

1 A. No.

2 Q. Did you and other people at the same time have such  
3 contact?

4 A. Like a meeting?

5 Q. Yes.

6 A. No. No.

7 MR. MAUTNER: Okay. Your Honor, I have nothing  
8 further of this witness at this time. I'd like her subject  
9 to recall on the issue on which the objection was sustained.

10 THE COURT: Cross-examine.

11 CROSS-EXAMINATION

12 BY MR. MCENTEE:

13 Q. Just one question. Mrs. Simmons, it's also true,  
14 isn't it, that in 1993 you were convicted of a violation of  
15 Health & Safety Code Section 11379?

16 A. Yes.

17 Q. Sales of methamphetamine --

18 MR. MAUTNER: Objection. Misstates the nature of  
19 that charge.

20 MR. MCENTEE: It's sales or transportation.

21 THE COURT: And it was for?

22 BY MR. MCENTEE:

23 Q. What was it for?

24 A. It was for possession.

25 Q. Well, weren't you convicted of a violation of  
26 Section 11379?

27 A. No, I wasn't. It was -- no.

28 Q. Mrs. Simmons, while we're waiting I'll preface my

1 next question by saying that Mr. Mautner is retrieving a  
2 document that I'm going to ask the Court for permission to  
3 show you to refresh your memory if I can about your 1993  
4 conviction.

5 MR. MCENTEE: May I approach the witness?

6 THE COURT: You may.

7 BY MR. MCENTEE:

8 Q. Mrs. Simmons, this is an automated printout of your  
9 criminal history. I wanted to direct your attention to the  
10 entry near the top of the page and ask you to take a look at  
11 it.

12 A. I don't have my glasses on, but all of that was  
13 expunged.

14 Q. But the question is: At the time in 1993 isn't it  
15 true that you were convicted of sales or transportation of  
16 methamphetamine pursuant to Health & Safety Code Section  
17 11379?

18 A. Yes.

19 MR. MCENTEE: I don't have any other questions.

20 THE COURT: Any redirect?

21 REDIRECT EXAMINATION

22 BY MR. MAUTNER:

23 Q. Which was it, sales or transportation?

24 A. I guess I don't know. It wasn't transportation, so  
25 they must had put it down as sales. I took that to trial  
26 with Jess Raphael and it was dismissed.

27 Q. Dismissed or expunged?

28 A. Then I had other charges expunged. The one for the

1 sales was dismissed.

2 Q. You're talking about 1993 or the more recent one?

3 A. Talking about '93.

4 MR. MAUTNER: Okay. Nothing further.

5 THE COURT: Anything else?

6 MR. MCENTEE: No. Thank you.

7 THE COURT: Okay. Ms. Simmons, you're excused but  
8 you're subject to recall which means we may call you back on  
9 the stand.

10 We'll take our noon recess then and return at 1:30.

11 What's your impression, Mr. Mautner, about our  
12 timing in this? Do the People think they'll finish this  
13 afternoon?

14 MR. MAUTNER: I would hope so, Your Honor. I have  
15 about four more witnesses, I think.

16 THE COURT: Okay. Thank you.

17 (Noon recess.)

18 THE COURT: We're back on the record in People vs.  
19 Harold Daniel Schultz. And Ms. Simmons has retaken the  
20 stand, I see.

21 You may begin, Mr. Mautner.

22 MR. MAUTNER: Does Your Honor have People's Exhibit  
23 18 up there at the bench? It's the letter to the defendant  
24 from the victim.

25 THE COURT: Yes.

26 BY MR. MAUTNER:

27 Q. Okay. Ms. Simmons, I'm going to show you what's  
28 been marked People Exhibit 18 for identification. Counsel

1 has already seen it.

2 MR. MCENTEE: Your Honor, I'm going to object to  
3 anything that's outside the scope of cross, and I think this  
4 is. All I asked her about was her criminal history.

5 THE COURT: Well, we talked about the possibility  
6 of her being recalled to discuss the videotapes for sure. Is  
7 there additional testimony that you're proposing to offer?

