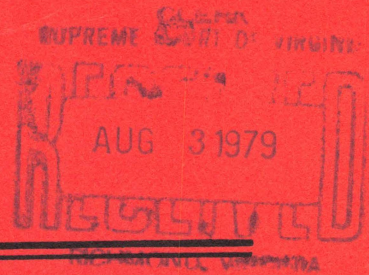


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 790318

SAMUEL ELLIS NAPPER, JR.,

.....Appellant

v.

COMMONWEALTH OF VIRGINIA,

.....Appellee

APPENDIX

Bobby R. Osborne
Leon P. Ferrance
BOBBY R. OSBORNE, P.C.
420 W. Campbell Avenue
Roanoke, Virginia 24016

Of Counsel for the Appellant

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VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

JULY 5, 1978

THE GRAND JURY CHARGES THAT:

On or about the 21st day of April 1978, in the County of Bedford, Virginia, SAMUEL ELLIS NAPPER, JR. unlawfully and feloniously did break and enter that certain storehouse of D. R. Crowell, T/A Crowells Sport Shop, with intent to commit larceny of a quantity of goods and chattels therein found, in violation of the provisions of Sections 18.2-90 and 18.2-91 of the Code of Virginia of 1950, as amended.

Deputy Sheriff W. D. Hardy, Jr.

COMMONWEALTH OF VIRGINIA vs. SAMUEL ELLIS NAPPER, JR.

ASS'T. COMMONWEALTH'S ATTORNEY: James W. Updike

DEFENSE ATTORNEY: Bobby Osborne

PRESIDING JUDGE: W. W. Sweeney

CHARGE: Statutory Burglary

DATE: December 8, 1978

COURT:

Call the case please.

CLERK:

Commonwealth against Samuel Ellis Napper, Jr. upon
an Indictment for Statutory Burglary.

COURT:

Is the Commonwealth ready, Mr. Updike?

UPDIKE:

The Commonwealth is ready, Your Honor.

COURT:

Is the defense ready, Mr. Osborne?

OSBORNE:

Yes, Your Honor.

COURT:

Let the accused be arraigned and receive his plea.

ARRAIGNMENT

CLERK:

Samuel Ellis Napper, Jr., you stand indicted
as follows:

THE GRAND JURY CHARGES THAT:

On or about the 21st day of April 1978, in the
County of Bedford, Virginia, SAMUEL ELLIS NAPPER, JR.
unlawfully and feloniously did break and enter that cer-
tain storehouse of D. R. Crowell, T/A Crowells Sport Shop,
with intent to commit larceny of a quantity of goods and
chattels therein found, in violation of the provisions of
Sections 18.2-90 and 18.2-91 of the Code of Virginia of
1950, as amended.

What say you? Are you guilty as charged in this in-
dictment or not guilty?

NAPPER:

Not guilty.

QUESTIONS BY COURT OF ACCUSED

COURT:

So you are pleading not guilty? State your full
name and age.

A. Samuel Ellis Napper, Jr. Age is twenty-seven.

Q. And do you understand what you are charged with and
the range of punishment for the offense?

A. (Inaudible)

Q. Do you understand what you are charged with and the range of punishment for the offense, that is how much time or fine you could get? Do you understand that?

A. (Inaudible)

Q. Do you understand that you are entitled to a jury trial if you want it?

A. (Inaudible)

Q. Well, my question is do you understand that you are entitled to one? Do you want me to try the case without a jury?

A. (Inaudible)

Q. Does the Commonwealth consent to it, to that on a plea of not guilty?

UPDIKE:

Yes, sir, it does.

COURT:

The Court enters its consent of record to try the case without a jury.

Q. Do you know the elements of this offense, that is what the prosecution would have to prove to convict you?

NAPPER:

A. (Inaudible)

Q. All right, are you satisfied with your lawyer?

A. (Inaudible)

Q. And have you decided of your own free will to plead not guilty?

A. (Inaudible)

Q. And do you realize that if you are convicted that you would have a right of an appeal if you desire?

A. (Inaudible)

COURT:

All right. That's all. Thank you. You may have a seat.

This Court makes a finding of fact that the defendant's plea was free and voluntarily, voluntary after consultation with competent counsel.

A All right, Mr. Updike.

UPDIKE:

Your Honor, because of the hour of the day the Commonwealth is willing to waive an opening statement unless the Court orders it.

COURT:

I certainly don't feel it is necessary, but I leave it up to counsel.

OSBORNE:

Your Honor, I have no reason to make an opening

statement. I am not sure what the theory of the case is at this point.

COURT:

All right.

OSBORNE:

I would move to separate the witnesses.

COURT:

All right. All witnesses in the case...

UPDIKE:

Your Honor, Deputy Bill Hardy will be our first witness.

COURT:

...if you'll just step outside please, we'll call you right back soon as we can.

All right, Mr. Hardy, come around and be sworn.

CLERK:

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

DEPUTY HARDY:

I do.

DIRECT EXAMINATION

W. D. HARDY, JR.

BY UPDIKE:

Q. State your name please.

A. My name is W. D. Hardy, Jr.

Q. And what is your occupation?

A. I'm Deputy Sheriff of Bedford County.

Q. And were you employed in that capacity on the 21st of April of this year?

A. Yes, sir, I was.

Q. Now on that particular day did you have the occasion to go to Crowells Sporting Goods?

A. Yes, I did.

Q. Now where is that located?

A. It's located inside Bedford County on 460 east almost to the county line.

Q. And in what particular community is it in?

A. The New London area. The address would be Route 1, Forest, but it is considered in the New London area.

Q. What time of day was this when you went there?

A. Approximately, three-fifty, three-forty, somewhere along in there, in the morning, a. m.

Q. And why was it that you went there?

A. Received a call that their burglar alarm....I was at home....received a call that the burglar alarm had been sounded at the building.

Q. And when you arrived at approximately three-fifty, what did you see at this sporting goods shop?

A. Well it took me approximately five minutes to get up, get dressed and arrive there. I drove on to the lot. The front of the building is secure. I went around to the back of the building and it was approximately a two and a half to a three foot hole, square hole, cut into the tin aluminum siding like on the back of the building.

Q. And what else did you observe?

A. Well, I observed the hole in the building and called other units that were, felt were in group and obser...told them that there was entrance made into the building. I started, tried to put my vehicle up against the hole to block it, but was unable. So I continued to, I started to circle the building and as I did I approached the front of the building coming from the rear, and a colored subject ran out of the, from the front of the building and ran across 460 and I went in pursuit of him. We went across a load... across the road, it's a four lane highway; we went onto the lot of the Ruritan Club, located directly across the road. I, we'd gone maybe thirty, forty, fifty feet into the lot of the Ruritan Club when I caught up with him. I cut him off with my vehicle I was driving and he turned and went back, northbound, going back across 460. At that time he started up about a five foot bank, gradual bank, leading up to the travel portion of the highway. He slipped and just about

fell going up the wet bank.

Q. Now the intruder, the person that you're describing now, he was not the defendant, Mr. Napper, is that correct?

A. Don't believe so, no, sir.

Q. Sir, going back to the building of Crowells Sporting Goods Shop, I'd like to show you this picture and ask you whether or not that accurately displays and depicts the the wall as you saw it on that occasion?

A. Yes, sir, it does. There was a hole the same size and these boards are a chart that he put against the wall.

UPDIKE:

You'd like to see these.

COURT:

You're putting this in as an exhibit?

UPDIKE:

Yes, Your Honor. Perhaps we should...

COURT:

All right.

UPDIKE:

...have that marked, "Commonwealth's Exhibit No. 1."

Q. Sir, going back to your investigation around the building, did you observe anyone else other than this particular black individual that you....

A. No, sir, I didn't. I never saw another subject.

Q. Did you examine the inside of the building?

A. Well, we went....Mr. Crowell, the owner of the shop, pulled up while I was across the road with this gentleman and he run back across on the north side of 460. He arrived, and when the man that I was in pursuit of went across 460 I wasn't able to make direct, or stay behind him at that time. He went across 460 and I lost him in the underbrush. So Mr. Crowell arrived and we went back to his building,...

Q. How...

A. ...The Sporting Goods.

Q. ...how much later was it that Mr. Crowell arrived after the time....

A. It would have been a matter of not over a minute, a minute and a half from the time that I first observed the hole in the back of the building 'til he arrived because I went across the road, was in pursuit of the man and the subject, Mr. Crowell onto the lot and the subject ran across 460 behind the truck. Mr. Crowell never saw him. He was pulling on the lot when this gentleman, the one I was in pursuit of, ran behind his pickup and into the bushes.

Q. Now what did you observe when you went back to the building?

A. We went back to the building at that time. We checked

for any other persons inside. After finding none, we called and we waited for the rest of the units to arrive and called for Special Officer Mayhew to bring bloodhound down to track the man that I had seen.

Q. Did you observe anything about the inside of the building that....

A. Well some of the counters were moved and some heavy counters had been moved and slid out of the way. The back door lock had been....There was a padlock on the back door. It had been busted open. There was a dead bolt going in the front door that I still don't see how anybody knocked it open but somebody hit it hard enough to spring the dead bolt off, and it was very little, I don't remember, it was very little, if any, goods were actually from inside the store were actually moved.

Q. Now the padlock that you described, I'd like to show you a picture and ask you whether or not this accurately depicts what you saw concerning....

A. Yes, sir, it does.

Q. Another picture?

A. Yes, sir, this is....The second picture is the remains of the other part of the lock that was still hanging on the door when we went through the building.

Q. And the third picture?

A. Yes, sir. It's the same....This is the back or single door leading from his business place.

UPDIKE:

Your Honor, if we could also have these marked...

COURT:

All right.

UPDIKE:

...exhibits for the Commonwealth.

Q. Deputy Hardy, did you have any occasion to observe anything on the outside of the building, anything in the immediate area?

A. Yes, sir. When Officer Mayhew arrived with the bloodhound, we started a track on the last location that I had definitely seen the subject in. The bloodhound immediately picked up the trail and we went towards the back of the building. Well, when we went back there was a big mound of fresh dirt located north, just northeast of the store. It wouldn't have been over forty, fifty yards, I don't believe that far, from the building. As we...the dog went up this mound of dirt. There was indications in the dirt of tracks, foot tracks coming down the bank. There was two sets of prints. They weren't...as they were loose dirt,

as you can see where they had been stepped in and as the foot had come out of it loose dirt had come in, and from the size and shape and what little bit we could see, it was two different people's footprints on that mound of dirt. On that mound of dirt....

