overruled; and (iv) based on the verdict being

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contrary to law and the evidence [the defense will rely on its discussion of the evidence in the CrR 7.4 argument for a discussion of his (iv) point].

I. AFFIDAVIT OF COUNSEL:

1. Mr. Talbott was convicted by jury verdict of two counts of aggravated murder in the above numbered cause number. The verdict was returned and read in court on June 28, 2019.

2. In closing arguments, the prosecutor began not by recounting the evidence against Mr. Talbott, but by meandering into a long series of questions asking the jury to consider what the victim's lives would have been like if they had not been killed.

3. At the beginning of the state's rebuttal argument, the state resumed this approach, telling the jury that their decisions would have consequences for the victim's families, and appealing to their emotions rather than their reasoning. Twice defense counsel objected to this appeal to emotions as being not rebuttal argument, and twice the court rejected the defense objection. In this motion, the defense cites fault with both rulings.

4. The prosecutor then continued in rebuttal on more than one occasion to ask the jury why they had not heard an explanation from the defendant regarding his sexual contact with Ms. Van Cuylenborg. Defense counsel did not object to these occasions because the court had already overruled objections twice previously, and defense counsel did not want to alienate the jury. This concern proved to accurate as described in the following paragraph (5)(b).

5. On July 7, 2018, the Everett Herald published a story entitled, "Jurors share why they found Talbott guilty of double murder," attached here as Appendix A. In it,

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the reporter documented interviews with three jurors, including the presiding juror, who described their process in reaching the decision. Among the items reported in that story were these:

a. The jury wanted a map of Western Washington to help visualize the areas of interest in the timeline. "So the jurors sent a note to Judge Linda Krese seeking a map of Western Washington. Krese denied the request. None of the exhibits showed an overview of Puget Sound so Martin made one from memory. He drew the couple's route from Victoria to Port Angeles to Hoodsport to Allyn to Bremerton — to thin air. "

b. Despite the court's instructions that jurors should disregard objections from counsel, they clearly ignored that instruction. On story noted that juror is quoted in the story as follows: "The jury also took notice of the defense objecting to questions about where Talbott lived at the time of the killings. 'You wouldn't be too worried about it if you felt it would exonerate him,' [one juror] said.

c. The jury also ignored the court's instructions regarding the defendant's right to remain silent and the corresponding requirement they not hold that against him. "It bothered jurors that the defense threw out theories, but offered no specifics to counter the state's evidence. The jury had been instructed not to hold it against Talbott that he remained silent — but it is human nature to want to hear his side of the story, one juror said.

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"I personally feel that, given the room he was in, that would have helped him. I can't speak to what he might have said, or really play the whole thing out," said [a] juror …"We would've appreciated something to go off of, just to play advocate for him."

d. The jury clearly took to the burden shifting argument made by the State in its closing, and they required some evidence or explanation from the defense in order to reach a not guilty verdict, which is obviously offensive to due process and a flagrant disregard of the jury instructions. The article noted that jurors were left to fill in the gaps, and one juror was quoted as surmising, "We've got a whole bunch of discreet, not clearly connected data points," Martin recalled. "It's like a spreadsheet, or a crossword puzzle, with all kinds of blank cells. And we're supposed to figure out the pattern, fill in all these holes — they didn't provide us the connectors. How in the world are we going to go yea or nay on this?"

II. EVIDENCE

The plain fact of the evidence in this case is that none of it linked Mr. Talbott to committing an act of homicidal violence in this case. Of the physical evidence admitted, nearly none even related to Mr. Talbott.

a. EXHIBIT 301 Blue blanket found on Jay Cook: this blanket was never associated with Mr. Talbott, neither through ownership or forensically.

b. EXHIBIT 305 Cigarette pack from Jay Cook's mouth: Mr. Talbott was never known to be a smoker, and there was no forensic link.

