

1 MR. KELLY: The United States calls Mr. Wayne
2 Armbrister.

3 MR. KELLY: Your Honor, if Ms. Gertner and I can have
4 two minutes of the Court's time at the side before we begin
5 the questioning of this witness to resolve one issue?

6 THE COURT: If you can't resolve it, I'll see you.

7 MS. GERTNER: I didn't hear, is that a yes or a no?

8 THE COURT: I mean, if I have I absolutely have to.

9 [Conference at the bench, as follows:

10 MR. KELLY: I'm aware of the Court's ruling, and I do
11 not intend to ask about the in-court ID or photo ID, nor do I
12 intend to ask any questions which may bear upon
13 characteristics observable in any photographs he may have been
14 shown. I would, however, like to ask him whether he has a
15 present memory of the transaction; and if so, what that memory
16 is. I assume Ms. Gertner will bring out the fact that he had
17 no memory at an earlier time, but if that's kind of the crux
18 of our disagreement.

19 THE COURT: This is for the purpose of having him do
20 what?

21 MR. KELLY: Well, he's the Radio Shack store clerk.

22 THE COURT: I understand, but what's he's going to
23 tell us? He can certainly identify the receipt.

24 MR. KELLY: He's going to tell us that a person
25 walked in, the person was carrying a note, and the person

1 grabbed some items of the shelf.

2 THE COURT: Are you objecting to any of that?

3 MS. GERTNER: I object to the -- we talked about
4 before. He's going to ask him to describe the man as tall and
5 what he was wearing. And in his testimony, he says that he
6 said he had no independent memory of the transaction by
7 looking at the piece of paper, none whatsoever. He can
8 construct what the notifications mean, but everything from the
9 time from that point on was part and parcel of the photographs
10 he was shown.

11 MR. KELLY: The photographs don't show height, they
12 don't show -- I wouldn't ask about weight, although it is
13 close to the line. And they don't show clothing. Certainly
14 it's clearly --

15 THE COURT: Isn't there independent evidence what
16 Mr. Shay or whoever this person was wearing?

17 MR. KELLY: I don't believe so. I'll knock out
18 clothing.

19 MS. GERTNER: In terms of height, he recognized man
20 in the photograph but never connected it to the transaction.

21 THE COURT: What evidence do we have that height was
22 suggested to him? Certainly, that wasn't part of any of the
23 suppression hearing.

24 MS. GERTNER: No, what I'm saying is that individual
25 photograph is shown to him of a man that he has seen on

1 occasion. He then reconstructs the person from the
2 photograph, not just the visual, not just the face, but the
3 rest of the person. And then over the course of other
4 conversation, he says that's the man in it. I don't think you
5 can disentangle it.

6 THE COURT: It seems to me that height was not part
7 of anything that was suggested or that one can reasonably say
8 did not come to independently. I would permit him to go into
9 height but nothing else. I think it is.

10 MS. GERTNER: I think the only position consistent
11 with your findings is that whatever memory that's refreshed by
12 process by the agents' visits and photographs should be
13 kept --

14 THE COURT: It don't understand that height was part
15 of that.

16 MS. GERTNER: It's a classic situation where someone
17 does not remember the person. And then they say Shay, they
18 then remember the details of this person because they know him
19 in other situations, and later on they put that person in the
20 transaction. Now, he's asking: What do you remember about
21 the person in this transaction?

22 THE COURT: Did Mr. Armbrister identify Mr. Shay in a
23 line-up? Was there ever a line-up?

24 MR. KELLY: No.

25 MS. GERTNER: In other words, I don't --

1 MR. KELLY: The photograph in no way, no manner
2 reflected height. . There was never any conversation by the
3 agent in terms of height.

4 THE COURT: But there was a suggestion that caused
5 Mr. Armbrister to remember a person. And he remembered that
6 person as having been there and he remembered that person as
7 having been tall. And the memory of the person as having been
8 there was the result of a suggestion and, therefore, the
9 memory of the person being tall is as a result of the
10 suggestion. That's the argument.

11 MR. KELLY: What he remembered in terms of somebody
12 came into the store and carried a note and took a left, and
13 this is all -- no one knew any of that. This is all memory
14 that came from this individual. Maybe it didn't come out on
15 February 20th. He claims the reason for that is because he
16 was grieving and had other problems.