8 MR. MAUTNER: I think she can clarify something the  
9 other witness said about this letter. With respect to the  
10 videotape, we haven't been able to find -- or we didn't get  
11 in time the equipment to actually play it.

12 I think that under Evidence Code 1523(d) this can  
13 be -- she can testify to her summation of what this writing  
14 says because it's fairly lengthy. Investigator Hinshaw can  
15 testify as to how long it would take to play the thing if we  
16 had the proper equipment. And if she did make the tape, we  
17 can get the foundational testimony about how that was done  
18 and review the tape and present it to the Contractors State  
19 Licensing Board as part of that action. The offer of proof  
20 would be the number of apparent hours based on his comings  
21 and goings shown on the tape.

22 THE COURT: 1523(e) is an exception to the rule  
23 stated in subsection (a) which says, "Except as otherwise  
24 provided by statute, oral testimony is not admissible to  
25 prove the content of the writing."

26 Subsection (d) says, "Oral testimony of the content  
27 of a writing is not made inadmissible by subdivision (a) if  
28 the writing consists of numerous accounts or other writings

1 that cannot be examined in court without great loss of time  
2 and, the evidence sought from them is only the general result  
3 of the whole."

4 Mr. McEntee.

5 MR. MCENTEE: Well, I'm not sure what that means.  
6 Also, there's a foundation problem. We don't know -- there  
7 has to be some authentication of whatever the witness claims  
8 she looked at before she can even summarize what that was,  
9 and I don't think the Government can make that burden. And I  
10 renew my objection based on hearsay that the tape,  
11 out-of-court statement which the tape is, would be recounted  
12 by this witness here in court for the truth of what's in the  
13 tape. That's hearsay.

14 THE COURT: I agree that a proper foundation needs  
15 to be made.

16 MR. MCENTEE: And she'd be doing much more than  
17 summarizing something. She would be going through details of  
18 this tape. Times, dates, and purporting to tell us what it  
19 meant.

20 THE COURT: This does say, "Oral Testimony of the  
21 content of a writing is not made inadmissible by subdivision  
22 (a) if the writing consists of numerous accounts or other  
23 writings that cannot be examined in court without great loss  
24 of time, and the evidence sought from them is only the  
25 general result of the whole."

26 I will allow Mr. Mautner to attempt to lay a  
27 foundation, and I'll reserve my ruling as to whether or not  
28 her testimony will be admissible depending on what she says.

1 I think if it meets this exception in subdivision (d), it may  
2 very well be admissible. Let's see what she says and then  
3 you can renew your objection, and I'll entertain a motion to  
4 strike if that's appropriate.

5 MR. MAUTNER: I think the way I'll do this is by  
6 marking another exhibit. People's next in order. I guess  
7 it's 30.

8 (People's Exhibit No. 30 was marked for  
9 identification.)

10 MR. MAUTNER: And I'm showing People's Exhibit  
11 Number 30 to counsel.

12 BY MR. MAUTNER:

13 Q. I'm going to show you what's been marked People's  
14 Exhibit Number 30 for identification consisting of three  
15 typewritten pages. Do you recognize it?

16 A. Yes, I do.

17 Q. How is it that you recognize these three sheets of  
18 paper?

19 A. I typed it up.

20 Q. Okay. For what purpose?

21 A. For my mother.

22 Q. What did you glean the information in that exhibit  
23 from?

24 MR. MCENTEE: Objection. Assumes that she gleaned  
25 the information. Witness just said -- all she said was she  
26 typed it.

27 THE COURT: Sustained.

28 BY MR. MAUTNER:

1 Q. Okay. Can you fairly be called the authoress of  
2 People's Exhibit 30?

3 A. Yes.

4 Q. You earlier testified about the security camera  
5 system that you have. What kind of end product did that  
6 system produce? You talked about how the cameras work and  
7 the motion detector. What was available to be viewed coming  
8 through those cameras?

9 A. Whatever motion was set off or set it off it  
10 would -- it would film the ten minutes -- I mean, ten  
11 seconds. So it's, like, anytime anybody goes down the side  
12 driveway that sets the motion on the camera which sets off  
13 the recording on it, and it would record ten seconds, you  
14 know, the vehicles coming and going.