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c. EXHIBIT 306 Tissue from Jay Cook's mouth: Not linked to Mr. Talbott forensically or otherwise.

d. EXHIBIT 307 Dog Collars used in ligature: Mr. Talbott did no own dogs or dog collars, and he was not forensically linked to this evidence.

e. EXHIBIT 310 a rock and a zip tie from the Jay Cook scene: not linked to Mr. Talbott forensically or otherwise. A note about the zip ties – and this will apply to a discussion of all of them – these simply were not implicated in either crime. They were not configured into handcuffs, they were not used as handcuffs, there was not evidence on either victim that they were bound, the were not bound when found, and Mr. Talbott was not known to be around zip ties nor was he forensically linked to any zip tie.

f. EXHIBIT 311 zip ties from cook scene: Mr. Talbott not associated with zip ties or forensically linked, nor was there any evidence that the zip ties were associated with the commission of the criminal acts.

g. EXHIBIT 312 rock from Cook scene: Mr. Talbott not forensically linked.

h. EXHIBIT 313 Comforter from van: Comforter had Jay Cook's semen stains and blood of an unknown origin, but neither the comforter nor any evidence on it were linked to Mr. Talbott.

i. EXHIBIT 315 latex gloves found under the back deck of Essie's Tavern: not clear these were involved in the crimes, but Mr. Talbott was not linked forensically or otherwise.

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j. EXHIBITS 317, 318, 319, 322, and 329 More zip ties: not linked to Mr. Talbott nor was their evidence they were used in the crimes.

k. EXHIBIT 320 Ms. Van Cuylenborg's wallet and Identification: found at Essie's Tavern parking lot. Mr. Talbott not linked to these items forensically, and no evidence exists that he had ever been to Bellingham at that point in his life, nor that he had ever been to Essie's Tavern – a small bar with a very local clientele.

l. EXHIBIT 326 plastic twine: Not linked to Mr. Talbott forensically or otherwise.

m. EXHIBIT 327 (bullet slug), 331 (shell casing), and 332 (bullets found at Essie's Tavern: not linked to Mr. Talbott forensically or otherwise. Mr. Talbott never known to have, own, or use firearms.

n. EXHIBIT 340 vials of DNA extract from bodily swab and black pants: links Mr. Talbott to sexual intercourse with Ms. Van Cuylenborg.

o. EXHIBIT 341 Tampon: not linked to Mr. Talbott.

p. EXHIBIT 342 Plastic Tie and underwear: no evidence presented to jury demonstrating a link with Mr. Talbott.

q. EXHIBITS 382, 383, 386, and 387 Ash tray contents and cigarettes from van. Mr. Talbot not forensically linked; the evidence at trial is that he was never a smoker.

r. EXHIBIT 402 the coffee cup collected from him in 2018: Mr. Talbott's DNA was on his coffee cup.

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s. FINGERPRINT EVIDENCE: The state presented evidence that a palm print associated with Mr. Talbott was found on the outside of the back door of the van.

t. MISSING ITEMS: Camera body, Camera lens, black coat, green backpack: Mr. Talbott was never associated with any of these items.

In viewing the evidence in the light most favorable to the state, there are three admitted exhibits have a connection to Mr. Talbott: Exhibit 340 - which is the DNA evidence demonstrating sexual contact, Exhibit 402 - the coffee cup that fell out of his truck in 2018, and the palm print evidence.

The state's entire case rests on a single proposition: that the sexual contact between Mr. Talbott and Ms. Van Cuylenborg was rape and not consensual.

But there is no actual evidence from which to support that inference. There are no injuries consistent with sexual assault (no general bruising on the body, no fingermark bruising as if someone were being held, no vaginal or rectal abrasions or tears, and no evidence of physical restraint. Rather than it being an evidentiary inference, it is a patriarchal conjecture. There was no evidence presented about her sexual interests, proclivities, practices, or desires. This is not to suggest anything about her choices, it is only to say the evidentiary record is silent on that point. The state asks for a leap of faith, and for the jury to bridge an evidentiary gap that extends beyond inference and to conjecture. The law requires more.

And there exist no evidence linking Mr. Talbott and Jay Cook at all. The State will point to the palm print on the van. Even giving the state the benefit of the

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considerable doubt that the palm print on the outside back of the van is Mr. Talbott's, there is no evidence regarding when it was left, or under what circumstances, or whether Jay Cook was anywhere near the van when the print was left. The evidentiary record only notes that Jay Cook's body was found 90+ miles away from where the van was found, and the timing and nature of the separation between the two is conjecture.

