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SHERYL HAYES-POPKO § IN THE DISTRICT COURT
 §
VS. § WILLIAMSON COUNTY, TEXAS
 §
DERRICK DUTTON § 277TH DISTRICT COURT

 MASTER INDEX

ORIGINAL

A P P E A R A N C E S

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MR. STEVEN DUSKIE
SBOT NO. 24000252
Lindley, Wiley & Duskie, P.C.
500 North 10th Street
Killeen, Texas 76540
Phone: (254) 634-6969

- and -

MR. DAVID FERNANDEZ
Attorney at Law
SBOT NO. 06933700
1508 Southwest H.K. Dodgen Loop
Temple, Texas 76505
Phone: (254) 773-0671
ATTORNEYS FOR THE PLAINTIFF

MR. J. LEE JARRARD, JR.
SBOT NO. 10578200

- and -

MR. DOUGLAS CORNWELL
SBOT NO. 24009024
Dietz & Jarrard, P.C.
106 Fannin Avenue East
Round Rock, Texas 78664
Phone: (512) 244-9314
ATTORNEYS FOR THE DEFENDANT

10 THE COURT: Ready to call your first
11 witness?

12 MR. FERNANDEZ: Mr. Dutton, Your Honor,
13 is our first witness.

14 THE COURT: You want to raise your right
15 hand and be sworn.

16 (The witness was sworn)

17 MR. FERNANDEZ: May I proceed, Your
18 Honor?

19 THE COURT: You may.

20 DERRICK DUTTON,
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. FERNANDEZ:

24 Q. Do you accept total and complete
25 responsibility for arresting Sheryl Hayes-Pupko on

1 December 6 of 2002 for failure to identify when you
2 did not have a valid legal reason for arresting her?

3 A. I take responsibility for arresting her, yes.

4 Q. Do you agree with me that you did not have a
5 valid legal reason for arresting her for failure to
6 ID?

7 A. At the time, I did not have probable cause to
8 arrest her for fail to ID, no, sir.

9 Q. Do you accept total and complete
10 responsibility for the injuries and damages that you
11 caused to Ms. Pupko when you arrested her for failure
12 to ID when you did not have a valid legal reason for
13 doing so?

14 A. No, sir.

15 Q. I'm going to ask you some questions about
16 what you did when you went to Ms. Pupko's home on
17 December 6 of 2002. Do you understand what we're
18 talking about?

19 A. Uh-huh. Yes, sir.

20 Q. First of all, you went and talked to the
21 Gerbans?

22 A. Yes, sir. That's correct.

23 Q. You got their side of the story?

24 A. Yes, sir.

25 Q. And then to be fair, you went and talked to

1 Ms. Pupko? 61
2 A. Standard procedure, yes, sir.
3 Q. You were investigating; you didn't want to
4 arrest an innocent person?
5 A. No, sir. I was investigating to -- because
6 it was a warrantless arrest -- not a warrantless
7 arrest situation. I had to get a warrant for that.
8 Q. Now, you have never charged Ms. Pupko with
9 evading detention, have you?
10 A. No, sir.
11 Q. You wrote an offense report in your case, an
12 official offense report?
13 A. Yes, sir, I did.
14 Q. Was that report thorough?
15 A. Yes, sir.
16 Q. Was it complete?
17 A. Yes, sir.
18 Q. Was it comprehensive as you could make it?
19 A. As I could make it, yes, sir.
20 Q. And was it accurate?
21 A. As far as I knew, yes, sir.
22 Q. At any time from your training, you knew that
23 you could write a supplemental report if you
24 remembered an important fact or if an important
25 fact -- you discovered an important fact, right?

1 A. Yes, sir. 62
2 Q. And in your report, you don't mention
3 anything about Ms. Pupko evading detention, do you?
4 A. No, sir.
5 Q. What it mentions is that you were going to
6 arrest her for failure to identify?
7 A. Yes, sir. That's correct.
8 Q. If evading detention had been an important
9 fact, then it's something that you would have put in
10 your report?
11 A. Yes, sir. The facts and circumstances that
12 would lead to evading detention were in the report.
13 Q. Pardon me, sir?
14 A. The facts and circumstances that would
15 establish probable cause for evading detention were in
16 the report.
17 Q. You didn't mention it in your report; you did
18 not mention evading detention in your report, did you?
19 A. No, sir, I did not.
20 Q. All right. So you approached Ms. Pupko to
21 talk to her, right?
22 A. Yes, sir.
23 Q. She was in her yard?
24 A. I believe she was in her doorway.
25 Q. In her doorway. She wasn't required to talk

1 to you, was she? 63
2 A. No. She had the right not to talk to me,
3 yes, sir. That's correct.
4 Q. She could have closed the door, gone back
5 inside, and there wasn't anything illegal about that,
6 right?
7 A. Yes, sir. She would have evaded detention.
8 She was a suspect in a criminal offense.
9 Q. So are you telling this jury that she was
10 detained at the moment that you knocked on her front
11 door?
12 A. No, sir. She came out on her own at that
13 point.
14 Q. Well, was she detained when she came out?
15 A. At the time that I started my investigation,
16 yes, sir.
17 Q. Does it say in here that she was detained
18 when you started your investigation?
19 A. No, sir.
20 Q. Matter of fact, the word "detention" is not
21 in your official report, is it?
22 A. I can't recall, sir.
23 Q. You want to review it?
24 A. Sure.
25 MR. FERNANDEZ: May I approach the

1 witness, Your Honor? 64
2 THE COURT: Sure.
3 Q. (BY MR. FERNANDEZ) Take your time.
4 A. (Examines document)
5 Q. Did you find it?
6 A. No, sir. No, sir. The word "detain" is not
7 in there.
8 Q. Now, when you were talking to Ms. Pupko in
9 front of her house, you hadn't formed the opinion
10 after talking to the Gerbans that you had probable
11 cause to arrest her for assault, did you?
12 A. Not without talking to her, sir. I needed to
13 talk to her to establish probable cause.
14 Q. You wanted to be fair?
15 A. Yes, sir. Yes, sir.
16 Q. You were still open-minded about the assault,
17 right?
18 A. Absolutely. Yes, sir.
19 Q. You didn't witness an assault, did you?
20 A. No, sir. That's what made it a
21 non-warrantless arrest situation.
22 Q. And you had a discussion with Ms. Pupko about
23 her relationship with the Gerbans and about the water
24 incident, right?
25 A. Yes, sir, I did.

1 Q. And that discussion lasted a few minutes? 65
2 A. Yes, sir, a few minutes.
3 Q. And at one point, y'all walked around maybe
4 about 30 feet to where the water incident might have
5 taken place?
6 A. Yes, sir.
7 Q. And you're a pretty observant police officer,
8 aren't you?
9 A. Try to be, yes, sir.
10 Q. Okay. Did you notice that Ms. Pupko didn't
11 walk normally?
12 A. No, sir. I never noticed that.
13 Q. Did you notice that she favored her left leg
14 and left arm?
15 A. No, sir. I never noticed that.
16 Q. Did you notice that her speech was halting?
17 A. No, sir.
18 Q. So she seemed perfectly normal to you, right?
19 A. As far as I could tell, yes, sir.
20 Q. After you talked to Ms. Pupko, did you form
21 the opinion that you had probable cause to arrest her
22 for assault?
23 A. I believed there was probable cause, but I
24 wasn't the person to make that decision, that would
25 have been a judge, sir, an impartial judge.

1 Q. And in your report, matter of fact, you don't 66
2 say that you had probable cause to arrest her for
3 assault, right?
4 A. The facts were there, yes, sir. I don't have
5 to specifically state that there's probable cause.
6 It's not in my report.
7 Q. That's my question. It's not in your report,
8 is it?
9 A. Sir?
10 Q. The words "you had probable cause to arrest
11 her for assault," those words are not in your report?
12 A. No, sir, they're not.
13 Q. So you asked Ms. Pupko her name?
14 A. Yes, sir.
15 Q. She gave you her name?
16 A. Yes, sir, verified it for me.
17 Q. You asked her her date of birth?
18 A. Yes, sir. That's correct.
19 Q. Were you taking notes all this time?
20 A. On a field notepad, yes, sir, just
21 identifying information.
22 Q. And while she gave you her name, she didn't
23 want to give you her date of birth, right?
24 A. That's correct.
25 Q. And you asked her several times to give you

1 her date of birth, right? 67
2 A. Yes, sir.
3 Q. And at that point, if you were going to
4 arrest somebody, you were going to make sure that you
5 had probable cause to, in fact, arrest them?
6 A. Yes, sir.
7 Q. You didn't want to make any quick or snap
8 decisions, did you?
9 A. No, sir.
10 Q. You didn't want to arrest an innocent person,
11 did you?
12 A. No, sir.
13 Q. Now, at that point, Ms. Pupko wasn't under
14 arrest for anything, was she?
15 A. No, sir. She was being detained for my
16 investigation.
17 Q. Again, the word "detention" is not in your
18 report, is it?
19 A. No, sir.
20 Q. All right. You decided that you were going
21 to arrest her for failure to identify?
22 A. Yes, sir, after several attempts to get her
23 date of birth.
24 Q. You should have known better from your
25 training and your experience, right?

1 A. Yes, sir. I was mistaken in the law. 68
2 Q. Have you arrested a lot of people in your
3 career?
4 A. Yes, sir.
5 Q. You learned your lesson about arresting
6 people when you don't have probable cause since
7 December 6, 2002?
8 A. I had probable cause for other offenses, sir.
9 Q. I'm talking about failure to ID.
10 A. No, sir, I did not have probable cause for
11 failure to identify.
12 Q. Have you learned your lesson about arresting
13 somebody for failure to ID if you don't have probable
14 cause?
15 A. Yes, sir. After the fact, I learned that I
16 was mistaken on the law.
17 Q. It's something you should have known before
18 that, right?
19 A. Yes, sir.
20 Q. So you grabbed her wrist?
21 A. Yes, sir, to keep her from walking away.
22 Q. And the reason you grabbed her wrist is
23 because you were going to arrest her for failure to
24 identify?
25 A. That's what I believed I had probable cause

1 for at the time along with other things. 69
2 Q. Well --
3 MR. FERNANDEZ: May I approach the
4 witness, Your Honor?
5 THE COURT: You may.
6 Q. (BY MR. FERNANDEZ) What you say in your
7 report is that you told her you were going to arrest
8 her for failure to identify?
9 A. Yes, sir.
10 Q. You didn't say, "I'm going to arrest you for
11 failure to identify along with other things," did you?
12 A. No, sir, I didn't.
13 Q. So she spun away from you?
14 A. Yes, sir.
15 Q. She didn't run from you, did she?
16 A. No, sir.
17 Q. At one point I believe in the information
18 that you filed, you said that she ran from you?
19 A. Yes, sir, in the complaint.
20 Q. That complaint is just like your official
21 report, isn't it?
22 A. Yes, sir.
23 Q. Supposed to be thorough, complete,
24 comprehensive and accurate, right?
25 A. Yes, sir.

