

UNDISCLOSED: The State v. Fred Freeman
Episode 2 - Deus Ex Machina
April 13, 2020

Colin Miller: Many of you are probably familiar with the phrase *Deus Ex Machina*. Here's a brief explanation from [Fandor](#):

Male Narrator:

You know when you're watching a movie, and the characters really get themselves into a jam, and you wonder, how in the Hell are they going to get themselves out of this mess?

And then... something like this happens. [screaming, sounds of mayhem]

This is referred to as a Deus Ex Machina. Deus Ex Machina is a term applied to a situation where the problem seems unsolvable, yet it is solved by an unlikely occurrence. So, in other words, lazy writing.

Deus Ex Machina translates as "God From the Machine," and it harkens back to ancient Greek theater, where actors playing Gods would be lowered onto the stage by cranes to resolve conflicts after playwrights had painted themselves into corners. In the prosecution of Frederick Freeman, the prosecution found itself painted into a similar corner. And so, at the very end of the case, the State pulled out an actual Deus Ex Machina, claiming that Frederick Freeman was a literal God From the Machine.

Rabia Chaudry: Hi, and welcome to Undisclosed: The State v. Frederick Freeman. This is the 2nd episode in a 4 episode series about Frederick Freeman, who was convicted of the 1986 murder of Scott Macklem. I'm Rabia Chaudry, attorney and author of *Adnan's Story*.

As always, I'm joined by my co-hosts Susan Simpson and Colin Miller.

Susan Simpson: Hi, I'm Susan Simpson. I'm an attorney in Washington, D.C. and I blog at The View from LL2.

Colin Miller: Hi, this is Colin Miller. I'm an Associate Dean and Professor at the University of South Carolina School of Law, and I blog at Evidence Prof Blog.

[02:20] Rabia Chaudry: In Episode One, we laid out the pickle that the prosecution found itself in during the prosecution of Frederick Freeman for the 1986 murder of St. Clair Community College student Scott Macklem.

Recall that witnesses testified that it would take six-and-a-half hours to drive from Escanaba, Michigan on the *Upper Peninsula* to the community college in Port Huron in the *Lower Peninsula*, on a good day. Although Beth Stier didn't testify at trial, Paul De Mars placed Freeman in a jump started, burgundy Mercury Marquis at a Bob's Big Boy in Escanaba a mere six-and-half-hours *before* Freeman was supposedly seen outside the community college. Meanwhile, three witnesses with interlocking memories placed Freeman at a karate studio in Escanaba just three hours *after* the murder, and two more witnesses placed Freeman outside the Treasure Chest in Escanaba between six and six-and-a-half hours after the murder with Michelle Woodworth and her yellow Mercury Marquis.

Given this compelling alibi evidence, the State had to place great weight on the testimony of their two eyewitnesses...before having to rely on a literal *deus ex machina* at the end of their case. Let's start with the State's most compelling witness, Rene Gobeyn.

Colin Miller: As a St. Clair County prosecutor would later admit, without Gobeyn, "we had no case at all." Gobeyn was a criminal justice major who later became an investigator with the Oakland County Prosecutor's Office in Michigan. As we noted in Episode 1, Gobeyn didn't see the murder and thought the shotgun blast that took Macklem's life was a tire blowing out. But, shortly after the shooting, at about 9:00am, he did see a mystery man driving out of the community college parking lot where the murder occurred.

Port Huron Police Officer James Carmody pulled Gobeyn out of one of his classes at 10:45am on the morning of the murder and interviewed him in one of the professor's offices at the community college.

According to the police report, Gobeyn gave the following description of the driver: He was a white male. About 25 years old. Wearing a green army jacket and a dark blue ski mask, with the red mouth portion pulled down to his eyebrows. Dark hair. The police report then notes, "No further information on the physical of the driver."

Gobeyn also gave a description of the car: small, possibly a foreign make vehicle, maybe a Mazda. Pinkish-tan or dark tan in color. Clean, in good condition, and making

no noises. Gobeyn says he wrote down the license plate number on a folder as 822-DHH, although he may have gotten the last letter wrong.

Carmody ran the plates, and they came up as match for a vehicle owned by a jeweler in Mount Clemens, Michigan who had no apparent connection to the murder.

So, you have the State's key eyewitness, and he may be off on the license plate of the car driven by the killer by just *one* letter. What do you do? In this case, the answer was...hypnosis. Here's part of my call with Dr. Thomas Mooney, a psychology professor at St. Clair Community College in 1986:

Dr. Mooney:

I drive into the school, I think the faculty parking lot is close- being redone or something- I park in the student lot and I see this tape up there. So, I'm walking in to, I have a class in what was called the North building. And I get to the door, and there's Officer James Carmody.

Jim's an old student of mine, knew him well. I said, Jim, what's going on? *"Tom, we've had a killing in the parking lot. For a fact, the only eyewitness is in your class."* You're kidding, Jim. Oh my gosh.

So, I go up to class and we talk a bit about the case, finish class. I talked to the young man, and I had just read in the last six months, an article in Time. There was a kidnapping of a bus out in California...

[06:44] Susan Simpson: This article was referring to a 1976 mass kidnapping in Chowchilla, California. Here's a clip from CBS This Morning:

Male News Anchor:

Three masked gunmen seized a bus carrying 26 children and their driver back in 1976. The kidnapers drove them 100 miles, from Chowchilla, California to a rock quarry. They buried the children and the driver alive, 12 feet underground, in a moving truck. While the driver and children managed to dig themselves out, the 28-hour nightmare still haunts them more than 40 years later.

