

8 Q. And were you aware of the type of clothing that  
9 Nancy would wear when she would run with you?

10 A. We would -- it's typically very hot here when we  
11 would run in the summers. So it was shorts, a shirt, and a  
12 bra.

13 Q. And when you say a bra, was it a particular type of  
14 bra that she'd wear, you'd wear?

15 A. Well, she typically wore a sports bra because she  
16 had larger breasts, and we would always comment about that.  
17 But yes, sports bras.

18 Q. And do you wear that similar type of clothing as  
19 well, that is, sports bras, yourself?

20 A. Yes.

21 Q. And how often would you say do you wear one when  
22 you run?

23 A. Every day when I run.

24 Q. So three times a week when you run, you always wear  
25 a sports bra?

1           A.    Yes.

2           Q.    And could you describe for us, if you would, Dr.  
3 Hackeling, what -- in putting on a sports bra, can you  
4 describe for us what happens when you put one of those items  
5 on your body to ready yourself to run?

6           MR. TRENKLE: Your Honor, I'm going to object to  
7 this line of questioning and request to be heard.

8           THE COURT: Well, it's time for a morning break  
9 anyway, so what we'll do is stay and work on this matter.

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1           of the jury have left the courtroom. Do you want to state  
2 your objection for the record?

3           MR. TRENKLE: I do, Your Honor. I believe what  
4 they're going to attempt to do is ask this witness to give  
5 her opinion of what the position of the sports bra on Nancy  
6 Cooper's body represents. That it -- That it's her opinion  
7 that is was somebody trained who pulled the sports bra on the  
8 body, not whatever.

9           And I think that's totally -- She's not an expert.  
10 I don't think that's an area for an expert in any event.  
11 It's not lay -- proper layperson opinion. A layperson can  
12 say something like, "She looked drunk. She acted upset."  
13 But to give an opinion as, I think this article of clothing  
14 looks like it was being dragged off, or put on, or whatever

15 | is totally out of the line of a proper layperson thing. And  
16 | even if there is some relevance, it's extremely outweighed by  
17 | an unfair prejudice, particularly since they made a point of  
18 | representing her as a physician.

19 |           THE COURT: Where are you going with this line?

20 |           MS. FITZHUGH: Judge, my intention is to ask her  
21 | about when you put on a sports bra, what happens when you put  
22 | on a sports bra? And she can describe, because she's a  
23 | runner, what happens when you put one of those things on.  
24 | We've asked her to look at Nancy's body at Fielding Drive,  
25 | the condition of the body previously. Because she is a

1 | doctor she was willing to do that, even though she was  
2 | Nancy's friend, to look at it, and look at the sports bra.  
3 | And I can ask her some questions with regard to that so you  
4 | can gauge.

5 |           The questions with regard to that, basically, that  
6 | it looks consistent with what she's described for us with  
7 | regard to -- well, how can you put one of those things on?  
8 | She's certainly not going to say she thinks the Defendant did  
9 | that or anything of that nature. I would point to 8(c)701  
10 | and the testimony by lay witness that would be where I would  
11 | ask you to allow her testimony. I can run through the  
12 | questions with her --

13 THE COURT: Go ahead and go through the questions so  
14 I'll know what it is that you're trying to get in. I need to  
15 hear it.

16 THE WITNESS: Do -- do I answer?

17 THE COURT: Just -- You can answer the questions  
18 she's going to ask you now. Don't say anything until she  
19 asks you a question.

20 VOIR DIRE EXAMINATION

21 BY MS. FITZHUGH:

22 Q. Dr. Hackeling, could you tell us if you would that  
23 the question that I asked you right before the break was --  
24 If you could describe for us what happens when you put a  
25 sports bra on, when you try to put that -- put a sports bra

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1 on. Could you describe for us what happens?

2 A. Sure. The sports bras are pretty tight and  
3 designed that way. So when you put them on, they're  
4 difficult to get on, and you can pull them on. Often times  
5 they will get crumpled up in the back because as you're  
6 pulling them down, it's kind of an awkward position that  
7 you're in to pull them down. And then, most people unpull  
8 [sic] them to make the bra correct. They're tight-fitting is  
9 the thing, so they are difficult to get on.

10 Q. And then with regard to what happens in the back,  
11 as you're trying to do that of putting it on ---

12 A. Right.

13 Q. -- how does it manifest itself in the back?

14 A. It often tumbles under as you get to here, but then  
15 all of us pull it out because it's very uncomfortable to  
16 leave it all tangled up.

17 Q. And then you wouldn't run like that? Would you ---

18 A. Oh, no. It would be way too uncomfortable.

19 Q. -- untangle it from the back? Is that correct?

20 A. Correct.

21 Q. Okay. And previously you've had a chance to look  
22 at a picture of Nancy's body from Fielding Drive and had a  
23 chance to view that prior to today. Is that right?

