

**"ANYTHING TWO PEOPLE KNOW IS NOT A SECRET."**

**THE LEGENDARY  
CHEYENNE**

**HERALD**

**the local advocacy journal**

In depth. Independent. Stories of Local Interest. Since January 30, 2002.

January 13, 2009 ♦ Issue No. 162 ♦ Next issue January 27, 2009

# NOT GUILTY!

*Why was this non-starter ever brought to trial?*

No words can be as sweet to hear for someone who was wrongfully charged, yet on trial, as "Not Guilty" being read by the Clerk of District Court. A guilty verdict would have brought up to ten years in prison.

**W.S. § 6-2-502 (a)(ii) A person is guilty of aggravated assault and battery if he attempts to cause, or intentionally or knowingly causes bodily injury to another with a deadly weapon.**

This trial was held on Monday and Tuesday, January 5 and 6, 2009. There were three witnesses and their combined testimony, including direct and cross-examination, consumed about three hours, ten minutes. Jury instructions took 15 minutes and each side consumed about 15 minutes for their closing arguments.

The jury of seven women and five men (a man was designated the alternate juror and did not join the deliberations) left the courtroom to deliberate - first they had to select a foreman (called a "presiding juror" by Judge Michael Davis) - at 2:20 that Tuesday. At 3:10, I was called to inform me that the jury had reached a verdict. The verdict was published at 3:22 and the accused was free to leave. He was found not guilty by a jury of his peers.

The system worked this day.

But it is debatable as to whether it had worked for the 297 days leading up to this acquittal.

Opening arguments and testimony by the first responding Cheyenne police officer (JT) took about an hour and a half. The eyewitness (LL) who testified for the prosecution was on the stand for about an hour. Jury selection consumed the morning and that was it for the first day.

On the second morning, the woman considered a "victim" (MP) by the prosecution took the stand. She consistently has said that she was not a victim - that she was the instigator

of the confrontation, that she was the aggressor. And that she was never shown nor threatened with a knife that night. Her story never wavered from her initial statement given to police that night, her testimony at the preliminary hearing nor her testimony at trial. She was in the witness chair for about 35 minutes.

It was during her testimony that the judge was called upon to make his only ruling of the trial. The defense attorney asked MP if she thought the accused was justified to take the actions he took that night. The young female ADA quickly stood and said "Objection." The judge immediately ruled, "Sustained." The fact that the ADA didn't state a reason for her objection did not matter to the judge. It didn't matter. The jury knew that the "victim" provoked the altercation and would have answered "yes," given the chance.

*The story about this incident appeared in the April 15, 2008 Cheyenne Herald (pages 1 and 7). We have been the only Cheyenne media to follow this potential injustice.*

The earlier story came after the preliminary hearing - which determines probable cause and whether the matter should go to trial. The prosecution doesn't have to present any real evidence to gain a ruling to proceed to trial. The eyewitness did not testify at that time. Her statement to JT that night was introduced through the testimony of the police officer. The only ones to testify back in April were the police officer and the "victim" who said she hadn't been threatened and hadn't even seen a knife that night, let alone had one held to her throat.

The only evidence introduced by the prosecution at the trial (but not at the preliminary hearing) were nine pictures. They showed the house (you can view better pictures of the house on the Cheyenne Herald website), some disturbed snow outside the doorway into the foyer of the up and down apartments, a

photo of the victim's red Ford Explorer and three pictures purporting to show her "injuries."

I do not mean to ridicule the prosecution but the "injuries" described at the preliminary hearing and what was shown in the photos at the trial did not match in severity. That probably cost the ADA with the jurors. To describe what she presented as evidence of injuries was a huge stretch. At the preliminary hearing, she referred to "blood" and that was what I expected to see. The jurors did not hear that earlier mis-characterization - they just heard what the ADA said this day about "injuries."

