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MR. VANCE: Have you made a ruling on the motion? You have denied it?

THE COURT: Motion is denied.

MR. VANCE: You never said the word denied. So I just wanted to make sure.

THE COURT: Do you have something else?

MR. FEAZELL: I want to get my witness in so it does not appear that he is a prisoner because he is coming through that door. Since he is not a prisoner, he just came in the back door.

THE COURT: All right, Mr. Pack, come over here and raise your right hand, please.

(Whereupon the witness was sworn.)

PUNISHMENT PHASE

STATE'S DIRECT EVIDENCE

D A R V I N P A C K, called as a witness on behalf of the State, having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. FEAZELL:

Q Will you state your name for the record, please, sir?

A Darwin Pack.

1 Q And spell your last name for the Court Reporter.
2 A P-a-c-k.
3 Q And Mr. Pack, I need for you to speak up loud
4 enough so that every single person on this jury
5 can hear your testimony, all right?
6 A Okay.
7 Q And Mr. Pack, I believe, you were sworn in a
8 couple of minutes ago?
9 A Yes, sir.
10 Q Where do you live right now? What town do you live
11 in right now?
12 A Waco.
13 Q Waco. How do you live with?
14 A My grandmother.
15 Q How old are you, Mr. Pack?
16 A Twenty-one.
17 Q Where were you living during 1982?
18 A With my grandmother.
19 Q In Waco?
20 A Yes, sir.
21 Q Specifically, where were you living during August
22 and September of 1982?
23 A With my grandmother.
24 Q Mr. Pack, during 1982, did you have an occasion
25 to meet a man by the name of David Wayne Spence?

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1 A Yes, sir.

2 Q When was it, if you recall, that you met David

3 Wayne Spence?

4 A September the 5th.

5 Q How is it that you remember it was September the

6 5th?

7 A It was two days after my birthday.

8 Q How old were you on that birthday, Mr. Pack?

9 A Eighteen.

10 Q Tell the jury how it was that you came to meet

11 David Wayne Spence right after your 18th birthday.

12 A Me and some friends of mine were riding around,

13 and we run out of gas, and this guy that was with

14 us knew David, and he called him over.

15 Q All right. Now, speak up so the jury can hear.

16 Who were the friends that were riding around with

17 you?

18 A Kenneth Harper and Jim Contella and Tammy.

19 Q What time of the night was it that you ran out of

20 gas?

21 A Around 12:00 o'clock.

22 Q Do you remember the neighborhood that you were

23 in when you ran out of gas?

24 A It was around 18th and McFerrin, somewhere around

25 there.

1 Q So that would be in North Waco?

2 A Yes, sir.

3 Q What happened when you ran out of gas?

4 A David and Gilbert drove by, and Jim saw them, and
5 he said he knew the people in the car, and he called
6 them over.

7 Q Mr. Pack, the people on the jury are having a
8 hard time understanding you. I need for you to
9 speak up so that they can hear you and enunciate
10 your words. Your words are kind of running
11 together, all right?

12 Q Now, what happened when you ran out of gas?

13 A Jim Contella flagged them down -- flagged David
14 and them down.

15 Q Who was with David?

16 A David, Gilbert and Robert Coleman.

17 Q Who is Gilbert?

18 A Gilbert Melendez.

19 Q At that time, did you know either David Spence or
20 Gilbert Melendez?

21 A No, sir.

22 Q Did you know Robert Coleman?

23 A Yes, sir.

24 Q Now, was Robert in the car with them?

25 A Yes, sir.

20 5

1 Q What happened when they were flagged down?

2 A They come back -- they come over there to us

3 and gave us a ride to my grandmother's house.

4 Q What car were they in? Do you recall what the

5 car looked like?

6 A It was a station wagon.

7 Q Do you recall who was driving the car?

8 A David.

9 Q By David, do you mean David Spence?

10 A David Spence.

11 Q What happened to your car? Did you leave it

12 there or what?