24 A. That's correct.

25 MS. FITZHUGH: And Judge, what I would do is ask her

1 | to look at that photograph. If I may approach, Judge, to  
2 | show --

3 | THE COURT: You may.

4 | Q. Looking at that photograph, can you tell us, if you  
5 | would, in viewing that photograph, does that picture of Nancy  
6 | with the sports bra that she has on there, does that -- is  
7 | that consistent with what you described for us as to what  
8 | happens when you put a sports bra on if you have not pulled  
9 | it completely down after putting it on?

10 | A. Correct. It gets tangled up. But then if you were  
11 | running in this, you would pull it down, because it's very  
12 | uncomfortable when it's tight like that.

13 | Q. Okay. I'm getting questions to clear up the fact  
14 | that -- is that putting it on or taking it off?

15 | A. Putting it on.

16 | Q. Okay. That's all.

17 | THE COURT: Do you want to ask her any questions at  
18 | this point?

19 | MR. TRENKLE: No.

20 | THE COURT: Do either of you wish to be heard any  
21 | further on your objection?

22 | MR. TRENKLE: I do. It's not proper lay testimony.  
23 | Says 8(c)701, it's -- rationally based perception of a  
24 | witness is helpful for a clear understanding of the testimony  
25 | in determination of fact at issue. This is not helpful for a

1 clear understanding. How she puts on a sports bra is not  
2 relevant to whether this -- anything about the sports bra  
3 that's on the body. What they're attempting to do is  
4 basically argue somebody was trying to put the sports bra on  
5 the body. It's not helpful to the jury, and it's not  
6 something that she's qualified to say one way or the other.

7 I'm sure there's different women who put sports  
8 bras on different ways, but it has -- to allow it in is  
9 extremely prejudicial. And it has -- if there is any  
10 relevance, it's extremely limited. And in fact, they already  
11 had their lab person testify that she was asked to testify on  
12 the bra because it was something that was used to drag. But  
13 that was an expert. That's someone who looks at stuff.

14 MS. FITZHUGH: Judge, I'm looking at a --

15 THE COURT: She was a DNA expert, right?

16 MS. FITZHUGH: Yeah.

17 THE COURT: Is that what we're talking about?

18 MS. FITZHUGH: Exactly. Judge, I'm looking at *State*  
19 *vs. Davis*, 321 North Carolina 52. It talks about the witness  
20 in testifying: If they're not testifying as an expert,  
21 testimony in the form of opinions or inferences is limited to  
22 those opinions or inferences which are rationally based on  
23 the perception of the witness and helpful to a clear  
24 understanding of his testimony, or her testimony, or the  
25 determination of a fact in issue. And I would argue to you

1 that that's exactly what she's -- she's testifying to the --  
2 The SBI was testing parts of the bra that were touched, that  
3 the State believed --

4 THE COURT: For epithelials, if I remember right.

5 MS. FITZHUGH: Exactly, exactly. This is something,  
6 of course, completely different. I'm not offering her as an  
7 expert in sports bra wear or as a -- I'm offering her, Judge,  
8 because she has occasion to put these on. It's a fact in  
9 issue whether she's jogging or not. And I would argue to you  
10 that it's completely proper. She's been a runner for many,  
11 many years herself, and she's testified and laid that  
12 foundation. She's put one of these on, sounds like, at least  
13 three times a week, if not more, for those many, many years,  
14 and so she can certainly tell us about that. And in looking  
15 at this picture and looking at that, it looks consistent with

16 what she's seen happen to her sports bras in the past. I  
17 would argue for that limited purpose that we be allowed to  
18 ask those questions.

19 MR. TRENKLE: She's a doctor looking at pictures of  
20 a body, giving her opinion on how this sports bra is. That's  
21 what she is. That's what it's offered for. That's exactly  
22 why they've asked this woman to give this testimony.

23 THE COURT: In my discretion, I am going to allow  
24 it, based upon the proffer, that this testimony is rationally  
25 based on the perception of this witness, and it is helpful to



1 a clear understanding and determination of a fact in issue.  
2 I am also going to note that I've consulted and considered  
3 Rule 403, and that the probative value of this evidence  
4 outweighs the danger of unfair prejudice and confusion, and  
5 whether it would mislead the jury. The objection is noted  
6 for the record.

7 MR. TRENKLE: I would include that this is also a  
8 violation of my client's Fifth, Sixth, and Fourteenth  
9 Amendment rights. It's also a violation of the North  
10 Carolina Constitution. It's also a violation of the ethics  
11 code.

