

1 apartment on Main Street and Mountain  
2 View.

3 "She was wearing only a football  
4 jersey. The bottom half of her body  
5 was covered with bed covers. Panties  
6 were under the pillow on the bed, and  
7 a bloody tampon was on the bed beside  
8 her body.

9 "A large semen stain was found on  
10 the bottom sheet. The rest of the  
11 apartment contained no evidence of  
12 struggle."

13 1286, next page -- actually, it's the end of  
14 1285, beginning of 1286:

15 "The vagina contained a white  
16 discharge but no signs of injuries."

17 There was evidence of a struggle in that case  
18 there being an opportunity to be examined. I think we  
19 must not have had, in all likelihood, the same degree of  
20 body decomposition as there was when Ms. Cobb was found,  
21 the victim in this particular instance, but the  
22 pathologist testified that the injuries were most  
23 consistent with the victim's being face up and someone  
24 applying their hands to her neck and either their elbows  
25 on her collar bones or chest or perhaps even their knees  
26 to straddle her and immobilize her.

27 So it appears that the evidence of struggle in  
28 this particular instance didn't offer any light on the

1 subject of whether she had had consensual sex or there  
2 was a struggle that ensued when Mr. Story decided to  
3 strangle Ms. Vickers to death. So the question in that  
4 case was exactly the question in this case. Was that  
5 consensual sex? Was that not consensual sex? Was  
6 there, in other words, a rape?

7 I think Justice Chin let us know that prior  
8 accounts of rape can help the jury to answer that  
9 question if the factors are appropriately met.  
10 Mr. Sanders, I disagree with you that this is something  
11 that is so far away from the -- the Story case. I think  
12 it is right on with the Story case, and I agree with the  
13 prosecution.

14 I think that Justice Chin had exactly these  
15 issues in mind when he made the statement in the opinion  
16 that Mr. Thomas has already alluded to that are found on  
17 Page 1300. He did not tip-toe around it. He let it be  
18 known that whether there was a rape in this case could  
19 be determined by the force that was used to kill this  
20 person. I think the fact that there was force used  
21 clearly against Ms. Cobb is also very similar.

22 There was a weapon used by the -- by the way,  
23 Mr. Sanders, you spent a lot of time once again  
24 reiterating factors of dissimilarity, but the factors of  
25 dissimilarity that you're alluding to are those that you  
26 already explained to me, are things that were told to  
27 you by your client, not things that have been  
28 established in any way by the record of either of these

1 prior rapes or one prior rape and one subsequent rape.

2 Your client telling you that one of the cases  
3 was not filed because the woman made a statement that  
4 said she might -- he raped my spirit or raped my soul,  
5 and that they heard a telephone conversation. You never  
6 heard that conversation. You never found a report of  
7 that as being the reason this case wasn't filed.

8 MR. SANDERS: Too old. I can't.

9 THE COURT: It's too old. You can't. That's  
10 one way of arguing it, but it's not convincing to me.  
11 You're saying that it's too old does not mean that  
12 it's evidence that was ever available. It is evidence  
13 that is not corroborated. It's a statement by your  
14 client to exonerate himself. That's the way that I  
15 feel.

16 I see that in each case, one case is use of a  
17 knife.

18 MR. SANDERS: Alleged knife.

19 THE COURT: That's all I'm talking about.  
20 That's all I'm talking about. I'm talking about what  
21 the prosecution's theory is and what their offer of  
22 proof is. Those things that Mr. Thomas said when I  
23 made him go through these factors, I agree with his  
24 interpretation. I think this is exactly what 1108 was  
25 intended to deal with.

26 I think that in any case where somebody is  
27 giving evidence of prior criminality offered to a jury,  
28 always hugely prejudicial, but you can't come to the

1 conclusion that just because it's hugely prejudicial  
2 that it's more prejudicial than probative. I think the  
3 probative value greatly outweighs the prejudicial -- the  
4 prejudice that's going to be raised.

5           You're going to be able to cross-examine those  
6 alleged victims. You're going to be given an  
7 opportunity of letting the jury see that these things  
8 are not true. I wonder why Mr. Thomas hasn't elected  
9 under 1108 to provide the alleged instances to the jury  
10 in his case in chief. I think they're admissible at  
11 that point in the trial. He hasn't asked for that.  
12 That's his decision. That's what he has chosen to do as  
13 a tactic. I don't understand tactics. I'm sitting up  
14 here as a judge, but looking at the Story case with the  
15 very factors that are illuminated in Falsetta and  
16 restated in Story.

17           I find this is a crime that involves a  
18 sexual -- a sexual offense. I think it's appropriate to  
19 let in these two instances. I don't find them remote in  
20 time. I don't think that they are unduly prejudicial.  
21 I think they're highly probative, and I'm going to allow  
22 that evidence in.

23           Anything else, either side? Other motions?

24           MR. THOMAS: One thing I wanted to put on the  
25 record so the appellate courts will know about it in  
26 case there is an appeal is at one point during the  
27 discovery process, Mr. Sanders and I did discuss --  
28 there's another murder/rape of a woman who was 60 at

1 the time. That occurred a few months prior to the  
2 Rita Cobb case.

3 We discussed that, and the DNA evidence in that  
4 case is different than the DNA evidence in this case. I  
5 allowed Mr. Sanders, because it's still an open case and  
6 unsolved homicide, I didn't want to give him all the  
7 reports, but I allowed him to go to San Bernardino  
8 Sheriff's Department homicide division and review all --

9 THE COURT: Mr. Thomas, thank you. I've got  
10 a meeting in four minutes. I asked about motions. I  
11 want to know about other motions. We can put things  
12 on the record that we need to be put on the record at  
13 8:30 on Monday.

14 MR. THOMAS: The only other motion, we can  
15 deal with it on Monday, is there are members of the  
16 victim's family that are on the witness list that  
17 would like to be present. We can discuss that on  
18 Monday.

19 THE COURT: You're going to have to talk to  
20 Mr. Sanders about that.

21 MR. SANDERS: I'm going to make a motion to  
22 have witnesses wait out in the hall.

23 THE COURT: To exclude people.

24 MR. SANDERS: To exclude.

25 THE COURT: It's not likely that I'm going to  
26 deny that motion.

27 Do you have any authority to the contrary?

28 MR. THOMAS: I do have authority.

1 THE COURT: I'm not going to hear it now.  
2 I'll see you on Monday morning at 8:30. Ladies and  
3 gentlemen, have a nice weekend.

4 MR. SANDERS: Thank you, your Honor.

5 MR. THOMAS: Thank you, your Honor.

6 (Whereupon proceedings in the above-entitled  
7 matter were concluded for the day.)  
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