OSBORNE:

I object to this line of testimony unless they can link these footprints up in some way as to have not been there the day before or something of this nature, I don't see how this testimony could be relevant.

UPDIKE:

Your Honor, we of course have already offered testimony that there was one gentleman there. We've offered testimony to the effect that this gentleman was not the defendant. We'd like to begin to establish our case and begin to establish that there was more than one person there on this occasion. We are quite prepared to introduce the testimony of the owner of the store and have him testify as to whether or not he'd ever seen these footmarks out there or whether or not he made them, but he's just a chain in a link in the circumstantial evidence that we're trying to present.

OSBORNE:

Your Honor, it takes more than that to establish cir-

circumstantial evidence. What we're doing now by the testimony that is being introduced is introducing facts of footprints found behind a building. Now footprints in a mound of dirt. When were these footprints left there? Unless they can show by some competent evidence that there were no footprints in there prior to this break-in, then I feel like it is totally irrelevant evidence.

UPDIKE:

Your Honor, it couldn't....Whether or not it is relevant and whether or not it really pertains to the case in hand is a decision that the Court has to make. I would respectfully argue, however, that at this point we've heard so little of the evidence that it is difficult to determine whether or not it is relevant. I would suggest that if the evidence could be admitted, at the appropriate time the Court could weigh the evidence as it always does, and determine how much weight should be accorded this particular bit of evidence.

COURT:

The objection is overruled.

Proceed.

UPDIKE:

All right.

HARDY:

A. It was on this mound of dirt that we found, if my memory serves me correctly, both of the two red axes. They were sticking down in the dirt with the handle sticking straight up.

Q. Did you see anything else other than that?

A. I'm sorry. I don't remember at this time. We went over the area. I observed them and we called one of the other officers to come and investigate that while we were continuing on with the bloodhound.

Q. While you were looking at these axes as you call them, was there anyone else there?

A. No. The bloodhound went to that area. It was William Mayhew in front of me and I was directly behind him, and as he went in front of me he pointed out the axes and the footprints, and then I stopped and looked at the footprints, and as I remember correctly I stated that it was two different sets and we hollered for somebody else to come and investigate that area.

Q. You state that there were two different sets. Could you tell us why it was that you thought there were two different...

A. Well, the...

Q. ...made you think this?

A. ...the print came down and there were two different footprints. You could see just partially of the soles of the shoes. You could make out just little ribs and things. Nothing that you could have preserved in this loose dirt, but you could tell it was two different types of shoes and two different people that had gone up and down this bank.

Q. Now, sir, where is this red bank of dirt in relation to the building and 460?

A. The building is approximately forty or fifty feet off of 460 and this red bank of mound of dirt is approximately forty to fifty feet back just northeast of the building. I believe it is some of the dirt that they moved out when they put the building in.

Q. And where would this pile of dirt have been in relation to the direction in which you saw this black male man run?

A. Well, when he....

Q. (Inaudible)

A. Right. He ran directly away. When I first saw him he was running across 460 away from this mound of dirt, and then as I cut him off across the road he came back across 460 and would have gone just east of this mound of dirt. He ran back, when I cut him off on the south, southern side of

460, he ran back across again on the same side as the building was...

Q. Are you saying...

A. ...to the north side of 460.

Q. ...he was running in the opposite direction from the dirt?

A. Right. He was running in the opposite direction when I originally saw him, but I turned him around on the lot across the road and he came back across 460 towards the general area of the dirt. It's a big, open field down below it and he ran in some heavy underbrush and I just, I couldn't see the subject anymore and I gave up pursuit at that time.

Q. Thank you. I'd like to show you these three items that we have here and ask you whether or not you've seen any of them before?

A. They look to be the same but as I stated we...all we did was stay there while an investigator came to get them. I didn't...I was with the dog and was going to follow the bloodhound and I did not mark them or touch them until an investigator got there.

Q. Sir, could you give us some idea of how many deputies were in the area at this time?

A. All right. While we were there - I was the first to arrive - Mr. Crowell came second, and in the next few minutes we got approximately three or four deputies from Campbell County that had, we...our office I assume had notified Campbell County. Three or four of their officers came down. Several more of our officers came down, and that day Mr. Jones was down and at that time as soon as they arrived we put them back out on the highway keeping the roads travelled so that if there was anybody out there that we had....We knew we had a man on foot and we kept cars on the road to keep him from getting in a car somewhere and leaving on us.

Q. Please answer any questions Mr. Osborne may have.

CROSS-EXAMINATION

BY OSBORNE:

Q. Deputy, do I understand you to indicate that you only saw one person run from the scene when you arrived?

A. Yes, sir. When I arrived and I first time I started to circle the building after I first went around to the back, that's when I saw one person and I only saw one person that night leave from the area.

Q. Do I also understand you to say that you are sure that it is not the defendant?

A. I...his basic clothes as I remember it being do not fit the subject that I saw.

Q. Did you apprehend the subject with that bloodhound that night?

A. Not with the bloodhound. We later charged another subject with that night, well, it was morning before we ever came out back from the woods, and we later did charge a gentleman, yes.

Q. Did you ever try to put the bloodhound on two separate trails?

A. No, we had the bloodhound....We, I knew exactly where the subject, when he had gone across the road, crossed. We brought the bloodhound over there, and I told the man that runs the bloodhound exactly where he crossed. The dog went to it and we could have crossed fifteen or twenty different tracks and that dog's going to stay on that track, and she didn't vary off. Now when we got down the woods later you could tell where the man that we were chasing had turned, tried making loops and he come back on himself, and we would have to cross ourselves and we were coming back until we pick up the trail again, but she, nine times out of ten, she's going to stay on the exact trail that she first picks up.

Q. In all of that searching, and how many deputies did you

say were out there?

A. There would have been three or four of us from Bedford County and then there was three or four deputies from Campbell County down in that area. They were patrolling from approximately Timberlake, a mile or two down the road, to the store and we were going a mile or two down the road and back on 811. There was a good six or seven of us.

Q. And all that searching with at least eight deputies getting any way by this man, that subject that night?

A. I don't know that much about this gentleman. I did not see him on that morning. The other gentleman we charged is the only one I had any connection at all with. I don't know Mr. Napper here. The first I knew about it was later in that day.

Q. Thank you. I have no further questions.

UPDIKE:

Thank you, Deputy Hardy.

Your Honor, if we could call Mr. Crowell.

CLERK:

Will you raise your right hand?

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

CROWELL:

I do.

DIRECT EXAMINATION

D. R. CROWELL

BY UPDIKE:

Q. Would you state your name for us please, sir?

A. D. R. Crowell.

Q. And your last name is pronounced Crow-ell, is that....

Okay, thank you, sir.

Q. And where are you employed?

A. Self employed.

Q. And where is that?

A. Crowell Brothers Construction Company and also a sporting goods store.

Q. Now this sporting goods store that you have, where is that?

A. West of the Bedford County line, Campbell-Bedford County line.

Q. And is this in Bedford County?

A. Huh huh.

Q. Sir, I'd like to direct your attention to the 21st of April of this year, and ask you whether or not your store was broken into on that occasion?

A. Yes.

Q. When did you first become aware of it?

A. About three forty-five in the morning.

Q. And how did you become aware of it?

A. I was called by security.

Q. And when you received this call, what did you do?

A. Got down there. Took off, got down there, and went to the store.

Q. And how much later after you received this call did you arrive at your store?

A. Probably five, six minutes.

Q. And when you arrived what did you see about, concerning your store?

A. I saw the front door open.

Q. And when had you last seen this front door?

A. About eight o'clock the night before or the evening before.

Q. And what was the condition of that door when you last saw it?

A. Closed, locked.

Q. And what else, if anything, did you observe concerning your store?

A. Later I went around to the back and saw that there'd been a hole chopped in the back of it.

Q. Mr. Crowell, if I could show you a photograph and ask

you whether or not it accurately depicts the back of your building as you saw it on that occasion? I'd like to show you Commonwealth's Exhibit No. 1.

A. Yes.

Q. And when had you last seen this back wall of the building?

A. When I left about eight o'clock I drove around and it was not like that.

Q. And what exactly was the condition of you....

A. Like, like new.

Q. And how old is your building?

A. September of last year.

Q. Had you given anyone permission to enter your building?

A. No, sir.

Q. Between the closing time on April 21st and the morning of April...I mean April the 20th and the morning of April 21st?

A. No, sir.

Q. Do you know the defendant, Mr. Napper, here?

A. No, don't know him.

Q. And when you arrived at your store who if anyone was there at that time?

A. Nobody right at the store.

Q. Was there anyone in the vicinity?

A. Saw one of the deputies across the road.

Q. Did you see anybody else?

A. No.

Q. Did you have the occasion to enter your store?

A. Yes, I went in.

Q. Was there anything unusual about the condition of your store at that time?

A. I found an empty pistol box laying on the floor behind my pistol case.

Q. And where was this pistol box the last time you saw it?

A. Up in the shelf about three feet away from where it was left.

Q. And when was it that you did last see it?

A. That night.

Q. Was there anything else unusual about your store?

A. No.

Q. Did you determine if anything had been taken from the store?

A. I couldn't determine anything. I didn't miss anything.

Q. And, sir, how many entrances are there to your store?

A. Three, three.

Q. And you mentioned the front door was open. Was there anything unusual about the other entrance ways, doorway?

A. The one small door in the back had the lock busted off from the inside and it was closed but you could open it or close it, either way.

Q. And was this door locked when you last saw it?

A. Yes, sir. Yes, sir.

Q. Sir, if I can show you Commonwealth's Exhibits 2, 3 and 4 and ask you whether or not they accurately depict what you saw that night?

A. Yes, that the lock laying on the floor with the blue paint on it. That's the chain, three-eighths chain, and the other part of the lock hanging in the chain, and this is another picture of the door with...where the lock was where it was struck with a blue, that's the blue paint on it, the door.