As noted in the Time article, under hypnosis, the bus driver was able to remember the license plate number on one of the vans that took them to the quarry, which ultimately led to apprehension of the abductors. And so, Dr. Mooney thought that he could do something similar here. He took Rene Gobeyn to his office and hypnotized him:

Colin Miller:

And so, what's the method that you used to hypnotize him, do you remember:

Dr. Mooney:

Body tension, body relaxation, starting with the forehead, the neck, the cheeks, the shoulders, the arms, the chest, the back, the hips, the legs. And then, counting backwards from 99. With every count that you take back, you go deeper into this very pleasant state. You're in control the whole time. You can never be too relaxed.

With Gobeyn hypnotized, Dr. Mooney then asked him to remember his day from the moment he woke up. And, when Gobeyn got to the part where he saw the man driving the car, Dr. Mooney told him the following:

Dr. Mooney:

When they slow the tape down, you are looking at this guy, slow the tape. Stop it. Describe what the guy looks like.

Well, he's got a cap on, and he's got a beard.

Okay. Start that tape. Let the car go. The car's passing you. Look at the back. Look at the license.

So, he was able to think of maybe three or four license plates-- or numbers. I take the tape down to the PHPD, and I bump into another former student of mine, John Bowens. I said, John, I've just interviewed the witness. Here's a description of the car with a possible license plate.

So, was this type of hypnosis something that Dr. Mooney frequently did?

Colin Miller:

And was this something that you did regularly at the time?

Dr. Mooney:

No. Something I would never do again.

One thing that Dr. Mooney did do correctly was to record the hypnosis session:

Dr. Mooney:

Now, I understand somebody took the tape.

Colin Miller:

Yeah. We don't know where the tape is, we have the transcript--

Dr. Mooney:

What happened?! What happened? [laughs]

That's right. The official status of the recording of the hypnosis session is: "missing." But there is a transcript of that session, and Colin reached out to Dr. Steven Lynn, the leading expert on hypnotically refreshed testimony, to review it:

Dr. Steven Lynn:

I've testified in a lot of cases. I've published maybe 100, 150 articles on hypnosis. I'm not sure how many on hypnosis and memory, but many. So, yeah. I have a pretty extensive background in that. I've testified in a lot of high profile cases. Both cases that are criminal and not criminal cases.

Colin Miller:

And so, generally speaking, do you have sort of a holistic overall take on hypnotically refreshed testimony and statements?

Dr. Steven Lynn:

The effect of hypnosis is to increase the overall volume of memory, so you get more accurate memories. Some with more inaccurate memories- there are a lot of false memories that are mixed in. A lot of guesses turn into fairly confidently held beliefs. There's now pretty sizable literature showing that there are risks of both false memories and unwarranted confidence in memories.

So, those are the two central findings that have made courts quite skeptical of the use of hypnosis- in fact, I think 27 states have banned hypnotically elicited testimony, and another nine have procedural guidelines.

So, it's admitted on a case by case basis.

Colin Miller:

And looking at that breakdown, do you think that this is something where- if you're able to comment- it should be banned per se, or that with certain safeguards it can be used in certain scenarios?

Dr. Steven Lynn:

Well, I wouldn't ban in per se. I think it's very difficult to argue that certain safeguards mitigate risks, necessarily because the research has not really been done on it. But even when you warn people that hypnosis can produce false memories, you have problems there.

So, what about the hypnosis in this case? Recall that when Gobeyn started remembering the car and driver, Dr. Mooney told him to "stop the tape" and free associate:

Dr. Steven Lynn:

When you tell somebody that they can view a tape, that's not how memory works. You can't slow memories down, you can't zoom in. In terms of free associating, that's one of the worst things I've ever heard. Just basically, free-associating, that's really horrible.

Colin then asked Dr. Lynn to comment on the beginning of the hypnosis session, where Dr. Mooney asked Gobeyn to recall his day by doing "[k]ind of an out-of-the-body, astro-projection kind of thing":

Dr. Steven Lynn:

The whole idea that you can Astral Project and leave your body... all these kinds of suggestions really would lead one to be overly confident in whatever they recalled, whether it was accurate, inaccurate, or just a flat out guess.

These are really confidence building techniques. A person would think well, if this is really like a videotape or a tape or whatever, that I can roll forward or backward, then whatever I recall will be accurate because what you see on a videotape or tape is an accurate rendition of what happened.

So these are really really techniques that we know of today that are really highly leading in the sense that they lead one to believe that memory is something it's not.

And what about the fact that Gobeyn was being hypnotized by his professor?

Colin Miller:

And in this case, the person being hypnotized is a community college student

and the person doing the hypnosis is their professor. Does that add any other wrinkles to it in terms of suggestibility?

Dr. Steven Lynn:

Well, that's violating a procedural guideline there, so yeah.

Colin finished the conversation by asking Dr. Lynn the following:

Colin Miller:

From what you've seen, how would you rate this compared to the other types of hypnotically refreshed testimony you've seen?

Dr. Steven Lynn:

I've seen a lot of really bad examples of hypnotically refreshed memories, but this ranks close to the bottom, I would say. This really is an egregious example of how not to use hypnosis.

I think there were really leading questions around a car or a vehicle; actually suggesting that it was a Honda or this kind of car, or whatever. You've got all the elements there. You've got the leading questions, the myth of the memory being like a tape recorded. You've got the implications associated with inflated confidence. It's really bad.

I think you can make a very strong case that this was very, very poorly done. And that day, since I don't know details- how confident the person was prior to the hypnosis- what the person saw. Which is part of the guidelines. You're supposed to get a very clear and specific statement regarding pre-hypnotic recollections.

