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CASE # 626

COURT OF GENERAL SESSIONS OF THE PEACE

CITY AND COUNTY OF NEW YORK

PART I.

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

vs. :

FRANK W. WALSH, Impleaded with
FRANK KELLY.
-----K

: Before
: HON. THOMAS C. T. CRAIN, J.
: and a Jury.

New York, February 7, etc., 1907.

Indicted for Robbery in the First Degree; Grand Larceny in
the First Degree; Assault in the Second Degree and Re-
ceiving.

Indictment filed January 18th, 1907.

A P P E A R A N C E S.

For the People

ASSISTANT DISTRICT ATTORNEY WILLIAM S. McGUIRE.

For the Defendant

LAWRENCE COHEN, ESQ.

James E. Lynch,

Official Stenographer.

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A jury was duly impaneled and sworn.

FRANCIS B. FOSTER, being called and duly sworn as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. McGUIRE:

Q What is your business? A Barber.

Q Whereabouts? A 448 Eleventh Avenue.

Q On the 9th of January, 1907, did you see this defendant? A I saw him in my room, yes, sir.

Q Where is your room? A In the rear of the shop.

Q Had you known him before that? A As a customer, yes, sir.

Q Had you seen him before on that night? A I saw him before on that night at about 11 o'clock in the evening.

Q Whereabouts? A Lynch's saloon, on the corner of Eleventh Avenue and 37th Street.

Q Was anything said or done there between you and him?

A Nothing more than -- we had a friendly drink together.

Q And then what happened? A In that saloon I saw a woman there, in the private entrance there; she appeared to be in an intoxicated condition, and I asked Mr. Walsh to have a drink, and Mr. Kelly to have a drink, trying to make trade there, I being a new person around there.

THE COURT: Strike that out.

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Q Go on. A However, this woman asked if she could have a drink with me. I asked Mr. Walsh if she was with him, and he says no, but he knew her. So I says, "Yes," she might have a drink. After they had had a drink, I left, and this woman followed me out, and asked me to loan her \$2.

THE COURT: Strike that out, unless it was said in the presence of the defendant.

Q Now, when did you see Walsh next? A At 2 o'clock in the morning, there was a rap came at the door, and I was called by my first name. I opened the door, supposing it to be somebody --

THE COURT: Strike out what the witness supposed.

Q Just say what you saw? A I opened the door, when I was taken by the throat and choked into insensibility.

MR. COHEN: I ask that that be stricken out.

THE COURT: That he was choked until he became insensible? I do not see why that should not stand. I do not think that he can testify that the insensibility was produced by the choking, but I think he can testify that he became insensible.

With that qualification I allow it.

Q Go on. A I was then taken up, and taken to the washstand, and the blood washed off my face. I had evidently been

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assaulted --

THE COURT: Strike out that he had evidently been.

THE WITNESS: (Continuing) Well, I had been assaulted, because I was bleeding from the nose, and my face was swollen and discolored.

Q Who took you to the wash-stand? A This lady that was in the room at the time.

Q Did you see anybody else there at the time?

A While I was being washed off I saw Mr. Walsh leaving the room at the time.

Q Did you see anybody else there? A Nobody else.

Q Then, what happened? A I went to bed. This woman told me she was going to the police station to report it.

THE COURT: Strike that out.

THE WITNESS: (Continuing) Very soon after that, I don't know at what time it was, a police officer came in to see whether I had been assaulted. He found my condition, and he left me --

THE COURT: Strike out everything except that the police officer came. The jury is instructed to disregard it.

Q A police officer came in? A Yes, and saw my condition

Q Do not say what he saw. He came in, and after he came

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in, he went out, and then what happened? A He asked me who assaulted me.

Q When did you next see Walsh? A I didn't see him again until he was under arrest.

Q Which police officer was it? A Both were there.

Q Did you have any conversation with Walsh when he was arrested? A No, sir.