1 Q. And in that information that would ultimately 70
2 be reviewed by a court, a prosecutor, a defense lawyer
3 or a jury, you said, "She ran away from me"?
4 A. Yes, sir.
5 Q. But she didn't, did she?
6 A. She walked away.
7 Q. Did you have handcuffs with you?
8 A. Yes, sir, I did.
9 Q. So you put the handcuffs on her?
10 A. Yes, sir, I did.
11 Q. And she was in pain?
12 A. After the fact, yes, I guess so.
13 Q. Well, as you were arresting her or as she was
14 spinning away from you, do you believe that she was in
15 pain?
16 A. I couldn't say, sir.
17 Q. Well, did she say anything?
18 A. I don't know, sir. I was telling her to stop
19 resisting at the time she was spinning.
20 Q. As a matter of fact -- I think you've seen
21 the photographs -- she had some pretty significant
22 bruises to her -- to her wrist, didn't she?
23 A. I don't know, sir.
24 Q. You haven't seen the photographs?
25 A. The photos I got were not very clear, sir.

1 Q. All right. And then when did the other 71
2 officer, the Georgetown officer arrive at the scene?
3 A. As I was transporting her away to jail, he
4 rolled up.
5 Q. So you were already in your patrol car
6 leaving?
7 A. Yes, sir.
8 Q. Okay. So he didn't witness anything that
9 happened?
10 A. No, sir.
11 Q. And after she told you that she had problems
12 with her legs, you went ahead and forced her legs into
13 the car, right?
14 A. I scooted her back in the seat. Yes, sir.
15 Q. When did you realize that you didn't have
16 probable cause to arrest Ms. Pupko for failure to ID?
17 A. Prior to the pretrial hearing.
18 Q. Prior to the pretrial hearing --
19 A. For the criminal case.
20 Q. In the criminal case. And the pretrial
21 hearing in the criminal case was about 15 months after
22 December 6, 2002?
23 A. I can't remember, sir.
24 Q. It was a pretty significant period of time,
25 right?

1 A. I don't remember. 72
2 Q. So in that interim time if you arrested
3 somebody for failure to ID, you really didn't know if
4 you were following the law or not, did you?
5 A. That was the first arrest and last arrest I
6 ever made for fail to ID.
7 Q. So who did you tell that you'd made a
8 mistake?
9 A. Actually the prosecutor brought it up to me.
10 Q. Okay. Well, on March 8, 2004, you testified
11 under oath against Ms. Pupko in the criminal case that
12 was pending against her, correct?
13 A. Yes, sir.
14 Q. And are you telling the jury it was before
15 that hearing, during that hearing, or after that
16 hearing that the prosecutor told you that you were
17 wrong?
18 A. Before that hearing.
19 Q. And you proceeded with the hearing?
20 A. Yes, sir, for the resisting arrest.
21 Q. Against Ms. Pupko?
22 A. Yes, sir.
23 Q. Still wanted to see her get convicted?
24 A. For resisting arrest, yes, sir.
25 Q. Well, the charge for failure to ID was still

1 pending, wasn't it? 73
2 A. No, sir. The county attorney's office had
3 dismissed that one.
4 Q. When did they dismiss it?
5 A. I couldn't tell you, sir.
6 Q. Okay. Well, we'll get into that later. So
7 the county attorney told you you were absolutely wrong
8 on the law on failure to identify when you arrested
9 Ms. Pupko, right?
10 A. He explained the law, sir.
11 Q. And you were absolutely wrong?
12 A. I was incorrect. Yes, sir.
13 Q. You're familiar with Article 38.04 of the
14 Texas Penal Code?
15 A. Yes, sir. Well, can you give me the --
16 Q. About evading -- about evading detention?
17 A. Yes, sir.
18 Q. That a person commits an offense if he
19 intentionally flees from a person he knows is a peace
20 officer attempting lawfully to arrest or detain him?
21 A. Yes, sir.
22 Q. You have now reached the conclusion some
23 eight years later that you had probable cause to
24 arrest Ms. Pupko for evading detention, right?
25 A. Yes, sir, based on the facts.

1 Q. You didn't have somebody reach that 74
2 conclusion for you, did you?
3 A. No, sir.
4 Q. Like your expert witness?
5 A. No, sir.
6 Q. And some six years ago, the failure to
7 identify, the Class C assault, and the resisting
8 arrest were all dismissed in the interest of justice,
9 weren't they?
10 A. Yes, sir, I believe so.
11 Q. And that was the right thing to do, wasn't
12 it?
13 A. All but the resisting arrest, yes, sir.
14 Q. Oh, you still think she resisted arrest?
15 A. Yes, sir. I believe she did.
16 Q. All right. You've arrested many people --
17 A. Yes, sir.
18 Q. -- in your career?
19 The person that you arrest might be an
20 athlete, might be a receptionist --
21 A. Yes, sir.
22 Q. -- mechanic, salesperson?
23 A. Yes, sir.
24 Q. People from all walks of life come into
25 contact with police, right?

1 A. Yes, sir. 75
2 Q. Could be an elderly person, could be a
3 disabled person?
4 A. Correct. Yes, sir.
5 Q. Could be a young person?
6 A. Yes, sir.
7 Q. Right? We can agree that needlessly
8 arresting a citizen is not prudent, is it?
9 A. Yes, sir.
10 Q. And a police officer, we can agree,
11 needlessly endangers a citizen if he arrests that
12 citizen without probable cause. Fair to say?
13 A. Yes, sir.
14 Q. You had the best training at the police
15 academy or the sheriff's academy or wherever you were
16 trained, right?
17 A. Yes, sir.
18 Q. And you had followup training --
19 A. Yes, sir.
20 Q. -- right?
21 A. Yes, sir.
22 Q. And as a matter of fact, you now -- you now
23 train other officers, don't you?
24 A. Yes, sir.
25 Q. And a police officer can always call a

1 supervisor if he or she is not sure about what they're 76
2 going out at the scene, right?
3 A. Yes, sir. That's correct.
4 Q. You didn't do that, though, did you?
5 A. No, sir.
6 Q. When you got to the -- to the jail, did you
7 alert the medical staff at the jail that Ms. Pupko
8 might be injured?
9 A. I don't recall if I did or not. It's
10 standard that they ask medical questions when they're
11 in intake.
12 Q. Even after all these charges were dismissed,
13 did you ever apologize to Ms. Pupko?
14 A. No, sir.
15 Q. As a matter of fact, you've been promoted and
16 not demoted since this happened, right?
17 A. Yes, sir, I have.
18 Q. This hasn't been a black mark on your career,
19 has it?
20 A. No, sir.
21 Q. We can agree that a police officer must have
22 knowledge of the law in order to do his job safely?
23 A. Yes, sir.
24 Q. And we can agree, unlike a mistake, lack of
25 knowledge by a police officer is preventable?

<p>1 A. Can you repeat that, sir?</p> <p>2 Q. If you don't know what the law is, the way to</p> <p>3 remedy that is to learn the law --</p> <p>4 A. Agreed.</p> <p>5 Q. -- right?</p> <p>6 A. Yes, sir.</p> <p>7 Q. To learn the law on failure to identify --</p> <p>8 A. Yes, sir.</p> <p>9 Q. -- right?</p> <p>10 Because that's your job, to follow the</p> <p>11 law and enforce the law, right?</p> <p>12 A. Correct.</p> <p>13 Q. What's the danger when a police officer</p> <p>14 doesn't know the law on failure to identify?</p> <p>15 A. Bad arrests are made. People are arrested</p> <p>16 without probable cause.</p> <p>17 Q. People can get hurt?</p> <p>18 A. If they resist, yes, sir, I guess so.</p> <p>19 Q. It could be the officer that gets hurt?</p> <p>20 A. Yes, sir, could be.</p> <p>21 Q. Could be the person that's being arrested,</p> <p>22 right?</p> <p>23 A. Yes, sir, could be.</p> <p>24 Q. A bystander, a husband, a relative might come</p> <p>25 out and see what's going on; they could get hurt,</p>	77	<p>1 have the probable cause to arrest her for, right?</p> <p>2 A. Yes, sir.</p> <p>3 Q. And that would have been wrong, too, wouldn't</p> <p>4 it?</p> <p>5 A. Yes, sir.</p> <p>6 Q. You're familiar with Article 14.01?</p> <p>7 A. I'm not clear on the statute. Can you give</p> <p>8 me the title?</p> <p>9 Q. Sure. I'll be glad to. It has to do with</p> <p>10 when the police may arrest without a warrant.</p> <p>11 A. Yes, sir.</p> <p>12 Q. And that you can arrest for a crime committed</p> <p>13 in your presence, right?</p> <p>14 A. Along with several other reasons.</p> <p>15 Q. All right. The assault with the water hose,</p> <p>16 that was not in your presence, was it?</p> <p>17 A. No, sir. That's why it was a -- required a</p> <p>18 warrant.</p> <p>19 Q. Right. And that's elementary law that every</p> <p>20 police officer should know, right?</p> <p>21 A. Yes, sir.</p> <p>22 Q. And of course the assault with a water hose</p> <p>23 or water is not a felony, right?</p> <p>24 A. No, sir. It's a Class C misdemeanor.</p> <p>25 Q. That's the lowest one, I think, maybe the</p>
<p>1 right?</p> <p>2 A. Yes, sir, I guess they could.</p> <p>3 Q. Have you talked to your expert witness in</p> <p>4 this case?</p> <p>5 A. Just during deposition.</p> <p>6 Q. How long ago was that?</p> <p>7 A. A month or two ago, I guess.</p> <p>8 Q. Okay. And did you -- did you tell that</p> <p>9 expert witness that you didn't have probable cause to</p> <p>10 arrest for failure to ID?</p> <p>11 A. Yes, sir. She was aware.</p> <p>12 Q. Now, during that 15, 16-month time period</p> <p>13 when the charges were pending, Ms. Pupko could have</p> <p>14 given up and pled guilty, right?</p> <p>15 A. Yes, sir. I think so.</p> <p>16 Q. And if she'd have pled guilty to failure to</p> <p>17 ID, she would be a convicted criminal?</p> <p>18 A. I believe the fail to ID was dropped prior</p> <p>19 to. The county attorney went on the resisting arrest</p> <p>20 which is still a valid arrest.</p> <p>21 Q. Up to the point that that charge was dropped,</p> <p>22 the failure to ID was dropped, she could have pled</p> <p>23 guilty and been a convicted criminal?</p> <p>24 A. Yes, sir, for fail to ID.</p> <p>25 Q. For a crime that you now admit you did not</p>	78	<p>1 fine at the time?</p> <p>2 A. Yes, sir. It's fine only.</p> <p>3 Q. Fine only. I think now it's \$500, but it was</p> <p>4 less than?</p> <p>5 A. Up to \$500. It's been up to \$500.</p> <p>6 Q. Okay. And of course, you didn't have a</p> <p>7 warrant to arrest, right?</p> <p>8 A. No, sir, not at that time. That's what I was</p> <p>9 attempting to do.</p> <p>10 Q. Now, you say -- The failure to ID was</p> <p>11 actually dismissed on 4-23-04?</p> <p>12 A. The county attorney's office dismissed it. I</p> <p>13 wouldn't know when they did. It was prior to the</p> <p>14 pretrial from what I understand.</p> <p>15 Q. Well, the pretrial was in March of '04,</p> <p>16 correct?</p> <p>17 A. Well, I was advised prior to the pretrial</p> <p>18 that it had been dismissed, that that and the assault</p> <p>19 had been dismissed.</p> <p>20 Q. Well, if the records show that it wasn't</p> <p>21 actually dismissed until 4-23-04, you wouldn't argue</p> <p>22 with that, do you?</p> <p>23 A. If that's what the -- The county attorney</p> <p>24 prosecutor advised me that they had been dismissed.</p> <p>25 Q. Okay. Now, the minimal force that you say</p>