Q. Now this blue paint shown in the picture had you ever seen that there before this particular occasion?

A. No, sir. That's all gray in there.

Q. And the lock in Commonwealth's Exhibit No. 2...

A. Huh huh.

Q. ...was that blue paint on that lock the last time you'd seen it?

A. No, sir.

Q. When you saw these items, the lock and the door, how much later was it after your arrival at the store?

A. Oh, less than ten minutes, because I went on....

Q. Anybody else go into your store...

A. No.

Q. ...while you were there?

A. No.

Q. Did you have the occasion to investigate the vicinity surrounding your store outside?

A. Not except to go around to the back and look at the hole in the wall and we did find a sledge hammer and an axe on a dirt pile about a hundred feet....

Q. How far is the dirt pile from your store?

A. About a hundred feet to the right rear.

Q. And what was it again that you found on this dirt pile?

A. A sledge hammer, blue sledge hammer and a axe, pole axe they call it.

Q. Sir, I'd like to show you these two items, the sledge hammer and an axe and ask you whether or not you've seen either the sledge hammer or either one of these axes....

(Recording machine failed to pick up the rest of Mr. Crowell's testimony.)

COURT:

All right, sir, just what you want to do.

CROWELL:

I think I'll leave. Go back and open my store.

COURT:

All right, sir.

UPDIKE:

Thank you.

COURT:

Thank you, Mr. Crowell.

UPDIKE:

Your Honor, if we could call State Trooper Fred Sink now.

COURT:

All right.

CLERK:

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

SINK:

Yes, sir.

DIRECT EXAMINATION

FRED B. SINK

BY UPDIKE:

Q. Would you state your name for us please, sir?

A. Fred B. Sink.

Q. And what is your occupation?

A. Virginia State Police Officer.

Q. And were you employed with them on April the 21st of this year?

A. Yes, sir.

Q. And where were you patrolling on that night?

A. Bedford County.

Q. Now on that morning did you have the occasion to encounter the defendant, Mr. Samuel Napper?

A. Yes, sir.

Q. And where were you when you did encounter him?

A. Around 460 approximately one mile east of Big Otter River.

Q. And when you saw him could you tell us where he was in relationship to Crowells Sporting Goods Shop?

A. Yes, sir, he was approximately three miles west from this sporting goods place.

Q. And what time of morning was this when you saw him?

A. It was somewhere around eleven o'clock.

OSBORNE:

I didn't understand that.

SINK:

A. Eleven o'clock.

OSBORNE:

Is that a. m. or p. m.?

SINK:

A. M.

OSBORNE:

On what day?

SINK:

On April 21st.

UPDIKE:

Q. And if you would, sir, describe the condition that Mr. Napper was in when you saw him.

A. He was standing alongside the highway, Route 460. I stopped and conversed with him awhile.

Q. And what did he look like?

A. Well you mean - his dress?

Q. Yes, uh uh.

A. Well he was...well, to put it pretty plainly, he was pretty ragged. His trousers were torn to the extent that he should not have even been on the highway. His top garments was wrinkled where it appeared to have been in some kind of an accident of some kind.

Q. Was he injured in any way?

A. No, sir, I could find no injuries.

Q. Did he say anything about why he was there?

A. Yes, sir. I asked him about that and he stated to me that he was trying to hitchhike to Roanoke, Virginia.

Q. Did he say anything else?

A. Yes, sir. I asked him about his condition and he stated to me that he had been in an accident in the City of Lynchburg the previous night, automobile accident.

Q. Did you see any injuries which might have occurred because of such an accident?

A. No, sir.

Q. You stated that his clothes were torn. Was there anything else that you might have observed about him?

A. Well, they was disarranged on him. He'd stuffed down his shirt, coat where it looked like he had been through the woods or through the leaves. I didn't know whether he'd slept out all night long or what. He appeared that he possibly had been out.

Q. Now after you encountered him there on Route 460 what did you do with him?

A. I picked him up and brought him to the Sheriff's Office, Bedford, Virginia.

Q. And were you with him the entire time he was at the Sheriff's Department?

A. Yes, sir.

Q. And how long did the two of you stay there?

A. I don't have any...possibly fifteen to twenty minutes.

Q. And what happened at that point?

A. What - after that?

Q. Hmm mmm.

A. I took the, Mr. Napper to the bus depot in Bedford in the City of Bedford, and then again in an effort to assist him to get to Roanoke, his destination.

Q. Do you remember about what time it was that you left him at the depot here in Bedford?

A. No, sir, I don't recall.

Q. Did you approximate how much later it was after the time when you encountered him on Route 460?

A. I can only estimate. Possibly, I will say thirty to forty-five minutes. I threw all my notes I had on him away. Had no charges against him.

Q. You stated that you first encountered him about eleven o'clock, is that....

A. Yes, sir, somewhere in that vicinity. It could have been a little before or a little after.

Q. Now while you were with him at the Bedford County Sheriff's Department were you involved in the investigation of any offense?

A. No, sir.

Q. What was your purpose then in being there generally?

A. Checking on him from previous information that I had received by radio.

Q. And that...after you left him there at the depot here in Bedford that was the last time you saw him on that day?

A. Yes, sir.

Q. Please answer any questions Mr. Osborne might have.

CROSS-EXAMINATION

BY OSBORNE:

Q. Trooper, you say you were checking on the defendant?

A. Yes, sir.

Q. All right. As a result of previous information?

A. Yes, sir.

Q. What was that?

A. I received the information over the radio that a subject described similar to him was on Route 460 and possibly wanted by Sheriff's Office of Roanoke County.

Q. So you picked him up and brought him to Bedford County Sheriff's Office?

A. Right, and called Roanoke County Sheriff's Office to see if they did want him for a felony.

Q. And obviously that was not so because you took him over to Bedford County Depot to be...

A. That's right

Q. ...(Inaudible)

A. That's right, yes, sir.

Q. While he was there at the Bedford County Sheriff's Office did anyone else indicate to you or did anybody from the Bedford County Sheriff's Office come in contact with him?

A. Come in contact with who?

Q. With this gentleman? You and your business there?

A. Not to my knowledge that they did.

Q. Did you notice while he was in your presence forty-five minutes to an hour anything in his hair?

A. Well his hair appeared to be awful dirty. It could have been anything in it. I don't know. I didn't examine him. He appeared to me to have slept out in the open all night. So....I didn't examine him. I had no reason to.

Q. Thank you. I have no further questions.

A. Yes, sir.

COURT:

All right. Thank you, trooper.

SINK:

Yes, sir.

UPDIKE:

Your Honor, if we call Deputy Wayne Wright at this time.

COURT:

All right, we'll excuse the trooper?

UPDIKE:

Yes, sir. Thank you for coming in.

Your Honor, we do have one expert witness that I want to make sure would get in today.

COURT:

All right.

UPDIKE:

I was just wondering when the Court....I guess....

COURT:

I plan to go ahead and try to finish this case.

UPDIKE:

Okay. I'll try to speed the thing along and get
(inaudible)....

CLERK:

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

WAYNE WRIGHT:

I do.

DIRECT EXAMINATION

WAYNE WRIGHT

BY UPDIKE:

Q. And you are Trooper Wayne Wright of the Bedford County Sheriff's Department, is that correct?

A. No, sir. I'm Deputy Wright of the Bedford County Sheriff's Department.

Q. I'm sorry. My mind's wandering today.

Q. Deputy Wright, on the 21st of April of this year did you have the occasion to encounter the defendant here, Mr. Samuel Napper?

A. Yes, sir, I did.

Q. And where were you when you saw him?

A. I observed Mr. Napper walking west on 460 just before you get to the State Police Office in Bedford County.

Q. And that's west of the city limits?

A. It's still in the city limits.

Q. But on the western part of the....

A. He was heading west toward Roanoke.

Q. And what time of day was this?

A. Approximately between twelve-fifteen and twelve twenty-five.

Q. This was on the 21st of April?

A. 21st of April, 1978.

Q. And when you saw him what did you do?

A. When I received information from the office, the Sheriff's Office, they were looking for this subject answering his description. He was walking on the side of the road. I pulled over to the side of the road and asked him his name and he told me what his name was, and I asked if he'd like to come to the Sheriff's Office and talk to us, and he voluntarily got in the car and went to the Sheriff's Office.

Q. And when you arrived at the Sheriff's Department what did you do at that point?

A. Okay. When we arrived at the Sheriff's Office I carried him back to the fingerprint room.

Q. And did you fingerprint him?

A. No, sir, I did not.

Q. What happened then?

A. At this time I read him his Miranda warnings, his rights, and asked him if he'd like to make a statement, and he stated that he did not, that he wanted to talk to a lawyer, and this was in the presence of myself and Deputy Sheriff Dellinger.

Q. Did anything else happen while you and Deputy Dellinger and Mr. Napper were there?

A. Yes, sir. While we were still talking to him after he said he wanted to talk to a lawyer, Mr. Dellinger observed a piece of fiber...it looked like a piece of insulation in his hair. After Mr. Dellinger made note of it, you know brought to my attention, I did see it in his hair.

Q. Had you seen these fibers before that?

A. No, sir, I didn't see them until he brought it to my attention.

Q. And what were the weather conditions, lighting conditions, outside on that day?

A. It was, it partly cloudy. The sun was in and out that day, and....

Q. When you entered the Sheriff's Department with Mr. Napper and Deputy Dellinger discovered this, what part of the Sheriff's Department were you in at that point?

A. It was in the fingerprint room.

Q. And if you would describe the lighting conditions in that room?

A. All right. This room is where we take fingerprints from individuals and it is well lighted. It's really brilliant there. That's the reason why it's so light because we have to take fingerprints.

Q. And you said that you also saw the fibers at this point?

A. When Deputy Dellinger brought it to my attention I did see them. Deputy Dellinger took the piece and took it out of his hair.

Q. If you could give us some idea of how many fibers you could see at that point?

A. Just the one. The only one that I saw, saw the one that he made note of and picked it out of his hair.

Q. If you could describe it for us.

A. It looked like a piece of insulation, like maybe cream looking. It was just a small piece.

Q. Did Mr. Napper make any statements concerning this while you were there with him?

A. No, sir.

Q. Please answer any questions Mr. Osborne might have.

CROSS-EXAMINATION

BY OSBORNE:

Q. Deputy Wright, whenever you stop along the side, Mr. Napper - you readily see this man, readily got in the car with you and back to police headquarters?