[15:54] Rabia Chaudry: This last part of Dr. Lynn's statement was key in the Frederick Freeman case. At the time of Freeman's trial, Michigan courts did not allow for the admission of hypnotically refreshed testimony. But, if an eyewitness made a statement *before* being hypnotized and a judge was satisfied that the eyewitness's trial testimony was based on what he saw and *not* based on facts that were implanted or suggested during hypnosis, the eyewitness could testify. And this is indeed what the judge in Freeman's case found.

But let's ourselves rewind the tape.

Recall that in his pre-hypnosis police statement, Gobeyn said the car he saw was foreign, maybe a Mazda. As Dr. Lynn noted, during the hypnosis session, Dr. Mooney asked Gobeyn leading questions about the car. Specifically, he asked, "What make of car is this? Ford, a Chevy. Are you able to play that tape back. What was that and see what kind of car it is?" And...guess what? Gobeyn leaves the hypnosis session convinced that the car he saw was not a foreign car like a Mazda, but the very American Ford Escort station wagon.

And then there's the license plate number. In his pre-hypnosis statement, Gobeyn said it was 822-DHH. During the hypnosis session, Dr. Mooney suggests several alternatives. For example, at one point, without any prompting by Gobeyn, Dr. Mooney asks if the last three letters could be D-S-O or D-H-M, and Gobeyn answers that both are possible. Gobeyn ends up giving 12 different license plate numbers, none of which have any connection to Fred Freeman.

And then, there's the biggest leading question. There's *only* mention of the driver having dark hair in the police report of Gobeyn's pre-hypnosis statement and *no* mention of facial hair. And this can't really be written off as Officer Carmody only writing down *some* of what Gobeyn told him. As noted, in the police report, Carmody listed the features shared by Gobeyn and then wrote. "No further information on the physical of the driver."

But now, fast forward to the hypnosis session. With no prior mention of facial hair by Gobeyn, Dr. Mooney asks, "Now he's got a beard too?" and Gobeyn responds, "I think so, it [indiscernible]. He's got dark hair, I know that." But did Gobeyn even know that?

[18:24] Colin Miller: At some point on November 5th, the day Scott Macklem was shot, Gobeyn returned to the community college parking lot, saw a man in a rusty silver car with Florida license plates, and ended up telling the police...*something*. At trial, the defense tried to claim that Gobeyn clearly identified this man as the same man he saw driving away after the Macklem shooting, while the State and Gobeyn tried to claim that Gobeyn just said that the man kind of resembled the earlier driver. Specifically, Gobeyn claimed that the thing that linked this Florida man with the driver he saw earlier was that "he had dark hair, same thickness of beard. It was dark colored."

While the jury never heard anything more, documents obtained since trial make it tough to believe that the police took what Gobeyn said as anything other than a serious lead. The police were able to connect the vehicle -- a silver Buick with Florida plates -- to a man named James Kilbourne and went to his house twice, once four days after

Macklem's murder and the second time a few months later. During that second trip, the Port Huron Police were able to interview Kilbourne about why he was in the community college parking lot on the day of Macklem's murder. The interview notes also state the following: "It may also be noted that Kilbourne has long curly blond hair, thin and has a heavy mustache."

That's right. Gobeyn says he's certain the man driving after the murder had dark hair and that the one thing linking that man and the Florida man was the dark hair on their faces and beards. But James Kilbourne had blond hair, which makes you further question Gobeyn's memory and what effect the hypnosis may have had on it.

[20:02] Susan Simpson: In any event, two days later, on November 7, 1986, Gobeyn made a second police statement and was shown a photo array, although the order of these two events is unclear. In the photo array, he picked out Frederick Freeman's photo, which showed him with a thick, dark mustache and a thin beard. And, in the report on Gobeyn's second statement, Gobeyn describes the driver as having dark hair, a moustache, and the start of a beard. Later, Gobeyn picks Freeman out of a lineup. Colin asked Temujin Kensu what he recalled about this lineup:

Temujin Kensu:

This is not the lineup you see on television, where there's a big glass wall, and you stand up and step forward, talk, and all that. This is what Port Heron had - in the basement of the St. Clair County Jail, they had a tiny wooden platform with a little piece of black cloth in front of it. They did not have an actual lineup area like you see on all of the television shows, ok? They put us up on this stage, and there are these guys there -- this little orange haired, midget-looking guy -- and I was like, what is going on here? I know that in a lineup everyone is supposed to look alike. And there's this black cloth, and so I can like hear and see everything. You're not supposed to be able to see anything, of course. I can hear and see everything. These people are like 2 feet from me, talking through a thin, black sheet, with a light on the sheet. So before they put the lights on the stage area, the little wooden platform, the lights are on where they're at. I can see everybody, I can see what they're doing, I can hear them. Crystal clarity.

So I literally watched Rene Gobeyn walk up to me, and he looked at me, and then he didn't even look, didn't even pay any attention to me. He wasn't looking at me, he wasn't looking at my face, he wasn't studying me. This is what I hear -- I wrote this in my affidavit, he never denied it -- he goes, "Well I know him, and I know him, and I know the guy you're looking for has got brown hair ...", and he's

literally looking all around, and he's looking down ... uh, there's Loxton on the end there, which everybody else picked out, and he's looking and looking and looking at him. Then he goes, "Uhh, I think he's got shorter hair", and then he looks back at me and he goes, "Uh, I'll say him." That was the big identification.

So I hear this, and again, I was young, I didn't care, I was having a fit. I was like, "This is illegal! What is this? This is ... I can see him! This is ridiculous!" You know, and they're like, "Shut up. Be quiet." And I turned to my lawyer, like, "Do something. What are you doing? This is insane!"