1 that you used ended up breaking Ms. Pupko's wrist, 81
2 right?
3 A. If you're telling me that, yes, but -- I
4 guess so.
5 Q. Pardon me?
6 A. If you're telling me that, yes, sir.
7 Q. You didn't know that?
8 A. No, sir, I did not.
9 Q. Up until today, you didn't know that her
10 wrist got broken?
11 A. I know there was a claim of that, yes, sir.
12 Q. Oh, so there's a difference between a claim
13 of it and it being broken. Okay. I understand. At
14 that point when you grabbed Ms. Pupko's wrist, you had
15 absolutely no legal right to do so if she was being
16 arrested for failure to identify, did you?
17 A. Not for fail to identify, no, sir.
18 Q. Right. Did you know -- Do you know now that
19 Ms. Pupko had been in a coma for some four months in a
20 very serious automobile accident before any of this
21 happened? Did you know that?
22 A. I know now. I did not know at the time.
23 Q. And that she has a learning disability?
24 A. I did not know that.
25 Q. And that she had -- her left femur was

1 shattered? 82
2 A. I know that now. I didn't know that at the
3 time.
4 Q. And that she doesn't have full range of
5 motion in the arm that you grabbed. Did you know
6 that?
7 A. I did not know that at the time, no, sir.
8 Q. And you know now that she can't run despite
9 what you said in your information, that she ran from
10 you, right?
11 A. Yes, sir, I know that.
12 Q. So Ms. Pupko, if as you say she turned and
13 walked away from you, she wasn't a threat to you; she
14 was walking away from you?
15 A. Anybody could be a threat, sir.
16 Q. She wasn't about to assault you frontally;
17 she turned -- according to you, turned and walked
18 away?
19 A. She turned into her garage, yes, sir.
20 Q. All right. She didn't have a weapon in her
21 possession, did she?
22 A. Not in her possession, no, sir.
23 Q. She didn't have anything nearby that she
24 could use as a weapon?
25 A. Yes, sir, she did.

1 Q. Is that in your official offense report, that 83
2 she had something close by?
3 A. No, sir. It was irrelevant, so I did not put
4 it in there.
5 Q. Pardon me, sir?
6 A. It wasn't relevant to that particular
7 offense.
8 Q. Exactly. It wasn't relevant. So you were
9 not in fear that Ms. Pupko was going to assault you,
10 were you?
11 A. No, not at that point. No, sir.
12 Q. Not at that point. Okay.
13 A. No, sir.
14 Q. Because you didn't state that important fact
15 in your official offense report, right?
16 A. What important fact is that, sir?
17 Q. That you're in fear that she might assault
18 you; it's not in your report?
19 A. Not at that point, no, sir.
20 Q. Right. You don't want anybody acting on your
21 behalf to come into this courtroom and tell this jury
22 that you were in fear of being assaulted by Ms. Pupko
23 at that point, do you?
24 A. In any arrest situation, you're in fear of
25 being assaulted at some point.

1 Q. At this point, do you want anybody coming 84
2 into this courtroom and telling this jury that you
3 were in fear of being assaulted?
4 A. Every arrest, I'm in fear of being assaulted,
5 yes, sir.
6 Q. As Ms. Pupko turned and walked away from you,
7 do you want anyone to come to this courtroom and tell
8 this jury that you were in fear of being assaulted by
9 Ms. Pupko?
10 A. Sure. In any arrest situation, I'm in fear
11 of being assaulted.
12 Q. Did you tell your expert witness that you
13 were in fear of being assaulted when you -- right
14 before you grabbed her as she was walking away from
15 you?
16 A. I don't believe I did.
17 Q. That would be an important fact for your
18 expert to know, wouldn't it?
19 A. I think all officers know that at the time of
20 arrest is the time that you fear the most.
21 Q. That would be an important fact for your
22 expert to know. True? Fair to say?
23 A. Okay. Yes, sir.
24 Q. Is that "yes"?
25 A. Yes, I guess so.

1 Q. Okay. Well, you can say "yes," or you can 85
2 say "no."
3 A. I'm not sure I understand the question.
4 Q. All right. Well, we've been talking about
5 whether or not you were in fear of being assaulted as
6 Ms. Pupko turned and walked away. I believe you said
7 that you were not.
8 A. No, I said I was. At the time of arrest,
9 you're always in fear that you're going to be
10 assaulted. You're at a higher level of caution.
11 Q. You now say that you were, but that's not in
12 your official report, right?
13 A. No, sir, it's not in my official report.
14 Q. And of course in your official report, your
15 information, you don't mention anything about any
16 items being nearby in the garage that could have been
17 used to assault you, right?
18 A. No, sir, because she didn't grab any.
19 Q. All right. You didn't have any injuries from
20 this, did you?
21 A. No, sir, I don't believe I did.
22 Q. Had you had any injuries, those would have
23 been photographed, right?
24 A. They would have been documented, yes, sir.
25 Q. Right. Now that you know that Ms. Pupko

1 doesn't have the full range of motion in her arm 86
2 because of the surgery to her ulnar nerve and she's
3 got a shattered femur and she's got a learning
4 disability, do you agree with me that her reaction in
5 spinning away from you was a reaction to pain?
6 A. Hypothetically I guess it could be, yes, sir.
7 MR. FERNANDEZ: Pass the witness.
8 THE COURT: Why don't we take our mid
9 afternoon recess at this time. Let's take a 15-minute
10 break, so be back in the jury room in 15 minutes.
11 Remember, don't discuss the case amongst yourselves or
12 with anybody else or let anybody discuss it with you,
13 and we'll see you back in 15 minutes.
14 (Recess from 3:13 to 3:31)
15 (Open court, jury present)
16 THE COURT: We may have to work on that
17 "how we sit down" technique a little bit. I don't
18 know why the jury room door was closed, but it doesn't
19 need to be closed when you're on a break, just when
20 you're deliberating. So you're not confined back
21 there. You're allowed to wander wherever you want,
22 and that door can be open. Was the temperature okay
23 back there?
24 JURY PANEL: (Heads nodding)
25 THE COURT: Because last week, it was

1 not. It was hot -- at least Friday, it was hot and so 87
2 we called maintenance and told them. It was a huge
3 problem. All right. Let's pick up with the
4 examination of Mr. Dutton.
5 Mr. Jarrard, are you going?
6 MR. JARRARD: Yes, Your Honor, if I may.
7 THE COURT: All right. Proceed.
8 CROSS-EXAMINATION
9 BY MR. JARRARD:
10 Q. Sir, please state your full name for the
11 record.
12 A. Derrick Andrew Dutton.
13 Q. And can you tell me a little bit about
14 yourself? Are you married?
15 A. Yes, sir. Yes, sir, 20 years.
16 Q. Tell me a little bit about your professional
17 background.
18 A. I started in 1996 with the sheriff's office.
19 Prior to that, I served four years in the Marine Corps
20 as an infantryman. After -- Once I started with the
21 sheriff's office, I started in corrections as a
22 corrections officer. I attended a basic peace officer
23 course with the Regional Training Academy here in
24 Austin. After completing that, I worked for a little
25 while in the transportation section of the sheriff's

1 office where I transported inmates to and from 88
2 wherever they needed to go. I promoted to patrol
3 division where I worked approximately five years --
4 five, six years. I made a transfer to the Traffic
5 Enforcement Unit, worked there for about a year and a
6 half, and then I promoted to detective. In '04 --
7 correction -- '05, I moved to the Training Unit and
8 have been there ever since.
9 Q. And prior to the Marines, what were you
10 doing?
11 A. I was in high school. Yes, sir, in high
12 school.
13 Q. And you enlisted right out of high school?
14 A. Yes, sir, six days after I graduated.
15 Q. Any training or assignments in the Marines
16 that might be relevant to your law enforcement
17 background?
18 A. My first year and a half, I was with the
19 security force battalion, and I worked the top secret
20 security detail for a nuclear submarine base.
21 Q. Tell me a little bit about your family.
22 A. I have two boys, 16 and 18. My 18 year old
23 is an Eagle Scout, my 16 year old is working on his
24 Eagle Scout. My oldest one just got accepted to
25 Southwestern University where he may be playing

1 baseball here shortly. 89
2 Q. Do you have any things that you do when
3 you're not on duty?
4 A. Yes, sir. I volunteer as -- for the last
5 five years, six years, I've volunteered as an
6 assistant scout master with a troop in Round Rock.
7 Currently I'm a crew advisor for Adventure Crew, which
8 is 16 to 21-year-old boys and girls. We do high
9 adventure activities, rope and rock climbing type of
10 stuff.
11 Q. Well, let's talk a little bit about the
12 reason that we're here today, the events with
13 Ms. Pupko. Tell me how you came to the call, to the
14 Pupkos' residence.
15 A. I received a dispatch from our communication
16 center.
17 Q. And what were you told in that dispatch?
18 A. Just that it was a neighbor dispute.
19 Q. Did you get any other information about what
20 you would be coming up to?
21 A. Not that I recall, sir. No, sir.
22 Q. What did you do when you arrived there?
23 A. I met with the complainant that dispatch had
24 given me, the Gerbans. I met with them first.
25 Q. And after you met with the Gerbans -- I mean,