Q Was there any property in your room prior to the entrance of these people that was not there after they had gone? A My clothing, my vest and pants and umbrella and my shirt. The officer brought them in.

Q Anything else? A Well, the contents that had been in these pockets were missing.

Q What were the contents? A My watch and chain and the money.

Q How much money? A Well, about \$7. I am not certain about the amount.

Q This was in the city and county of New York?

A Yes, sir; on the premises.

CROSS EXAMINATION BY MR. COHEN:

Q How long have you been in business in the barber-shop on Eleventh Avenue? A Since the 17th of July, 1906.

Q And this defendant has been a customer of yours, hasn't

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he? A He has, on and off, yes.

Q And you have known him since what date? A I cannot say what date. He has been an occasional customer.

Q Well, on the 9th day of January, 1907, the day this assault occurred, you knew the defendant Walsh? A I knew him, yes, sir, by sight, but not by name.

Q I do not understand what date you said, when you opened your store there? A The 17th of July, 1906, I bought the place out.

Q Are you a married man? A Yes.

Q Do you live there with your family? A No, sir.

Q You have a store, and what is in the rear of the store? A There is a room in the rear of that store, that I occupy as a sleeping room, at that time I occupied it.

Q Where does your family live? A In Philadelphia.

Q On the night of the 9th of January, 1907, what time did you close your store? A At 9 o'clock.

Q At 11 o'clock on that night, where were you?

A At 11 o'clock I was on my way home.

Q Well then, just prior to 11 o'clock when you were on your way home, had you been in Lynch's saloon? A Yes, sir, I had been earlier in the evening, immediately after I closed my place.

Q Did you go there alone? A Yes.

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Q Your store is between what streets? A 36th and 37th Streets.

Q On Eleventh Avenue? A Yes, sir.

Q On the east side of the way? A Yes.

Q And Lynch's saloon is where? A On the east side of the way, the northeast corner of 37th Street and Eleventh Avenue.

Q That is up? A Yes.

Q From where your store is? A Yes.

Q Now, when you went to that saloon, which door did you go to? A I went through the front door.

Q Where did you go? A In the saloon.

Q Yes. A Right to the bar.

Q Who, if any one, did you see? A I didn't pay any particular attention to whom I saw there.

Q Well, did you see the defendant Walsh? A No, sir.

THE COURT: Now, counsel, you are talking about the first time he went in the saloon?

MR. COHEN: It was only once.

THE WITNESS: No, I was there twice.

Q What time did you go there first? A At 9 o'clock, immediately after closing my place.

Q How long did you stay there? A Probably five minutes.

Q Where did you go when you came out? A To a friend of

mine at 55th Street and Sixth Avenue, Mr. Miles.

Q How many drinks did you have when you went in the 37th Street place first? A One.

Q Did you go to Mr. Miles' after? A Yes.

Q Did you drink there? A No, that is not a saloon.

Q What time did you leave Mr. Miles? A Somewhere about 11 o'clock.

Q Then, where did you go? A Went home.

Q To your own store? A No, sir, I was on my way home, and stopped into Lynch's, the same saloon.

Q Now, when you went there the second time, what time was it? A About twenty minutes past eleven, I should judge.

Q Now, which door did you go through? A The same door, the front door.

Q Who was behind the bar, if you remember? A The bartender, Peter Lynch.

Q Now, do you remember any persons who were in that saloon at that time besides Peter Lynch? A I haven't any recollection. I didn't pay any special attention to them, outside of the two defendants.

Q Wasn't there a woman there? A Yes, sir, she was there.

Q Was there a man named Gallagher there? A I don't know.

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Q Well, were any other persons there in addition to the two defendants and that woman? A I don't know. I didn't pay any attention to who they were with.

Q Well, you will not swear there were not other persons there? A Well, there were other persons there, sure.

Q But you do not know who they were? A No, sir.

Q Where was Walsh, this defendant, at the time you came in? A In the saloon?

Q Yes. A Where, at the bar?