13 A Yes, we left it there because it run out of gas.

14 Q Okay, so then what did you do?

15 A We went over to my grandma's house, and they gave

16 me a ride over there.

17 Q Please, speak up for the jury. Look at them when

18 you talk. They need to hear your testimony.

19 Was your grandmother at home?

20 A No, she was in Bastrop with my parents.

21 Q Was she -- were you expecting her back that night?

22 A No, sir.

23 Q What happened when you got to your grandmother's

24 house?

25 A We went in, me and -- me and Kenneth and Jim went

1 in and Tammy. All of us went in the house, and
2 then David and Gilbert and Robert followed us in.

3 Q Okay, so first, the people you were with went in?

4 A Yes.

5 Q Did you invite David and Gilbert into the house?

6 A No.

7 Q What happened then when they got into the house?

8 What happened next?

9 A Well, they came in and went to the kitchen table
10 and sat down.

11 I went in and turned the radio on.

12 Q All right, now, please, you are speaking in a
13 monotone and running your words together. Speak
14 up so the jury can hear you. What happened?

15 A Okay, they went in, and they sat down at the kitchen
16 table. I went in and cut the radio on, and they
17 had some beer, and they were drinking beer.

18 Q Okay, then what happened?

19 A David -- I mean, Robert and Jim got into an
20 argument about motorcycles.

21 Q Now, do you remember how old Jim was?

22 A About 15.

23 Q Was he a big boy or a little boy?

24 A No, he is little.

25 Q How about Robert? How old was Robert?

1 A He was the same age I am.

2 Q Okay, what happened when Jim and Robert got into
3 this argument over motorcycles?

4 A I asked them to quiet down, you know, to see if I
5 could get them to leave.

6 Then they kept on arguing a little more, and
7 then Robert went outside, and I followed him outside,
8 and I -- you know, trying to talk him into getting
9 everybody to leave so I could go to bed.

10 Q Okay, are you all able to understand? All right,
11 now, when you followed Robert outside, was there
12 any problems going on right then?

13 A None other than just arguing about motorcycles.

14 Q Well, what did you talk to Robert about when you
15 got outside?

16 A I asked him, you know, if he could get David and
17 all of them to leave, you know, so I could get
18 ready to go to bed.

19 Q All right. Now, Robert, that is Robert Coleman?

20 A Yes, sir.

21 Q And is he the one that was in the car with David
22 and Gilbert?

23 A Yes, sir.

24 Q Okay, what happened about your asked Robert if he
25 could get them to leave?

1 A Jim come outside, and he started arguing some more
2 with Robert about, you know, motorcycles, and I
3 just told Jim, I said, "Why don't you go get your
4 girlfriend and you can go with them?"
5 Q Then what happened?
6 A Then Jim, he just turned on me and started wanting
7 to fight me.
8 Q Had Jim been drinking?
9 A Yes, he had a little bit.
10 Q All right, what happened then?
11 A I asked him to go ahead and get his girlfriend and
12 everything, you know, just leave.
13 Q Okay, so what happened? Did he leave?
14 A No, he started wanting to fight, and I told him I
15 didn't want to fight him.
16 Q Are you a scrapper and a fighter, Darwin?
17 A No.
18 Q Was Jim a good bit littler than you?
19 A A whole lot littler.
20 Q And you didn't want to do that?
21 A No.
22 Q So what happened then?
23 A Well, Gilbert and David, they just started slapping
24 me around and egging it on.
25 Q Now, wait a minute. Were Gilbert and David outside

1 or inside?

2 A David and Gilbert come out after they argued -- Jim

3 was trying to fight with me.

4 Q Where were you all outside?

5 A Out in the front yard.

6 Q What happened when David and Gilbert got outside?

7 A Well, they saw what was going on, and I said that

8 I didn't want to fight Jim, and then they just kept

9 on egging it on.

10 Q How were they egging it on?

11 A They started hitting me around and slapping me

12 around and stuff, just, you know, egging it on.

13 "If you don't hit him, we are going to fight you"

14 and all this stuff.