One photo was a close-up and enlargement of the back of MP's right hand. At the base of her fingernail on her index finger ("pointer," MP called it), was what could have been taken for a blood blister. It was red, not bleeding, circular and was the size of a "red hot" candy. It was about 1/4 or 1/5 of the width of MP's finger. Presented as an injury from that night, MP countered that it was a hangnail which she aggravated by filing into cabinets at her job.

Another photo was of MP's left ear lobe. It was without an earring (JT testified MP had worn "studs" that night, MP testified she had worn hoop earrings) and was red, again no running blood from an irritated mark on the lobe. That mark was not perfectly circular and was about the same size as the mark on her finger. MP testified that her earring had come out while she was pursuing entry into the apartment the defendant was determined to keep her out of. He has said he did have another woman there (which MP could tell by her vehicle parked in front) and his children were sleeping.

MP testified that she was "upset," that night. "Mad." A guy she considered her boyfriend did not respond to text messages and wouldn't answer his phone. She drove to his place and saw why he wouldn't. He had another female friend there.

LL testified that she had lived in the upstairs apartment for less than three months and had complained to the landlord about heavy smoke coming from downstairs in what was to have been a "smoke-free" building. She was not alone that night, her boyfriend was with her. She testified that a "slamming door" awakened her. Her boyfriend did not rise that night nor was a written statement asked of him about what he had heard or knew of the events.

LL also said there was "yelling" from below. She got out of bed and went to the window in a "spare bedroom" having nothing in it except a computer. It was never established what the height (off the floor) is of that window. LL testified that she pulled aside the curtain and opened the blinds and looked out. The prosecution introduced a partial photo of the house including the small window but did not show the much larger window just to the east of it. Why?

LL testified that she saw a female "running away from the house down the sidewalk and [the defendant] was running after her." He had a knife "up", grabbed MP and swung her by the front of her shirt. He held the knife 6-8" from her throat, LL testified. It was a "butcher style" knife, with a 6-8" blade. MP "had a cigarette in her mouth," LL testified.

Next, MP ran back toward the foyer, the male had the knife in his hand and was chasing after her. LL then lost sight of them when they got close to the house and then in the foyer. She said they "were brawling in the foyer," for 3-5 minutes. She went to the kitchen to retrieve her phone and called 9-1-1. According to the defense attorney, in her call, she told the dispatcher that the defendant was "a drug dealer." No transcript of that call was introduced.

LL testified that the defendant shook MP "like a rag doll" and yelled at her: "I'll kill you if you don't get back into the house." MP had testified that she wanted to get into his house - to speak with him and the female he had inside. (See page 8, please.)

**WWW.CHEYENNEHERALD.COM**

## The acquittal (continued from the front page)

The defendant's position was that he didn't want MP in his apartment because his children were asleep there. That inconsistency remained in the air.

The issue of whether the defendant had taken a knife outside when he went out to tell MP she wasn't coming in - to either wake up his kids or fight the other woman - wasn't in dispute. The inconsistency was about how he handled it and whether he had used it in a threatening manner. MP testified that when she first arrived, before she had gotten out her truck, the defendant had come out and told her to leave. She had been texting him and called him on the telephone, too. He knew she was there. He also told her if she didn't, he would call the police. She testified he told her that more than once.

The prosecution tried to get MP to say she knew the defendant had a knife in his hand. In her written statement that night, she used the word "knife." It was never made it clear that the police officer, when he responded and asked MP what was going on, had told her 9-1-1 had received a call about a male chasing a female around the yard with a knife. So, MP was prompted to believe that what she had seen in his hand as he walked up the sidewalk to his house to return it inside, was a knife. A law enforcement officer had said it was a knife and she picked up on that. She never clearly saw a knife.

The defendant said he took a knife with him when he went outside because he thought MP might be accompanied by "hoodlums" he said she hung with. His own vehicle had just been vandalized by having two tires slashed. He warned MP when he came out, "don't do anything to my dad's truck." He had borrowed that vehicle to get back and forth to work.