Q Yes, in which part of the saloon? A Somewhere along the bar there. I don't know, when I came in, I was beside him.

Q And where was Kelly at that time? A Beside Mr. Walsh.

Q Talking together? A Talking together.

Q Now, they were in the rear of the saloon? A Yes.

Q And that was in close proximity to where this woman was standing? A Yes.

Q Will you explain to the jury just how this woman was in the saloon? A There was an entrance, then you come, just say here is the office -- you could just see her face and her body, but you could not see her limbs.

Q You say she was conversing with these two men at that time? A Not necessarily.

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Q But was she? A No, sir, she was conversing with anybody that would listen to her.

Q Well, she was conversing with these men, among others?

A Yes, sir, among other people, she did.

Q And when you came, did you enter into conversation with Kelly or Walsh or the woman? A Nothing more than to ask them to have a drink.

Q Is that the first thing that was said by either side?

A Yes, sir. As far as I can remember.

Q And they had drinks with you? A Yes, sir.

Q Did the woman? A Yes, sir.

Q Now, who went away first; just confine yourself to the four persons, Kelly, Walsh, the woman and yourself.

A I did.

Q Had you been talking to the woman up to that time; I mean without the others entering into the conversation?

A No.

Q Now, isn't it a fact that Walsh went away first?

A No, sir.

Q Well, do you remember? A I positively remember that I left that saloon before either of the four people concerned.

Q And you left these two defendants, that is, Kelly and Walsh, and the woman in practically the same position that they were in when you entered the saloon? A Yes, sir.

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Q Now, you say that the woman followed you and asked you for \$2? A She came out and asked me to loan her \$2, yes, sir.

Q Had you not at that time talked with her and asked her to accompany you? A Not that I remember.

Q Well, you were not intoxicated, were you? A No, sir.

Q Well, why do you say "not that you remember"? A Well, I know I did not.

BY THE COURT:

Q Are you sure of that? A I am positive. That is the best way to speak.

BY MR. COHEN:

Q Well, do you mean to say that it is possible that you might have requested her to accompany you? A I did not request her to accompany me, no, sir.

Q Well, before you went out ~~out~~ of the saloon, was she right with you? A She came out, as I did; she came out that side door and I went out the front door.

Q And you had about half a block to go to your home?
A Yes, sir.

Q And she walked with you to your home? A Yes, sir.

Q And did she or did she not enter your apartment?

A She entered the apartment with me.

Q At that time, where were the defendants? A I do not

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know. We left them in the saloon.

Q Now, you say you left them in the saloon. Didn't you and she go out together for the purpose of going to your home?

A I say I went out first, and she followed after me.

Q Well now, her advances to you were all rejected, were they, by you? A No, sir.

Q And you were willing to have her accompany you, if she would? A I say, because she was so boisterous, so noisy --

Q Now, when she got out in the street, you continued to talk to her? A I took her into my place, because of her noise.

Q Is that the best answer you can give, for taking her into your apartment? A Yes, sir.

Q It is not because you wanted to have intercourse with her, or anything like that, is it? A No, sir.

Q Well, you did take her into your rooms? A Yes.

Q And you did take off your clothing? A I did.

Q And she took off her clothing? A No, sir.

Q Or part of it? A No.

Q When you removed your clothing, where was she?

A Sitting on a chair.

Q And did you go to bed while she was sitting in the chair? A She was asleep when I went to bed, yes, sir.

Q How long did you and she talk before you finally divested yourself of your clothing? A Probably twenty minutes.

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Q But was she? A No, sir, she was conversing with anybody that would listen to her.

Q Well, she was conversing with these men, among others?

A Yes, sir, among other people, she did.

Q And when you came, did you enter into conversation with Kelly or Walsh or the woman? A Nothing more than to ask them to have a drink.

Q Is that the first thing that was said by either side?

A Yes, sir. As far as I can remember.

Q And they had drinks with you? A Yes, sir.