15 Q. Record such ten second increments on what medium?  
16 On what?

17 A. On the videotape.

18 Q. Okay.

19 A. On the VCR tape. I don't know what you...

20 Q. How many VCR tapes would you go through in a month  
21 with this system?

22 A. The tapes that submitted it's like probably a  
23 year's worth, because it only records ten seconds and not  
24 many vehicles go down our driveway, the side driveway.

25 MR. MAUTNER: Okay. So let me have the tape she's  
26 referring to marked as People's Exhibit Number 31. And for  
27 the record, counsel has a copy of this?

28 MR. MCENTEE: M-hm.

1 THE COURT: Do you need to see it?

2 MR. MCENTEE: No.

3 (People's Exhibit No. 31 was marked for  
4 identification.)

5 BY MR. MAUTNER:

6 Q. Okay. I'm going to show you what's been marked  
7 People's Exhibit Number 31 and ask if you recognize it and if  
8 so, how, by what markings, or labels?

9 A. Yes, I do. Because it says, "Malibu. Do not  
10 record over." Malibu being the new car that I bought. My  
11 car got wrecked, and it was the only picture I had of my new  
12 car.

13 Q. All right. And you used that cassette then from  
14 the security system you bought after your car was damaged?

15 A. No. The car was on there -- this is the only  
16 pictures I have of the new vehicle that got wrecked. Because  
17 I owned that vehicle during the time that Danny was working  
18 for us and it just being on there made me happy.

19 Q. Okay. You said you prepared and submitted People's  
20 Exhibit Number 31. Did you review its contents first?

21 A. Yes, I did.

22 Q. Did you review all of its contents?

23 A. I reviewed it to find when the -- because it's  
24 dated. It's like time-stamped, or whatever you call it, for  
25 the time, the date, and the seconds. And so I went to the  
26 date that he started working was January 15, 2006, and I --

27 MR. MCENTEE: Your Honor, for the record, I object  
28 now. She's recounting what's on that tape, and I object on



1 the basis it's hearsay.

2 THE COURT: She's recounting what she did in  
3 reviewing the tape, so I'll overrule objection.

4 THE WITNESS: I just reviewed when he started and  
5 each time his truck pulled in the side driveway.

6 BY MR. MAUTNER:

7 Q. Is People's Exhibit Number 31 a recording of  
8 everyone who came through during that three-month period?

9 A. Yes.

10 MR. MCENTEE: Objection. That's beyond the scope  
11 of her knowledge.

12 MR. MAUTNER: I can rephrase the question.

13 THE COURT: Okay.

14 BY MR. MAUTNER:

15 Q. Is People's Exhibit Number 31 a recording of all  
16 the times that your system by motion sensor caused a  
17 recording to be made?

18 A. Yes.

19 Q. There isn't a second tape somewhere?

20 A. No.

21 Q. All right. Getting back to People's Exhibit 30,  
22 how did you go about preparing People's Exhibit Number 30?

23 A. By going through the tape and just my mother had  
24 things written down.

25 Q. What things did your mother have written down?

26 A. She had a little booklet that she can't find. But  
27 the little booklet that every day that he showed and what he  
28 did on the job and when he called and said he couldn't be

1 there. That's what it's -- that's how I came by this.

2 Q. Okay. What's the relationship between the missing  
3 book and People's Exhibit 31, the videotape? You just said  
4 you used the missing book to --

5 A. At the time the book wasn't missing, okay? I had  
6 that book, and I also had the tape. It was -- this all  
7 started for the Contractors State Licensing Board. This  
8 evidence right here, okay?

9 Q. You're speaking of People's Exhibit Number 30?

10 A. Yes.

11 Q. Okay.

12 A. And then --

13 Q. Hang on. There's no question pending.

14 Did you prepare People's Exhibit Number 30 for your  
15 mother's complaint to the State Contractors Licensing Board?

16 A. Yes.

17 Q. Did you submit it to them?

18 A. Yes.

19 Q. And did you compile People's Exhibit Number 30 by  
20 reviewing the contents of People's Exhibit Number 31?

21 A. Yes.

22 Q. How long did it take you to do that?

23 A. I honestly couldn't -- maybe an hour watching the  
24 tape and going through the book. Possibly an hour, hour and  
25 a half. I don't know.