1 when you knocked on the door, what was the next thing 90
2 that occurred with the Gerbans in your investigation?
3 A. I asked them what had occurred, and they
4 informed me that basically they had had --
5 MR. DUSKIE: Objection --
6 A. -- a long history with --
7 MR. DUSKIE: Objection, Your Honor;
8 hearsay.
9 MR. JARRARD: Your Honor, the whole basis
10 of this case is what did he know and was it
11 reasonable, so we need to establish what --
12 THE COURT: Objection is overruled.
13 A. I had met with the Gerbans, and they had
14 advised me that they had had civil issues or issues
15 with the neighbor for an ongoing period of time in
16 relation to a covered patio that they had put -- that
17 they had built over their jacuzzi.
18 Q. (BY MR. JARRARD) And what happened next as
19 part of that interview process?
20 A. They had advised that they were -- they were
21 putting -- installing a cable -- a cable feed into
22 that covered patio. Mr. Gerban stated that he was on
23 a ladder, plain and visible from over the fence.
24 Mrs. Gerban was next to him outside. And the next
25 thing they knew, they were feeling water coming over

1 them -- cold water. 91
2 Q. And what was this date?
3 A. December 6, I believe -- 6, 7.
4 Q. Of 2002?
5 A. Yes, sir.
6 Q. Do you recall what the weather might have
7 been that afternoon?
8 A. I recall it was fairly cold.
9 Q. After you had spoken to the Gerbans, what did
10 you then do next?
11 A. After speaking with the Gerbans, I had gone
12 out to my unit, my vehicle to obtain statement forms
13 for them to start filling out while I made contact
14 with the other party involved.
15 Q. And the other party was whom?
16 A. Ms. Pupko.
17 Q. Had you formulated any opinions about this
18 situation at that point?
19 A. No, sir, not at that point.
20 Q. Would it have been reasonable for you to
21 formulate an opinion at that point?
22 A. No, sir, not at that point.
23 Q. And why not?
24 A. I hadn't gotten her side of the story yet.
25 Q. So after you left the Gerbans and after

1 giving them the reports to fill out, what did you then 92
2 do?
3 A. I went to make contact with Ms. Pupko.
4 Q. And where did you find Ms. Pupko?
5 A. I believe she was in the doorway.
6 Q. Had you spoken to Ms. Pupko before that
7 point?
8 A. No, sir.
9 Q. What did you do once you met Ms. Pupko?
10 A. I asked her to explain to me what had
11 transpired, what had gone on between her and the
12 Gerbans.
13 Q. Did you tell her anything before then?
14 A. I identified myself, told her who I was.
15 Q. And what did you tell her your purpose for
16 being there was?
17 A. I was investigating the neighbors being
18 sprayed with the water hose.
19 Q. And what was her reaction to your announcing
20 the reason you were there?
21 A. Initially she was cooperative. She took me
22 to the side of the house to show me where she was
23 watering a plant in her -- I guess in the side between
24 the two houses.
25 Q. Okay. And what did she tell you about the

1 incident? 93
2 A. She had advised that -- that while watering
3 the plant, the hose had fallen out of her hand and in
4 her words, did the like snake thingy, kind of like I
5 guess one of those toys that -- you know, a water toy,
6 basically just kind of went out of her hand and
7 started going crazy.
8 Q. And describe to me, you know, the -- what you
9 found in the backyard in relation to where the tree
10 was and the Gerbans were and the scene of that water.
11 A. Well, I noticed that the whole side of the
12 house was covered in water. It was still dripping.
13 Q. Was there anything between Ms. Pupko and the
14 Gerbans?
15 A. A privacy fence, yes, sir.
16 Q. About how tall was that fence?
17 A. Average height. Six foot, I guess.
18 Q. Did you see anything on the other side of the
19 fence?
20 A. A ladder against the house.
21 Q. Was there any -- How did Ms. Gerban react to
22 your -- I'm sorry. How did Ms. Pupko react to your
23 questioning at that stage?
24 A. While she was explaining, she -- she would
25 continually go off the line of questioning and go into

1 the covered patio explaining that the Gerbans didn't 94
2 have proper building permits and that she had -- she
3 had gotten with the homeowner's association or the
4 county or whoever. She was -- And I continually tried
5 to bring her back to what I was there for, explained
6 to her that I wasn't there for the civil issues, that
7 I was there to investigate the fact that the Gerbans
8 had been sprayed with the water.
9 Q. Did she appreciate that fact?
10 A. I don't know, sir.
11 Q. I mean, did she -- did she easily come back
12 to the questioning that you were undertaking with her?
13 A. No, sir. She kept on the line of the civil
14 issues that she had had.
15 Q. So after you had spoken to her about what you
16 saw on the backyard, what did you do next?
17 A. I believe she took me back over to look at
18 where the hose was spooled up, which was kind of on
19 the side of the corner of the house. We are standing
20 basically either to the side or in front of her garage
21 door, which was open at the time.
22 Q. Did you ever prevent her from telling you any
23 facts that you thought were relevant to the incident
24 with the water and the Gerbans?
25 A. I'm sorry. Say that again, sir?

1 Q. Did you ever prevent her from telling you any 95
2 of the facts that she wanted to tell you about the
3 Gerbans and the water incident?
4 A. No, sir, not about the water.
5 Q. So after you had -- she had shown you where
6 the water hose was reeled up, what happened next
7 between Ms. Pupko?
8 A. At that point, I explained to her that she
9 was a suspect in the criminal offense of the assault
10 of the neighbors, assault by contact, and I asked her
11 to -- I had her name, so I asked her to verify the
12 spelling of her name, which she did, and then I asked
13 her date of birth.
14 Q. What -- Excuse me. Let's step back for just
15 a second. When -- Were you taking notes throughout
16 this whole interview process with Ms. Pupko?
17 A. No, sir.
18 Q. At what point did you start taking notes with
19 Ms. Pupko?
20 A. Just on her identifying information -- name,
21 spelling of the name, date of birth, that kind of
22 thing.
23 Q. So you would have had to get a pen. Where
24 did that pen come from?
25 A. From my pocket.

1 Q. Did her mood change at all once you started 96
2 asking her questions?
3 A. She became uncooperative when I asked her for
4 her date of birth. She asked me why I needed that.
5 Q. Did you have to ask her more than one time
6 for her name?
7 A. No, sir.
8 Q. How many times did you have to ask her for
9 her date of birth?
10 A. Several times. I don't remember exactly how
11 many.
12 Q. Was her demeanor changing at all from the
13 moment that you took out your pen to the time that you
14 asked her date of birth the last time?
15 A. Yes, sir.
16 Q. And how was it changing?
17 A. She just kind of became irrational as far as
18 questioning me why I needed the information. I
19 explained to her that it was a block on my report form
20 that I had to fill out because I was writing a report
21 to submit to a judge for a warrant. She just -- she
22 became more and more irrational about it each time I
23 asked her.
24 Q. Should Ms. Pupko have known that you were
25 investigating the criminal complaint of the Gerbans?

1 A. Yes, sir. I told her. 97
2 Q. The final time that you asked her her date of
3 birth, what did she do in response?
4 A. I advised her if she didn't give me her date
5 of birth that I would be forced to arrest her for fail
6 to identify so I could identify her for warrant
7 purposes. At that point, she said she was done
8 talking to me and walked away.
9 Q. All right. Well, let's talk about the
10 failure to identify. You testified that it was -- you
11 were mistaken on the law. Explain why you had made
12 that mistake.
13 A. The law is very -- The statute is kind of --
14 I don't know the word. It's kind of hard to
15 understand as far as levels of detention and things of
16 that nature. I believe that it occurred because of a
17 discussion of a case law in training in which the law
18 in Texas was changed. I believe that's where my
19 mistake came from.
20 Q. Tell me what you understand today about what
21 it means to commit the crime of failure to identify.
22 A. In a state of detention when an officer is
23 investigating somebody and they have them detained,
24 the only time it would be an offense is if she gave me
25 a fictitious name, date of birth or address.

1 Q. She didn't give you a fictitious name? 98
2 A. No, sir.
3 Q. Is there a second part to that statute?
4 A. The first part is if they're arrested and
5 they refuse to give you the information.
6 Q. So is that where your confusion came in?
7 A. Yes, sir. Yes, sir.
8 Q. The -- Well, let's talk about -- There's been
9 a lot of discussion about detention and arrest. Is
10 there a distinction between a detention and an arrest
11 by a police officer?
12 A. Detention, an officer is required to have a
13 reasonable suspicion that that person is involved in a
14 criminal offense or about to commit a criminal
15 offense.
16 Q. And that is what?
17 A. Reasonable suspicion would just be a
18 reasonable person would have information that would
19 lead them to believe that that person had committed or
20 was about to commit an offense.
21 Q. But that's detention. What's the difference
22 between detention and arrest?
23 A. For an arrest, you have to have probable
24 cause, which is a higher burden of proof.
25 Q. Is detention only dealing with suspects?

1 A. No. You're detaining somebody to either 99
2 either establish probable cause that they committed an
3 offense or -- or negate the fact that they were
4 involved in an offense.
5 Q. Can you detain witnesses?
6 A. To a certain extent, yes, sir. Yes, sir.
7 Q. And if you advise them that you need to get
8 certain information simply as a witness, can you
9 detain them as opposed to arresting them?
10 A. Yes, sir.
11 Q. Is there a distinction between detaining a
12 witness and detaining a suspect?
13 A. No, sir. No, sir.
14 Q. So at this case, did Ms. Pupko know or should
15 have known she was being detained as either a witness
16 or a suspect in this matter?
17 A. Yes, sir. I advised her she was a suspect.
18 Q. In your opinion as a certified peace officer,
19 master peace officer, is there an occasion when a
20 witness or a suspect can voluntarily disengage that
21 detention without your authority?
22 A. I'm sorry. Can you say that one more time,
23 please?
24 Q. It was poorly worded. I apologize. As a
25 master peace officer, you have special training. Is

1 that correct? 100
2 A. Yes, sir.
3 Q. Based on your training and your experience,
4 is there a point when a witness or a suspect can
5 voluntarily disengage the detention of the police
6 officer?
7 A. Not if I have a reasonable suspicion, no,
8 sir.
9 Q. So in your mind, what does that mean as far
10 as an interview of a witness or a suspect?
11 A. Basically they're going to answer the
12 questions that are posed to them and they're not free
13 to leave until I've finished my investigation.
14 Q. But they don't have to answer those
15 questions?
16 A. No, sir. No, sir.
17 Q. But -- And how long can you detain them if
18 they're not answering your questions?
19 A. A reasonable amount of time, as long as I'm
20 continually investigating. The courts have held that
21 it's -- "reasonableness" would just be established on
22 a case-by-case basis basically.
23 Q. And with Ms. Pupko, were you still
24 investigating at the time she turned and walked away
25 from you?