There simply is insufficient evidence to convict Mr. Talbott of either killing.

III. LEGAL AUTHORITY AND ARGUMENT

A motion pursuant to CrR 7.4 (a)(3) and CrR 7.5 (a)(7) both view the evidence in the light most favorable to the state and asks the court to determine whether evidence is legally sufficient to support jury's finding of guilt. "Evidence is sufficient if any rational trier of fact, viewing it most favorably to the state, could have found essential elements of charged crime beyond a reasonable doubt." State v. Bourne, 90 Wn.App. 963 (1998).

The defense has argued this motion pretrial as a knapstad motion, and after the State rested its case as a Green motion. After reviewing the evidence admitted at trial that was actually admitted to the jury, the defense moves to arrest judgment. The defense will rely on the arguments made above, as well as the arguments made in those prior motions.

In a motion pursuant to CrR 7.5 (a)(2) for a new trial based on prosecutorial misconduct, the defense "first bears the burden of showing the prosecutor's conduct was improper. The defendant must then show that the improper comments resulted in prejudice that has a substantial likelihood of affecting the verdict." State v. Pierce, 169 Wn.App. 533, 551-552 (2012)." In this regard, the prosecutor's appeal to the passion and prejudice of the jury as well as his burden shifting were clearly misconduct under the law.

And from the interviews that jurors did with the Herald, the burden shifting argument clearly took root: the jurors left the prosecutor's closing and rebuttal closing with

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an expectation that they should have heard some version of events from the defendant to counter the State's imagined scenario. This is contrary to law and their instructions. Clearly the prosecutor's misconduct resulted in prejudice to Mr. Talbott.

Under CrR 7.5 (a)(6), a new trial can be granted when the defense objects to the prosecutor's misconduct and is overruled. This occurred twice in the State's rebuttal closing related to the appeal to passions and prejudice of the jury. The defense contends the court's overruling of the defense objection was not proper, and the overruling had the effect of muting further defense objections and allowing the prosecutor's misconduct to fester as prejudice in the minds of the deliberating jury.

Under CrR 7.5, regarding irregularity in the jury proceeding, a defendant is entitled to a new trial when he has been prejudiced by extrinsic evidence and it cannot be cured. State v. Pete, 152 Wn.2d 546 (2004). In this case, the defense had no knowledge that one of the jurors had drawn a map "out of thin air" to guide the jury in their deliberations. The defense has no idea what this map looked like, nor what details were included on it, nor any information related to its accuracy or inaccuracy. This cannot be reconstructed, and a new trial is warranted. "This type of evidence is improper because it is not subject to objection, cross examination, explanation, or rebuttal." Id.

IV. CONCLUSION

For the reasons stated herein, the defendant requests that Judgment be Arrested, and alternatively, that he be granted a new trial.

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DATED this 8th day of July, 2019.

Respectfully submitted,

/S/ Jon T. Scott

Jon T. Scott, WSBA #30308
Attorney for Defendant

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APPENDIX A

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John Van Cuylenborg (center), surrounded by family and friends, awaits the verdict of William Talbott II on June 28 at the Snohomish County Courthouse in Everett. (Kevin Clark/The Herald via AP, Pool file)

Jurors share why they found Talbott guilty of double murder

In interviews, three jurors gave a window into deliberations in 1987 murders of a young Canadian couple.

By Caleb Hutton
Sunday, July 7, 2019 5:47am | LOCAL NEWS | EVERETT | MONROE

EVERETT — The moment the state rested its case the morning of June 25 in a landmark murder trial, at least one juror said he felt underwhelmed by the evidence and thought the suspect would walk free.

"This is what we've got to go on?" juror No. 2, Bob Martin, a retired planning director, remembered thinking after prosecutors had spent eight days laying out evidence that William Talbott II had killed a young Canadian couple in 1987, including DNA linking him to the crimes that had been obtained through a genealogy website.

"We've got a whole bunch of discreet, not clearly connected data points," Martin recalled. "It's like a spreadsheet, or a crossword puzzle, with all kinds of blank cells. And we're supposed to figure out the pattern, fill in all these holes — they didn't provide us the connectors. How in the world are we going to go yea or nay on this?"