12 THE COURT: All right. The objections are all noted  
13 for the record, and we'll be recessed 'til 11:20 a.m.

18 THE COURT: Let the record reflect that all counsel  
19 are present, the Defendant is present, and all members of the  
20 jury are in the jury room. Anything from the State or the  
21 Defense before we bring in the jury?

22 MS. FITZHUGH: No, Your Honor.

23 THE COURT: Anything from the Defense?

24 MR. TRENKLE: No.

25 THE COURT: And just to be -- so I can be clear, do

1 you intend to ask this witness any opinion question other  
2 than --

3 MS. FITZHUGH: Just what I asked, that if it was  
4 consistent with what she's described to us -- regarding  
5 putting on a jog bra ---

6 THE COURT: But not -- not that it looks like  
7 somebody else dressed her or anything of that nature?

8 MS. FITZHUGH: No. No, I would not do anything like  
9 that, Judge.

10 THE COURT: Okay.

11 MS. FITZHUGH: And since they're out, Judge, I'll  
12 ask you this now. My intention would be to show, of course,  
13 that picture to her and have her give that testimony. But  
14 also I would ask to publish this picture to the jury

15 individually, with some instructions from you about those  
16 jurors -- it would be for illustrative purposes of her  
17 testimony, that -- some instruction from you with regard to  
18 those jurors who don't wish look at the picture, being able  
19 to pass it along, so that they don't ---

20 THE COURT: They have already seen this picture, if  
21 I am not mistaken?

22 MS. FITZHUGH: That's my understanding. They have  
23 not seen this picture, 143.

24 MR. ZELLINGER: Your Honor, It's my recollection  
25 that State's Exhibit 1, 2, and 3 were shown to them. But

1 that's in a collection of pictures that were introduced with  
2 Agent Hill from CCBI and they're ones that Dr. Watson looked  
3 at, but I don't believe that they've ever been shown to the  
4 jury at this point.

5 MR. TRENKLE: Well, I don't know whether those  
6 pictures, but they've seen pictures of the body that show the  
7 bra. Now pictures -- If it's the CCBI pictures, you allowed  
8 them into evidence over objection with the understanding that  
9 they were the basis of opinions of the entomologist, not as  
10 far as them -- additional pictures being published to the  
11 jury.

12 THE COURT: I'm inclined to not allow you to publish  
13 the picture to the jury at this time. They have seen  
14 pictures of the body with the bra on, on the back, that back  
15 picture. If I'm not mistaken, they have seen that. I --

16 MS. FITZHUGH: May I approach the Clerk?

17 THE COURT: Yes.

18 MS. FITZHUGH: Okay, Judge, what I'm asking you now  
19 about is Picture Number 2, which I understand has not been  
20 published to the jury.

21 MR. CUMMINGS: Two has.

22 THE COURT: Two has. According to the Clerk and my  
23 records ---

24 MS. FITZHUGH: Two has been published to the jury.

25 MR. CUMMINGS: Two and three.

1 THE COURT: Two, three, and seven.

2 MS. FITZHUGH: Judge, what I'm arguing to do is,  
3 obviously, in the testimony about this -- the Dr. Hackeling  
4 is giving us about what -- putting on the sports bra, of  
5 course, has not been before them previously. In addition,  
6 that the pictures that were shown to the jury were to  
7 illustrate the testimony of the other witness. Of course,  
8 they didn't talk about the condition of the bra at that  
9 point. They have not looked at them themselves in their  
10 hands, and certainly won't with this testimony. I just feel  
11 it's illustrative of what she's telling us with regard to the  
12 bra, sports bra today. So I would ask to -- to be able to  
13 show that to them individually, with the understanding that  
14 they may pass it along if they do not wish to look.

15 THE COURT: Do you want to be heard?

16 MR. TRENKLE: Well, I just -- (A) they've already  
17 seen this, (B) this is exactly the kind of concern I had  
18 that's enhancing this quote, unquote "lay testimony" which is  
19 totally inappropriate. And to allow them to pass it around  
20 only enhances that -- here's a doctor showing pictures of a  
21 body. And there's already jurors that have expressed  
22 discomfort at seeing the pictures anyway. I don't see how  
23 that enhances anything, other than the shock value of seeing  
24 this body.

25 THE COURT: In my discretion, I'm going to allow you

1 to use State's Exhibit Number 2 to have this witness testify  
2 from her observations on that and not publish it to the jury  
3 again. It has previously been published to the jury. The  
4 portion, or the bra that you're talking about, is prominence  
5 -- prominent in the photograph, and I don't want to be  
6 repetitive and offend sensibilities of the jurors or inflame  
7 their passions. So you can use that photograph with her, but  
8 I'm not going to, in my discretion, allow it to be published  
9 again to the jury. It's previously been published to them.  
10 Okay, bring in the jury.