1 A. Yes, sir. I was still trying to identify 101
2 her.
3 Q. You had -- At that point that she turns, what
4 happened next?
5 A. When she turned and walked away from me, I
6 advised her that she would be placed under arrest for
7 fail to identify. I grabbed a hold of one arm -- left
8 or right, I can't remember which -- to cease her
9 movement into the garage.
10 Q. When you asked her to stop, did she stop?
11 A. No, sir.
12 Q. Opposing counsel had asked you some questions
13 about being in fear at that moment.
14 A. Yes, sir.
15 Q. Were you in fear of Ms. Pupko at that moment?
16 A. I was at a heightened sense of caution
17 because it was an arrest situation, yes, sir, so I
18 guess I was in fear.
19 Q. Was it because of Ms. Pupko or your training?
20 A. Both. Both training and Ms. Pupko and her
21 actions.
22 Q. So what did you have to fear about Ms. Pupko?
23 A. Her ability to grab a weapon from -- from
24 within the garage; she might have been going for a
25 weapon inside the house; a multitude of things.

1 Q. What happens when you -- in a normal 102
2 situation when you are arriving at a neighbor dispute
3 or a domestic dispute where tempers may be heightened?
4 What does your training tell you to do in that
5 situation?
6 A. You're constantly on alert for one or the
7 other to lash out. It's an emotionally charged
8 situation. You're coming in as I guess a mediary
9 [sic] to try to settle the dispute, and they can -- it
10 can become violent very quickly.
11 Q. If she had made it to the interior door of
12 her garage, do you know what was on the other side of
13 that door?
14 A. I had no idea. No, sir.
15 Q. Is it your experience and your training that
16 you should be concerned about what's on the other side
17 of that door?
18 A. Absolutely. Yes, sir.
19 Q. No matter the demeanor of the person that
20 you're interacting with?
21 A. Correct.
22 Q. Are there things in the garage that would
23 cause you concern as a reasonable peace officer?
24 A. Well, absolutely. Screwdrivers, lawn mower
25 blades, you name it, gasoline.

1 Q. So it wasn't so much that you had formulated 103
2 a fear of Ms. Pupko; it was your training requires you
3 to formulate caution in the scenario?
4 A. Correct. Yes, sir.
5 Q. Once you reached out for Ms. Pupko's arm,
6 what occurs next?
7 A. She began spinning around which caused me to
8 spin around with her trying to stay behind her so I
9 could effect the arrest by putting handcuffs on her.
10 Q. So when you grabbed her, which direction was
11 she facing?
12 A. I believe she was facing towards the door.
13 She was walking towards the interior door.
14 Q. In relation to you, what were you seeing?
15 A. I was seeing her back and kind of bladed --
16 her side bladed basically.
17 Q. Were you instructing her at that moment about
18 anything?
19 A. I was advising her that she was under arrest.
20 Q. And as you grabbed her arm, what occurs next?
21 A. She began spinning, using the other hand was
22 hitting at my hands, pushing my hand and hitting at my
23 hand that had a hold of her wrist.
24 Q. And how long did this occur?
25 A. A very short amount of time, maybe three,

1 five seconds. 104
2 Q. Was there any way that you could have
3 reasonably just cuffed her hands in front of her at
4 that point?
5 A. No, sir, unless she became compliant all of a
6 sudden.
7 Q. Did that happen?
8 A. No, sir, it didn't.
9 Q. As you're spinning and she's slapping, what
10 occurs next?
11 A. I felt like I was starting to lose control of
12 the situation because she was spinning around in
13 circles. At that point, I decided to use her vehicle
14 to kind of stop her movement, her ability to move
15 around, so I kind of put my weight into pushing her
16 against the vehicle, which I did.
17 Q. Did Ms. Pupko have a cane with her that day?
18 A. No, sir.
19 Q. I think you testified you didn't notice
20 anything odd about her gait or her speech?
21 A. Not at all, no, sir.
22 Q. So it wasn't her brawn that was at issue
23 then. What took you so long -- or what caused you to
24 get this situation under control?
25 A. Well, any time an officer is using force,

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1 which sometimes we have to do to effect an arrest,
2 there's several elements of an arrest, and one of
3 those being the actual taking of the person, the
4 seizing of the person, which obviously takes force.
5 Putting handcuffs on is a certain level of force. Any
6 time that we use force, we have to weigh those -- we
7 have to weigh factors. We call them force variables.
8 Things like age, size, gender, perceived skill, things
9 of that nature, time of day or night, we have to weigh
10 all those factors and use the necessary or reasonable
11 amount of force to effect a law enforcement purpose.
12 Q. And what is the goal in those levels of
13 force? Is it to protect you only?
14 A. No, sir. No, sir. I mean, you're obviously
15 taking into account your suspect's welfare as well.
16 Q. So what did you evaluate -- If you can
17 remember in that split second, what did you evaluate
18 about the situation with Ms. Pupko and the level of
19 force you needed to use?
20 A. I remember recalling to myself that based on
21 her age and her gender comparatively, the force
22 variables were against me which led me to use -- not a
23 lesser amount, but the minimal amount that I could to
24 try to effect that arrest which probably allowed her
25 to spin around a little bit more. For instance, if it

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1 had been a male same size as Ms. Pupko, I probably
2 would have went ahead and taken him to the ground to
3 effect the arrest just so he couldn't have spun. In
4 this case with those variables in place, I didn't feel
5 that that was necessary at that point.
6 Q. So you didn't take Ms. Pupko to the ground to
7 handcuff her behind her back?
8 A. No, sir, I did not.
9 Q. How did you effectuate the handcuffing of
10 Ms. Pupko?
11 A. Once I got her positioned against the
12 vehicle, she was unable to spin anymore at that point.
13 I had one hand -- I had one hand in my -- in my grip.
14 I grabbed my handcuffs out of my case, and I got one
15 handcuff on her hand. At that time, she spun around
16 with the other hand in an attempt to strike me. I
17 dodged that one and grabbed a hold of the arm and kind
18 of pulled it behind her, and I put the other handcuff
19 on.
20 Q. How much force did you use to position her
21 against the car?
22 A. I just kind of used my body weight, kind of
23 pushed her up against it.
24 Q. And why did you use the car as opposed to
25 some other technique?

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1 A. It was close. It was close.
2 Q. As this process is going on, is there
3 anything that you're telling Ms. Pupko?
4 A. I was continually telling her to stop
5 resisting.
6 Q. And what was she doing?
7 A. I couldn't recall. Spinning around and
8 hitting my hands.
9 Q. Was she hysterical?
10 A. I don't recall whether she was or not.
11 Q. Would it be unusual for a suspect to be
12 hysterical?
13 A. No.
14 Q. Would it be unusual for a suspect not to want
15 to be handcuffed?
16 A. No.
17 Q. As you handcuffed her with both hands, did
18 you realize that any injury had been caused to
19 Ms. Pupko?
20 A. Not at that time, no, sir.
21 Q. Did she say anything to you at that moment
22 that you put her arm behind her back?
23 A. Not that I recall.
24 Q. Do you recall which arm you handcuffed first?
25 A. I want to say it was the left hand. I can't

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1 be positive. The right hand was the one that was
2 loose from what I recall.
3 Q. So the right hand is the one she swung at
4 you?
5 A. I believe so.
6 Q. And that's the last arm for you to handcuff?
7 A. Yes, sir.
8 Q. As you're handcuffing, did anyone else arrive
9 on the scene?
10 A. No, sir.
11 Q. As you were trying to handcuff her, did you
12 make any radio calls?
13 A. I believe I called for another unit just
14 because she was -- she began to fight, and that was --
15 I believe that was as soon as I grabbed her and she
16 started spinning around. I got on my lapel mike which
17 was placed in front of me and called for another unit.
18 Q. And is that pretty hard to do, to talk and
19 spin and grab all at the same time?
20 A. Yes, sir. Yes, sir.
21 Q. Once you had her handcuffed, did you ever
22 warn her that she needed to stop resisting?
23 A. Once I had her handcuffed?
24 Q. Or at any point in this process, did you ever
25 warn her that --

1 A. Yeah. While she was spinning around, I was 109
2 continually telling her to stop resisting.
3 Q. And did she ever comply with that order?
4 A. No, sir.
5 Q. Let's go back to probable cause for your
6 arrest. Do you think you had probable cause to make
7 the arrest of Ms. Pupko?
8 A. Yes, I did.
9 Q. And what was that probable cause?
10 A. Now or then?
11 Q. Let's start with now. I mean, what do you
12 think?
13 A. Well, based on my -- based on the information
14 that was present at the time, I had probable cause for
15 evading detention.
16 Q. And why is that?
17 A. Because she was in a state of detention and
18 basically walked away from me, fleeing from me.
19 Q. And the state of detention occurred because
20 of what?
21 A. Because I was investigating the assault case.
22 Q. And what does it take to constitute evading
23 detention?
24 A. Basically that the person flees from a person
25 they know or should reasonably know is a police

1 officer and they're being detained or arrested. 110
2 Q. And what does "flee" mean?
3 A. Basically walk away. Run away, walk away.
4 Q. You don't have to be chasing someone down the
5 street in order for them to be fleeing?
6 A. No, sir.
7 Q. From the moment that you had probable cause
8 for evading detention, was there any injury to
9 Ms. Pupko that you're aware of prior to her resisting
10 arrest?
11 A. Not that I'm aware of, no, sir.
12 Q. Had you laid a hand on her prior to that?
13 A. No, sir, not prior to that.
14 Q. Did you lay a hand on her before you reached
15 out and grabbed her when she walked away?
16 A. No, sir.
17 Q. You've admitted that there was not probable
18 cause in hindsight with failure to ID. Is that
19 correct?
20 A. That's correct.
21 Q. Was there any injury that occurred to
22 Ms. Pupko from the moment that she failed to identify
23 herself and the moment that you grabbed her arm to
24 stop her from walking away?
25 A. No, sir.