Yet three days later, Martin joined four other men and seven women in voting to convict Talbott of two counts of first-degree aggravated murder in the killings of Jay Cook and Tanya Van Cuylenborg, following a high-profile trial that drew national media attention. Talbott became the first suspect identified by so-called forensic genealogy to have his case decided by a jury.

In interviews with The Daily Herald, three jurors shared their perspectives of the trial, including searing memories of death scene photos, restless nights at home playing devil's advocate, and the key pieces of evidence that led them to a guilty verdict.

"As the days went on, we were able to realize we had more (evidence) than we initially had thought," said the presiding juror, Laura, 38, of the Mukilteo area, who asked that her surname not be published citing privacy concerns.

"We were really literal with the jury instructions," she said. "We put the definition of reasonable doubt on a white board, and we went back to it all the time. It grounded all the different forks of conversation."

Sheriff's detectives identified Talbott, 56, a trucker from SeaTac, as a suspect in 2018, when crime scene DNA was uploaded to a public ancestry site for tracing family lines.

Police use of public genetic banks has been a recent game-changer for long-unsolved crimes. In the past year, dozens of suspects have been arrested in cold cases nationwide, including the alleged Golden State Killer, a serial murderer and rapist who terrorized Californians in the 1970s and '80s. But the practice is also controversial, with privacy advocates and others contending that such searches violate constitutional protections.

In Talbott's case, a DNA profile of semen on Van Cuylenborg's pants had been uploaded to GEDMatch. Second cousins on both sides of the defendant's family had shared genetic profiles on the site. Renowned genealogist CeCe Moore built a family tree that led to Talbott's parents, who had one son. Cheek swabs later confirmed Talbott's profile matched the semen.

Behind closed doors, the jury did not weigh the merits of genetic genealogy. The defense did not dispute the evidence as shoddy science, a violation of the defendant's rights or a violation of his relatives' rights.

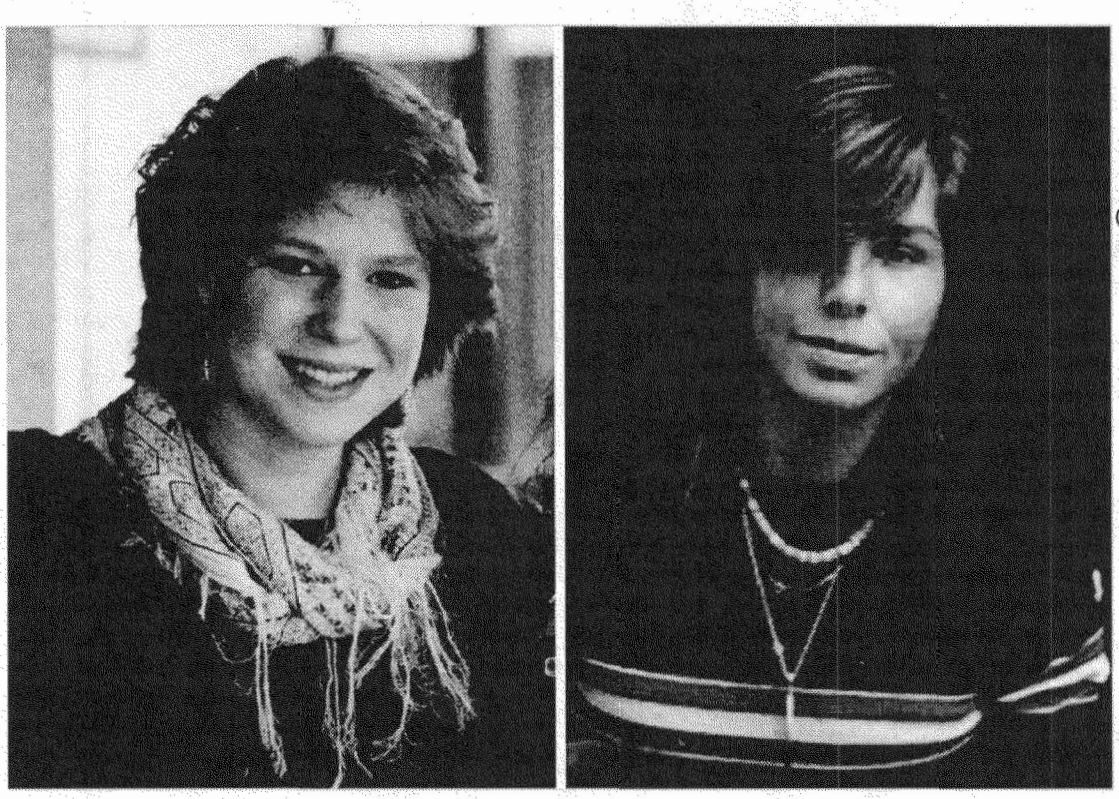
"It wasn't a point of conversation during the trial, it wasn't contended, it wasn't debated. We knew it was a unique way to find somebody, but we weren't presented with anybody we needed to find credible or not," Laura said. " ... All that matters is that they found him, and he was on trial, and that's all we had to consider."