11 (The jury entered the courtroom.)

12 THE COURT: All right. Welcome back. I see all  
13 members of the jury are present. You may proceed.

14 MS. FITZHUGH: Thank you, Your Honor.

15 CONTINUED DIRECT EXAMINATION

16 BY MS. FITZHUGH:

17 Q. When we left off, I was asking you about your  
18 experience as a runner and your experience in wearing sports  
19 bras or jog bras. And if you could tell us -- Describe for  
20 us, if you would, when you are putting one of those things  
21 on, describe for us what happens with a sports bra or jog  
22 bra?

23 MR. TRENKLE: Objection, pursuant to previous  
24 grounds.

25 THE COURT: Overruled.

1           A.    The jog bras typically are tight, so they are  
2 difficult to get on.  When you pull the jog bra on, often at  
3 about here, it will roll up, and then you have to pull it  
4 down to get the jog bra fully on.

5           Q.    And you don't leave the jog bra rolled up that way  
6 to run, do you?

7           A.    It's so uncomfortable, I can't imagine you could do  
8 that.  Everyone will -- I personally will pull it down  
9 immediately.

10          Q.    Okay.  And which direction does it roll?  Does it  
11 roll under towards the body or roll outwards away from the  
12 body.

13                   MR. TRENKLE: Objection.

14                   THE COURT: Overruled.

15          A.    When you're putting it on, it typically crinkles  
16 under, and then you have to pull it out.

17          Q.    Have you had a chance, previous to your testimony,  
18 to view a picture of Nancy's body as it was found on Fielding  
19 Drive on July the 14th of 2008?

20          A.    Yes.

21                   MR. TRENKLE: Objection.

22                   THE COURT: Overruled.

23                   MS. FITZHUGH: And if I may approach, Your Honor.

24                   THE COURT: You may.

25                   BY MS. FITZHUGH:

1 Q. I'm going to hand you what's been previously marked  
2 and admitted as State's Exhibit Number 143. And is that the  
3 photograph that you've been shown previously?

4 A. Yes.

5 Q. And with regard to that photograph, could you tell  
6 us what you see Nancy wearing in that photograph?

7 A. It's a jog bra.

8 Q. Okay. And does it look consistent with what you  
9 described to us with regard to what happens when a jog bra or  
10 sports bra is put on?

11 MR. TRENKLE: Objection.

12 THE COURT: Overruled.

13 A. Yes, when you put the jog bra on, it will roll up  
14 and tuck under like that, and then usually you pull it down  
15 to straighten it out.

16 Q. And does that picture look consistent with that?

17 A. No, it's all crinkled up -- caught in the roll-up  
18 position, usually what happens about here, when you're  
19 putting it on.

20 MR. TRENKLE: Objection.

21 THE COURT: Overruled.

22 Q. So it's consistent with that crinkling and rolling  
23 under --

24 A. Right.

25 Q. -- not consistent with pull -- it be pulled --

1 MR. TRENKLE: Objection.

2 THE COURT: Overruled.

3 MR. TRENKLE: Objection to the leading.

4 A. It hasn't been pulled all the way down.

5 THE COURT: Sustained to the form of the question.

6 Q. Okay. Has it been pulled -- does it look to be  
7 pulled down in that picture?

8 MR. TRENKLE: Objection, that goes beyond ---

9 A. In the picture it has not been pulled down.

10 THE COURT: Wait. That goes beyond the realm of the  
11 illustrative. Overruled, go ahead -- I mean, sustained.

12 Q. Does the -- I just want to make sure that I  
13 understand. So I just want to make sure I understand what  
14 you were saying with regard to the -- your testimony about a



13 understand. So I just want to make sure I understand what  
14 you were saying with regard to the -- your testimony about a  
15 sports bra being put on. Does that picture look consistent  
16 with what you described with regard to it being rolled under?

17 MR. TRENKLE: Objection. Asked and answered and  
18 also pursuant to previous grounds.

19 MS. FITZHUGH: Judge, I believe that --

20 THE COURT: Overruled.

21 A. Can you repeat the question again?

22 Q. Sure. Does it look consistent? Does that  
23 photograph look consistent with your testimony about what a  
24 jog bra does or a sports bra does when it's put on -- that  
25 being -- rolled under and crinkled in the back?

1 A. Yes, it's rolled under and crinkled in the back.  
2 It's not pulled down.

3 MS. FITZHUGH: Thank you. Thank you, Your Honor.  
4 And thank you, Dr. Hackeling. I don't have any further  
5 questions at this time.

6 THE COURT: Cross.

7 MR. TRENKLE: Thank you, Your Honor.