So that's how he -- now, just so you know, just so you know I told the truth when I wrote the affidavit, it turned out he actually admitted he did know two people in the lineup. And they were cops! This guy had intimate involvement with the police, he wanted to be a cop forever, he hung out at the cop shop, he was associating with these guys all the time, and that's why he knew the two guys in the lineup. They put two cops in the lineup.

It's impossible to corroborate everything Kensu says about the lineup, but his claim about how the lineup was conducted is corroborated by Richard Krueger, the other State eyewitness. And, yes, Rene Gobeyn did know 2 of the 6 people in the lineup, who were both police officers.

Gobeyn would eventually testify against Freeman at trial and add another physical characteristic that was not in either of his two police statements: that the driver had a nose that was too big for his face. At trial, we can also see how the defense tried to establish that Gobeyn could not have identified the driver. On the stand, Gobeyn acknowledged that he only saw the driver's face for five seconds as the car drove past him. And Gobeyn admitted again that the driver had a ski mask pulled down to his eyebrows and added that the collar of the driver's green jacket was pulled up to cover the bottom of his face. Finally, Gobeyn testified that the driver had his head down and appeared to be trying to conceal his face with his hand. So, could you make out an identification of someone under these circumstances? That was the question posed to the jurors.

[24:13] Rabia Chaudry: As noted in a [Metro Times](#) story on the Freeman case, one of the jurors said, "The thing that finally convinced me was the testimony of Rene Gobeyn." But what about the testimony of the State's second eyewitness, Richard Krueger? In Episode 1, we reported that Richard Krueger saw a suspicious man by the community college at about 8:01am, or about an hour before the murder. According to

a police report of an interview conducted 2 days after the Macklem murder, Krueger said the suspicious man had a green army jacket and pull down hat and might have had a light beard that was neatly trimmed. According to Krueger, the suspicious person “acted like he was on a mission, going to war.”

But recall that Krueger was not a student and did not park in the student parking lot where Scott Macklem was shot; instead, he was attending a supportive employment symposium and he parked in an adjacent city lot. Looking at photos of these two lots, Krueger’s estimate in his police statement that he got “as close as 100 feet” from the suspicious man seems accurate. Given this, you might wonder about the specificity of Krueger’s description.

And Colin did too. He reached out to Geoffrey Loftus, the leading expert on eyewitness identifications from different distances. Specifically, Loftus wrote an article after conducting a number of studies with Erin Harley to test what’s known as the “distance-as-filtering hypothesis,” which posits that as a face is viewed at further and further distances, facial details become coarser, meaning that there is less ability to detect the details of the face. These studies involved celebrity faces, and the ability to recognize those faces was close to 100% through a distance of about 25 feet, gradually fading to zero at 110 feet. Loftus conducted these studies by concluding that “[w]hen you make an image smaller you lose information in exactly the same way as happens when you keep the picture large but make it blurry.” And that’s now exactly what he does for juries at trials:

[26:15] Geoffrey Loftus:

It’s actually an article that I’ve been able to rely on a fair amount in cases that I’ve participated in. So judges seem perfectly willing to accept it as reasonable evidence, and it’s been fairly compelling when I’ve testified because I’ve been able to construct the kind of visual images that appear in the article and show them to the jury and say: Look, this witness looking at the perpetrator from X feet away would have had, at best, this amount of visual information available to them. And then the jury can look at one of these blurred pictures and ... you know I told that even if everything else was perfect, even if the witness had an indefinite amount of time, even if the witness was paying rapt attention to the perpetrator’s appearance, even if it were in bright sunlight, this is still the best the visual system would have been able to do in terms of acquiring information about what the perpetrator looked like. So, you know, there you have it. You decide, jury, whether this would have been a sufficiently good memory representation for the witness to later recognize the suspect from a lineup or whatever.

Colin Miller:

And so basically, when you come into court, you have, depending upon the distance they have given, an image that is sufficiently blurred based upon the distance, and you display that to the jury and give the testimony you just explained, right?

Geoffrey Loftus:

Right, exactly.

[28:04] Colin Miller: Other experts in the field of eyewitness identifications agree. For example, Willem Wagenaar and Juliette van der Schrier conducted tests and determined that the proportion of correct eyewitness identifications to errors was too great at distances over 15 meters, or 49 feet, to be reliable. And Jennifer Dysart, another expert in the field, has summarized studies to conclude that distances of 100 feet or more “make it extremely difficult to encode the details of a person’s face, which is required in order to make accurate identification decisions.”

All of which goes to say that Krueger’s minute descriptions based on his estimate that he got no closer than 100 feet from the suspect individual...well, suspect. Nonetheless, Krueger was shown the same photo array as Gobeyn and also selected Frederick Freeman. But then, a funny thing happened at the lineup. Krueger did not select Freeman. Instead, he selected another man: James Loxton. I asked Kensu what he remembered about this:

Temujin Kensu:

As far as the way he was acting, this is what he was doing -- he was going, “Oh my god, it’s so hot down here. These lights are ridiculous. I can’t see anything!” And they’re going, “Well just try sir, just try.” And he goes, “I don’t see anybody that looks like who I’m looking for. I don’t see anybody like that.” He keeps going on and on, whining and protesting, “Oh it’s so hot. Can’t we do this later, ugh? Oh my god!” And then finally he goes, “Okay, it’s him”, and he points to the end. And you can see them go, “Are you sure? Are you sure that’s the guy?” And then they’re getting upset, you know? And he goes, “Yes. If it’s anybody it’s him, right there. That guy right there.” And that was the identification of that individual.