In her closing statement, public defender Rachel Forde conceded Talbott and Van Cuylenborg had sexual contact.

She argued it was consensual.

She argued the presence of DNA did not prove murder.

The jury did not buy it.



Tanya Van Cuylenborg and Jay Cook (Family photos)

The case

For Martin, the timeline was key.

On Nov. 18, 1987, Cook, 20, and Van Cuylenborg, 18, set out from Vancouver Island in a bronze Ford Club Wagon with a $750 money order for an overnight errand to pick up furnace parts in Seattle. They bought a Bremerton ferry ticket for a 10:35 p.m. crossing, with a plan to sleep in the parking lot outside Gensco.

Martin, who has a master's degree in geography, needed a visual of the couple's travels. So the jurors sent a note to Judge Linda Krese seeking a map of Western Washington. Krese denied the request. None of the exhibits showed an overview of Puget Sound so Martin made one from memory. He drew the couple's route from Victoria to Port Angeles to Hoodsport to Allyn to Bremerton — to thin air.

On Nov. 24, 1987, a passerby reported a woman's body against a rusty culvert off a rural road in the woods in north Skagit County. Van Cuylenborg had been shot in the back of the head.

The next day, in downtown Bellingham, police found the couple's van and inside it, .380-caliber ammunition and surgical gloves.

On Thanksgiving Day, 1987, a pheasant hunter stumbled upon Cook's battered remains south of Monroe, beneath the wooden approach to High Bridge. He had been beaten with rocks and strangled.

At each crime scene, police recovered zip ties.

The medical examiner told the jury there was no scientific way to pin down when the two victims had been killed.

So jurors knew only the obvious.

The couple was alive when they were last seen alive.

They were dead by the time they were found dead.

The prosecution's theory did not get much more specific.

Talbott did not testify.

Jurors were left to fill in the gaps.

Laura, the presiding juror, expected her civic duty to be a brief inconvenience for her coworkers and herself. Instead, it's something she'll carry with her the rest of her life, she said.