26 MR. MAUTNER: Your Honor, I think I've laid a  
27 foundation for talking about what's in People's Exhibit  
28 Number 30, which is kind of a summary of the content of the

1 writing, rather than trying to watch the hour and a half tape  
2 that we don't have any equipment for.

3 THE COURT: Would you like to voir dire  
4 Ms. Simmons?

5 MR. MCENTEE: Yeah, I think I would.

6 VOIR DIRE EXAMINATION

7 BY MR. MCENTEE:

8 Q. Ms. Simmons, you didn't just look at the tape in  
9 preparing this summary; isn't that right?

10 A. No.

11 Q. You also looked at some document your mother had  
12 prepared, correct?

13 A. Yes.

14 Q. So if you were to try to summarize what's on that  
15 tape, you'd be including in your summary information that  
16 your mother gave you; isn't that right?

17 A. Yes and no. Because the tape shows every time his  
18 vehicle came on to the property and when it left.

19 Q. Right. But you used -- it shows his vehicle every  
20 time the tape turned on, right?

21 A. No. The tape does not turn off, and you can tell  
22 by looking at the date, the time stamp.

23 Q. What I'm saying is, what you have is a tape of what  
24 the camera recorded when the motion detector worked and the  
25 camera turned on, right? Isn't that right?

26 A. Well, it's not a motion detector. The camera has a  
27 detector on it, so it doesn't stop. I don't know what you're  
28 asking.

1 Q. I'm asking this: I'm trying to get you to agree to  
2 the proposition that all that is on that tape is what's there  
3 due to the camera functioning properly; isn't that right?

4 A. Yes.

5 Q. So if the camera didn't function properly at times,  
6 it wouldn't pick up Mr. Schultz's presence, correct?

7 MR. MAUTNER: Objection. Calls for speculation.

8 THE COURT: Overruled. You can answer.

9 BY MR. MCENTEE:

10 Q. That's right, isn't it?

11 A. No. Because it's picked up a lot -- there's houses  
12 next door and people coming out. It picked up those things  
13 too. I mean, it's obvious if you look at it.

14 Q. Okay. What I'm saying is, there may have been  
15 times when the system didn't work properly --

16 A. No.

17 Q. -- and Mr. Schultz actually was there that the  
18 camera didn't record his presence; isn't that right?

19 A. No.

20 Q. You don't know if that's true or not, do you?

21 A. I believe it isn't true. I know that the camera  
22 works because there's other things that it did was picked up  
23 on the tape, not just his truck.

24 Q. Also, it's true, isn't it, that if Mr. Schultz  
25 happened not to park in the driveway the camera wouldn't have  
26 turned on, wouldn't have recorded his presence in the  
27 driveway on those occasions; isn't that right?

28 A. He always parked in the driveway. There was no

1 other way for him to get to where he was working.

2 Q. The fact is that when you prepared your summary you  
3 incorporated into the summary information that your mother  
4 gave you from that little book you mentioned, right?

5 A. On the summary of the times and the hours that he  
6 was there?

7 Q. Yes.

8 A. No. About other things, you know. But the times,  
9 the hours that I came up with was what's on this tape.

10 Q. What in your summary did you glean from the  
11 writings in your mother's book?

12 A. Meaning what?

13 Q. What part of your summary is based on the  
14 information from your mother's book?

15 A. Well, not the hours. Okay. The hours, those I got  
16 from the tape. The other things where she had said that  
17 she'd given a set of plans and stuff, I couldn't have gotten  
18 that off of the tape.

19 Q. So that's some of the information that's in your  
20 summary?

21 A. Yes.

22 MR. MCENTEE: I don't have anything more, Your  
23 Honor, but I'd submit that trying to untangle what is from  
24 her mother and what is from her observation of the tape that  
25 may or may not have worked properly every time Mr. Schultz  
26 came on the property is an endeavor we should not engage in.  
27 It remains hearsay. The hearsay is really, I think, lacking  
28 in a reliable foundation, and it shouldn't be admitted.