Now, you might be tempted to think this is an exaggeration, but it’s what Krueger testified to at trial. Here are some selections of his trial testimony talking about the lineup:

“They were behind a black screen with a lot of light, it just seemed inappropriate. It was very hot. We were in a basement, it was very uncomfortable. I commented on it....We stood in a very uncomfortable antechamber where there...were sinks. As far as I was concerned not appropriate for a lineup.”

[30:06] According to Krueger, he just wanted to get out of there, so he picked the person who looked most like the person he saw in the parking lot. But again, that person was not Frederick Freeman, despite the fact that he was in the lineup. It was James Loxton. And Loxton definitely does not resemble Freeman:

Colin Miller:

And so how would you characterize the differences in appearance between yourself and James Loxton?

Temujin Kensu:

James Loxton, in person, he looks kind of like a cross between a Native American and Italian. He had that kind of swarthy, greasy thing going on and I've been locked up a long time, you can tell when somebody is just like a dope-fiend scumbag, this guy had "dope-fiend scumbag" written all over him. I looked like a dorky, nerdy... I had a punk rock shag haircut, I looked like a little- we used to call 'em bee-boppers. This guy looked like your typical heroin addict. He just had that greaseball, stringy, dope-fiend thing. He was wiry, he was skinny, he had jacked teeth, a little mustache, he just looked like a little dope fiend. He looked nothing like me at all, especially... far more different in person. And when Larry Gunter, the cop, found out that they had picked that guy out... I was almost never allowed to bathe. But Larry was one of the cool ones and he would try to get me out to bathe. And they would take me to this trustee pod, and that guy was there, and I confronted him while I was in there. And I said, Listen man. Did you have something to do with that murder? Because people picked you out, dude. You look nothin' like me, and he literally ran from me to the other end of the pod and was hiding in the back of the pod while I went to take my shower.

Looking at the photos of the two, we can confirm that this is accurate. However, despite the lineup snafu, the prosecution called Krueger at Freeman's preliminary hearing, and he identified Freeman at the defense table as the man he saw in the parking lot. On cross-examination, defense counsel asked Krueger whether he was informed that Freeman was not the person he picked out at the lineup. Krueger answers "no," but adds that this misidentification wouldn't reduce his confidence at all.

Susan Simpson: Two other interesting things happen at the preliminary hearing. First, as noted, Rene Gobeyn says the driver he saw was wearing a green army jacket and a dark blue ski mask. Of course, in his police statement, Krueger said that the man he saw was wearing a green army jacket and a hat. Understandably, the prosecution wanted to establish that these two eyewitnesses both saw the same man. But Krueger testifies that the man's hat was a seaman's cap, likely green. And, on cross-examination, the following exchange takes place:

Q: Now this fatigue coat, are you talking about an Army fatigue coat, do you know what I mean by Army Supply or Army Surplus, green fatigue coat, is that what it is?

A: It's more modern than that.

Q: So when you say green fatigue, you mean the color green fatigue, it's a color of a coat similar to an Army issue?

A: Well, they issue four or five different colors, it wasn't a combat fatigue coat.

Q: It was more of a puffy ski jacket or at least a winter sort of jacket?

A: Something more winterish.

All of which goes to say that Gobeyn and Krueger may have seen the same man, but it's far from a certainty.

The second interesting thing at the preliminary hearing is that Krueger changes his distance. Now, Krueger claims he got within 50-70 feet of the suspect man. At trial, he would reduce the distance even more, saying he was a short distance from the man, "maybe 40 or 50, 60 feet." And, despite the fact that this seems impossible given that Krueger was in a different parking lot, the changes go unchecked by defense counsel David Dean.

While this omission was glaring, there's something else that was definitely not David Dean's fault. Colin recently spoke to Herb Welsler, who has worked to prove that the Port Huron Police Department got the wrong guy in the Scott Macklem case. For Welsler, this has been quite a career shift given his prior job:

[34:07] Herb Welser:

So I worked for the Port Huron Police Department just under 31 years. I started as a cadet at the police department in 1974...

After retiring from the Port Huron Police Department - in 2005, Welser got a call in 2008 from Bill Proctor, a local TV reporter who was covering Freeman's appeal:

Herb Welser:

Bill Proctor contacted me and let me know that he had an appointment with the Port Huron Police Department in 2008 to go into the police department to view the evidence box and folders that were there. So myself, Bill Proctor, and Fred's wife Anika went to the police department and looked through the file. And that's when we found, in the file, the photographs that were used in the photo lineup.

Colin Miller:

And when you see these photos that are used in the lineup, were there things that immediately jumped out to you?

Herb Welser:

Absolutely. When I saw those photographs were used, there was 4 photographs of persons that had been arrested by the Port Huron police department which showed on those photographs a placard that stated "Port Huron Police" on it and then there was a photograph of Fred Freeman, which stated "Pleasant Ridge Police Department" and there was many many other differences in the photograph of Fred Freeman compared to the four photographs with Port Huron Police arrest.

And so, Freeman's defense called in Jennifer Dysart, one of the eyewitness experts we mentioned earlier in the episode, and she corroborated Welser's initial impression when testifying at Freeman's habeas hearing. According to Dysart, it was clear that Freeman's 2 photos came from a different source than the 2 photos of the four other men in the photo array. First, his photos had dark lines behind them while the other photos had a solid color in the background. Second, in one photo, Freeman was facing forward, and, in the other, his head was turned to the right while the other 4 men were facing forward in one photo and had their bodies turned entirely to the left in the other photo. Third, as Welser noted, Freeman's placard came from the Pleasant Ridge Police Department while the other 4 men had placards from the Port Huron Police Department. And, fourth, Freeman's photos had a gap between them while the other 4 men had a dark line between their photos.