15 Q Did they hit you any out there?

16 A Yes.

17 Q How were they hitting you?

18 A Slapping me and pushing me around.

19 Q Did David do any of that?

20 A Yes, sir.

21 Q How much of it was David doing?

22 A It was about the same.

23 Q All right, was that one hit, five hits, 10 hits?

24 What do you think?

25 A Four or five.

1 Q Okay, what happened then?

2 A Well, I grabbed Jim and you know, just grabbed him

3 from behind and just held him there, and then he

4 pulled out this knife.

5 Q Jim pulled out a knife?

6 A Yes.

7 Q Let me ask you to tell the jury -- you said they

8 were slapping you. In particular, David, where on

9 your body was he slapping you?

10 A In the face and body, just wherever he could hit me.

11 Q You were hit in the face, though?

12 A Yes.

13 Q What happened after Jim pulled out the knife?

14 A David, you know, took the knife -- or asked Jim

15 to give him the knife and so Jim gave him the

16 knife, and then Jim was still wanting to fight.

17 So I kicked him, and I went in the house.

18 Q Okay, then what happened?

19 A Then they kept on. They were arguing a little bit

20 more, and they was messing --

21 Q They who?

22 A David and Gilbert.

23 Q Were arguing with who?

24 A Well, they were arguing with me and Kenneth.

25 Q Kenneth was outside then?

1 A Yes.

2 Q And that is the Kenneth you have already told us
3 about that was there with you?

4 A Yes.

5 Q Okay, what happened?

6 A And then I went on in the house to talk to Jim
7 because he went back over there with his girlfriend,
8 and I was going to get him to get his girlfriend
9 and leave.

10 Q Why did you want them to leave, Darwin?

11 A I was ready to go to bed, and they was getting too
12 rowdy.

13 Q So what happened then?

14 A Well, then David and Gilbert come in.

15 Q They came back inside the house?

16 A They came back in the house.

17 Q Okay, go ahead.

18 A Well, they come back in the house, and I was in
19 there talking to Jim, you know, and told them, I
20 said, "Why don't you all leave?"

21 Q Wait a minute. Slow down because I am having a
22 little trouble understanding you. What happened?

23 A Okay, they come back in the house, and you know, I
24 was talking to Jim in the back room, and I told him,
25 I said, "You all just go ahead and leave" and then

1 Gilbert hit me in the stomach four or five times
2 and put me up on the bed.
3 Q What do you mean, put you up on the bed?
4 A Threw me up on the bed and then jumped on top of
5 me and started choking me and slapping me.
6 Q Did you see what Jim was doing during this time?
7 A No, I didn't.
8 Q Okay, what happened next?
9 A They were slapping me and choking me and stuff, and
10 then he got up, and David told me to take my pants
11 off.
12 Q All right. Okay, now, what happened?
13 A Before he told me to take my pants off, David got
14 the knife from Jim and laid up on the bed and put
15 the knife to my throat.
16 Q Okay. Now, who are you talking about?
17 A David.
18 Q Spence?
19 A David Spence.
20 Q What happened when Mr. Spence put the knife to your
21 throat?
22 A He put the knife to my throat, and he told me, he
23 said, "I'm going to cut your Adam's apple out and
24 eat it."
25 Q How did that make you feel?

1 A Scared.

2 Q What were you scared about, Darwin?

3 A I thought he was going to do it.

4 Q Okay, what happened after Mr. Spence put the knife

5 to your throat?

6 A Well, he got up, and then he told me to get at the

7 edge of the bed and take off my clothes -- my pants.

8 Q Your pants?

9 A (Nodded.)

10 Q Okay.

11 A And then --

12 Q Did Gilbert also tell you to take off your pants?

13 A Gilbert told me to take off my underwear.

14 Q All right, what happened after David told you to

15 take off your pants?

16 A He just started slapping me around, again, and

17 threw me back up on the bed.

18 Q Was he slapping you pretty hard?

19 A Yes.

20 Q Okay, then what happened?

21 A Then they told me to get to the edge of the bed

22 and spread my butt.