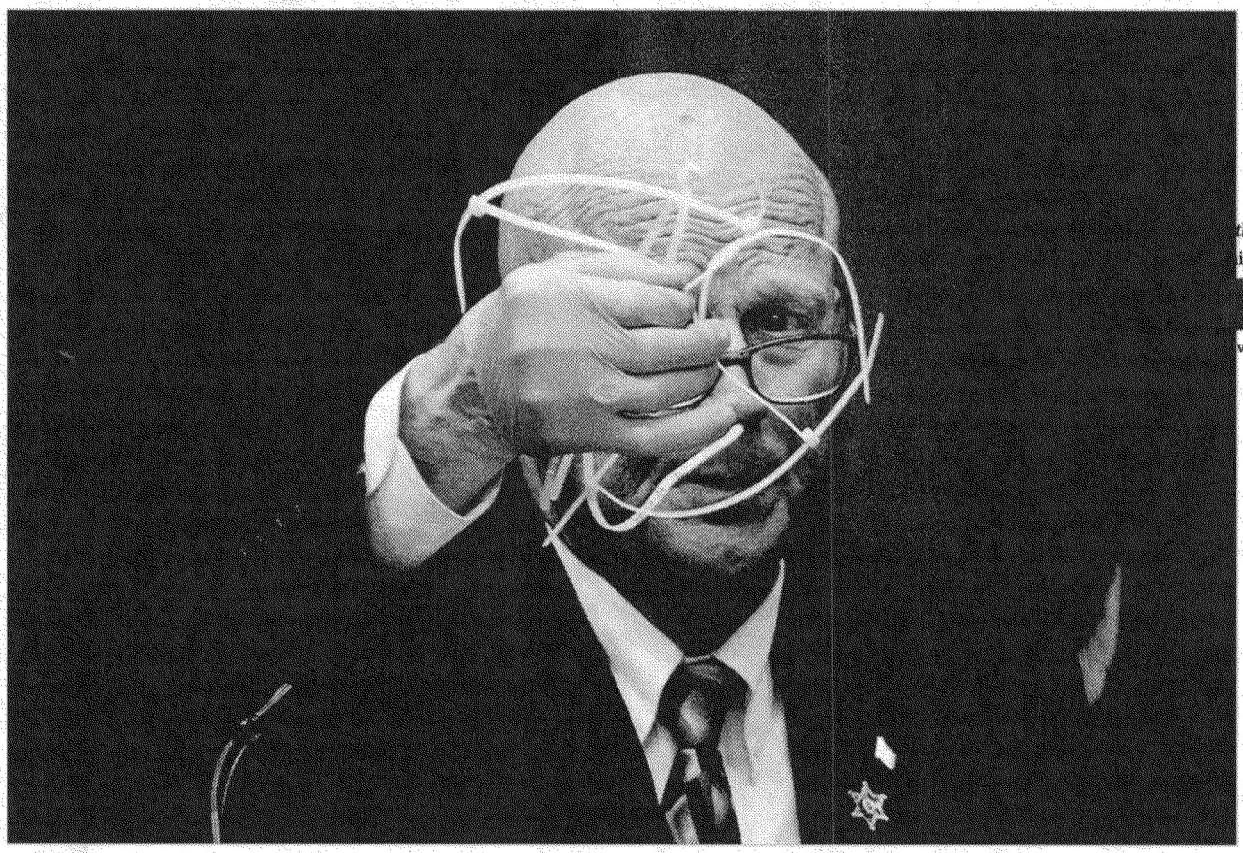
Before testimony began, the 118 Snohomish County residents in the jury pool received a questionnaire with a brief summary of the case, including the allegations of rape and murder. But the gravity didn't sink in for Laura, she said, until attorneys made their opening statements.

Suddenly she could put faces to the young couple.

Suddenly they were real people, with real families, and the man accused of this brutality was sitting across from her.

After eight days of testimony and closing arguments, the jury spent about half an hour deliberating that Tuesday before being sent home.

At first Laura, like juror No. 2, felt they had little to work with.



Retired Snohomish County detective Rick Bart displays a group of zip ties, found near the body of Jay Cook , during his testimony at the trial for William Talbott II at the Snohomish County Courthouse on June 19 in Everett. (Andy Bronson/The Herald via AP, Pool file)

The jury room

Much of the second day's deliberations focused on Van Cuylenborg. Talbott's DNA had been found on her pants in the van and on her body. Jurors ran through all of the possibilities — could the pair have been kidnapped for two, three, four days? Could they have been held hostage inside the van? Where were they killed? When? How, exactly?

Laura examined nearly every piece of physical evidence, like the blue blanket that covered Cook's torso and the interlaced zip ties — a much longer string of them, when stretched out, than how it had looked on the witness stand.

Over the hours they searched for innocent explanations for the recovered evidence, seeking to give the defendant as much leeway as possible.

By trial's end, all three jurors said they had a deep respect for the other jurors in the room.

"They were very objective, recognized their own biases," Laura said. "... (Someone said), 'I have a bias for needing data to make decisions.' 'I have a bias for wanting to have heard from him, I know I can't hold that against him,' but you're not going to get that."

It bothered jurors that the defense threw out theories, but offered no specifics to counter the state's evidence. The jury had been instructed not to hold it against Talbott that he remained silent — but it is human nature to want to hear his side of the story, one juror said.

"I personally feel that, given the room he was in, that would have helped him. I can't speak to what he might have said, or really play the whole thing out," said juror No. 8, Cheyanne Palmer, 22. "We would've appreciated something to go off of, just to play advocate for him."