1 Q. Had there been any physical contact or 111
2 interaction between you and Ms. Pupko from the moment
3 she failed to identify to the moment that you arrested
4 her?
5 A. No, sir.
6 Q. When you reached out to grab her arm, did
7 that constitute an arrest at that point?
8 A. Yes, sir, the actual seizing of the person.
9 Q. So prior to that, she's just detained; the
10 arrest occurs when she is grabbed?
11 A. Yes, sir.
12 Q. Was there probable cause for a crime after
13 the moment that you arrested her?
14 A. I'm sorry?
15 Q. Was there an independent cause for you to
16 arrest her for a different crime after you reached out
17 and grabbed her for the failure to ID?
18 A. Yes, sir, resisting arrest.
19 Q. And why did you have probable cause for the
20 resisting arrest?
21 A. Because I was trying to effect an arrest, and
22 she was using force against me to affect that arrest.
23 Q. Do you know at what point that Ms. Pupko may
24 have been injured in this arrest process?
25 A. I have no idea.

1 Q. Did she ever tell you that you were hurting 112
2 her during that -- up until the point you handcuffed
3 her?
4 A. Not that I recall, no, sir.
5 Q. After you handcuffed her, did she tell you
6 that she thinks you had injured her wrist or her arm?
7 A. No, sir, not that I recall.
8 Q. After you had arrested her, what did you do
9 next?
10 A. I walked her to my patrol unit which was
11 parked in the street.
12 Q. And what occurred once you got her to the
13 patrol unit?
14 A. I opened the door, asked her to sit down.
15 She did. She took a seat in the back of the patrol
16 unit. At --
17 Q. How -- I'm sorry. I didn't mean to
18 interrupt.
19 A. At that point, she sat down. I asked her to
20 slide in.
21 Q. So describe how she was sitting at that
22 moment.
23 A. She was sitting down with her hands cuffed
24 behind her back. She sat down with her legs outside
25 the vehicle.

1 Q. Did you have to assist her to sit down? 113
2 A. Not that I recall.
3 Q. And did she comply with your request to slide
4 into the vehicle?
5 A. No, sir. I asked her several times. That
6 was the first time she ever mentioned anything about
7 any injuries.
8 Q. So what is she telling you at that point?
9 A. She was saying something to the effect that
10 her legs didn't bend that way or something to that
11 effect.
12 Q. And in response, what did you do?
13 A. I asked her just to slide back and keep her
14 legs straight. I asked her just to slide back in the
15 seat so I could close the door.
16 Q. And what was her demeanor throughout this
17 process?
18 A. I don't know how you explain it. She was --
19 she was kind of sobbing, you know, explaining to me
20 that her knees didn't bend that way, that kind of
21 thing.
22 Q. And again, is that unusual for a suspect not
23 to want to --
24 A. Absolutely not.
25 Q. At some point, did you have to intervene to

1 get her into the car? 114
2 A. Yes, sir. After several requests, I grabbed
3 her basically above her knees and kind of slid her
4 back into the unit into the seat so that I could get
5 the door closed.
6 Q. Did you ever force her legs into the police
7 car?
8 A. No, sir.
9 Q. How was she sitting once you slid her into
10 the back seat?
11 A. Kind of at an angle on the seat.
12 Q. So you didn't physically force her legs into
13 a bent position to sit forward in the seat?
14 A. No, sir. There was no need to.
15 Q. Would you have cared which way she was
16 sitting in the seat going to the jail?
17 A. Not really, no, sir.
18 Q. At that point, did she tell you anything
19 about any of the injuries that she thinks she
20 sustained during this event?
21 A. Not that I recall, no, sir.
22 Q. Did anyone assist you in putting her in the
23 police -- in the squad car?
24 A. No, sir.
25 Q. After you had her in the squad car, what

1 occurred next? 115
2 A. I'm sorry, sir?
3 Q. I'm sorry. After you had her in the squad
4 car, what did you do next?
5 A. I began to transport her to the jail. I
6 called into our dispatch, advised them that I was
7 en route. At that point, the Georgetown officer had
8 arrived. We kind of went door to door and just rolled
9 down the window. He was just checking on my status
10 basically.
11 Q. So you were already moving?
12 A. Yes, sir.
13 Q. Did you do anything before you got in your
14 car?
15 A. Retrieved the statements from the Gerbans,
16 the written statements that I had them working on.
17 MR. JARRARD: May I approach the witness,
18 Your Honor?
19 THE COURT: You may.
20 Q. (BY MR. JARRARD) Sergeant Dutton, could you
21 identify that document?
22 A. This would be my written report on the
23 incident along with my affidavit -- probable cause
24 affidavit for the resisting arrest, fail to identify
25 and assault by contact.

1 Q. Do you recognize these documents as the 116
2 documents that you had prepared in relation to this
3 arrest?
4 A. Yes, sir, and the last two pages are the
5 statements -- the written statements from the Gerbans
6 in reference to the assault or the incident.
7 Q. Mr. Fernandez had asked you some questions
8 about the accuracy of your report. Could you explain
9 to us the purpose of this report and the documents
10 attached to it?
11 A. Mostly it's to -- it's to document the
12 incident. It assists in my recollection during the
13 criminal proceeding.
14 MR. JARRARD: Your Honor, may I use the
15 Elmo, please?
16 THE COURT: Sure.
17 MR. JARRARD: Figure out how to get
18 this --
19 MR. FERNANDEZ: May we approach, Your
20 Honor?
21 THE COURT: Sure.
22 If y'all want to stand up and stretch,
23 feel free.
24 (Bench conference, on the record)
25 MR. FERNANDEZ: If Counsel is going to be

1 introducing part of this document -- Is that what
 2 we're doing?
 3 MR. JARRARD: Yes.
 4 MR. FERNANDEZ: -- there's hearsay
 5 included in the report.
 6 MR. JARRARD: Again, Your Honor, this is
 7 based on what he knew at the time. His arrest has to
 8 be based on the statements that he's taken. And that
 9 they've made a lot of -- you know, he gets to control
 10 the charges, and the purpose again is what he gets
 11 to --
 12 THE COURT: What specifically are you
 13 concerned about?
 14 MR. DUSKIE: We only object to the
 15 hearsay information in the report, Judge, and to go
 16 further --
 17 THE COURT: Well, I've never really had a
 18 situation exactly like this, but it's sort of
 19 analogous to a motion to suppress, and hearsay is
 20 admissible for purposes of, you know, whether what the
 21 officer did is correct or not. So --
 22 MR. JARRARD: And again, Your Honor, it's
 23 not offered for the accuracy of what's in here; it's
 24 based on what was told to him and what he had
 25 formulated in his mind as to probable cause.

1 MR. DUSKIE: Well, if we were to believe
 2 that, then it wouldn't be difficult to believe that he
 3 was -- that the statements of the neighbors had
 4 anything to do with probable cause to arrest for
 5 evading detention. It's irrelevant. If we're going
 6 to say that, it's completely irrelevant.
 7 MR. JARRARD: And Your Honor, they've
 8 already testified both sides as to what was told to
 9 him --
 10 THE REPORTER: I can't see who's talking.
 11 THE COURT: Mr. Jarrard is talking.
 12 MR. JARRARD: So if it is hearsay, it's
 13 already come in. This is just --
 14 THE COURT: I mean, you questioned him
 15 about the report to begin with and then -- All right.
 16 Objection's overruled.
 17 (Bench conference concluded, open court,
 18 jury present)
 19 Q. (BY MR. JARRARD) Sergeant Dutton, again,
 20 this is your arrest report that you prepared. Is that
 21 correct?
 22 A. Yes, sir. That's correct.
 23 Q. And attached to that document are two witness
 24 statements that you gathered from the scene. Is that
 25 correct?

1 A. Yes, sir, from the Gerbars.
 2 MR. JARRARD: Your Honor, we'd move to
 3 admit Defendant's Exhibit No. 1 into evidence.
 4 MR. FERNANDEZ: I think the Court has
 5 already overruled our objection, Your Honor -- Is that
 6 correct? -- as to hearsay.
 7 THE COURT: Yes, sir.
 8 MR. FERNANDEZ: Thank you, Your Honor.
 9 THE COURT: Was it marked?
 10 MR. JARRARD: Yes, it is, Your Honor.
 11 THE COURT: All right. Defendant's
 12 Exhibit 1 is admitted.
 13 MR. JARRARD: Hopefully everyone can see
 14 this.
 15 Q. (BY MR. JARRARD) Officer Dutton, can you
 16 explain what is contained on this first page of the
 17 report and the purpose of that?
 18 A. This is the incident information from our
 19 records management system.
 20 Q. And it's simply there to do what?
 21 A. Just shows the incident -- the occurrence of
 22 the incident.
 23 Q. Does it contain certain information?
 24 A. Yes, sir.
 25 Q. Such as?

1 A. Address, that kind of thing.
 2 Q. And the first -- first question there is
 3 identifying --
 4 THE REPORTER: Mr. Jarrard --
 5 MR. JARRARD: I'm sorry. I'm sorry.
 6 Q. (BY MR. JARRARD) The first block there is
 7 for the purpose of identifying whom?
 8 A. The suspect in the arrest report.
 9 Q. Which is in this case?
 10 A. Sheryl Hayes-Pupko.
 11 Q. And there's several blocks there that contain
 12 several identifying information. Is that correct?
 13 A. That is correct.
 14 Q. So is this the type of information you were
 15 trying to elicit from Ms. Pupko when you were
 16 identifying her on the scene?
 17 A. Yes, sir.
 18 Q. Let me show you the second page of that
 19 document. Can you identify what's the purpose of this
 20 sheet?
 21 A. This is actually our incident or offense
 22 report cover sheet. The first page is actually from
 23 our records management system that's generated based
 24 on the next page.
 25 Q. And about the middle there, what is

1 identified the purpose of your call was? 121
2 A. It was dispatched as a disturbance. Is that
3 what you're referring to?
4 Q. Yes. And again, the top of the document has
5 certain specific identifying information from
6 Ms. Pupko. Is that correct?
7 A. Yes, sir, for -- No, sir, not in that page.
8 That is actually the complainant. The first page
9 would be the complainant, which was Olga Gerban. But
10 it does have all of her identifying information.
11 Q. Did the Gorbans have any problem giving you
12 their identifying information?
13 A. Absolutely not.
14 Q. Behind that is -- Is what?
15 A. This is our suspect or witness page. It
16 basically has all the identifying information on
17 suspects, witnesses, missing persons, whatever the
18 accident is.
19 Q. And who does it identify as the suspect in
20 this case?
21 A. In this case, it was Sheryl Hayes -- Sheryl
22 Jean Hayes-Pupko.
23 Q. And can you identify the third page of that?
24 A. The third page is my narrative which I write
25 out which explains the incident.