23 Q Now, wait a minute. I had asked you about what

24 happened after they told you to take off your

25 pants.

1 A I took them off.

2 Q Okay, and then what about your underwear?

3 A I took them off.

4 Q Who told you to do that?

5 A David and Gilbert.

6 Q All right, did you want to take it off?

7 A No.

8 Q Why did you do it?

9 A I was scared.

10 Q Were you threatened in any way?

11 A No.

12 Q No, I mean, did they say anything to make you take

13 off your underwear?

14 A (Nodded.)

15 Q All right, where was the knife?

16 A I don't know. I didn't see it.

17 Q You didn't see it, at that time? When was the

18 last time that you had seen the knife?

19 A When he put it to my throat.

20 Q All right, what happened after that, after you were

21 made to take off your underwear?

22 A He told me to lay on the side of the bed and

23 spread my butt apart.

24 Q Who told you that?

25 A Gilbert.

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1 Q Okay, what happened then?

2 A Well, then, he run his finger up my butt hole, and
3 he told me, he said, "Don't even make my dick hard."

4 Q What happened to you then, Darwin?

5 A He just pulled me back on the bed and started
6 slapping me, again.

7 Q Okay, and who was slapping you that time?

8 A Gilbert.

9 Q Then what happened?

10 A Then Gilbert pulled out his penis and came to the
11 edge of the bed.

12 Q He pulled out what?

13 A His penis.

14 Q All right.

15 A And he told me to suck it, and I told him no, and
16 then David got the -- he come up -- crawled up on
17 the bed and pulled a knife and told me, he said,
18 "If you don't suck it, I am going to cut you."

19 I started to get up, and I felt him cut me on
20 my right leg.

21 Q You started to get up off the bed?

22 A Yes, I started to get up off the bed.

23 Q And then what did you feel?

24 A He cut me on my right leg.

25 Q He, who?

7

1 A David.

2 Q Spence?

3 A Yes.

4 Q Then what happened?

5 A I just -- scared me. So I put my lips to his dick.

6 Q To Gilbert's?

7 A To Gilbert's, yes.

8 Q All right, what happened after that?

9 A I just turned back over, and then David called me

10 a punk, and I said -- you know, I said, "Yeah, I

11 am." Then Gilbert slapped me and said, "You're

12 dumb for saying that" and then David said, "You're

13 a punk." He done it about four or five times.

14 Q Was he talking loud?

15 A Yes, he was hollering.

16 Q How hard was he hitting you?

17 A Pretty hard.

18 Q Were you bleeding?

19 A Yes.

20 Q Where were you bleeding from?

21 A My leg.

22 Q Is that where he cut you?

23 A Yes.

24 Q How big a cut was it?

25 A About four inches long.

- 1 Q Was it deep?
- 2 A Pretty deep.
- 3 Q What happened after that?
- 4 A Well, David stood me up by my hair and he told me --
- 5 Q Wait a minute. Stood you up by your hair?
- 6 A Yes.
- 7 Q What do you mean by that?
- 8 A Grabbed me and stood me up, and he held me there,
- 9 and he said, "I'm going to show you how a real man
- 10 hits."
- 11 Then he hits me and knocks me up on the bed.
- 12 He said, "No, that wasn't good enough." So he stands
- 13 me back up and does it again.
- 14 Q To show you how a real man hits?
- 15 A Yeah.
- 16 Q What happened after he did that?
- 17 A He drug me into the bathroom and stuck my head in
- 18 the commode.
- 19 Q Spence did?
- 20 A Spence.
- 21 Q All the way in the commode?
- 22 A The first time, he got -- you know, he didn't get
- 23 my face in there real good, and then he grabbed --
- 24 got a good hold and shoved my face in there.
- 25 Q Were you having to hold your breath?

2 9

1 A Yes.

2 Q What happened then?

3 A Then he pulled me up and threw me on the floor,

4 and then Gilbert kneeled down beside me and

5 started choking me and slapping me again, and then

6 David kicked me in the head.

7 Q Were in the head did he kick you?

8 A On the right side.

9 Q Did he kick you hard?

10 A Yes.

11 Q What happened then?

12 A Then they picked me up, and threw me back on the

13 bed and started slapping me around and choking me

14 again.