Q Did the woman? A Yes, sir.

Q Now, who went away first; just confine yourself to the four persons, Kelly, Walsh, the woman and yourself.

A I did.

Q Had you been talking to the woman up to that time; I mean without the others entering into the conversation?

A No.

Q Now, isn't it a fact that Walsh went away first?

A No, sir.

Q Well, do you remember? A I positively remember that I left that saloon before either of the four people concerned.

Q And you left these two defendants, that is, Kelly and Walsh, and the woman in practically the same position that they were in when you entered the saloon? A Yes, sir.

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Q Now, you say that the woman followed you and asked you for \$2? A She came out and asked me to loan her \$2, yes, sir.

Q Had you not at that time talked with her and asked her to accompany you? A Not that I remember.

Q Well, you were not intoxicated, were you? A No, sir.

Q Well, why do you say "not that you remember"? A Well, I know I did not.

BY THE COURT:

Q Are you sure of that? A I am positive. That is the best way to speak.

BY MR. COHEN:

Q Well, do you mean to say that it is possible that you might have requested her to accompany you? A I did not request her to accompany me, no, sir.

Q Well, before you went out ~~out~~ of the saloon, was she right with you? A She came out, as I did; she came out that side door and I went out the front door.

Q And you had about half a block to go to your home?

A Yes, sir.

Q And she walked with you to your home? A Yes, sir.

Q And did she or did she not enter your apartment?

A She entered the apartment with me.

Q At that time, where were the defendants? A I do not

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know. We left them in the saloon.

Q Now, you say you left them in the saloon. Didn't you and she go out together for the purpose of going to your home?

A I say I went out first, and she followed after me.

Q Well now, her advances to you were all rejected, were they, by you? A No, sir.

Q And you were willing to have her accompany you, if she would? A I say, because she was so boisterous, so noisy --

Q Now, when she got out in the street, you continued to talk to her? A I took her into my place, because of her noise.

Q Is that the best answer you can give, for taking her into your apartment? A Yes, sir.

Q It is not because you wanted to have intercourse with her, or anything like that, is it? A No, sir.

Q Well, you did take her into your rooms? A Yes.

Q And you did take off your clothing? A I did.

Q And she took off her clothing? A No, sir.

Q Or part of it? A No.

Q When you removed your clothing, where was she?

A Sitting on a chair.

Q And did you go to bed while she was sitting in the chair? A She was asleep when I went to bed, yes, sir.

Q How long did you and she talk before you finally divested yourself of your clothing? A Probably twenty minutes.

Q Was she drunk or sober? A She was drunk, and told me she had no place to stop.

Q And for that reason, you, a married man, allowed her to stay in your room? A Yes.

Q Did you lock the door? A Yes.

Q Have you a bed in the apartment? A Yes.

Q Did she occupy it? A No, sir.

Q At any time? A No, sir.

Q Did you? A I did.

Q Were you drunk? A No, sir.

Q Did you have intercourse with her that evening?

A No, sir.

BY THE COURT:

Q Was she in the same room with you? A Yes, sir.

BY MR. COHEN:

Q She was a young woman? A I don't know how old she was..

Q Was she a white woman or colored? A A white woman.

Q Have you ever seen her before? A No, sir.

Q Or since? A Never.

Q Did you go to sleep? A Yes.

Q Did you fall tight asleep? A Yes, sir.

Q Was she asleep before you went to sleep? A I supposed she was.

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Q Well now, how much of your clothing did you remove, without going into details; I mean, did you take off your trousers? A Yes.

Q Your coat and vest? A Yes, coat and vest and shirt.

Q And what, if anything, became of the key to the apartment? A That was in my trousers pocket.

Q Now, when you were undressing, this woman also was undressing? A I suppose she was asleep.

Q Well, you won't swear she was asleep? A I can't swear to it. I can't swear anybody is asleep.

Q Now, which way did you enter that store, the front door or through the side door? A The front door.