A. Yes, sir, he did it voluntarily.

Q. Voluntarily cooperated with you and at that instance nevertheless.

A. Are you speaking now of while we were on the highway?

Q. While you were on the highway.

A. Yes, sir.

Q. Up until such time as you read him his rights?

A. Yes, sir.

Q. And then he said he wanted a lawyer?

A. Yes, sir.

Q. You continued to talk with him?

A. Did I continue to talk with him?

Q. Yes.

A. No, sir.

Q. And all the time that you had seen him in the sunlight, on the highway, and in the car sitting beside you, you hadn't noticed the fiber that was noticed by Deputy Delinger after you got in the fingerprint room?

A. No, sir. While we were out on the highway there wasn't any sunlight. I might say it was pretty cloudy that day.

Q. It was daylight?

A. Yes, sir, it was.

Q. Was it as light as it is in here?

A. I couldn't tell you. I don't know.

Q. In the automobile he was sitting in the back or did he ride in the front seat with you?

A. He was riding in the front seat in the passenger side.

Q. And you walked him into the Sheriff's Office out of your car and walking beside of you?

A. Yes, sir. He didn't walk beside me. He walked in front of me. The piece of insulation that was located in front of his, in front of his face just over top of his eye, and he was in front of me at the time.

Q. So whenever you were talking to him, looking straight at him, that insulation would have been in the hair right in front?

A. Yes, sir.

Q. And you never noticed it?

A. No, sir.

Q. Thank you. I have no further questions.

UPDIKE:

I have no further questions.

COURT:

Thank you. You want to excuse Mr. Wright?

UPDIKE:

Yes, sir.

COURT:

Thank you, Mr. Wright.

Next witness.

UPDIKE:

Your Honor, we call Deputy Claude Dellinger.

CLERK:

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

DELLINGER:

Yes, sir.

DIRECT EXAMINATION

CLAUDE DELLINGER

BY UPDIKE:

Q. State your name and occupation for us please.

A. Deputy C. A. Dellinger, Jr., Bedford County Sheriff's Department.

Q. Were you employed by the Sheriff's Department of Bedford County on the 21st of April?

A. Yes, sir, I was.

Q. On that day did you have occasion to encounter a Mr. Samuel Ellis Napper, Jr.?

A. Yes, sir, I did.

Q. Is that person in the Courtroom at this time?

A. Yes, sir, he is.

Q. Would you please point him out?

UPDIKE:

Now of course for the record the witness pointed at the defendant.

Q. Now where were you when you encountered him?

A. At the Bedford County Sheriff's Department in the photograph and fingerprinting room.

Q. Now what are the lighting conditions?

A. It is florescent lights, well lit.

Q. And what happened while you were in there?

A. I was talking to Mr. Napper, and as I was talking to him I looked at his hairline, etc. and on his left hand side just above his ear there was a particle of fiber. I didn't know what kind of fiber it was. At that time I reached over and pulled the fiber from his hair and I made a comment to him that I believe I found what I needed. And he told me quote: "You didn't find that damn thing in my hair," and as I looked again farther back ~~there was~~ some more fiber and he refused to let me ~~have that~~. I told him I didn't need it - I had enough.

Q. Now how close were you to him at the time you saw it?

A. Face to face, approximately two, two and a half foot.

Q. These fibers that you took from his hair, what did you do with them?

A. After removing the fibers from the defendant's hair-line, I put them in a clear bag, has a zip lock type top on it, sealed it, stappled it and wrote a magic marker on the top side, and also wrote a note and put one inside with the fiber.

Q. Sir, I'd like to show you this cellophane bag and ask whether or not you've seen that before?

A. Yes, sir.

Q. Where was it that you saw that?

A. This is the....At the Sheriff's Department. This is where I put the fiber in. It is wiped off now; you can barely see it: "It's a fiberglass insulation removed from hair of Samuel Napper, Jr." and time of day.

UPDIKE:

Your Honor, we'd like this marked (inaudible)....

OSBORNE:

Which is the writing on the back and (inaudible)....

DELLINGER:

A. May I see that? The note inside is my handwriting.

After putting the fiber inside, I put the paper in, sealed

it and also wrote on the outside.

OSBORNE:

Q. And the writing on the inside is your note?

A. Yes, sir. Has my initials on it, C. A. D., time and date.

Q. Is there anything in that thing now?

A. Yes, sir, it is.

Q. May I see it again? Is it inside the little....

A. Yes, sir, it is.

Q. Can you show me? I can't see it?

A. I can't see it either.

Q. You can't see it either?

A. (Inaudible)

Q. I'd thought maybe you could show it to me. Are you sure?

A. Yes, sir, I am.

Q. Can you see it now?

A. I see particles of it.

UPDIKE:

Your Honor, at the appropriate time I wouldn't want to explain why this substance (inaudible) named that, or if we could have that marked for identification?

COURT:

What's the last exhibit?

It's just offered for what's there. I'm not saying there's anything in there either.

OSBORNE:

Your Honor, to be able for cross-examination purposes, I can't....

COURT:

Well, that's all right. I'm just....What was the last number?

UPDIKE:

(Inaudible)

COURT:

This is going to be hard to mark I'm afraid. This will be No. 5?

UPDIKE:

Yes, sir.

COURT:

I think we're going to need something. I can't write on that cellophane. We can go ahead. I'll admit that as Exhibit No. 5.

UPDIKE:

Thank you.

Q. Deputy Dellinger, after you placed this fiber in this cellophane bag, what did you do with the bag and the the fibers?

A. I sealed the bag and locked it in my desk drawer until....

Q. Where is this desk drawer?

A. At the Sheriff's Department.

Q. And how many keys are there to this desk drawer?

A. My key.

Q. And when did you put it in that desk drawer?

A. Approximately, ten minutes after I removed it from the defendant's hair.

Q. And has this substance been in your sole possession between these two times?

A. Yes, sir.

Q. When did you remove the cellophane bag from the desk drawer?

A. The next day, the 22nd.

Q. And when was it that you removed it?

A. I'm not exactly sure on the time.

Q. Tell us approximately what time of day it was.

A. In the evening I believe it was. At that time I handed it to Officer Mayhew. He took possession of it.

Q. And, sir, were you actually involved in the investigation of the break-in itself as far as going down to Crowell's Sporting Goods Shop?

A. No, sir, I wasn't.

Q. Please answer any questions that Mr. Osborne has.

CROSS-EXAMINATION

BY OSBORNE:

Q. Deputy Dellinger, you say you were not involved at all in the investigation at Crowells?

A. Not the....I was not at the scene of the break-in. My first encounter like I say was at the Sheriff's Office when the officers...Officer Wright was talking to him. I was standing at the door and he made a comment that he didn't want, he didn't have anything to say until he talked to a lawyer. I sat down after Officer Wright stood up. I told Mr. Napper I didn't want him to say anything just listen to me. I started talking to him and while I was talking to him is when I noticed the fiber.

Q. Didn't want him to say anything, just wanted him to listen? He had already told you he wanted an attorney?

A. Yes, he said he did not want to say anything to us until he talked to an attorney. I said, "Don't say anything then."

Q. May I ask you this: When you noticed whatever you noticed in his hair, what made you seize the comment, "I found what I need"?

A. Because it looked like fiberglass to me - insulation.

Q. Well, you had not been down to Crowells, you were not involved in the investigation, how did you know, or what reason would you have to know that insulation might be important in that case?

A. The building itself is the metal building. I've been in the building quite a few times on another break-in. The way of entry to the building was cut in the middle. If you cut the middle open on the building, whoever it was had to go through a panel of fiberglass.

Q. Had you been down there and had you at that time known that there was a hole cut through the building and it was fiberglass it was exposing?

A. The....That morning when I came in the comment was to...that they went in Crowells and I don't know if I brought the question up how they got in. They said, "They cut the panel, cut a hole in the wall and went in."

Q. So your complete association with this case was in what they said and this man after he said, "I don't want to say anything else," and then you noticed something in his hair, and you pick it out of his hair that you think is going to be conclusive evidence because "I found what I need". Is that what you thought at that time?

A. I made a statement "I found what I need".

Q. Thank you, deputy. I have no further questions.

REDIRECT EXAMINATION

BY UPDIKE:

Q. And you stated that was a statement, not a question, is that correct?

A. Yes, sir.

Q. No further questions.

COURT:

Stand down please, Mr. Dellinger.

Next witness.

UPDIKE:

Your Honor, if we could call Deputy Ray Mayhew.

CLERK:

Do you swear that the evidence which you shall give in the proceeding before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

MAYHEW:

I do.

DIRECT EXAMINATION

RAY MAYHEW

BY UPDIKE:

Q. Would you state your name and occupation?

A. My name is Ray Mayhev, Deputy Sheriff of Bedford County Sheriff's Department.

Q. Were you employed for the Bedford County Sheriff's Department on the 21st of April of this year?

A. I was.

Q. And were you involved in investigating the charge presently pending against the defendant?

A. Yes, sir.

Q. Now when did you first go to the Crowells Sporting Goods Shop?

A. It was on April 21, 1978, approximately I arrived on the scene it was pretty close to four a. m.

Q. Deputy Mayhew, can you describe for us what you first saw when you got there?

A. Well when I initially arrived at Crowells Sporting Goods I was gave information from other sources to patrol the shell area around Crowells Sporting Goods. After doing so for a short period of time....

Q. How many deputies and officers were there when you got there approximately, do you have some idea?

A. Officer Hardy was there, myself was there. There were Campbell County some units there. Altogether I say when I arrived there was three or four officers already

there on the scene.

Q. And you said you gave instructions for them to patrol the area?

A. No, sir. I received instructions.

Q. Did you see any officers patrolling the area while you were there?

A. Yes, sir, I did.

Q. With what frequency was this being done?

A. Well it was 460 it was frequently patrolled. Every few minutes you'd see a police car going east and west on 460.

Q. And what did you notice about the condition of the building when you arrived?

A. When I, when I went to Crowells Sporting Goods I went to the rear of the building, which would be on the north, back of the building, I observed a large hole in the rear of the building.

Q. Sir, I'd like to show you a photograph and ask you whether or not that photograph depicts what you saw, Commonwealth's Exhibit No. 1.

A. Yes, sir, it does.

Q. And you can describe what you saw as you observed that, the damage to the building?

A. After I saw the hole had been made into the building I started to look around for physical evidence that might have been left at the crime scene.

Q. Well let me ask you about the the outer edge of the building, now the outside wall of the building, what is that composed of?