15 Q Both David and Gilbert?

16 A Gilbert.

17 Q All right, what was David doing?

18 A I don't know.

19 Q All right, were you getting pretty dizzy by then?

20 A I didn't know what was going on, Vic.

21 Q Were you scared?

22 A Yes.

23 Q Was it all happening pretty fast?

24 A Yes.

25 Q What happened after that, Darwin?

1 A He told me, David said -- he said, "If you call
2 the cops, I'm going to kill you" and then he --
3 Q Where was your friend Kenneth when this was going
4 on?
5 A He was sitting over by the dresser.
6 Q Watching?
7 A Yes.
8 Q Why wasn't he doing anything to help?
9 A Because David threatened to kill him.
10 Q If he helped?
11 A Yes.
12 Q Was Kenneth scared?
13 A Yes.
14 Q Now, tell the jury again what Kenneth's last name
15 was.
16 A Kenneth Harper.
17 Q All right, did you ever hear David threaten Kenneth?
18 A Yes.
19 Q What did he say to him?
20 A He told him, "If you try anything, I'm going to
21 kill you."
22 Q Okay, then what happened?
23 A Well, after they slapped me around a little more,
24 Gilbert said not to call the cops, and you know,
25 David said, "If you call the cops, one of us is

- 1 going to plead guilty and the other one will be
2 back to kill you."
- 3 Q What happened then?
- 4 A They left.
- 5 Q Did you call the cops?
- 6 A Not right off.
- 7 Q How much later was it that you called the police?
- 8 A Two or three days.
- 9 Q Why did you call the police two or three days later?
- 10 A My parents talked me into it.
- 11 Q How did your parents find out about what happened?
- 12 A My grandma come home and she seen everything --
13 seen the blood, and she seen the cuts on my leg.
- 14 Q She saw the blood?
- 15 A Yeah.
- 16 Q What did she see the blood on?
- 17 A The sheets and the floor.
- 18 Q How many times in all were you cut, Darwin?
- 19 A About four times.
- 20 Q Where were you cut?
- 21 A On the leg and arm -- both legs.
- 22 Q Did you bleed a lot from your legs?
- 23 A Yes.
- 24 Q Now, Darwin, you testified that was in September
25 1982, right?

- 1 A Yes, sir.
- 2 Q And here it is, it is October 1985.
- 3 A Yes, sir.
- 4 Q A little over three years. Do you still have any
5 scars from those cuts?
- 6 A Yes, sir.
- 7 Q May I ask you, if you would, sir, just to step
8 out here in front of this witness box, and show
9 the jury. You can just kind of step out over here
10 and show the jury where those scars are.
- 11 A Here is one.
- 12 Q Can the jury see this scar, and this scar here?
13 Where is the other one, Darwin?
- 14 A (Indicating).
- 15 Q This deep one back here. You can take the stand
16 again.
- 17 You say you did finally let the police know?
- 18 A Yes, sir.
- 19 Q Were you afraid to let the police know?
- 20 A Yes.
- 21 Q How come?
- 22 A I figured they would come back and kill me.
- 23 Q Sir?
- 24 A I thought they would come back and kill me.
- 25 Q You really believed that?

3

1 A Yeah.

2 Q The person that put those cuts on your legs and

3 the one on your arm, the person that held the knife

4 to your throat, the person that made you put your

5 mouth on Gilbert Melendez' penis, do you see that

6 person in the courtroom today?

7 A Yes, sir.

8 Q Would you point him out to this jury, please?

9 A Right there.

10 MR. FEAZELL: If the record

11 could reflect, Your Honor, that Mr. Pack has

12 identified David Wayne Spence.