[36:58] Rabia Chaudry: Dysart testified that these were substantial differences that drew attention to Freeman's photo and made it stand out. She then concluded that, in hundreds of photo arrays that she'd reviewed, she'd never seen one so suggestive. Now, at this point, you may wonder why this wouldn't have been so obvious to David Dean and why this wasn't his fault.

And the answer is that the photo array that Proctor and Welser uncovered was not the photo array turned over to the defense or shown to the jury at trial. Instead, the defense and the jury were given a different version of the photo array that removed the substantial differences from the one shown to the actual eyewitnesses. And Dysart concluded both that the photo array shown to the eyewitnesses could have influenced the subsequent identifications of Freeman by both Gobeyn and Krueger and that the average juror would not have thought that the photo array that was introduced into evidence was suggestive. Dysart then added this simple but poignant conclusion: "I believe the jury was misled."

And it's clear that the photo array was important to the jurors. During deliberations, they sent a note to the judge asking to see the photo array again. So, being shown the altered photo array could very well have changed their verdict, especially given that they started in a 6-6 deadlock.

Now, at this point, you may be wondering: This was a crowded community college parking lot. Wouldn't there have been more witnesses to the Macklem shooting and its aftermath? The answer is "yes," and some of them testified at trial. But, like Gobeyn, they thought that the shotgun blast that took Macklem's life was a firecracker or a tire blowout, and they didn't have much meaningful to say.

[38:48] Colin Miller: But there was one more eyewitness to the aftermath of the Macklem murder, and she was not shown the photo array, although she did take part in the police lineup. That eyewitness was 19 year-old Cathy Ballard, who went to the community college in the morning and worked at Wendy's in the afternoon. In her police statement, Ballard said that between 8:55 and 9:00am on November 5th she heard what sounded like a firecracker and something she would repeat at both the preliminary hearing at trial: She heard a yell like a man trying to sound like a woman.

Then, like Gobeyn, Ballard testified to a car driving by her, which she described as a small, compact-sized car, possibly a Horizon or Chevette that was reddish-brown in color. And, like Gobeyn, Ballard testified that the driver was trying to conceal his face

with his hand, although she was able to describe him as a white male, around 19 years-old, with dark hair.

For whatever reason, Ballard was not shown the photo array, but again she did take part in the lineup, where she wasn't able to identify anyone. Moreover, at Freeman's preliminary hearing, Ballard also wasn't able to identify him as the driver. But then, at trial, things got interesting.

On direct examination, the prosecutor asked Ballard about an epiphany she had at the preliminary hearing. In response, Ballard testified that something clicked, although she didn't verbalize it at the time. She said that when she saw Frederick Freeman at that hearing, she just knew that he was the guy she had seen at the far right of the police lineup. And, for Ballard, there was something about that man's demeanor at the lineup: his body language, his attitude, the impression that he was laughing like it was a joke. Ballard was able to connect this behavior by the man on the far right of the lineup to the attitude the driver displayed in the parking lot on the morning of the murder, like he had just played a practical joke. For Ballard, the connection was uncanny, jarring even.

At this point, you might be thinking, damn, maybe Frederick Freeman did defy the laws of time and physics to commit this murder, despite all of his alibi witnesses. But then, on cross-examination, David Dean confronted Ballard with a harsh reality. The man on the far right of the lineup was not Frederick Freeman. It was James Loxton.

[41:14] Susan Simpson: So, obviously the jury didn't know everything we've revealed, such as the suggestive photo array. But they did know this. None of the three eyewitnesses claimed to see the murder. Cathy Ballard could not identify Fred Freeman as the driver she saw and was startled by the similarity in demeanor between James Loxton and the driver. Richard Krueger picked James Loxton out of the photo lineup based on appearance. And Rene Gobeyn was hypnotized, changed key details of what he saw, and identified James Kilbourne on the day of the shooting as someone who at least could have been the driver he'd seen. Meanwhile, the defense had all of the alibi witnesses that we detailed in Episode 1.

Oh, and speaking of alibis, you might have noted that both Gobeyn and Ballard testified that the driver they saw was driving a small, maybe even a compact-sized car while Fred Freeman was seen with two different Mercury Marquis hours before and after the murder. For those of you who might not remember the Marquis or only remember later models, the two '70s models that Freeman and Woodworth had were huge:

Colin Miller:

So people might have a different impression of what Marquis after... these are both in the seventies, yours and the other?

Temujin Kensu:

Yeah, '76 and '77.

Colin Miller:

And so what are the size of these vehicles?

These are enormous four-door boats. They're like the size of a Chrysler Imperial. They're giant square cars, they're both four-door cars. The burgundy one was in kind of nice shape, it was purchased from an older gentleman who took really good care of it. The gold one was beat to death, the doors were dented, there were no hubcaps, it was like a hundred-dollar piece of junk that we picked up in a little used car place in Flint. Not far from where Shelly worked, Shelly worked at a Coney Island and I want to say it was American, American Coney Island. She could tell you the name for sure. And this place was just a couple doors down from the CI and we actually bought it at like 3:00 in the morning, the guy had a little used car lot next to his house. And we were walking everywhere, and Shelly takes money up from tips. So I knock on the door, fortunately he wasn't too upset and he sold me this big junker. So we had that, and later on we bought the burgundy one.

[43:28] Susan Simpson: So, clearly the prosecution was in deep trouble. There's no way that the clean, small car Gobeyn saw was the Burgundy Marquis that Freeman had hours before the murder in Escanaba, and there was *really* no way it was the janky yellow Marquis that Freeman was seen with six to six-and-a-half hours after the murder in Escanaba. And that's even assuming you ignore the three karate alibi witnesses who saw Freeman in Escanaba a mere three hours after Macklem was murdered in Port Huron.