A. The outside of the building is more or less a tin type.

Q. And the inside wall, what, what kind of wall is that?

A. On the, after you get through the layer of tin there is a layer of fiberglass between the, between that and the inside of the building.

Q. And what color fiberglass is this?

A. It was yellow.

Q. You notice anything about the brand of fiberglass insulation?

A. No, sir, it wasn't no, I didn't notice no, any particular name brand on the fiberglass.

Q. What else, if anything, did you notice about the building as you conducted your investigation?

A. Well, I went to the inside of the building, which on the inside of the building I found a lock laying on the floor at a rear exit door.

Q. Sir, if I could show you Commonwealth's Exhibits 2, 3

and b and ask you whether or not they accurately show what you observed at that time?

A. Yes, sir, they do.

Q. Did you observe anything else about this....

A. I didn't understand the question.

Q. Did you observe anything else in that area, anything concerning the store?

A. On the inside of the store where the lock was connected to a chain what had the door locked, I observed blue paint on the side of the door frame and also blue paint on the lock what was lying on the floor.

Q. Now what shade of blue were you talking about?

A. Well, it was sort of a light blue.

Q. And is the blue there in the photograph accurate as well as you remember?

A. Yes, sir, it is.

Q. Did you observe anything concerning the store, what kind of condition that was in, the merchandise and so on, things of that nature?

A. The only thing I observed was disturbed was where it was some boxes had been pushed away from the wall where the hole was made into the sporting goods.

Q. Now in the vicinity where this hole in the store is

located, did you observe any, anything in that area, any tools?

A. Not on the inside. I went back to the rear of the store. On the outside of the store I found an axe laying approximately three to five feet from the hole where had been made into the building.

Q. Now the axe that you found would you be able to observe these two axes and tell whether or not either of these two is the one that you saw?

A. Yes, sir, I can.

Q. Which one was it?

A. This. This axe here was the one laying approximately three to five feet from the building.

OSBORNE:

(Inaudible)

UPDIKE:

The exhibits that aren't....(Inaudible)

MAYHEW:

A. The reason why I can identify this is the axe because one axe is larger than the other one.

Q. Excuse me. And what did you do with this axe after you saw it?

A. After I found this axe here I picked it up myself and

I took it and put it in my police car and locked my police car up.

Q. Sir, I notice some initials on the handle. Whose initials are....Do you have any knowledge concerning those?

A. Yes, sir. I put those initials on there, C. R. M., my full name is Clarence Ray Mayhew.

Q. And these two other articles, have you seen either of these before?

A. Yes, sir, I have.

Q. And where did you see these?

A. That axe where you're holding in your hand now was found approximately one hundred feet from the sporting goods behind a pile of red dirt.

Q. And the sledge hammer that we have. Where did you find that?

A. It was found in the same location lying behind the red pile of dirt approximately one hundred feet behind the building.

Q. Did you observe anything else in the immediate area where you found these two tools?

A. I didn't observe any, any other type of hardware of any type.

Q. Was the land disturbed in any way?

A. I saw some tracks.

Q. And what was eventually done with these tools?

A. Those three items were taken by me, put in my police car and locked up.

Q. And what did you eventually do with them after that?

A. After that they stayed in my possession 'til I got to the Bedford County Sheriff's Department where then I put my initials on them and one of them was...they were put in the the evidence room and from there they were removed by me and taken to the lab.

Q. Now did you have any occasion to take any samples of any sort in the area where the break-in, or where the hole in the wall is?

A. Yes, sir. I clipped a piece of metal from the, beside where the hole was taken which had some paint markings on it. That also stayed in my possession and also I taken a sample of insulation from the building where the hole was made. It also stayed in my possession.

Q. Sir, I'd like to show you a container and ask you whether or not you've seen that before?

A. Yes, sir. This was the container that I put the insulation in.

OSBORNE:

May I see that? I'd like to see if I can see some insulation.

MAYHEW:

The black tube is where the insulation was in.

OSBORNE:

It's down inside?

MAYHEW:

That's where I put it, yes, sir.

OSBORNE:

Your Honor, is there any reason at this time that we can't....Oh, I caught that.

UPDIKE:

I have no objection to counsel....

OSBORNE:

I can see insulation this time. No problem.

UPDIKE:

Q. And you stated that you placed insulation in this container. What did you do with the container after that?

MAYHEW:

A. After the, the insulation was placed in the container I stuck the tube in my pocket. It stayed in my possession until I got to Bedford County Sheriff's Department. There

I labelled it and it stayed in my desk drawer, which each individual has a desk and has a lock on it; it stayed in my desk drawer until I removed it to take it to the secretary to have a lab report typed up to take it to the laboratory for examination.

Q. And how many keys are there to your desk drawer?

A. Each individual has his own key.

Q. And when you removed this from your desk drawer what was the day, when was it?

A. This was on April 24, 1978.

Q. And when was the container taken to the lab?

A. On that same date.

Q. And which lab are we talking about?

A. It was taken to the Roanoke Lab, Consolidated Lab.

UPDIKE:

Your Honor, we'd like to have this...

COURT:

All right.

UPDIKE:

...also admitted into evidence.

COURT:

No. 6.

UPDIKE:

Q. During your investigation did you have occasion to

receive any samples from anyone else?

A. I did. On the...

Q. What was this?

A. ...on the 22nd day of April, 1978 I received a clear, plastic bag. Inside of this bag was a yellow fiberglass type material what I received from Deputy Sheriff Dellinger.

Q. Sir, I'd like to show you Commonwealth's Exhibit No. 5 and ask you whether or not that's the cellophane bag that you just described for us?

A. Yes, sir, it is because the simple reason is I remember this very clearly by the red writing on this and the white piece of paper and all in the bag, in which after I took it, after Deputy Sheriff Dellinger gave me this bag, I took and put it also in my desk and locked it up until it was moved on the 24th day of April, 1978 to be taken to the lab for analysis.

Q. And did you take this to the lab at the same time that you took this other container?

A. I did.

Q. Sir, did you have the occasion to pick up these items at any time from the lab?

A. I did.

Q. And when was that?

A. I went and picked the items up from the Roanoke Laboratory on June 8, 1978.

Q. And have they stayed in your possession ever since?

A. After I received the, all the evidence back from the laboratory I brought them back to the Sheriff's Office.

I personally opened them up to make a check list to see if all the items was back in the containers that I had submitted for evidence. After checking the list off, I then taken the evidence and put them in the evidence lock up.

Q. Going back to the store, if you could describe the area in which this store is located for us.

A. The store is located in Bedford County on State Route 460, approximately three-fourths of a mile from the Campbell County line near New London.

Q. And if you'd just give us some idea of what else is located in that area?

A. It's located near the New London School. Also located near the New London Ruritan Club.

Q. Are there any wooded areas in this particular vicinity?

A. There are wooded areas on both sides of 460 close to the sporting goods.

COURT:

For the purposes of the record, I come by there on my

way to Bedford very often. I am very familiar with the location.

UPDIKE:

Thank you, Your Honor.

Q. Please answer the questions Mr. Osborne may have.

CROSS-EXAMINATION

BY OSBORNE:

Q. Trooper Mayhew, you say you made a list of the items you submitted to Consolidated Laboratories?

A. Yes, sir.

Q. What all did you submit?

A. I submitted one sledge hammer, one axe, one black tube with fiberglass in it, one clear, plastic bag with yellow fiberglass in it, one lock, one piece of metal from the building, also the clothes of the, another defendant which was charged in the B and E, and also a hair sample, also a cap.

Q. Were the clothes of Samuel Napper submitted?

A. No, sir.

Q. Were any fingerprints to be taken from any of these items you recovered (inaudible)...such as the axe, sledge hammer, etcetera?

A. No, sir. Weren't no fingerprints recovered from these items.

Q. Were any fingerprints attempted to be taken from them?

A. I dusted one of the axe handles to see if I could lift any fingerprints. I couldn't lift any fingerprints because of the texture of the wood. It's a rough grain material and none could be lifted.

Q. So you dusted only one?

A. I dusted only one item.

Q. Didn't you try the metal of the axe or any of the metal on there because....

A. I dusted one of the axes, the head of the axe no prints could be lifted from that.

Q. So you didn't attempt the others?

A. No, sir, I didn't after I failed on one I didn't see where that I could left any prints from these items.

Q. And so the only items submitted to Consolidated Laboratories that involved the defendant, Samuel Napper, was the clear, plastic bag that Mr., Deputy Dellinger had turned over to you?

A. The clear, plastic bag with the contents of yellow fibers inside. Yes, sir.

Q. No other clothing, nothing else belonging to

to Samuel Napper was submitted for examination?

A. No, sir.

Q. Might I ask what the purpose of submitting the clothes of the other subject was?

A. The purpose of submitting Mr. McMillian's clothes was to see if there was any fiberglass insulation in the clothing that Mr. McMillian was wearing to match up with the fiberglass sample that was taken from Crowells Sporting Goods to see if we could get a match up.

Q. And you stated that you had a key to your desk?

A. Yes, sir, I do.

Q. And everyone has a key but no one else has a key to anybody else's desk, is that correct?

A. No, sir. Each individual has their own desk and each individual has their own key to the desk.

Q. Not even the sheriff has a key to your desk?

A. Not to my knowledge, he does not.

Q. Not to your knowledge. You always lock your desk each evening?

A. I personally lock my desk at all times.

Q. During the period of time that these samples were in your desk, are you sure that you always had it locked?

A. Yes, sir.

COURT:

Are there any further questions?

OSBORNE:

No, sir.

COURT:

All right. Thank you. Step down.

Mr. Mayhew, you're excused as far as I'm concerned.

UPDIKE:

Would you remain outside just in case we use
you again.

COURT:

Mr. Scott, would you get me 18.2 section of the Code?
I just want to look at this code section.

CLERK:

Do you swear that the evidence which you shall give
in the proceeding before the Court shall be the truth, the
whole truth and nothing but the truth, so help you God?

ELMER MILLER:

I do.

COURT:

We're sorry to keep you so long, sir, but it's been
a long, hard day. I started off at eight-fifteen at Mont-

vale this morning and I'm still here too.

MILLER:

I'm aware of that. I'm just glad of the consideration in using me.

COURT:

Well, we don't...let you off, get you through today so you won't have to come back.