13 THE COURT: All right.

14 Q Darwin, are you working somewhere now?

15 A Yes, sir.

16 Q Where do you work?

17 A Schmaltz Sandwich Shop.

18 Q That's in Waco?

19 A Yes, sir.

20 Q Do you still think about this, what happened to

21 you sometimes?

22 A Every once in awhile.

23 Q Something you had rather not think about?

24 A Yes.

25 Q Do you know if Mr. Melendez was arrested on this

1 case?

2 A Yes, sir.

3 Q And do you know if he was sent to prison for
4 aggravated sexual abuse on this case?

5 A Yes, sir.

6 MR. FEAZELL: We will pass
7 the witness, Your Honor.

8 CROSS EXAMINATION

9 QUESTIONS BY MR. REAVES:

10 Q Mr. Pack, have you talked with David Spence since
11 September of 1982?

12 A No.

13 Q Have you talked with him within the last several
14 months?

15 A No.

16 Q Within the last year?

17 A No.

18 Q Okay, do you know his family?

19 A No.

20 MR. REAVES: That is all the
21 questions I have, Your Honor.

22 MR. FEAZELL: That is all we
23 have, Your Honor.

24 THE COURT: Allright.

25 MR. FEAZELL: May this witness

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be excused?

THE COURT: Any objection?

MR. VANCE: As long as he is under the rule like every other witness, that is fine, Your Honor.

THE COURT: All right.

(Witness excused.)

MR. FEAZELL: Mr. Pack, that means you have to wait out in the hall, and if you will wait, I will talk with you. Your Honor, that went a lot quicker than I had anticipated.

THE COURT: All right.

MR. FEAZELL: That is all we have got today.

THE COURT: All right, you can have other witnesses available at 9:00 in the morning, gentlemen?

MR. FEAZELL: Yes, sir, I sure can.

THE COURT: All right, and can you all -- will that give you enough time?

MR. VANCE: Yes, we will be ready.

THE COURT: All right, recess until 9:00 o'clock in the morning.

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Ladies and gentlemen, if you will step into the jury room for a minute then we will proceed with getting you all settled down.

(Whereupon the jury retired from the courtroom and the following proceedings took place out of their presence and hearing:

MR. FEAZELL: In case there is any doubt on the record, Your Honor, when the Defense invoked the rule at the beginning of the trial, the State also invoked the rule, and now, we are invoking it as far as the punishment phase as well.

MR. VANCE: We don't have any problems. We don't have any witnesses in here that are going to testify.

THE COURT: All right.

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FRIDAY, OCTOBER 18, 1985

MORNING SESSION: 9:20 a.m.

- - - - -

(Whereupon the Defendant was
(present.

(Whereupon the proceedings took
(place outside the presence and
(hearing of the jury.

THE COURT: All right, gentlemen,
before I bring the jury in, is there any matters
that need to be disposed of outside the presence of
the jury?

MR. REAVES: Yes, Your Honor,
there are. Pursuant to our Motion in Limine
previously filed, we understand there is a
reputation witness which will be testifying,
Mr. Gene Deal.

We need to take him up outside
the presence of the jury to determine whether or
not he is a proper reputation witness, and
additionally, there is a psychiatric witness,
Dr. James Jolliff, and we need to take it up outside
the presence of the jury, whether or not statements
made to him in which he formed his opinion were
made voluntarily.

MR. BUTLER: Judge, if they feel

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like they need a hearing outside the presence of the jury, we certainly do intend to offer those two witnesses that he has named.

THE COURT: All right, let's bring Mr. Deal in or whichever is available.

MR. BUTLER: Judge, at this time, also, just for clarification, Mr. J. L. Crawford is here. He is an investigator with our office, and he is here in the courtroom.

He has previously testified at the earlier stages of this trial. I just wanted the record to reflect that this is the punishment phase.

We do not anticipate having him as a witness, and I just wanted the Court to be aware that he is present in the courtroom, but he is, as I understand it, not under the rule any more.

THE COURT: Any objection, gentlemen?

MR. VANCE: As long as he is not going to be called.

THE COURT: Well, they have so stated so --

MR. VANCE: We have no problems.