1 Q. And how does this get generated? 122
2 A. I type it out.
3 Q. Now, earlier Mr. Fernandez was questioning
4 you about the report. Is this the document he was
5 referring to?
6 A. Yes, sir.
7 Q. And he made quite a big deal that there was
8 no reference to detention. Why do you not refer to
9 detention in this report?
10 A. Because I had focused on the fail to
11 identify, and that's what I had decided to arrest her
12 on, so I put the pertinent facts to that in there.
13 Q. Is there a reason you don't mention the magic
14 phrase "probable cause" in this document?
15 A. Not really. This is just a documentation of
16 the facts and the circumstances that I knew at the
17 time for the establishment of probable cause.
18 Q. And do you have to establish probable cause
19 for every violation that you identified in this
20 report?
21 A. For the ones that I identify, yes, sir. Yes,
22 sir.
23 Q. Do you identify probable cause for any crime
24 that you could have charged for?
25 A. No, sir. I wouldn't have to necessarily put

1 the probable cause in there. The facts are there 123
2 either way.
3 Q. Is there anything in this report that is
4 different than what you've told to the jury here
5 today?
6 A. No, sir.
7 Q. The next page is what of this document?
8 A. This is a probable cause affidavit, sworn
9 affidavit by me on the facts and circumstances around
10 the incident.
11 Q. And contained in here there are three of
12 these. Is that correct?
13 A. Yes, sir, one for each charge.
14 Q. And what were the charges that you booked her
15 in on?
16 A. Resisting arrest, failure to identify and the
17 assault -- Class C assault.
18 Q. And once she's arrested, what would this
19 document be used for?
20 A. It would be used for arraignment,
21 magistration by a neutral judge when she's
22 incarcerated.
23 Q. So do you determine if there's probable cause
24 to hold her in jail?
25 A. No, sir.

1 Q. Who would make that determination initially? 124
2 A. A neutral magistrate.
3 Q. Had you been allowed to complete your report
4 on the assault by contact which was the water
5 spraying --
6 A. Yes, sir.
7 Q. -- would you have filled out something along
8 these lines?
9 A. Yes, sir. That's what I was going to fill
10 out to submit to the justice of the peace for the
11 warrant.
12 Q. And would you have had to have arrested
13 Ms. Pupko in order to complete that affidavit?
14 A. No, sir, not at all.
15 THE COURT: Can I see the lawyers here
16 for a second.
17 (Bench conference, on the record)
18 THE COURT: All right. I overruled your
19 objection for two reasons, one, because it was going
20 into what he knew at the time of the offense and two,
21 because you had gone into the offense report itself at
22 the time when you were questioning the witness. I
23 haven't looked through the entire document. There's
24 also two witness statements attached which -- which
25 are hearsay which you didn't go into at the time --

1 you didn't go into on direct examination. I didn't
2 realize they were in here. His testimony was he
3 picked those up after she was already in the car. So
4 to the extent they're hearsay, assuming you're still
5 objecting to them, I'm sustaining that objection. The
6 jury hasn't seen them and doesn't even know they're in
7 there, so don't go into the last two pages and remove
8 them before we go further.
9 MR. JARRARD: Thank you, Your Honor.
10 THE COURT: I mean before we do anything
11 to show them to the jury.
12 MR. JARRARD: Certainly.
13 (Bench conference concluded, open court,
14 jury present)
15 Q. (BY MR. JARRARD) So once you -- I think you
16 had indicated that those reports are filled out after
17 you reached the jail. Is that correct?
18 A. Yes, sir. Yes, sir.
19 Q. After you had passed the police officer on
20 the street -- In fact, do you recall that officer's
21 name?
22 A. I believe his name was Crawford.
23 Q. Did you know him prior to this?
24 A. I knew of him. I didn't know him personally.
25 Q. What happens when you arrive at the jail?

1 A. I entered the sally port --
2 Q. And what is the sally port?
3 A. Sorry. It's a locked facility, has a gate
4 that opens up. We pull our patrol car in and then it
5 closes behind us so that you avoid a suspect escaping
6 basically.
7 Q. And did you remove her from -- Ms. Pupko from
8 the vehicle at that point?
9 A. Yes, sir.
10 Q. And did she explain to you any injuries that
11 she had suffered during your arrest?
12 A. Not that I recall, no, sir.
13 Q. What was her mood or demeanor?
14 A. Same as it was when I arrested her.
15 Q. Was she crying?
16 A. Silently. Yeah, I believe so.
17 Q. Again, was that unusual for you to take
18 someone to jail and they're crying?
19 A. No, sir.
20 Q. Is it unusual if they're hysterical?
21 A. No, sir.
22 Q. Once you're at the -- inside the jail
23 facility, where -- how -- what's the relation to that
24 facility to where the booking would occur?
25 A. It's connected. There's an interlocking room

1 from the sally port in which they do intake processing
2 inside.
3 Q. "They" being whom?
4 A. The corrections facility, the corrections
5 officer.
6 Q. So it's not your job to book her into jail,
7 is it?
8 A. No, sir. No, sir.
9 Q. And did you turn her over to jail staff at
10 that point?
11 A. Yes, sir, I did.
12 Q. You worked in the jail. Is that correct?
13 A. Yes, sir, I did.
14 Q. What would the normal routine for the jail
15 staff be at that point?
16 A. You come down; you start a booking folder;
17 you put the person's name on the booking folder.
18 There's several -- several questionnaires that you
19 have to ask in relation to medical issues,
20 psychological issues, things of that nature. Once
21 you've started the folder, you've gotten the name,
22 then you would take that person -- unhandcuff them,
23 pat them down for any contraband, weapons, anything
24 like that, and then switch out your handcuffs for
25 their handcuffs.

1 Q. And is that done by you, or is that done by
2 staff?
3 A. By the intake officer, yes, sir.
4 Q. So as they're processing Ms. Pupko into the
5 jail, what role did you then have?
6 A. I start working on my report at that point,
7 preliminary stuff like the information sheet, the
8 first couple of sheets.
9 Q. Now, that's what we were just going through?
10 A. Yes, sir.
11 Q. Once you've completed that, those statements
12 and those forms, what then do you do?
13 A. I would go up to our patrol room where there
14 was a computer accessible and start writing out my
15 narrative, the complaints --
16 Q. Once that's completed, then what do you do?
17 A. I take it back to the jail to put in the
18 booking folder so that the magistrate can look at it
19 later in that afternoon or whenever they do it.
20 Q. Do you have anything to do with the
21 magistrature process?
22 A. No, sir, absolutely not.
23 Q. Do you have anything to do with the charges
24 that ultimately get filed against Ms. Pupko in this
25 case?

1 A. Other than writing the probable cause
 2 affidavit and the complaint, no.
 3 Q. And you have Defendant's Exhibit No. 1 in
 4 front of you there. Is there anything in those
 5 probable cause affidavits that was incorrect?
 6 A. Not that I know of, no, sir.
 7 Q. One of these probable cause affidavits is for
 8 resisting arrest or detention. Is that correct?
 9 A. Yes, sir, resisting arrest or transportation.
 10 Q. And one was for failure to identify. Is that
 11 correct?
 12 A. Yes, sir. Yes, sir.
 13 Q. And one was for assault by contact?
 14 A. Yes, sir.
 15 Q. Why didn't you fill out one for evading
 16 detention?
 17 A. Really no purpose to stack charges.
 18 Oftentimes in an incident, you'll have multiple --
 19 multiple charges that you could file based on the
 20 facts and the establishment of probable cause. It
 21 just -- it's not necessarily a reasonable thing to do
 22 to stack so many charges on somebody.
 23 Q. So is this closely related to the resisting
 24 in your mind?
 25 A. In my mind, yes, it was.

1 Q. Once the charges are filed against Ms. Pupko,
 2 do you have any say or any authority about the
 3 dismissal of those charges?
 4 A. No, sir. That would be up to the county
 5 attorney's office.
 6 Q. So the prosecutor is the one who would have
 7 controlled the criminal docket once this case was
 8 filed?
 9 A. Correct.
 10 Q. What was your role in the -- There had been
 11 some mention of a criminal proceeding. What was your
 12 role in that proceeding?
 13 A. I testified in a pretrial. I believe it was
 14 a suppression hearing.
 15 Q. It wasn't even a final hearing; it was just a
 16 pretrial hearing?
 17 A. Yes, sir.
 18 Q. Do you recall about what time it was that you
 19 would have booked Ms. Pupko into the jail?
 20 A. I want to say it was roughly 5:00.
 21 Q. Is it reflected on the documents?
 22 A. The incident occurred at 4:11 is what my
 23 report reflects.
 24 Q. The incident being what happened at her home?
 25 A. Yes, sir. Yes, sir. That would have been

1 the original water spraying.
 2 Q. So to the best of your knowledge, from the
 3 time that you arrived to the time that she's booked in
 4 the jail is from 4:11 to 5:00 p.m.?
 5 A. Yes, sir, roughly.
 6 Q. So could this situation have gone a lot
 7 differently from your perspective?
 8 A. Yes, sir, absolutely.
 9 Q. And how could that have been different?
 10 A. Had she given me her identifying information,
 11 I would have been able to complete my report. That
 12 would have been submitted. I would have left there,
 13 prepared my documentation, sent it to a justice of the
 14 peace, and he would or would not have issued a warrant
 15 depending on the situation.
 16 Q. Were there any other factors that you needed
 17 to consider prior -- had she complied other than just
 18 getting the information on this call?
 19 A. Can you repeat that?
 20 Q. Was there any other considerations that you
 21 had about this scene before you could leave the scene
 22 other than just getting her information?
 23 A. Neighbor disputes oftentimes are ongoing and
 24 eventually they go to this point where there's
 25 actually a physical -- physical altercation. That's

1 always in your mind as you're dealing with these
 2 situations. Again, like I said earlier, just being
 3 cautious of these situations is a prudent thing for a
 4 police officer to do just because you never know
 5 what's going to come out of the situation. Yeah,
 6 there were a lot of red flags. To that point in my
 7 career, I'd never had anybody not give me their
 8 information and from that point on to now, I still
 9 have not had anybody not ever give me the information
 10 when I requested it. So all those factors kind of
 11 throw up red flags for a police officer when you're
 12 investigating something like this.
 13 Q. Mr. Fernandez asked you about apologizing to
 14 Ms. Pupko or being sorry for your involvement in this
 15 case. Have you utilized this event in your life for
 16 any purpose?
 17 A. Oh, absolutely. Absolutely.
 18 Q. What is that?
 19 A. I teach an intermediate arrest search and
 20 seizure class. I also teach an intermediate use of
 21 force class to in-service deputies or officers all
 22 over the state really, for that matter, the country.
 23 And I use this as kind of a wake-up to officers
 24 basically explaining the fail to identify law and how
 25 it can get you into a mess if you're not clear on the

1 law. Yes, sir, I use it quite often -- quite often --
 2 and get a lot of arguments back in reference to it.
 3 Q. So no misunderstanding here, I mean, you're
 4 not telling us that you're happy about what happened
 5 to Ms. Pupko, are you?
 6 A. No, sir. No, sir. I use it to educate other
 7 officers so they don't make the mistakes that I make.
 8 Q. And I think you had said this was the one and
 9 only time you had the opportunity to use this
 10 particular statute?