1 THE COURT: Does Exhibit 30 include information  
2 that is not on the tape?

3 MR. MAUTNER: It does. I would probably be  
4 proffering a censored version that only has the dates and  
5 times. There's other commentary in between. Yes. It's  
6 quite clear which one is which. And the other material on  
7 here has already been testified to by Mrs. Petree for the  
8 most part.

9 MR. MCENTEE: I'm going to raise a 352 objection to  
10 this. Also, it's just time consuming, confusing, and the  
11 effort that will be entailed in sorting it out isn't worth  
12 whatever probative value will come out of it.

13 THE COURT: Mr. Mautner.

14 MR. MAUTNER: I think the amount of time that the  
15 defendant was actually on the site is relevant. And this is  
16 evidence tending to demonstrate and to corroborate  
17 Mrs. Petree's testimony about how little the defendant was  
18 actually on the property and that's its relevance.

19 THE COURT: Is the amount of time he's on the  
20 property really that relevant?

21 MR. MAUTNER: It seems to me circumstantial  
22 evidence of the criminal intent necessary, yes. I mean, it's  
23 a piece in a much bigger pie, but that's what it's being  
24 proffered for.

25 THE COURT: And if the Court were to look at  
26 Exhibit 30, does it indicate the dates which Ms. Simmons  
27 noted the defendant was present at the property?

28 MR. MAUTNER: Yes.

1 THE COURT: In addition, it also has notations that  
2 perhaps she picked up from her mother's book.

3 MR. MAUTNER: Correct.

4 THE COURT: So it would be easy for the Court to  
5 just make the distinction, ignore what came from the mother's  
6 book versus her observations from the tape.

7 MR. MAUTNER: Right. The observations from the  
8 tape are nothing more than date and time stamps, and the  
9 narrative comments are from the other source.

10 THE COURT: I am going to overrule the objection  
11 and allow Ms. Simmons to testify pursuant to the exception in  
12 1523(d). It appears to me that a proper foundation has been  
13 laid. There's no suggestion that the camera wasn't operating  
14 properly. I suppose it's possible that it wasn't. If the  
15 defendant testifies, he can clarify that. If he doesn't, I  
16 still think that a proper foundation has been laid. And I  
17 will consider the -- instead of requiring the DA to redact  
18 Exhibit 30, I'll just indicate for the record that I will  
19 disregard any notations that obviously came from the mother's  
20 notebook, and I'll only review it for the times reflected on  
21 there that Mr. Schultz was shown on the video to have been on  
22 the property.

23 In terms of the 352 motion, I do believe it is  
24 relevant to motive and intent and it's not prejudicial,  
25 unduly prejudicial to Mr. Schultz. And if we can just deal  
26 with it in this fashion with a summary, it won't take up an  
27 undue amount of time.

28 So you may continue, Mr. Mautner.

1 BY MR. MAUTNER:

2 Q. Does People's Exhibit 30 contain all of the  
3 notations -- notations of all the observations you made of  
4 the defendant's comings and goings between January 17th and  
5 March 11th, 2006?

6 A. Yes, it does.

7 Q. Okay. And did you include in Exhibit 30 the times  
8 he arrived and the times he left?

9 A. Yes.

10 Q. And did you do anything else in terms of analysis  
11 in that summary?

12 A. I don't understand.

13 Q. Okay. That's all that Exhibit 30 contains,  
14 correct?

15 A. Yes.

16 Q. Times of arrival and times of departure, correct?

17 A. Yes.

18 MR. MAUTNER: I think I can -- I think what I want  
19 to do is proffer People's Exhibit 30 at this time rather than  
20 going through each line with the witness. That would seem to  
21 defeat the purpose of admitting the summary.

22 MR. MCENTEE: That's fine. I can take a look at  
23 it.

24 THE COURT: Exhibit 30 then will be received.

25 MR. MCENTEE: All right.

26 MR. MAUTNER: I have no further questions.

27 (People's Exhibit No. 30 was received  
28 into evidence.)