17 THE COURT: I understand.

18 MR. KELLY: The reason he remembered was because the
19 guy was --

20 THE COURT: He was taller than he.

21 MR. KELLY: He's 6 foot three-and-a half.

22 MS. GERTNER: He says I saw that guy before. I told
23 him he was tall, slender, color of his hair, jeans, I saw
24 him --

25 MR. KELLY: First time --

1 MS. GERTNER: Three times after the fall of 1991. I
2 never connected that person with the transaction at all, he
3 had no independent memory of the transaction. But then
4 follows the other end of that is connecting, reconstructing
5 the transaction and putting that person in it. I don't see
6 how you can disentangle anything other than what he looked,
7 what he said before the process of I.D. began. Is the only
8 bright line rule here.

9 MR. KELLY: His features are not observable in the
10 photograph, such as height. Photograph didn't suggest any of
11 that.

12 MS. GERTNER: If a person says you showed him a
13 photograph of someone that he knows elsewhere, he says, yes, I
14 know all about this person.

15 THE COURT: The defendant's position, as understand
16 it, is that there is not much dispute but that Mr. Shay was
17 periodically in that Radio Shack. He therefore could have
18 been observed, but it was the suggestion that tied him to this
19 particular event.

20 MR. KELLY: There was no suggestion of height. There
21 was never a suggestion of height.

22 THE COURT: But this particular person.

23 MR. KELLY: I'm not sure.

24 THE COURT: Let me think about, start and when you
25 get to the question --

1 MS. GERTNER: You don't have very much to go before
2 you get to this.

3 MR. KELLY: How tall are you? Do you have a memory
4 as to how tall this customer was?

5 THE COURT: Let me think on it.

6 ...end of conference at the bench.]

7 Dwayne Armbrister, sworn

8 Direct Examination by Mr. Kelly

9 Q Would you state your name and spell your last name for
10 us?

11 A Dwayne Armbrister, A R M B R I S T E R.

12 Q Where do you reside, Mr. Armbrister?

13 A Boston.

14 Q How old a person are you?

15 A 27.

16 Q Are you employed, Mr. Armbrister?

17 A Yes, I am.

18 Q How are you employed?

19 A Radio Shack.

20 Q And what Radio Shack location do you work at, sir?

21 A 197 Mass. Ave., Boston.

22 Q Approximately when did you begin working at that
23 location?

24 A Around somewhere around October '90.

25 Q And after October of '90, did you work at different Radio

1 Shack stores?

2 A Yes, I worked at a Radio Shack in East Boston.

3 Q When did you begin working at the Radio Shack out of
4 197 Mass. Ave.?

5 A The exact date?

6 Q Not the exact date, how about the month and year?

7 A It's about probably around March of that year.

8 Q Is it possible, sir, that your employment at that store
9 began later, sometime in the summer of 1991, at the 197
10 Mass. Ave. Radio Shack, Mr. Armbrister?

11 A Possible.

12 Q Do you have a clear memory of when you started at that
13 store, sir?

14 A No, not exactly.

15 Q Where is that store at 197 Mass. Ave. located in relation
16 to the Christian Science Church?

17 A It is directly across the street.

18 Q Mr. Armbrister, I want to direct your attention to the
19 date of October 18th, 1991, were you working on that date,
20 sir?

21 A Yes, I was.

22 Q What hours were you working?

23 A 9 to 6.

24 Q I'm going to show you what has been admitted into
25 evidence as Exhibit No. 33. Do you recognize that,

1 Mr. Armbrister?

2 A Yes, I do.

3 Q Tell us what it is, please.

4 A It's a sales receipt.

5 Q And were you the store clerk on this particular
6 transaction, Mr. Armbrister?

7 A Yes.

8 Q And how if at all was the fact that you were the store
9 clerk reflected on the face of the receipt itself?

10 A Because my initials are at the top left corner.

11 Q Now, Mr. Armbrister, what time of day did this
12 transaction take place?

13 A The time stated at the right corner, 2:36 p.m.

14 Q Would you describe the layout of the Radio Shack's store
15 on Mass. Ave. in Boston as its appeared on October 18th,
16 1991?