According to JT, the defendant responded when he was asked where the knife was, "I threw it back inside." The police never took any knife into possession. They never pressed the issue to view, photograph or take a knife or demand the defendant produce it. It should be noted that the police officer on the stand was fairly new to his job and he had relinquished control of the investigation to a superior within minutes of his arrival on scene. That superior did not testify. That was never clarified, either.

This former house, now two apartments, up and down, is bordered closely on both the east and west by other residences. (Refer to the Cheyenne Herald photos on our website.) JT never attempted to question an occupant of either house. He didn't know if anyone else had. There was no statement entered into evidence or referenced from another police officer interviewing anybody beyond the three people who have been mentioned - the defendant, the eyewitness and the "victim."

The ADA often said there was only one eyewitness to the incident. What she meant to say is that there was only one eyewitness for the prosecution. There were two other eyewitnesses, the two principals in the disagreement.

JT testified that he had about 8 months on the streets alone the night he received a call stating there was "a male subject holding a knife to a female subject's throat." When he arrived, he testified, MP was in the front yard on her cell phone. It was never determined who she was talking with - maybe it was unimportant. When he asked about the incident, "she didn't really give me a good answer," he said. "The other half of the disturbance was inside," the officer testified. The defendant quickly came outside. He had only recently convinced MP that she wasn't coming inside and she was leaving when the police officer came on scene. "Where is the knife?" "What knife? I have lots of knives." "I put it back inside my apartment."

By this time, MP was back in her pickup. She said she had told the responding officer, "we had an argument, nothing happened, everything is all right," and she was about to leave when police arrived.

The officer and a sergeant handcuffed the defendant, searched him, and placed him in the back of a police car. Not his own car because he had a female ride-along with him and MP later was placed there to make her written statement. JT failed to say under direct examination, but it was asked under cross, that he drew down on the defendant before handcuffing him.

When the officer was asked if he questioned the boyfriend in the upstairs apartment, he said he had spoken "indirectly" to him. By that he meant the guy hadn't said anything but seemed in agreement with whatever LL said.

When asked if there were other photos taken that night, the officer said he didn't know. When asked if he had reviewed the introduced photos before court that day, he said he had not. On several questions under cross examination, he couldn't recall what had been said or happened. He had total recall under direct. He couldn't provide an estimate of the size of the foyer. He didn't remember if there was a porch light or whether it was on if there was one. He couldn't recall if the upstairs window was open - the photo showed it was. LL said for circulation.

It was not determined whether the photos showing the recent light snow being disturbed near the front door could have been done by the police officers. The sidewalk up to the house is narrow and short. Many may have walked in the snow. Police did not ask to view text messages that were sent between the two parties and did not record times of any. In one photo, the defendant's cell phone had been taken from him and was on the floor of the foyer - in plain sight.

It is common that a witness can recall everything his side asks and then fights the other side to remember anything. That cannot go over well with a jury. Not remembering simple things comes across as dodging or lying. Neither helps that sides case. The only evidence of a "struggle" - other than what the prosecution said were the "injuries" - was dirt in

two places on MP's clothes. On her left pant leg by the knee and somewhere on her jacket, there was "loose dirt." No photos were introduced to confirm that. MP had said she slipped to the ground twice. Once when she was trying to exit her truck at the public sidewalk (that stretch of sidewalk is at about an 8° slope) and again when she was trying to force her way into the apartment and the defendant was holding her back. It was slippery from the recent snow and she fell. She testified that the defendant had never "thrown" her down and never had her in a "headlock."

LL's testimony that the defendant shook MP "like a rag doll" was a bit difficult to accept. The defendant is probably no taller than MP and only maybe 25-30 lbs heavier. If he held a knife in his right hand, he would have had to shake her with his left - his off hand - and he didn't look big enough to pull that off. MP said it never happened. She also testified that she told the officer she didn't need an ambulance but one was called anyway. That's probably a prudent precaution to take under those circumstances. But, no complete exam was made to determine whether she had injuries she didn't even realize. There were no bruises to her neck, no abrasions on her neck, , no marks, no

blood anywhere but two tiny areas, and there were no other visible signs of injury.