The defense argued that because Van Cuylenborg's bodily fluids were found on a swab, along with Talbott's DNA, it showed she'd been aroused. The comment backfired horribly with a jury with seven women.

"I think it took a lot of us, myself included, everything we could to not audibly make some sort of sound at that statement, or crack a laugh," Laura said. "It was like the one attempt at maybe making some defense of consensual sex, and it was completely off-base."

Jurors took their first pulse of how people were feeling at the end of Wednesday, their first full day of deliberation. Some, like Palmer, were convinced of Talbott's guilt. Martin and others remained undecided.

On the white board the jury drew a line to represent how long Cook could've been alive, and a shorter line for Van Cuylenborg. Over days, jurors came to believe there was a small window of time when the pair most likely met their killer — the eight hours or so between when the ferry docked in Seattle and the time the store opened in the morning. Van Cuylenborg was outside her home country, on a trip with her boyfriend, and having her menstrual period.

In a compressed timeline, it did not make sense that she would consent to unprotected sex with a random stranger, then encounter another random stranger, who killed her with a gun and happened to leave behind no DNA.

Once that was established, it seemed absurd that Talbott could be part of one killing, but not the other, Laura said. They saw no evidence to suggest the pair had split up.

"We tried to attack it from: Let's just talk about Tanya, let's just talk about Jay," Laura said. "We couldn't, we couldn't. It was all connected. It only made sense if you looked at it from the big picture."

The jury also took notice of the defense objecting to questions about where Talbott lived at the time of the killings.

"You wouldn't be too worried about it if you felt it would exonerate him," Palmer said.

Talbott's parents had a home about seven miles west of High Bridge, and his roommates testified he'd lost his job and moved out in 1987. The jury knew that much.

"I finally told people that 100 percent is a bad word," Laura said. "Unless you're there and see it with your own eyes, you're not going to be 100 percent sure of anything."

The verdict

By Thursday afternoon, Martin's doubt had been erased.

"I'm not used to having my world shift like it did here, because leaving the courtroom (early on), I was sure they had not given us enough," he said. "For me, in a day and a half, to change my perspective that radically, is kind of an unusual thing."

By then, only three jurors remained undecided.

By the next morning, they, too, fell in line with those who thought Talbott guilty.

It was a decision reached after a hard critical examination of the facts, not emotions, Laura said. She saw the families in court each day, but did not want sympathy to sway her belief one way or the other.

"I didn't want there to be a bias for helping them find closure, if it wasn't the right closure," she said.

When the verdict was announced to a packed courtroom around 11 a.m. Friday, June 28, her hands shook.

Afterward, in a private debriefing with attorneys, the jury was informed of a major piece of evidence the state hadn't been able to present at trial. Zip ties found in the couple's van had tested as a possible match for Talbott's DNA. In recent months, the state crime lab had obtained new equipment that was better at testing mixed samples of DNA. Results came back in the middle of the trial, and, out of caution, prosecutors did not put that evidence before the jury.

The lead detective in the case, Jim Scharf, gave jurors his opinion of what happened, and what made most sense to him. Much of it aligned with what the jury concluded over the preceding days, about who was killed first and why.

"And then I realized how powerful it was," Laura said, "that they didn't give a theory on what they thought happened (at trial). Like, 'Here's what we think happened. We think (Talbott) found them here, and then he took them here, and then he did this.' We didn't really get that. But we had ultimately come up with the same important proof points."

When the guilty verdict was read aloud, Talbott had flinched in his seat and gasped.

"No," he rasped. "I didn't do it."