DIRECT EXAMINATION

ELMER T. MILLER

BY UPDIKE:

Q. State your name for us.

A. Elmer T. Miller.

Q. And where are you employed?

A. I'm employed as a forensic scientist with the northern Virginia branch of the Bureau of Forensic Science, Consolidated Laboratory Services, State of Virginia.

Q. And how long have you been employed there?

A. I've been employed there since January 17 of this year.

Q. And if you'd give us some idea of how long you've done this type of work?

A. I became employed as a Special Agent with the FBI in 1950 and in 1959 I was transferred to the FBI Laboratory

at Washington, D. C. I remained employed there as a chemist in paint, soil, glass, safe insulation and that type of material until my retirement from the FBI Laboratory on December 31, 1977.

Q. And where did you receive the training for this work?

A. I received the Bachelor of Science Degree from the University of Richmond at Richmond, Virginia. Subsequently, I received a Master of Science Degree in Forensic Science at the George Washington University in Washington, D. C. I was also employed by the State of Virginia except for three years in the navy as a chemist by the Virginia Department of Agriculture where my work involved ores, minerals, gasoline and other materials for the service of the public in the enforcement of state labelling laws.

Q. And, sir, have you qualified before in a Court of Record in the Commonwealth of Virginia as an expert in the field of (inaudible)....

A. On many occasions.

UPDIKE:

Do you have any questions concerning his qualifications?

OSBORNE:

None.

COURT:

I'll accept them.

UPDIKE:

Q. Now, sir, as a part of your work as a forensic scientist do you have occasion to examine glass, perform various kinds of analysis on fiberglass?

A. The comparison of glass is, if I have a particular specialty, my specialty. I have published articles, methods on the comparison of glass beginning in 1965. Methods that I refined are used throughout the world at the present time have been accepted by the American Association of Analytical, of Official Analytical Chemists. Later I did the same work on the comparison of glass fibers, mineral, wool insulations which is after all a glass product. This method that I published in 1974 is now used throughout the country. I've taught its use personally in Texas and others at the FBI Academy in Washington. It has been referred by some of the various laboratories throughout the country and is in the process of being approved as an official method now. In fact, the work has been completed on it. I have published three papers on it.

Q. Mr. Miller, could you tell us how the comparison of

glass products is done in cases?

A. Glass, including glass fibers, we have to choose the properties which vary from source to source, that is from one batch or one building to another. Those properties as far as glass is concerned are the properties of refractive index, density and dispersion. Now refractive index, Your Honor, is the bending of light rays as it goes through a denser medium. If we suspend this or put this pencil in a glass of water, as you know from your college physics, it will appear to bend at the surface. This property of the bending or the refracting of the light rays can be measured very exactly with the aid of a phased microscope which sends a small pencil of light straight up through our glass slide on which we can place the tiniest particle of glass or small number of fibers. We are able to measure the property of refractive index to the fourth decimal place, that is one ten-thousandth of a unit. It can be measured with confidence within two one thou...ten-thousandths of a unit, that is the limit of errors that allow for the limit of experiment, experiment, experimental is that now. By putting the fiber on a glass slide immersed in an oil, we send light through it of all the colors. There are four hundred different

colors that we get from a (inaudible) and by heating and cooling the oil we reach a specific temperature which we electronically keep within a tenth of a degree centigrade. We reach that point where the glass is no longer visible under the microscope and the phase microscope works also on the phase of the light and, therefore, it is ten times as accurate as a medical microscope in this regard. When we reach the point where the glass and oil are exactly the same, then we know that the glass matches the oil and since the oil has been standardized to the Bureau of Standards we have a number, a figure for the refractive index. By using different wave lengths of light we get the dispersion which is the difference in the refractive index in different colors of light. This is important because both of these properties are dependent upon composition which we cannot measure on tiny particles or on single fibers, but there is a direct relationship.

Specifically, we are not really interested in the numbers on one particular fiber or group of fibers as we are in the comparison. So by taking the fibers from a particular source such as the building and the fibers from another source such as a person, his belongings or

clothing and comparing them under exactly the same conditions, we can see whether they match each other. We can indeed put them on the same slide at the same time, but if they exactly match each other then we know from experience that it is most probable that they came from the same source. I have done this research by buying glass wool, mineral wool or rock wool in various stores in the Washington area and seeing that I can tell them apart and this is what we are after.

Q. Mr. Miller, if I could show you....

COURT:

I think that is No. 6.

UPDIKE:

Q. If I could show you Commonwealth's Exhibit No. 6 please, and ask you whether or not you've seen that before, and if you have under which conditions did you see it?

MILLER:

A. Yes, I've seen this before. It bears a number and it bears my initials on the container and also on the lower pill boxes, plastic boxes at the top. Inside this container is yellow glass wool. Yellow glass wool is typical of that produced by the Corning Glass Works and sold for industrial use. The glass is clear. The resin

on it which is put on it to hold it in vats and also to preserve it is dyed yellow for the purpose of identifying that product. The little pill boxes on the top are perfectly clear because I have driven off the resin with heat. In that process I have also (inaudible) the glass to make it very uniform and that's what it looks like without the resin. Inside it's yellow.

Q. And how common is this color yellow as far as fiberglass and insulation is concerned?

A. Fiberglass manufactured by the Corning Glass Works - I've been to the company - it, that that's used for residences and which you buy at your local hardware store and that is colored pink. It has a red dye. It's colored pink to distinguish in the industry as against Johns Manville which is amber colored, natural resin color, and most other fibers which are natural color. Owens-Corning sells some that's natural color in very large carload lots because it's a little bit cheaper and they sell it then for large builders who might order such tremendous quantities.

Q. Sir, if I can show you Commonwealth's Exhibit No. 5 and ask you....

OSBORNE:

I've lost you somewhere. I believe you said that re-

ferring to the amber color as the yellow that's sold in large quan....

A. No, sir. Yellow is bright yellow. It's dyed yellow. The amber is the natural color of the resin with no dye in it.

Q. Have you said anything about yellow?

A. This is yellow glass wool. That's yellow that's dyed. The resin is dyed. The glass is clear. This is glass. Many of these products are not glass. Many of these, in fact most of the products are made of slag from glass furnaces or either rock and they are called rock wool or mineral wool, but this product is glass. It's glass wool or burlled silicate glass.

I recognize exhibit...

UPDIKE:

Five.

MILLER:

A. ...five, Exhibit 5. It also bears my initials and a number and the case number, that is the case number in the laboratory. It also has a small pill box placed there by me. When I received it it was sealed. Has a plastic envelope that had a top bright yellow glass wool in it. That yellow glass wool I heated, make it clear. Some of

it is in this pill box. Some of it I threw away when I had finished my examination with it. I used it.

Q. Sir, why us....Let me ask you first, is there anything in that little pill box right there?

A. Yes, sir, sure. Through the microscope there is a great deal in here compared to what we usually work with. That's a....

Q. And, sir, why is it not yellow at this point?

A. I've heated it to drive off the resin.

Q. Sir, could you open that little container - not that one - but the other one. First, the other one, please, sir. I'm afraid if we open that one....

A. This, this, I, I recall there being much more than I see there. I recall that there was much more. I open this...

Q. Yes.

A. ...or the pill box?

Q. Yes.

A. Or both. All right. That's the way it looks when it's in a building or an attic and when it is....

Q. When did these two items come into your possession?

A. They came into my possession the 24th of May of this year. This is how it looks after it has been heated and (inaudible)....

Q. And how was it that this came into your possession?

A. It came into my possession in a sealed - this was sealed in a container and this was sealed with tape as it is now. This is my tape on it, but it was sealed with the the other tape.

Q. But the process by which it came into your possession?

A. Ch. It came to me on the van that is used by the Virginia Crime Laboratory System to connect our laboratories in Roanoke, Virginia and Richmond, Virginia and Falls Church. The van....

Q. Is it sufficient to say that it came to your lab in Richmond by the ordinary practices that....

A. It came in usual course of business for us, which is a van in a locked box within that van, and an armed guard on the van. I believe he is a sworn officer. I'm not sure.

Q. Thank you, sir. Now if you could tell us what if any analysis you performed on these two exhibits that you have - Commonwealth's Exhibits 5 and 6, and if you performed any opinions after performing such analysis if you would be kind enough to tell us what they would be?

A. Briefly, I, as I've explained, I first determined the refractive index and dispersion, that is the refractive index in various wave lengths of colors of light of the

glass and this container. Of course the first thing I do is look at it just like I showed it to you. The second thing I do is to look at it under a microscope to see whether the fibers are long, curled, how fine they are, and specifically I'm looking for little glass balls and what we call slugs, little teardrops which are made in the process and which distinguish a product of this quality with a product of - I hate to run anything down but - of lesser quality. There are a great many of lesser quality. Most of them are lesser quality. I do exactly the same thing. I did exactly the same thing to this. After having finished that I set them aside so that I can't mix them up at all. This I put under the low power microscope, found the fibers to match in color and relative length and the number of slugs, which is very few, and in the relative diameter to the fibers. After that I checked to the refractive index and the density. They are exactly. I found that in one of these I had (inaudible) that is heated the fibers and then cooled them slowly to a temperature of 700 degrees, 650 degrees. It's a little high for glass, but not for rock wool. I found that it overdid it a little bit so I (inaudible) the rest at 550 degrees do that first. Then, this when I (inaudible) at 550 degrees

exactly matched that which had been heated to 550 degrees and cooled slowly. This makes the product uniform. As it cools rapidly it does not give a uniform product.

Q. After you performed such an analysis were you able to formulate any opinion concerning this?

A. Yes, in my opinion the glass fibers that were the tuft of yellow fibers in Exhibit 5 either came from the same source as the the exhibit....

COURT:

Let me see if I can't find out the mark. There is so much writing on that, but let me make....

UPDIKE:

Sure.

MILLER:

I want for the record to have it right.

COURT:

Yes, sir. Here we are right here.

MILLER:

A. Exhibits. It either came from the source of exhibits saved up from another source of glass wool, yellow glass wool insulation having exactly the same properties.

UPDIKE:

Q. Would you call this then class evidence, is that correct?

A. It's class but in a product of this quality it is very good class evidence. That is, the demarcation between different sources is precise and narrow. There is a very small limit of experimental error, Your Honor, you are familiar I'm sure, and that is the lower, the smallest limit to which you can be confident. So the confidence limit is is very precise on this, on these products. Therefore, with...I can make a statement that it most probably came from the source of this. I have bought it at different stores and different times over a period of two years. I did work, work with the paint but it's the same product except for the resin. I didn't find any I couldn't tell apart. There was some that close but I couldn't tell them apart. I could tell all of them from the company's products. There was no question.