17 A Well, at that time it was, like, a narrow passageway.

18 Q Speak into the microphone.

19 A A narrow passage. When you walk into the store, with
20 television and VCRs on the right-hand side, telephone at the
21 left side, and stereo components on the right side as you make
22 a right as you go in. POS systems at the left.

23 Q Does that mean something, POS?

24 A Computers.

25 Q It is the cash registers for those of us that aren't so

1 sophisticated?

2 A Yes, they are.

3 Q As you walk in the door, those are to the left?

4 A Those are to the left. So you have to walk by them to
5 get into the rest of the store. And in the right-hand corner
6 is little transistors and little parts.

7 Q Okay. Do you have a present memory of the transaction
8 which is reflected by the receipt, Exhibit 33, before you?

9 A Yes.

10 Q Do you remember how busy was the store at the time at
11 about 2:30 in the afternoon on October 18th, Mr. Armbrister?

12 A It was about five to six customers in the store.

13 Q Would you please describe for us what you recall
14 happening as it relates to this transaction reflected in
15 Exhibit 33?

16 MS. GERTNER: Objection, your Honor.

17 THE COURT: Say that again.

18 THE COURT: Start the question.

19 Q Would you please describe for us what you recall
20 happening as it relates to this transaction reflected on this
21 receipt from the earliest moments that you can recall?

22 MS. GERTNER: I object, your Honor.

23 THE COURT: To the extent that he can recall the
24 transaction, without identifying the person, he can tell us.

25 MS. GERTNER: Your Honor, he can identify the receipt

1 and reconstruct the receipt from the information on the
2 receipt. There is no independent memory other than the
3 receipt.

4 THE COURT: This is what the question is all about.
5 He may have the question.

6 Q Mr. Armbrister, would you please describe what you recall
7 happening as it relates to this transaction, from the earliest
8 moment that you can recall?

9 A Well, I recall customer walking in the store, and then he
10 walked to the right-hand side of the store at the back. And I
11 walked over to ask him if -- I walked to the customer and
12 asked if he needed any help, and he in return said, I'm all
13 set. So I went back over to the computer and stood there for
14 a while. And I was joking around with a fellow employee.

15 Q Now, what -- strike that.

16 Who, if anyone, was with the customer when he entered
17 the store?

18 A He was alone.

19 THE COURT: Excuse me, one second.

20 (Pause.)

21 Sorry, go ahead.

22 Q Who, if anyone, was with the customer when he entered the
23 store?

24 A He was alone.

25 Q When you approached the customer you described what, if

1 anything, was he carrying in his hands?

2 A Well, he had a small piece of paper in his hands.

3 Q Can you describe how large it was for us?

4 A About a quarter of a sheet.

5 Q When you say a quarter of a sheet, what do you mean?

6 A Like, for instance, if this was a sheet, it was about
7 that much, the top portion.

8 Q Are you referring to like a standard sized piece of
9 paper, one of these?

10 A Right.

11 Q If you ripped out a quarter, is that what you are
12 referring to?

13 A Right.

14 Q Did you happen to notice or observe whether or not there
15 was anything written on the slip of paper?

16 A There was writing on it, but I didn't see what it was.

17 Q Now, you said you went back to the counter, tell us what
18 happened next, Mr. Armbrister?

19 A Well, a fellow employee --

20 Q I'm not interested in the conversation with the fellow
21 employee. With respect to the customer what, if anything, did
22 he do next?

23 A Oh, he walked around with his list and picked up, I
24 guess, whatever was on the list. And after that, he came up
25 to the cash register.

1 Q Okay. And when he arrived at the cash register, tell us
2 what happened then, sir?

3 A I asked for the last four digits to his telephone number.

4 Q When he provided you with that information, what did you
5 do?

6 A I typed it in.

7 Q And when you say "typed it in," are you referring to
8 this. What did you say it was, cash registration and you have
9 to answer yes or no?

10 A Yes.

11 Q Are you inputting this information as it is being
12 provided to you by the customer?

13 A Right.

14 Q Okay. What else, what next happened, sir?

15 A Then I asked him, the customer for his name and address.

16 Q What happened?

17 A The customer goes 5100, I go your name and address, it
18 goes 1500, I punch in 1500.

19 Q Then what happened?

20 A Then I look at it, I goes, I match, I mean, your name so
21 he goes, that's it. So I said like your address street
22 address he goes S A H Y. That's what I punched in.