The defendant was Mirandized and questioned but no video or audio tape was made of that questioning. No written statement, of course. He did not testify.

From personal observation, there was enough light for LL to take in the scene. There is a city street light almost directly across the street from the address.

LL testified that she had taken her dog out for a walk at 9:30. But, she did not say that she was awakened by her dog barking. That wasn't asked. She described it as "a little dog" so it seems it might be an inside dog. It sounded like a "yip yip" dog that barks at all noises. No questions about that, though.

The jury obviously put more credence in MP's testimony than LL's. Why? The box below might help. LL had to be terrified. She had to fear seeing a woman stabbed. It was quick. It was dark. I will not call her a liar. I think she testified to what she thought she saw. At least she called for help, whether MP needed it or not. For that, she is to be commended. Some would not have gotten involved.

### Eyewitness memories

Every year, hundreds of defendants are convicted on little more than the say-so of a fellow citizen. Although psychologists have suspected for decades that an eyewitness can be highly unreliable, new evidence leaves no doubt that juries vastly overestimate the credibility of eyewitness accounts. It is a problem that the courts have yet to solve or face squarely.

Eyewitness testimony is not as reliable as it would appear to be.

Witnesses are more apt to tailor their stories—and thus their memories—to the interests of the first listeners. An eyewitness to a crime is more inclined to recount, and thus remember incriminating details, when speaking to a police officer intent on solving the crime.

Memory is affected by retelling, and we rarely tell a story in a neutral fashion. By tailoring our stories to our listeners, our bias distorts the very formation of memory.

The protections of the judicial system against prosecutors and police "assisting" a witness' memory may not sufficiently ensure the accuracy of those memories. Even though prosecutors refrain from "refreshing" witness A's memory by showing her witness B's testimony, the mere act of telling prosecutors what happened may bias and distort the witness's memory. Eyewitness testimony, then, is innately suspect.

Rarely do we tell a story or recount events without a purpose. Once witnesses state facts in a particular way or identify a particular person as the perpetrator, they are unwilling or even unable—due to the reconstruction of their memory—to reconsider their initial understanding.

In *Eyewitness Testimony*, Elizabeth Loftus makes the psychological case against the eyewitness. Beginning with the basics of eyewitness fallibility, such as poor viewing conditions, brief exposure, and stress, Loftus moves to more subtle factors, such as expectations, biases, and personal stereotypes, all of which can intervene to create erroneous reports. Loftus also shows that eyewitness memory is chronically inaccurate in surprising ways. An ingenious series of experiments reveals that memory can be radically altered by the way an eyewitness is questioned after the fact. New memories can be implanted and old ones unconsciously altered under interrogation.

Bias creeps into memory without our knowledge, without our awareness.

As shown by recent studies, this weight must be balanced by an awareness that it is not necessary for a witness to lie or be coaxed by prosecutorial error to inaccurately state the facts—the mere fault of being human results in distorted memory and inaccurate testimony.