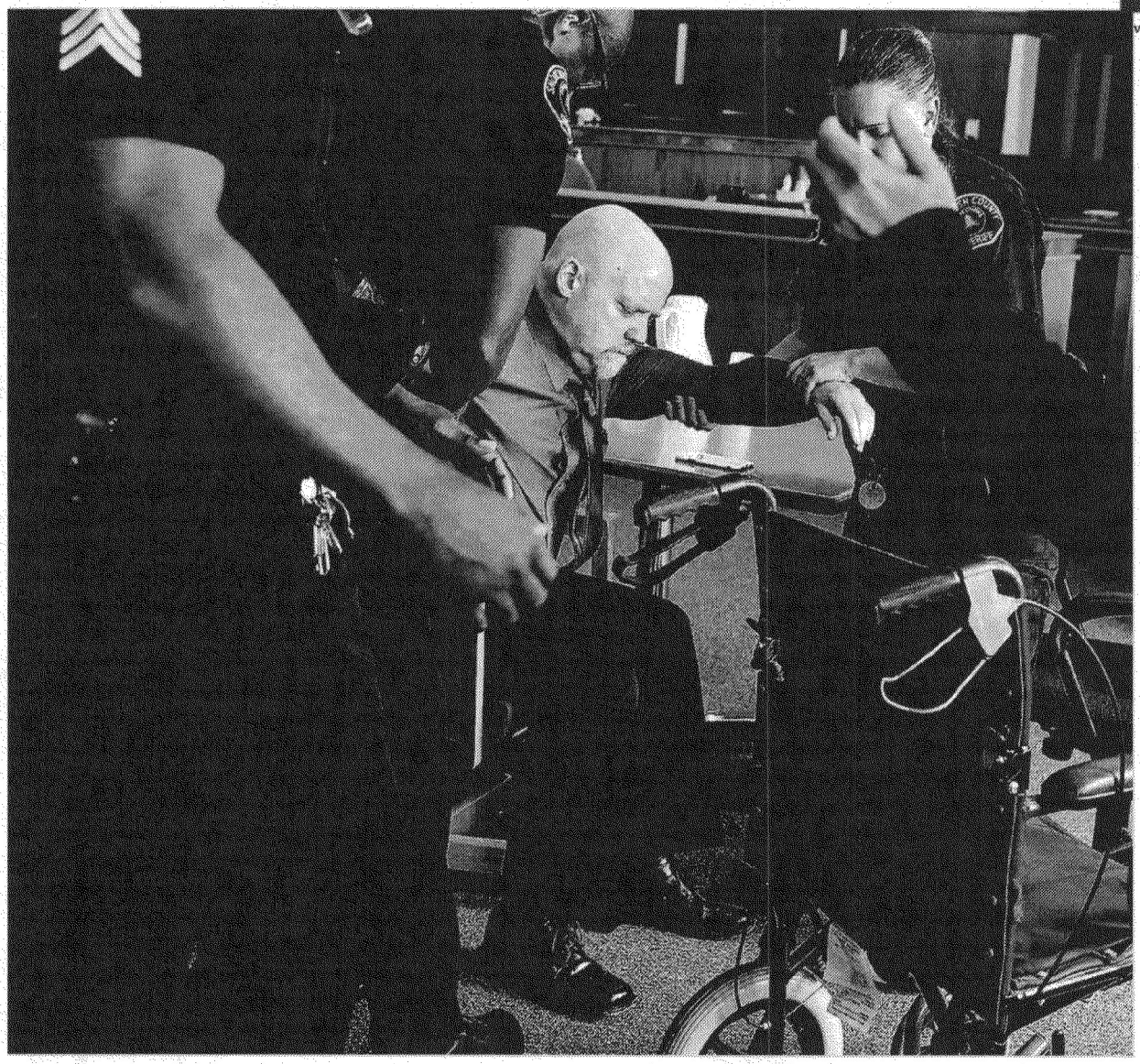
It was the first time the jury heard the defendant's voice.

"We hadn't heard one word from him, one breath, the whole trial, and the one time I hear his voice is when he's found guilty," Laura said. "His exclamation was -- it was emotional to hear. 'I didn't do it.' Then you wonder how do defendants usually react when they're guilty or innocent? Is it normal to say that? You think about every little thing. And at the end of the day, you think: I helped put away somebody that was a monster."

Talbott was pushed out of the courtroom in a wheelchair, in an apparent state of shock.

At least three jurors plan to attend Talbott's sentencing July 24.

Caleb Hutton: 425-339-3454; chutton@heraldnet.com. Twitter: @snocaleb.



William Talbott II is helped to a wheelchair by Snohomish County Sheriff's deputies after being found guilty June 28 at the Snohomish County Courthouse in Everett. (Kevin Clark/The Herald via AP, Pool file)