23 Q Did you continue asking him questions at that point?

24 A I asked him again for the address, he goes that's it.
25 Like he was aggravated. I goes, the hell with it.

1 Q So what did you do?

2 A I punched it in.

3 Q You punched what is reflected on the receipt?

4 A Right.

5 Q Now, would you describe the demeanor any expression,
6 demeanor?

7 A Well, he was aggravated, sort of facial, you know.

8 Q Just demeanor?

9 A Yes, like aggravated.

10 Q Aggravated.

11 Mr. Armbrister, how are your typing skills?

12 A Good.

13 Q In the kind of work you do for Radio Shack, inputting
14 this information from customers, do you ever make mistakes?

15 A Yes.

16 Q Are you able to tell us whether or not, whether on this
17 particular information you recorded information accurately or
18 possibly could have made a mistake?

19 MS. GERTNER: Objection, your Honor.

20 THE COURT: Well, he can tell us whether he thinks he
21 put it in accurately?

22 A Possible.

23 Q Possible what?

24 A I could have made a mistake.

25 Q Hit the wrong keys?

1 A Sure.

2 Q Outside asking this information about name and address,
3 did you have any conversation with this customer at the
4 counter?

5 A Yes, I made a remark like, Damn, you're tall, how tall
6 are you?

7 MS. GERTNER: Objection, your Honor.

8 MR. KELLY: Sorry, your Honor.

9 THE COURT: Objection is sustained. The jury will
10 disregard the statement.

11 MS. GERTNER: Moreover -- well, I can state the
12 reasons later on.

13 MR. KELLY: I was going to ask those questions we
14 were discussing.

15 THE COURT: The objection is sustained.

16 MR. KELLY: Thank you, your Honor.

17 Q Now, Mr. Armbrister, I want to show you what's previously
18 been introduced as Exhibit No. 34. I ask if you recognize
19 that, sir?

20 A Yes, I do.

21 Q Have you seen that before?

22 A Yes.

23 Q That is what is known as a photospread, were you shown
24 that by federal agents at some time?

25 A Yes, I was.

1 Q And at that time you were shown that, what were you asked
2 to do, Mr. Armbrister?

3 A Look it over, see if anyone looks familiar.

4 Q And did anyone of those photographs look familiar to you,
5 Mr. Armbrister?

6 A Yes.

7 Q Which photograph and which page?

8 A Page No. 2. Photo on the right side.

9 Q And did you tell the -- strike that.

10 How, if at all, did that customer look familiar to
11 you, Mr. Armbrister?

12 A Because I remember before joking about his receding
13 hairline to a friend.

14 Q Had that person on the second page of photograph No. 2
15 been in that store before, your store?

16 A Yes, he has.

17 Q Can you tell us approximately how many times you've seen
18 that person in your store at 197 Mass. Ave.?

19 A Two to three times.

20 Q And during what time frame, sir?

21 A About the same time, around the same time frame.

22 Q The same time frames, what sir?

23 A As the other guy.

24 Q Fall 1991?

25 A Yes, a couple of weeks.

1 Q Mr. Armbrister, Mr. Armbrister, I'm going to show you
2 what's been marked for identification as Exhibit 36 A; do you
3 recognize that, sir?