BY THE COURT:

Q Is there a side door to that store? A Yes, sir/

BY MR. COHEN:

Q Was that side door used by you to go into the place?

A No, sir.

Q How many keys did you have when you opened this front door, so that she might have seen them? A I had a bunch. I have them in my pocket now.

Q Let us see them? A There they are (indicating). The largest key is the key of the store.

Q Now, this bunch of keys that you hand me, contains a key which opens into the store from the street? A Yes, sir.

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Q And also a key that opens the door that leads into your premises from the hall? A No, sir.

Q Well, does this bunch of keys contain a key that let the person into your apartment in any other way? A There is only one key connected with that place there, and that is the large key.

Q What time, if you know, were you awakened? A About 2 o'clock.

Q How do you fix the hour? A I have no idea of fixing the hour, any more than when I was over at the police station after the arrest was made, and I judge that to be about an hour after.

BY MR. COHEN:

Q And that was what time you got to the police station?
A About 3 o'clock.

Q Do you know how long you stayed at the saloon drinking before you went to your room? A The second time I was there?

Q Yes. A Probably twenty minutes.

Q What were you drinking? A Whiskey.

BY THE COURT:

Q What door did you go to when you heard the knock?
A That rear door where the knock was; the rear door leading directly to my room.

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BY MR. COHEN:

Q Where did you get the key to open that door?

A It does not require a key. It is a spring lock.

Q And you opened it? A Yes.

Q And do you know whether you opened it, or the woman opened it? A I opened it.

Q Was the woman there when the knock came? A She was.

Q You opened this front door to go into your apartment?

A Yes, sir.

Q And was anybody in the street at that time?

A I don't know.

Q You did not look? A No, sir.

Q Is this rear room shut off from the street by a partition? A No, sir, there is a hall door leading to it.

Q And this room containing your bed cannot be seen by passersby in the street? A No, sir.

BY THE COURT:

Q It is on the ground floor? A Yes, sir.

Q And on the side of your store there is a hallway that leads through the building? A Yes, sir.

Q And the room you speak of is in the back of the store?

A Yes, sir.

Q And there is a door that leads from the room into the hallway? And also another door leading from the room into the

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store, is that right? A Yes, sir.

Q And the knock on the door was a knock on the door leading from the room into the hall? A Yes, sir.

BY MR. COHEN:

Q You say you personally opened the door because you had the keys for the store? A Yes, sir.

Q Now, what sort of lock is that? A I don't know what kind of a lock it is.

Q Well, are you sure you locked the door after you and this woman came in? A I am positive.

Q What would make you so positive? A I have never left it open before or since.

Q Is that the only reason? A Yes, sir, that's the only reason, and nobody entered that door or left it after I closed it.

Q Well, you and the woman came into your store? A Yes.

Q Now, is there any reason, except the fact that you always locked that door, that would lead you to the conclusion that you positively locked the door that night? A Well, what reason could I say --

THE COURT: Now, counsel, wants to know whether you remember as a distinct fact that you did lock the door, after you came in, or whether you merely say now that you did lock it because you generally lock it.

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A I say positively that I locked it.

BY MR. COHEN:

Q Now, when this knock came, did you speak to the woman or say anything to her? A No, sir, I didn't have time to talk to anybody. I supposed it was some friends of mine.

Q I ask you, did you speak to the woman when the knock came? A No, sir.

Q Did she awaken you? A No, sir.

Q Was she awake when the knock came? A I don't know. I did not look in her direction.

Q Do you know whether or not this woman, whoever she is, had opened these doors, either the front or side door, while you were asleep? A She could not open the front door without she had my key.

Q Your keys were in your trousers? A Yes.

Q And your trousers were where? A Lying on a chair.

Q Where she could have reached them? A Yes, she could have reached them.

Q And she could have reached to your watch and chain?

A Everything that was there.

Q Everything that was there she could have taken?

A Yes, sir.