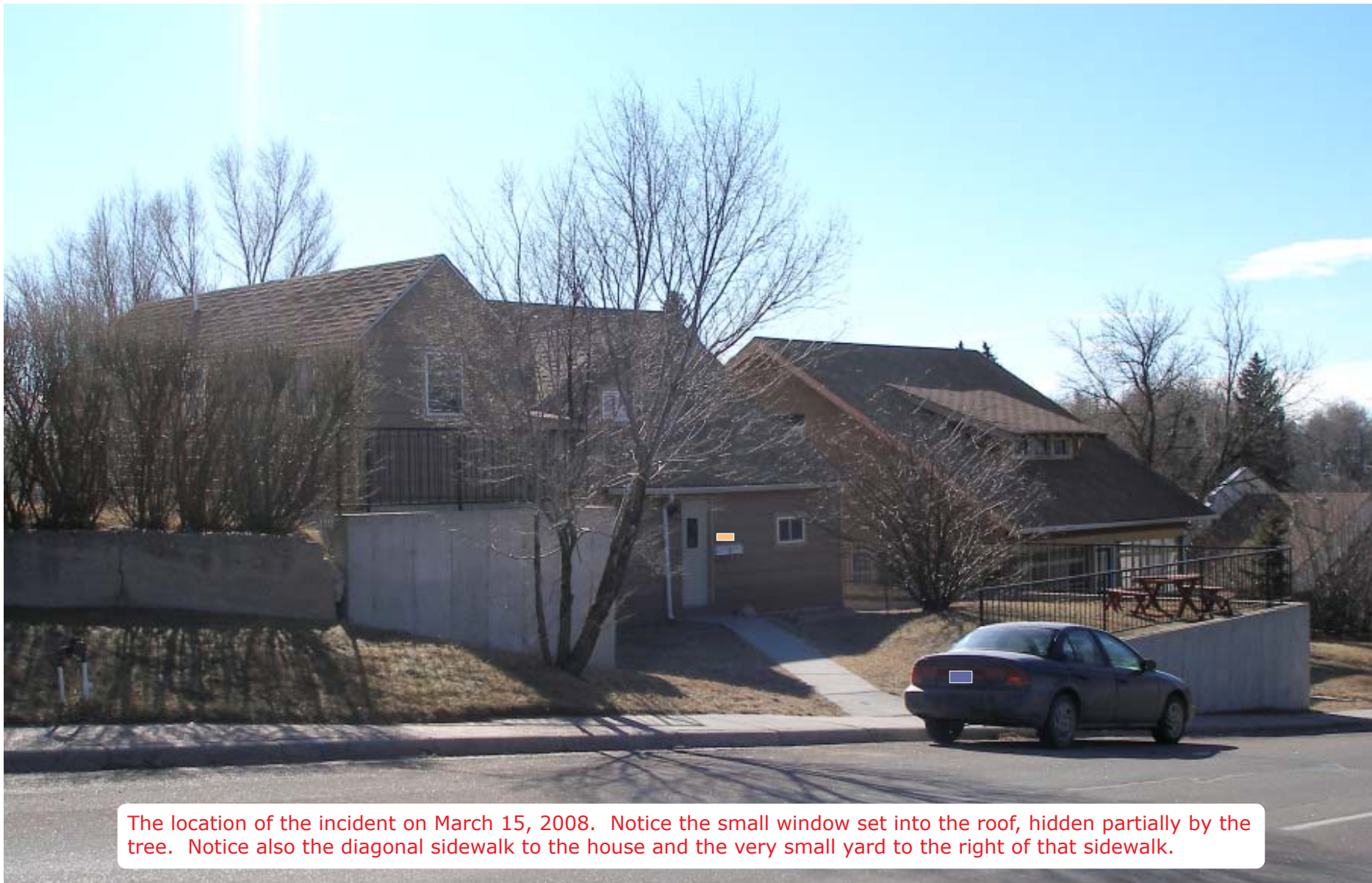
Our memories are not video cameras; we are not able to record an event in our memory, to be retrieved later when we summon it.

It is more accurate to say that our memory is an imperfect mechanism that can easily be distorted by external influences.

Sources: Various studies published on the internet with attribution

**IN THE NEXT ISSUE: COMMENTS FROM FAMILY MEMBERS AND THE "VICTIM" AND ASSESSMENT OF THE ATTORNEYS FOR EACH SIDE ... AND MORE!**

**E-MAIL ... CHEYENNEHERALD@BRESNAN.NET**



The location of the incident on March 15, 2008. Notice the small window set into the roof, hidden partially by the tree. Notice also the diagonal sidewalk to the house and the very small yard to the right of that sidewalk.



The location of the incident on March 15, 2008. The small window upstairs is more visible in this photo. Notice the pitch of the roof and the overhang of the roof, obstructing view from that window to near the entrance. Notice also the severe slope of the public sidewalk in front of the house and the only opening to the sidewalk to the house is to the left of railing that runs almost the entire length of the retaining wall.