4 A Yes, I do.

5 Q What is it, please?

6 A It's a battery holder.

7 Q Okay. Is it a Radio Shack item?

8 A Yes, it is.

9 Q Is there a model number to it sir?

10 A Model No. 270-391, the top of this receipt.

11 Q Is that the battery holder indicated as the first line on
12 this receipt?

13 A Yes, it is, the same battery holder.

14 Q Let me show you what's been marked for identification as
15 Exhibit 36 B, what is that, Mr. Armbrister?

16 A That's a toggle switch.

17 Q Okay. There is model number to that, sir?

18 A Yes, its the second catalog number on the sales receipt
19 275-602.

20 Q It is the second item here indicated on this receipt in
21 this transaction?

22 A That's it.

23 Q Okay. Let me show you Exhibit No. 3, what is that?

24 A It's a little lamp. It is also the third item on the
25 receipt. 22-11 33.

1 Q Package of lamps?

2 A Yes, it is.

3 Q Let me show you Exhibit 36 B. What is that, sir?

4 A That's a lamp base.

5 Q It's a holder for lamps?

6 A Right.

7 Q Is that also referred to as the fourth item on the
8 receipt?

9 A Yes, it is.

10 Q Model No. 272-3566?

11 A Yes.

12 Q Exhibit 36 E, it's a project box.

13 A It's also list on the receipt No. 270-220.

14 Q The receipt, it says box and then it has four X, two X?

15 A Dimensions.

16 Q Those are dimensions of the box?

17 A Right.

18 Q Finally, sir, 36 F, what is that?

19 A Logic project box, catalog No. 270-223. It's also on the
20 receipt.

21 Q And it also listed the dimensions of that box?

22 A Yes, it does.

23 MR. KELLY: Your Honor, the United States offers
24 Exhibits 36 A through F.

25 THE COURT: E is already in evidence, and I assume

1 there is no objection to the others.

2 MS. GERTNER: Aside from the packaging, your Honor,
3 no. That's an issue we'll deal with later.

4 THE COURT: They are all in evidence.

5 [Government's Exhibit 36 A, C, D, E, and F entered in
6 evidence.]

7 MR. KELLY: Your Honor, we need to speak to the Court
8 very briefly.

9 THE COURT: About the same thing?

10 MR. KELLY: No, a different thing.

11 [Conference at the bench, as follows:

12 THE COURT: Let me point out that in the, in the
13 opinion on June 29th, I had found that at the first time that
14 Armbrister was interviewed, he said that he recognized Shay
15 because it was rare to have customer taller than himself but
16 he was unable to tie that to that particular transaction.
17 That's the reason for not allowing him to testify about the
18 tall man on October 19th.

19 MS. GERTNER: I also move for a mistrial for that
20 comment, I believe it is very dangerous at this point in the
21 trial. It is a comment which is completely impermissible.

22 THE COURT: The motion for mistrial is denied?
23 What else do you have?

24 MR. KELLY: This issue, your Honor, I would like to
25 play a 30-second clip from the WLVI video tape that bears

1 directly upon this witness's testimony.

2 THE COURT: I don't think so. Mr. Shay admits that
3 he was there? You can certainly argue it. And if you want to
4 during the argument play a piece of it or read the transcript
5 I have no problem.

6 MR. KELLY: I'll ask the witness, just while we're
7 here, I mean it is clear from the record that he did not have
8 a memory, a present memory of some of the events he's
9 described when he was first approached on February 20th. And
10 I want to ask him one or two questions about whether he has an
11 explanation to why that was. I assume they are going to go
12 into it on cross-examination.

13 THE COURT: You don't have an objection, do you?

14 MS. GERTNER: I'm actually not going into it.

15 THE COURT: Are you going to cross-examine?

16 MS. GERTNER: I'll cross-examine on only one point,
17 which is point he says he didn't make a mistake.

18 THE COURT: If you want to you can.

19 MR. KELLY: Well, I assumed that Ms. Gertner was
20 going to inquire about that. But given that she's not going
21 to inquire about that, I probably won't do that.

22 But your Honor, for the record, if I can, while we're
23 here for one other minute, with respect to the question of
24 "tall," as I as I understand the Court's ruling, it is
25 certainly the Government's view that no suggestiveness as to

1 height was made at any time by these photographs.

2 THE COURT: No, I understand that. But he was not
3 able to tie the tall person who came into the store to this
4 particular transaction until after all the suggestions had
5 been made. Ms. Gertner is correct. The suggestions go to the
6 tallness, even though the pictures don't show it.

7 MR. KELLY: Again, there was factual issue. They
8 claim it was because of the suggestiveness. We claim it is
9 because this fellow, again, apart from the photo ID --

10 THE COURT: Its an issue I've dealt with, and I don't
11 really wish to revisit. I understand you're unhappy about it.

12 MR. KELLY: With respect to asking this gentleman
13 whether or not he had seen this customer in the store on any
14 other occasions, I don't know what the defenses's position is.

15 MS. GERTNER: Same issue.

16 MR. KELLY: Well, questions earlier today to
17 Mr. Leahy was: Didn't Tommy Shay say that the guy had
18 perjured himself and he knew him from the block. I ought to
19 be able to ask this customer whether or not he hangs around
20 the block.