Q. The class that we're talking about would you be able to give us some idea of the, how large this class?

A. Well the product is made in very large vats. very large furnaces. These large furnaces are continuous. They, the raw materials are dumped in in usually truckload lots - the sand, the borax, silica. I'm sorry, the sand goes in the truck loads lot, truckload lots, and the silica. The borax in this glass is put in by the pound. When they get the batch all mixed up dry, it's dumped in,

and that is a batch. The...it then floats through. One tank goes through a small pipe into a second tank and perhaps a third where it is simply moving along. The third tank of course is properly holding in the right temperature. That's the working end of the furnace. From that it's drawn off. So,....

Q. The, the, the....

A. I have done with...not with this product but with glass. We find that the different batches are different. In other words, when they dump in another batch of sand it produces a different glass which comes out....

Q. So you're saying, sir, is different ingredients were added and that would change the product?

A. Yes, it's an inexpensive product. Sand and lime and glass making product particularly for glass wool are inexpensive. They don't bother to get the impurities out of it. Don't need to.

Q. Are you saying then that you could distinguish one batch of this substance from another batch?

A. Most probably. I'm saying in my experience I was able to do that when I purchased them at different stores.

Q. Can you give us any idea of the degree of error that we might talk to you about, degree of certainty?

A. I, with window glass the degree of certainty is from one to seventeen maximum out of a thousand that we would not be absolutely from on the basis of numbers. With glass wool it's approximately the same. Certainly given a hundred we could tell ninety-nine of them apart. One or two per cent maximum would be there that couldn't be told apart in my experience.

Q. So you're saying most probably these two items came from the same source?

A. That's right. In the first place we have the characteristics of it being yellow and being this particular product and in an industrial application, and we have also the situation where (inaudible)....had to transfer it to wherever this came from, which is not my testimony.

Q. Would there be variations between the same make of, of, or the same....Would there be variations between fiberglass made by the same manufacturer?

A. That's what I just said. I deliberately checked that deliberately and sent it to various laboratories throughout the country to see if they could do it. We could all do it.

Q. Thank you, sir. If you could answer....

COURT:

All right, Mr. Osborne.

CROSS-EXAMINATION

BY OSBORNE:

Q. We have couched all of your comparisons from the two things in the terms of "most probably"?

A. I must.

Q. You must?

A. Yes.

Q. Because you can't be one hundred per cent sure. can you?

A. On a mass produced product it is impossible. That remote possibility.

Q. This product...were you able to determine from your examination who produced this product?

A. From what they have explained to me in my consulting with them, it's a yellow so it's Owens-Corning.

Q. Owens-Corning?

A. Corning Glass Works.

Q. Corning Glass Works?

A. Fiberglas with one s.

Q. And they're one of the biggest producers of fiber-glass, are they not?

A. Yes, they are.

Q. And they...do they give you any indication of how

much fiberglass is produced out of say one vat that you were talking about?

A. No.

Q. So you had no idea how many rolls of fiberglass could have been produced out of the same vat or the same make?

A. I admit it was a very large amount.

Q. Very large amount?

A. Very large amount.

Q. So, what we're talking about now was trying to match a sample from one particular roll and say that the sample that you have compared "most probably" came out of the same vat from Corn...Owens-Corning or Corning Fiberglas, and you don't know how large or how many rolls of fiberglass could have been made at that time, do you?

A. No, I don't.

Q. So it could be anywhere from one thousand rolls to fifty thousand rolls?

A. Well,....

Q. Two hundred thousand rolls? But you don't know, do you?

A. I can, I cannot answer you. Two hundred thousand rolls is a little large of course and two thousand rolls is probably logical, but I simply don't know and so I

can't, I can't answer it.

Q. So your testimony here is that "most probably" the samples that were submitted to you came or were produced by Corning and "most probably" they came and were made out of the same vat, which was a large quantity....

A. In my opinion this is one of their one...fiberglass with one s, Corning Glass product which is dyed deliberately yellow and which is sold for industrial use. Beyond that, in distinguishing those from one another, we get into the vats, and I've always been able to do it. I haven't examined all of it there is and never will.

Q. Thank you very much. I have no further questions.

REDIRECT EXAMINATION

BY UPDIKE:

Q. But you said this thing was the glass which came from one vat from the glass which was coming from another vat?

A. I've done that with window glass and not in my experience done it with fiberglass. I've only done it purchased from different stores and different ones from the same store. I did that too.

Q. No further questions.

COURT:

All right. Thank you very much, Mr. Miller. You're

excused. We appreciate your coming over.

MILLER:

Thank you.

COURT:

Well, let's just take a little stretch break here, gentlemen.

COURT RECONVENED.

MOTION TO STRIKE

BY OSBORNE:

His story, or whatever the trooper had about this subject at that time was away. He takes him over and leaves him at the bus stop. There is no indication whether or not he had money to to transport himself on back to Roanoke. So the next thing we know is a few minutes or within a half hour later he is picked up again. He again offers no indication of being afraid or concerned there because he is person who has recently committed a crime when he's approached by an officer. He cooperates with him. Then he comes back, brought back and then a fiber is taken from his hair by one deputy after having been in the presence of a state trooper and for having been in the presence of another deputy sitting as close

as I am to him now in the car.

Well, what have we got? We've got fiber that we hear an expert and who I would not even think that I could cross-examine as to his qualifications that obviously were there, and he says "most probably" the fibers I got here were produced by a manufacturer in the same vat, and he's referring to obviously his experience with the production of glass, and fiberglass I don't even know whether it's produced in the same manner as glass. I don't know whether he knows that because he didn't indicate it. But what we do know is that that one vat could have produced thirteen number of rolls, fiberglass. That evidence - that there has enough I believe to completely destroy the Commonwealth's case as to proof beyond a reasonable doubt.

But let's go a step further. Say that fiber did come from that store. The Commonwealth has not shown and hasn't in no way shown that this man was not present there at that store during the working hours the following morning, and it is very possible, and that evidence has not been refuted or shown in any way, to show why that it is not possible that he actually had been in the store and could have actually got that fiber if it actually came from his

hair on the day in question because we have a tremendous amount of time lapse between the break-in and the time that this man is then in the fingerprint room in Bedford County and allegedly a piece of fiberglass taken from his hair.

Now I've heard of slender threads of evidence, Your Honor, but this is one time I think that we actually had the case that where we have only a slender thread of evidence. There is no way that the Commonwealth has put this man at the scene of the crime, and there is no way we're connecting this man with the actual break-in, and I move to strike the Commonwealth's evidence.

COURT:

All right, thank you.

Mr. Updike, do you wish to reply?

UPDIKE:

Needless to say we differ with Mr. Osborne's estimation of the Commonwealth's case. To begin with, Your Honor, with regards to whether or not this man has gotten fiberglass in his hair from this store on some other occasion, I remember, it's my recollection of course it doesn't make any difference what I recollect or what the Court recollects, but it is my recollection that I

asked the owner of the store whether or not he had ever seen this man before. I believe he replied he didn't know him, had never seen him before. I respectfully offer you that that refutes the possibility the man going in there, getting the fiberglass in his hair at some other time.

Your Honor, in addition to that, we'd like to emphasize and we agree with the assessment made by Mr. Osborne as far as the Commonwealth proving that there was a break-in with the intent to commit larceny. We've shown that various things inside were moved around, in particular an empty pistol box. But, Your Honor, we think that we've gone further than that. We've shown that there was at least one black male involved and we think that we've also shown that there were two people involved.

We would like to refer the Court to the physical evidence that we have. The fact that there were two axes found. One man who was going to break into a place I'd respectfully submit to the Court would not carry two axes and a sledge hammer with him. One axe would be sufficient. In addition to that, the places where these axes were located - one right outside the hole in the wall, one axe and this sledge hammer were found some one hundred feet away on a red bank, red bank of dirt.

Your Honor, we would submit to the Court that what happened down there was that they were in the process of breaking into this store and the reasonable inference of, from that is the police officers began to show up because of the fire, I mean the burglar alarm had been detonated, they were caught in the act, and because of that they decided it was time to leave with great dispatch. The owner of this store testified that the front door was broken in an uncommon manner, that undoubtedly it took great strength and pressure to do this. I respectfully argue that this was done by a man who was in a great deal...great deal of hurry to get away.

But, Your Honor, even in addition to that, we have the footprints out there. The deputies have testified that there were indications of two sets of footprints. It didn't look like just one man was out there, but two, and to connect this one particular defendant with the case and try to establish beyond a reasonable doubt that he was the man that was out there with the other black man that has been described before the Court, we respectfully argue that the trooper, Trooper Sink, caught this man within three miles of the place of this particular break-in. Now of course it was some seven hours later, but that was the pur-

pose, Your Honor, of bringing out the testimony that there were a number, a number of deputies in that area, both from this county and from the adjoining county, patrolling there. We have the testimony of the trooper who stated before the Court that the man looked like he had been out in the woods, slept the night out in the woods. He was torn, his clothes were ragged. He looked dirty. Your Honor, I would respectfully argue that the way, the reason the man looked like that when he did was because he realized that there were deputies out there; he realized that the thing for a man to do under that circumstance was to lay low for awhile, to stay out in the woods, to travel through the woods as much as he could. He got out on the highway and he got caught.

In addition to that, we of course have the testimony of the expert and he, he testified that it was his opinion that most probably the fiberglass taken from the hair of the defendant was from the same source as the fiberglass that was taken from the store. Now of course I would like to remind the Court that in this point of the proceeding we only have to establish a prima facie case, that the evidence has to be viewed in a light most favorable to the Commonwealth, but even if we were at the conclusion of

all the evidence, Your Honor, we'd only have to exclude every reasonable hypothesis of the defendant's guilt, innocence, excuse me, every reasonable explanation as to why he might be innocent. We don't have to exclude every imaginable hypothesis of of the man's innocence. And, Your Honor, to to think that a man is that close to the break-in with fiberglass in his hair, to try to imagine that somehow he got out there and some place somewhere got fiberglass some other place I would respectfully argue is contrary to human experience; it defies the (inaudible)...of common sense and it certainly it is an imaginable possibility but not a reasonable possibility. And that's all that we have to accept, the reasonable possibility, and again, at this point, we have to establish our prima facie case. I respectfully argue that we have done it.