Q Now, when the knock came, you got up out of bed?

A Yes, sir.

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Q And you cannot remember whether she got up at the same time, or whether you said anything to her? A I cannot.

Q Well, you do not know very many people in that neighborhood, do you? A Just customers.

Q Tell me the name of any person on the face of the earth that you would expect to call you at that hour? A In New York City?

Q Yes. A Well, I haven't any idea who would call me at that hour.

Q And notwithstanding the fact that you were in your room there with a strange woman, the moment the knock came, you opened the door? A Yes, sir.

Q Now, do you remember opening the door? A I do remember positively opening the door.

Q Do you remember who stood at the door when you opened it? A No, I could not see anybody.

BY THE COURT:

Q Was there a light in your room? A Yes, sir.

Q And you do not know who the persons were who were at your door, do you? A No, sir.

Q Was there a person standing in front of the open door when you opened it? A I could not see; just as soon as the door was opened I was taken by the throat, and then the door was between me and the person who had me.

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BY THE COURT:

Q A hand was passed around the end of the door and you were taken by the throat? A Yes, sir.

BY MR. COHEN:

Q Did you have your clothes on? A No, sir.

Q You are a man of pretty weak eyesight? A Yes, sir.

Q And without your glasses you cannot scarcely see?

A No, I can tell the time without my glasses.

Q Well, it was dark? A Yes, sir.

Q It was about half past two o'clock in the morning?

A Yes.

Q And you were without your glasses? A Yes, sir.

Q And you had just been awakened from your sleep?

A Yes, sir.

Q Now, will you swear it was not the woman that grabbed you by the throat? A I am positive it was not the woman.

Q Why; because why? A Because she was behind me; she could not come in front of me.

Q She was a large woman? A She appeared about my size.

Q Well, did she appear to be a strong woman?

A No, sir.

Q You say the fact that she was behind -- A (Interrupting) I am positive she did not grab me by the throat.

Q Why are you positive she did not grab you by the

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throat? A Because she was in the room after the assault occurred.

Q So that, because she was in the room after the assault occurred, you are positive it was not the woman? A I was drawn out into the hall by the assault.

Q What became of the men? A I don't know.

Q Do you know which man, or who are the men who assaulted you then? A No, sir.

BY THE COURT:

Q Do you know that there was more than one man in the hall? A Yes, sir.

Q How do you know? A I heard two voices.

BY MR. COHEN:

Q You heard two voices? A Yes, sir.

Q Do you know whose voices they were? A No sir.

BY THE COURT:

Q Had you ever heard them before? A I can't say that I had.

BY MR. COHEN:

Q Did the woman say anything? A No, sir.

Q Did they speak to her? A No, sir.

Q Now, you know that these two defendants had been talking to this woman in the saloon? A Yes, sir.

Q And she made no outcry that you remember? A She told

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them to stop.

Q Told them to stop? A Yes.

Q Now, you remember that this woman went to the police station, do you? A Yes, after the arrest she went to the police station.

Q You remember that the defendant was there also?

A Yes, sir.

Q Don't you remember that she said that Walsh had nothing to do with it? A I do, indeed.

Q And don't you remember that she said that Kelly is the man that did this? A Yes.

Q Don't you remember that she said that Walsh was not there when it happened? A That is what I remember.

Q Have you tried to find this woman? A No, sir.

Q Now, the only thing you know about Walsh is this, that while you were being washed off, or when you were recovering from your unconscious condition, Walsh was there helping to wash you off? A I did not see him helping me at all. I saw him leave the room, that's all.

Q Through which door? A Through the rear door.

BY THE COURT:

Q And that was how long after you had been grabbed by the throat? A Well, immediately after I became conscious.

Q You do not know how long you were unconscious?

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A No, sir.

Q You do not know the time you were grabbed by the throat? A No, sir.

BY MR. COHEN:

Q Now, you say that you saw Walsh do this, leave the room? A Yes, sir.