21 THE COURT: That you can do.

22 MR. KELLY: Whether or not he was acquainted with
23 this customer that he saw on this date from the block?

24 MS. GERTNER: That's the point. He's linking the
25 customer that he saw in the transaction with someone that he

1 saw on the block.

2 THE COURT: You can certainly inquire whether he
3 hangs around the block. My guess is he will say no.

4 MR. KELLY: I'm sure he'll say no.

5 THE COURT: He was not part --

6 THE COURT: He was not part of that group in that
7 store.

8 MR. KELLY: He's not gay.

9 THE COURT: That way you can certainly counteract
10 whatever the defendant may have said on that issue.

11 MR. KELLY: With respect to the question about
12 whether or not he had seen this customer in the store on other
13 occasions, is that a question?

14 MS. GERTNER: I mean, I don't even know, I think that
15 any inquiry is absolutely outside of the --

16 MR. KELLY: Obviously, we disagree. But if you don't
17 want it, I'll avoid it.

18 THE COURT: Thank you.

19 ...end of conference at the bench.].

20 THE COURT: You may proceed.

21 Q Mr. Armbrister, are you gay, sir? Pardon the personal
22 nature of the question, but are you gay?

23 A No, I'm not.

24 Q Do you visit or socialize in an area known as the block?

25 A No, I don't.

1 MR. KELLY: Nothing further.

2 THE COURT: Ms. Gertner, any questions?

3 Cross-examination by Ms. Gertner

4 Q Mr. Armbrister, I believe you testified on direct
5 examination that you could have made a mistake when you typed
6 in S A H Y?

7 A Right.

8 Q Do you recall testifying: Is it fair to say that in fact
9 you rarely make a mistake, right?

10 A Is it fair I said I rarely make mistakes?

11 Q When you type information?

12 A No.

13 Q Do you remember testifying before the grand jury, you
14 testified on a previous hearing in this court?

15 A Yes, I do.

16 Q Do you remember being asked this, Mr. Armbrister, 224:

17 "Do you ever make mistake when typing information
18 into this computer panel as the customer is giving you the
19 information?

20 "Answer: Rarely."

21 Do you remember saying that?

22 A I guess I do.

23 MR. KELLY: Well, your Honor, this is another
24 instance where the Government would respectfully request more
25 than simply that question.

1 THE COURT: What else do you want her to read?

2 MR. KELLY: I would like her to read through line 17.

3 MS. GERTNER: Your Honor, I think those are improper
4 questions for this event.

5 MR. KELLY: I don't believe that's correct at all,
6 with all due respect to Ms. Gertner.

7 THE COURT: Can I see the transcript?

8 (Pause.)

9 THE COURT: Why don't you read the whole thing down
10 to the part bracketed, including the rest of the answer.

11 Q "Did you ever make mistakes in typing information
12 into this computer panel as the customer is giving you the
13 information?

14 "Answer: Rarely.

15 "Question: Rarely.

16 "Are you a good typist?

17 "Answer: Yes, I am.

18 "Question: Is it possible or probable that from time
19 to time you input the information incorrectly?

20 "Answer: It is quite possible.

21 "Question: Hit the wrong keys?

22 "Answer: Sure."

23 Do you recall being asked those questions?

24 A Yes.

25 Q And do you recall giving those answers?

1 A Yes.

2 MS. GERTNER: Just one moment, your Honor.

3 (Pause.)

4 No further questions.

5 THE COURT: You don't have anything else, do you?

6 MR. KELLY: No, your Honor, although if the Court --

7 THE COURT: We'll take the recess now.

8 Thank you, Mr. Armbrister, you're excused.

9 And members of the jury, we will take the recess
10 now.

11 [Whereupon, the jury was excused.]

12 THE COURT: Court is in recess.

13 [Recess.]

14 THE COURT: Whose next?

15 MR. KELLY: The United States calls Fred Burke. I'll
16 do it when the jury arrives.

17 THE COURT: Maybe he can come in.

18 MR. KELLY: All right.

19 The United States calls Fred Burke.

20 THE COURT: Why don't you step into the witness box.
21 And as soon as the jury comes we'll swear you.

22 THE CLERK: Jury.

23 [Whereupon, the jury entered the courtroom.]

24 THE COURT: Please be seated.

25