I would respectfully ask the Court to deny the defendant's motion to strike the evidence.

COURT:

All right. Do I....If you have any additional evidence I really think I'd like to...if you have any, I'm not suggesting at all the defendant take the stand, but I, what I'm saying is I would like to rule at the conclusion

of all the evidence. I understand this is the conclusion of all the evidence. Is it?

OSBORNE:

Yes, it is, Your Honor.

COURT:

That's what I want to make sure of.

OSBORNE:

I'd like to just make one further point.

COURT:

Sure.

OSBORNE:

The items that have been introduced here that were found behind the building, I was waiting for the Commonwealth to link those items up because obviously I asked on the cross-examination of Trooper Mayhew where all this was, and the items that were submitted were a piece of tin, the, these items here, and obviously they were submitted for the purpose to try to link them as actually being the tools used in the break-in. Now I heard no evidence put on that would indicate that these items were actually used to cut this hole in this building. Now they're displayed before the Court. They're displayed and...of course they're there for the purpose

of trying to indicate, as he indicated, that there is more than one person involved in this break-in, but no one has been able to say whether they were there before the break-in. No one was able to state whether or not those footprints had been there for one day, ten days, a month, and I respectfully submit to the Court that there has been no evidence upon which the Court can find beyond a reasonable doubt that this man participated in any crime in the vicinity of Crowells Sporting Goods Shop. Now I ask the Court to rule.

COURT:

All right.

I would really like to review my notes and check out one or two points of law that concern me a little bit. I hate to ask you to come back again, Mr. Osborne, but.... Are you due over here next week on anything?

OSBORNE:

No, sir, I'm not.

I was going to ask the Court to set a divorce case that we had continued today because we felt like that this was going to happen until January, the first Friday in January, and Mr. Wandrei discussed this earlier, but....

COURT:

I don't know whether I can. I haven't looked at my book. I'll be glad to if I have it open.

OSBORNE:

As far as returning, Your Honor, I have some cases scheduled Monday Morning in Roanoke City but I can be here in the afternoon (inaudible)....

COURT:

But I won't be here in the afternoon. What I thought was to get ya'll, to get you in here in the morning and take yours first and let you go.

Is your client on bond?

OSBORNE:

No, sir, he's been incarcerated since....

COURT:

Huh huh.

OSBORNE:

That's not because, not just because of this charge.

COURT:

Well, well I'm not....That's all right. I just want to know if he was on bond or in jail already.

What's your schedule? How about Tuesday morning at say nine-fifteen?

OSBORNE:

Your Honor, I have to confess that I went off this morning in a hurry to get here and I left my calendar book laying on my desk and I don't have it. I do know that I have court trials set in some court every day next week in the morning, but if the court is going to be here until say twelve, I could be here on Monday before twelve o'clock. Generally, I'm pretty sure that the case I have set is a traffic case in Roanoke City. I should be done there by two-thirty and I could get...you know come on back....

COURT:

Well that would be fine if you're pretty sure you could get here around twelve now because I've got to be in Lynchburt at two p. m. and I would have to leave at one.

You want to set this thing for twelve o'clock? I think that the case is entitled to....It's been a long day and rather than....It's an unusual case and frankly I'd like to look up some questions about fingerprint law which is very analogous to this. Just how much evidence is needed to connect - I think the law if that there is a presumption of intent to commit larceny from a proven breaking and entering but I would like to check that.

There are several little points I want to cover, and....

OSBORNE:

Your Honor, as far as pointing out the breaking with intent, it was the purpose of my cross-examination to put (inaudible)....was the fact that there was no obvious statement that obviously damage done inside (inaudible)....

COURT:

Well I don't think that's your strongest point. I mean that you can reasonably presume that when there's a break-in of this kind and objects are moved around inside that the intent was to commit larceny. I', not too impressed with that, but I think the main question is whether or not the the conviction, a conviction can stand on the fiberglass. But of course were it not for the fiberglass I would state very categorically that I would dismiss this case outright because there would be nothing else to connect him beyond a reasonable doubt with the break-in. But now that's the question, and that's what I want to look into, and it all hinges on that one little piece of fiberglass.

OSBORNE:

That "most probably".

COURT:

And that might be enough to convict him very honestly.

UPDIKE:

I think that there has to be corroboration but we think we, through the other circumstantial evidence, that we've shown....

COURT:

Now, now there's some corroboration looking at it from your viewpoint, but the primary, the primary item is is the fiberglass. Without the fiberglass, regardless of any corroborating evidence, there wouldn't be, there certainly would not be a Commonwealth's case. But I'd like to look into it. So I'm going to reset the case for final disposition at twelve o'clock on Monday, and for any reason you see that you are not going to be able to get here by twelve, please call us so I can adjust my schedule. I'm here all next week I think. Just about all next week.

So the accused is remanded to jail. And for the record now you have rested your case? I want to make sure.

All right, you've rested your case. Then the Court will defer its decision until noon on Monday.

All right, that's all.

CASE RESUMED.

December 11, 1978.

COURT:

This is the case of Commonwealth versus Samuel Napper, charge of Breaking and Entering with intent to commit larceny in connection with Crowells Sporting Goods Store out here on Route 460. I heard this case on Friday. Counsel made final argument and I said at that time that I would need...that I would want some time to study my notes and check the law before making the finding, and I have gone over my notes and made some checking and I am prepared now to make the finding.

FINDING OF COURT

Based upon the evidence which I have heard and based upon the, excuse me, wait a minute, wait a minute, you all have to stand....Would you mind....You don't mind getting up and going back there please.

Based upon the evidence which I have heard and the law of the State of Virginia, it is the Court's opinion that the Commonwealth has proven beyond a reasonable doubt that Mr. Napper is guilty of the crime as charged. I think the evidence is sufficient.

Do you know of any reason to say or cause to offer why this Court should not now pronounce judgment, Mr. Napper?

NAPPER:

(Inaudible)

COURT:

It is the judgment of this Court that you are guilty as charged in the indictment.

Do you want a pre-sentence investigation and report?

OSBORNE:

Your Honor, we would ask for one.

COURT:

All right. It will be ordered.

All right, this Court will....You will have to tell Mr., one of the probation officers who...there's nobody here, you'll have to tell them that one has been requested, and we'll order a pre-sentence investigation and report, and we will not set an exact time for sentencing but at such time as that report is ready and is a time that is convenient with counsel, you will meet me back up here one morning before we start court and I'll be glad to do it any time that it suits you all.

OSBORNE:

Your Honor, Mr. Napper is also being held on a charge out at Roanoke. I wonder if it might be possible that he could be sent back to Roanoke pending pre-sentence investi-

gation. I would imagine it shouldn't take too awful long. The argument before the Supreme Court on the petition will be dealt with January 4th in the morning.

COURT:

I really don't know anything about that and I'd rather not make any decisions. That's more the Sheriff's and Correction Department's decision than it is mine because I have no knowledge whatsoever of any other previous problems Mr. Napper may have had. As a matter of fact, I assumed he hadn't had any, but I can't answer that question. I'm not certain who holds him. All I know is that I have to remand him to jail now and defer sentencing until such time as the report is ready, and we will have it early one morning at the conven...at your convenience, particularly since you have to come over here from some distance. And you stay in touch with him, Mr. Updike...

UPDIKE:

I sure will.

COURT:

...and when everything's ready, set it up, let me know, we'll handle it at nine-twenty or something like that. It won't take over five minutes.

All right, thank you, gentlemen.

OSBORNE:

The Court notes my exceptions to the ruling.

COURT:

Of course. Of course. And again I want to tell you, Mr. Napper, that you have a right to appeal, to appeal my decision if you and your coun...lawyer feel that I was incorrect. You have a perfect right to appeal to the Virginia Supreme Court. I think I'm right, but sometimes I'm wrong. I just do the best I can.

All right, that's all.

UPDIKE:

Thank you.

The Court then proceeded to hear another matter.

The recorder malfunctioned and you cannot hear the recorded ending of the Napper case. The following is a narrative statement of the closing and sentencing:

The defendant in person and by his attorney reappeared and informed the Court that the defendant wanted to waive a pre-sentence report and be sentenced on this date.

The Court then inquired of the defendant, Samuel Ellis Napper, Jr., if anything for himself he had or knew to say or cause to offer why judgment should not now be pronounced against him, and nothing being offered or alleged in delay of judgment, the Court proceeded to sentence the defendant to confinement in the penitentiary of the Commonwealth of Virginia for a term of two years.

The Court advised the defendant of his right to an appeal to the Supreme Court of Virginia and the right to have an attorney appointed to represent him if he could not afford one.

Mr. Osborne stated that he would check with the person who employed him when he returned to Roanoke. The Court informed Mr. Osborne that if necessary he would be appointed to represent the defendant on any appeal.

The defendant stated that he did wish to appeal.

The defendant was remanded to jail.

END.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD, DECEMBER 11, 1978.
COMMONWEALTH

against - - - - Upon an Indictment for Statutory Burglary

SAMUEL ELLIS NAPPER, JR., date of birth March 9, 1951

This day came again the Attorney for the Commonwealth, and Samuel Ellis Napper, Jr., who stands indicted for a felony, to-wit: Statutory Burglary was led to the bar in the custody of the jailer of this Court, and came also Bobby R. Osborne, his attorney, pursuant to the adjournment of the Court from December 8, 1978.

The Court having heard all the evidence and argument of counsel, the Court finds the accused guilty of Statutory Burglary as charged in the Indictment.

And it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of two years to run consecutively with any other time previously imposed and that the Commonwealth of Virginia do recover against the defendant its costs by it about its prosecution in this behalf expended.

It is further ordered that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to the law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court orders that the prisoner be allowed 136 days credit for the time spent in jail awaiting trial.

The Court certifies that at all times during the trial of this case, the defendant was personally present and his attorney was likewise personally pres-

ent and capably represented the defendant.

The attorney for the defendant noted his exceptions to the finding of the Court and noted an appeal.

And the prisoner is remanded to jail to await transfer to the penitentiary.

A Copy - Teste:  Clerk.

Common Law Order Book 41 at Page 299.