But the prosecutor couldn't make that assumption. And so, after the defense rested, the prosecutor asked to call a rebuttal witness, a pilot named Robert Evans, to create its own deus ex machina, a literal God From the Machine that would save its case from ruin. The prosecutor's theory was as follows:

One: After Paul De Mars saw Freeman in the early morning hours of November 5th at the Bob's Big Boy in Escanaba, Freeman could have driven to the Delta County Airport, a small, county-owned public use airport in Escanaba.

Two: Freeman could have pre-arranged a private plane to fly him down to the St. Clair County Airport, a small, government-owned airport in Smiths Creek, Michigan.

Three: Freeman could have had a car such as an Escort or a Chevette waiting for him at the St. Clair Airport.

Four: Freeman could have driven that car about 47 miles to the community college in time to be seen by Krueger at 8:01am, shoot Macklem at 9:00am, and then drive the 47 miles back to the airport, where the private plane was waiting for him.

Five: Freeman could have then flown back to the Delta County Airport in Escanaba. AND THEN

Six: Freeman could have driven to downtown Escanaba in enough time to arrive at the karate studio in enough time to be seen by his three alibi witnesses at noon.

[45:35] Rabia Chaudry: Of course, a prosecutor can't just call a witness or present a theory without foundation. So, what did the prosecutor argue? We'll get more into Freeman's arrest later, but, for now, what you need to know is that, after Freeman learned that his ex-girlfriend Crystal Merrill had accused him of murdering her new boyfriend Scott Macklem, Freeman made a call to her while the Port Huron police officers were there. And one of those officers, Sergeant Dave Hall, was taking notes.

At trial, Hall would testify about the call, including the following:

"Yes, he talked about that he wasn't in Port Huron. He kept trying to convince her, I wasn't in Port Huron that day, I was in Escanaba, and if I was in Port Huron, you know, I was 560 miles away. And then he talked about, you know, how long it would take him to travel. He says I could drive in eight hours or I could take a ferry across to Green Bay, Wisconsin, or, you know, I could take an airplane out of any airport and make it in a couple of hours."

And that, according to the prosecutor, was the connective tissue needed to introduce its plane theory. Freeman, however, remembers the phone call very differently:

Temujin Kensu:

I wound up in a donut shop, I believe it was a Winchell's, maybe. And I'm in this donut shop, and I go to the pay phone in the donut shop. We didn't have, like the phone cards and stuff you have nowadays, but you have like a phone card that had a number, like a code number, and you could bill stuff to your home phone. And so, billing the call to my home phone, I called Crystal, and we start talking, and I'm like "Why are you telling the police that I killed your boyfriend?" And she's saying all this crazy stuff. And so I know people are listening. And she's going like "Remember that one time you had those poison darts?" And I was like "What are you talking about, you whack job?" And so the cool thing is, in the notes from Dave Hall, who was allegedly listening to this call, he tries to testify at trial that I said all this stuff, and he says he took it all from his notes. Well, we had to fight, but we got his notes, and you should have those now, they're attached to the Habeas. And in the notes you'll see that not a single thing he said that I said is in those notes.

The portion of Hall's notes that lines up the best with his testimony is the following:

*Wednesday Morning. 560 miles from you in E.
Green Bay Wis.
Slept until 1200 noon
"Best Speir"
Paul
Purchases from Treasure Chest*

In other words, Freeman is saying how far away he was from the community college on the Wednesday of the murder and mentioning his alibi witnesses, including "Best Speir," which was presumably an attempt to name Beth Stier, his date hours before the murder. And, yes, there is a mention of Green Bay Wisconsin, but no mention of a ferry or a plane.

Suspiciously, Sergeant Hall did not make a report of his notes until two months after this phone call, well after the Port Huron Police had spoken to Freeman's alibi witnesses and ostensibly knew that they precluded a drive to and from the community college. In pertinent part, that report stated:

“He wanted to know what day of the week it was and she stated that it was Wednesday morning. “He stated on Wednesday morning I was 560 miles away from you in Escanaba.” He also stated that he could have possibly flown out around from the airport. He got up there in a couple of hours or he could have taken the ferry across from Green Bay Wisconsin.”

It’s unclear exactly what to make of these notes. There’s no ferry that Freeman could have taken from Escanaba, Michigan or Green Bay, Wisconsin to get anywhere near Port Huron and the community college. If anything, it seems like Freeman is saying he would have needed to do a couple hour drive or take a ferry to Green Bay to fly out of Green Bay’s airport to Port Huron. And, indeed, it is about a two hour drive from Escanaba to Green Bay, which lines up with the statement in the report that he could have gotten up there, *i.e.*, to Green Bay, in a couple of hours, not that he could have gotten to Port Huron in a couple of hours.

[49:21] Susan Simpson: But, as noted, that’s not what Sergeant Hall testified to. He testified that Freeman could take an airplane out of any airport and make it to Port Huron in a couple of hours. Of course, this also makes no sense because, even being generous to the State, because Freeman had only one airport that could possibly work: The Delta County airport in Escanaba. And so, despite Hall’s evolving statement being the only shred of *anything* supporting the State’s theory, the judge allowed testimony by Robert Evans, the pilot. Evans testified that you could charter a single engine plane for a flight between the Delta County Airport and the St. Clair Airport for about \$450. He also did two test trips, with one taking 1:37 and the other taking 1:40.