11 A. Yes, sir. That's correct.
 12 MR. JARRARD: Pass the witness, Your
 13 Honor.

REDIRECT EXAMINATION

14 BY MR. FERNANDEZ:

15 Q. When you arrested Ms. Pupko, when you made
 16 the decision to arrest her for failure to identify,
 17 you did so knowingly and intentionally, didn't you?

18 A. Yes, sir. At the time, I believe she
 19 committed an offense.

20 Q. And the case would have gone differently if
 21 you had simply followed the training that you were
 22 given on failure to identify?

23 A. I don't understand your question, sir.

24 Q. Well, had you -- You were trained on what the

1 elements of the offense of failure to identify,
 2 correct?

3 A. Yes, sir.

4 Q. The person -- Under your training, the person
 5 has to be under arrest for an offense before you have
 6 probable cause to arrest them for failure to identify,
 7 correct? That was your training?

8 A. Yes, sir. Yes, sir.

9 Q. Had you followed your training, then you
 10 wouldn't have arrested or attempted to arrest
 11 Ms. Pupko for failure to identify?

12 A. No, I probably would have arrested her for
 13 evading detention instead.

14 Q. You're saying that now in 20/20 hindsight,
 15 aren't you?

16 A. At the -- at the time, I had fixated on the
 17 fail to identify. And understand, there's
 18 40-something chapters of the penal code that we have
 19 to memorize and every element of those crimes.

20 Q. So one way or the other, you were going to
 21 arrest her for something that day?

22 A. No, not necessarily. No, sir.

23 Q. You just got through saying you were going to
 24 arrest her for evading detention.

25 A. When she walked away from me, yes, sir.

1 Q. And one of the things I'm sure you teach your
 2 students -- your police students is that those police
 3 officers should respect a citizen's right not to give
 4 information, correct?

5 A. Yes, sir. In certain situations, yes, sir.

6 Q. Well, when the Constitution calls for it,
 7 right?

8 A. Agreed. Yes, sir.

9 Q. And you've heard the term "pissing off the
 10 police" --

11 MR. FERNANDEZ: Excuse me, Your Honor.

12 Q. (BY MR. FERNANDEZ) -- "P-O-P"; you've heard
 13 that, haven't you?

14 A. Yes, sir, I have.

15 Q. That happens when a citizen doesn't cooperate
 16 with the police officer, makes the police officer mad,
 17 and then the police officer is going to arrest that
 18 person for something, right?

19 A. I suppose so. I --

20 MR. JARRARD: Objection, Your Honor;
 21 calls for speculation.

22 MR. FERNANDEZ: I'll move on, Your Honor.

23 Q. (BY MR. FERNANDEZ) Now, as far as the
 24 resisting arrest charge, you told the jury earlier
 25 that you had thought that that was still a good

1 charge?

2 A. Yes, sir, it was. It still is.

3 Q. You agree with me -- You say that the law is
 4 complicated; you agree with me that the prosecutor in
 5 that case, the judge in that case, the defense lawyer
 6 in that case all disagree with you?

7 MR. JARRARD: Objection, Your Honor; he's
 8 trying to introduce

9 THE COURT: Objection sustained.

10 MR. FERNANDEZ: I'll move on, Your Honor.

11 Q. (BY MR. FERNANDEZ) We can agree and I think
 12 you already testified that all three cases that you
 13 filed were dismissed in the interest of justice?

14 A. By the county attorney's office, yes, sir.
 15 What I do know is that --

16 Q. And the judge signed off on that?

17 MR. JARRARD: Objection, Your Honor --

18 A. I couldn't tell you --

19 Q. (BY MR. FERNANDEZ) All right. Now

20 MR. FERNANDEZ: I'll move on, Your Honor.

21 THE COURT: All right. Come here,

22 everybody.

23 (Bench conference, on the record)

24 THE COURT: Okay. Let's stop the legal

25 questions.

1 MR. FERNANDEZ: Pardon me? 137
2 THE COURT: Let's stop the legal
3 questions. I mean --
4 MR. FERNANDEZ: Yes, sir.
5 THE COURT: -- the statute requires a
6 judge to sign it when the prosecutor files a
7 dismissal; there's no discretion on the judge's part.
8 So let's don't be asking a bunch of legal
9 questions that he doesn't know the answer to, and the
10 answer is different than what you're implying to the
11 jury.
12 MR. FERNANDEZ: That's my last legal
13 question, Judge.
14 THE COURT: Good.
15 (Bench conference concluded, open court,
16 jury present)
17 Q. (BY MR. FERNANDEZ) I'm going to ask you some
18 non-legal questions --
19 A. Okay.
20 Q. -- about when you were placing Ms. Pupko in
21 the patrol vehicle.
22 You understand what we're talking about?
23 A. Yes, sir.
24 Q. Now, she had trouble getting in the car, so
25 you had her slide in first?

1 A. I asked her to slide in, yes, sir. 138
2 Q. All right. So with the Court's permission,
3 if this is your patrol vehicle, you wanted her to kind
4 of turn this way, and assuming that this is not here,
5 just kind of slide in?
6 A. She had already sat down in that position.
7 Q. Okay. So she's sitting down, but her legs
8 are outside the patrol vehicle?
9 A. Yes, sir.
10 Q. All right. She told you that she couldn't,
11 correct?
12 A. She mentioned something about her legs didn't
13 move that way.
14 Q. That she didn't have the range of motion --
15 A. Something to that effect, yes, sir.
16 Q. Right. And then as a matter of fact, what
17 you did is you pushed her legs into the car?
18 A. That -- No, sir.
19 MR. FERNANDEZ: May I approach --
20 A. I pushed her -- I pushed her whole body into
21 the car.
22 Q. (BY MR. FERNANDEZ) In fact, you actually put
23 your hands physically on her knee, grabbed it and
24 pushed her into the vehicle, correct?
25 A. Yeah, above her knee and pushed her in.

1 Q. All right. Now, I want to ask you -- And she 139
2 was crying, wasn't she?
3 A. I believe so. I don't recall.
4 Q. That's what you testified to before, that she
5 was crying.
6 A. Then that's probably correct.
7 Q. If you said it, it's correct --
8 A. Yes, sir.
9 Q. -- right?
10 Now, I want to ask you some more about --
11 Oh, do you agree with me that pulling away and
12 spinning away does not constitute resisting arrest?
13 A. It's not active resistance, no, sir. It's
14 defensive resistance. At the point that she started
15 hitting my hands, it became active resistance.
16 Q. In your opinion, that's when it became
17 active?
18 A. Yes, sir.
19 Q. All right. And again, you don't know if she
20 was doing that in reaction to any pain that you might
21 have been causing her, right?
22 A. I couldn't tell you.
23 MR. FERNANDEZ: One moment, Your Honor.
24 Q. (BY MR. FERNANDEZ) A few moments ago, you
25 were asked about when you had probable cause for

1 evading detention. Remember? 140
2 A. I believe so, yes, sir.
3 Q. And you said, "Now or then?" Do you remember
4 that?
5 A. I don't recall exactly what the question was,
6 sir.
7 Q. Okay. Well, you made that distinction as to
8 whether or not -- You were being questioned about did
9 you feel you have probable cause now or did you feel
10 you had probable cause then.
11 A. I believe that was failure to identify.
12 Q. Okay. Failure to identify. Well, as far as
13 evading detention, what you've told this jury is what
14 you believe in 20/20 hindsight because none of that is
15 in your report about the detention, is it?
16 A. No, because I didn't charge her with that at
17 the time.
18 Q. Right. And she was not under arrest for
19 evading detention when you grabbed her wrist, was she,
20 because the reason you grabbed her wrist was to arrest
21 her for failure to identify?
22 A. I had probable cause for it. Whether I
23 arrested her for it or not, I had probable cause for
24 it.
25 Q. I understand. So she was not under arrest

1 for evading detention when you grabbed her wrist to
2 arrest her for failure to ID?

3 A. No, sir. I wasn't arresting her for that. I
4 had decided to arrest her for fail to ID.

5 Q. Okay. So she wasn't under arrest for that,
6 right?

7 A. No, sir.

8 Q. Now, whenever y'all were having this
9 conversation, you and Ms. Pupko, were y'all in the
10 garage?

11 A. No, sir. I believe we were outside the
12 garage kind of in the driveway or opposite corner of
13 the driveway.

14 Q. And did she turn and actually walk into the
15 garage?

16 A. Yes, sir.

17 Q. Are you familiar with Article 14.105 of the
18 Code of Criminal Procedure?

19 A. I need the name -- the title of the statute,
20 sir.

21 MR. FERNANDEZ: May I approach the
22 witness, Your Honor?

23 THE COURT: You may.

24 Q. (BY MR. FERNANDEZ) Did you actually -- So
25 you went into the garage and you grabbed her?

1 A. Yes, sir, when she walked away from me.

2 Q. Did she consent to you going inside of her
3 garage?

4 A. No, sir.

5 Q. Do you believe that you had to have her
6 consent to go inside her -- her home?

7 A. No, sir, I don't, not inside her garage.

8 Q. Pardon me?

9 A. Not inside of her garage. One of the
10 exceptions to that would be fresh pursuit. That would
11 be considered a fresh pursuit if I'm trying to effect
12 an arrest on her.

13 Q. Pardon me?

14 A. If I'm trying to effect an arrest and she's
15 walking away from me, that would be considered fresh
16 pursuit.

17 MR. FERNANDEZ: Pass the witness.

18 MR. JARRARD: No further questions, Your
19 Honor.

20 THE COURT: You can step down.

21 THE WITNESS: Thank you, Judge.

22 THE COURT: Call your next witness.

23 MR. DUSKIE: Judge, we call Sheryl

24 Hayes-Pupko.

25 Judge, strike that. We're going to call

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1 a different witness in light of the time that we've
2 got left today. We'll call someone and try to get
3 them done before 5:00.

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