Q When you became conscious? A Yes, sir.

Q Did you have your clothes on then? A No, sir.

Q Was it still dark? A There was light in the room.

Q Did you see his face, or the back of his head?

A I saw him leaving; I saw his side face.

Q You saw the side face of a man? A Yes.

Q At that time? A Yes.

Q And your best opinion now is that it was Walsh?

A Yes, sir.

Q You are not sure? A I am sure.

Q Why? A Because I knew the man.

Q You knew the man? A Yes, I had seen him in the evening, and knew him as a customer.

Q You say you did not have your clothes on? A I did not.

Q How far away from you was he when you were leaving the room? A As far as you are.

BY THE COURT:

Q But you had not recognized his face in the hall?

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A No, sir.

BY MR. COHEN:

Q What is that? A There were two voices calling me by my first name.

Q When you say he was as far as I am from you, would you say the distance of 15 feet? A I don't know.

Q Well, is it 15 feet from you to where I am?

A I don't know.

Q Well, what is your best opinion; is it about 15 feet?

A I don't know.

Q Well, is it 10 feet? A 10.

Q Will you stick to that, that this man was about that distance away from you when you identified him as Walsh?

A Yes, about 10 feet.

Q That was in this rear room? A Yes.

Q How large is that rear room? A Well, I imagine it is about 12 by 15; something like that.

Q So that, he was very nearly the entire space of the room away from you? A Yes.

Q And the mere fact -- you did not get a good look at his face at all? A I did not see the front of his face.

Q And although you did not see the front of his face, and although he was 15 feet away from you, and you had just been recovering from unconsciousness, you are willing to swear that

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this man that went out was this man Walsh? A I said he was about 10 feet away from me.

Q You remember when you came before the Police Court, do you? A Yes, sir.

Q Do you remember who had been cross examined by Colonel Townsend, who appeared for this man in the Police Court?

A Yes, sir.

Q Do you remember that the officer had a conversation with you, in which he called your attention to the fact that you should have identified Walsh as one of the defendants?

A That he said to me?

Q Didn't he say to you "Why didn't you identify Walsh as one of these defendants"? A No, he did not say that.

Q What did he say to you? A He said to me "You did not say that you were certain when you are, that you saw Walsh".

Q The officer said to you "You did not say you were certain it was Walsh when you are certain"? A "When you told me you were certain".

Q Yes, you had told the officer you were certain it was Walsh? A Yes.

Q When you went to the Police Court you were not certain?
A Upon cross examination of the attorney, and my first experience in court, I was confused.

MR. COHEN: I ask to strike that out.

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THE COURT: You are asking him why he was not certain, and he is telling you.

Q Tell us why you said to the officer; just give the explanation you were about to give? A What explanation?

BY THE COURT:

Q You were telling us why you were not certain?

A I was certain, but the attorney putting questions to me in the manner ~~he did~~, he had me confused in saying that I thought I was certain.

BY MR. COHEN:

Q Well, what did he say now to you, that made you appear uncertain? A I can't recall just what he did say.

Q He made you say, didn't he, that you only thought it was Walsh? A No, I did not say that. I said I thought I was certain.

Q That is to say, you testified then that you thought you were certain? A Yes.

Q Now, didn't you say positively in the Police Court that you would not say that that the defendant Walsh was the man?

A I did not say that. To whom did I say that?

Q I ask you now. Didn't you say to Magistrate Whitman at the Police Court, that you were not sure, and you would not swear that Walsh was the man? A That assaulted me?

Q Yes. A That assaulted me? Yes, I say so now.

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Q Then, the only thing I understand, your testimony is, the only thing you are willing to swear to is that a man left your premises immediately after you returned to consciousness, that he was 10 to 12 or 15 feet away from you, and that that man you are willing to swear most positively was Walsh?

A Yes, sir.

Q Now, that is the whole story, isn't it? A That is the whole story.

Q And more than that regarding Walsh you do not know?