Evans admitted that he checked the flight register at the Delta County Airport in Escanaba for the day of the murder and didn’t see any unusual flights listed there. But, he claimed that the flight registers at both airports were voluntary, meaning that pilots didn’t have to sign them. Evans, however, had to admit that he spoke to a group of the local pilots at the St. Clair Airport and that they all told him that they didn’t fly anybody to or from Escanaba on the day of the murder.

And so, that left the State arguing that Frederick Freeman was a literal God from the Machine, able to travel to and from Port Huron in a private plane and a chartered car without a trace. It almost seems unfair to Freeman to dignify the State’s *deus ex machina*, given that there was literally nothing to support it, but let’s break down a couple of issues with it beyond the lack of evidence that it ever happened.

First, could Freeman have afforded to charter this round-trip private flight, with the pilot waiting hours for him while he committed the murder? Well, this would have been *really* difficult, given that he was scraping by selling vitamins door-to-door and qualified for appointed counsel:

Colin Miller:

When he got appointed your counsel, that means the court had to find that you were indigent right?

Temujin Kensu:

Right yeah, I had a hearing. I testified at the hearing about what I had. And I testified very honestly, and they fought me, aw, they fought me brutally. They did not want me to have a lawyer of any kind. And it was funny because Dave Dean was crooked, he was one of their snitches, but Ken Lord was fighting me big time at this hearing. And I said "Dude, you guys have already been into my storage unit, illegally, twice. You've torn the thing apart. You know exactly what I've got." I mean I was like you know, charge me with perjury, I hope you do, you ass. Because you know everything that I own. You've been through my home, you've got my cars. Well, they had them, and they released them. And you've got my storage bins, so you know everything that I've got in the world. So where do you think I'm hiding assets at? My girlfriend is on welfare, and I live in a dumpy farmhouse, you know? The place was a shack, I mean don't get me wrong, it was a dump. I mean I appreciate Melvin renting it to me, but it was a dump.

Second, even under the State's plane theory, could Freeman have made it from the community college at 9:00am to the karate studio in Escanaba at noon? Colin checked with John Manalli, the owner of that karate studio:

Colin Miller:

And what do you think about this specific theory they presented at trial that he could have chartered this plane from the Upper Peninsula to commit this crime, and then fly back in time to see you at the karate studio?

John Manalli:

Ah, [laughing] I don't really see how that would be possible. The airport in Escanaba is all the way across town. Unless it was a jet, and I don't know if Escanaba could take jets or something like that, how could he have possibly gotten back in that amount of time is just beyond me. And the theory that came, could he have used his ninja capabilities, I mean, what teleport?

[53:10] Colin Miller: So, putting aside teleportation, let's put the prosecution to their paces, starting by working backwards. Richard Krueger saw the man the state claims is Frederick Freeman outside the community college at 8:01am. If it took at least 4 minutes for Freeman to get from the car he drove to where Krueger saw him, we're at 7:57am. The drive from the St. Clair Airport would have been 50 minutes, which takes us to 7:07am. Let's be conservative and say it took 10 minutes to disembark the plane and get to a car, taking us to 6:57am. Using Evans's quicker flight, it's 1:37 in the air, taking us to 5:20am. Would Freeman be able to charter a private single engine plane to take off at 5:20am from northern Michigan on a sub-zero November morning? Seems doubtful.

Now, let's look at the other end. Scott Macklem was shot at 9:00am at St. Clair Community College. Again, it's a 50 minute drive from the community college to the St. Clair Airport, which takes us to 9:50am. Let's be conservative and say it takes 10 minutes to get on the plane and prepared for take-off, taking us to 10:00am. Using Evans's quicker flight, it's 1:37 in the air, taking us to 11:37am. Again, add another conservative 10 minutes to disembark the plane and get to a car, which takes us to 11:47am. Finally, add another 10 or so minutes to get across town to Chao's Black Belt Academy, and we're at 11:57am. Then, add a few minutes to get out of the car and into the karate studio, taking us to noon, which is when or shortly after the karate witnesses said Freeman arrived.

[54:57] Rabia Chaudry: So, is it possible that the State's timeline works? *Maybe*, just barely, if everything works out perfectly. But wait, the karate witnesses saw Freeman with his fiancée, Michelle Woodworth. So, either Freeman had his very pregnant girlfriend waiting for him at the airport or the karate studio, or Freeman had to make the trip to and from Rock, Michigan, adding another 80 minutes to the State's fictional timeline, blowing it up entirely.

You might wonder, then, how the jury adopted the State's theory. Well, according to one juror, it was more like they rolled over. We mentioned Bill Proctor earlier, and here's part of one of his news stories about the Freeman case:

Bill Proctor News Report:

But twelve jurors, including this man, Richard Pelegrine, believe it was possible, as the prosecutor theorized, that Freeman, despite having so little cash that he couldn't pay his rent, somehow found the money to charter a private plane to fly

in, commit the murder, and fly back north to set up his alibis. Mr. Pelegrine admits that no evidence of such a flight was ever presented in court.

Bill Proctor:

But they never showed you a pilot.

Richard Pelegrine:

No sir.

Bill Proctor:

And they never showed you a plane.

Richard Pelegrine:

No sir.

Bill Proctor:

And they never showed you how it really happened.

Richard Pelegrine:

No sir. It was circumstantial. It was all circumstantial. We have no evidence.

But there's something that the jury didn't know about Robert Evans, the State's witness regarding the plane theory. And there's also something that the jury didn't know about the only key witness for the State that we haven't mentioned yet. And there are a few key things the jurors didn't know about defense counsel David Dean. Next time...on Undisclosed.

Colin Miller: Thanks for listening to this episode of Undisclosed. I'd like to thank the following people: Rebecca LaVoie for audio production, Christie Williams for website management, Mital Telhan, our executive producer.

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