A No, sir.

Q And you do not know that Walsh is one of the men that assaulted you, do you? A No.

Q You do not mean to have the jury understand that Walsh is one of the men that assaulted you? A No, sir.

Q You do not know but what this woman had called from the street for help, and that Walsh came to her assistance or your assistance? A I don't think so. I am not sure, no.

Q Now, you remember that Walsh was taken to the Police Station? A Yes.

Q And you testified, what this woman said, that Walsh had nothing to do with it; you remember Walsh was searched?

A Yes.

Q And no watch and chain were found on Walsh, was there?

A No, sir.

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Q Was there any money found on Walsh? A I don't think so.

Q Were your trousers found near him or by him, or in any way connected with him at all? A These things were brought in from the hall by the officer.

Q Now, what was the first you knew of the arrest of this defendant? A When the woman came back for me and told me to come outside to identify them.

Q To identify Walsh? A To identify the prisoners, the defendants.

Q Were they both arrested at that time? A Yes.

Q There was no knife found on this defendant, was there?

A Yes, sir, I believe there was. I didn't see them searched.

Q You do not know whether there was a knife or not?

A I did not see the men searched.

Q This time that you were brought out to identify the defendants, how many minutes or hours was it after the assault?

A I don't know.

Q Was it an hour? A It was 3 o'clock at the Police Court, when I arrived there, and I suppose the assault had been an hour before. That is the only measure I had of the time.

Q Well, was the front door opened, if you know, the front door of the barber shop, after the time you came in with this woman? A No, sir.

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Q Do you know, or had you any reason to know whether it was or not? A It was not, unless it was opened while I was asleep.

Q That is what I mean. I say, do you know positively?

THE COURT: You have his answer, counsel.

Q Did you walk in or out of that door at any time after that? A Not until 7 o'clock in the morning.

The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess until 2:05 o'clock p.m.

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AFTER RECESS.

Trial resumed.

FRANCIS B. FOSTER, a witness on behalf of the People, resumes the witness stand:

CROSS EXAMINATION CONTINUED BY MR. COHEN:

Q You testified that when you were restored to consciousness, that you saw the defendant Walsh 10 feet away, walking out of the door? A I saw him walk out of the door.

Q Do you know whether or not there were any other men in the room, or had been in the room at that time, or up to the time you say you saw Walsh coming out? A No, sir.

Q You do not know? A No, sir.

Q That is to say, there may have been other men?

A I don't know.

THOMAS B. HALE, being called and duly sworn as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. McGUIRE:

Q Officer, you are attached to the 20th Precinct of this city? A Yes, sir.

Q On the 9th of January, this year, did you arrest the defendant? A Yes, sir.

Q State the circumstances leading up to the arrest; when did you first see him on that night? A About half past one

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on the morning of the 9th of January, I was coming along Tenth Avenue. I saw Walsh and a man whom I subsequently recognized as Kelly come from the hallway of 448 Eleventh Avenue.

They walked south.

BY MR. COHEN:

Q I could not hear what you said.

THE COURT: He said he was coming along Tenth Avenue and he saw them coming out of the hallway.

THE WITNESS: Yes, your Honor, 448 Eleventh Avenue.

BY MR. McGUIRE:

Q What avenue were you on at the time? A On Eleventh Avenue. I saw Walsh and Kelly coming from the hallway of 448 Eleventh Avenue.

Q Is that a flat house there? A Yes, it is a tenement house.

Q And that is where Foster's barber shop is? A Yes, sir.

Q Go on. A I stood at the corner of 37th Street and Eleventh Avenue, and Walsh and Kelly walked south, towards 36th Street, and about ten or fifteen minutes after, a woman came along and informed me that a man had been assaulted --

THE COURT: Strike that out, what the woman informed the witness.

Q What did you do then? A I went and investigated, and I found Mr. Foster lying in bed.

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Q What condition was he in? A His face was covered with blood.

Q Was he or was he not sober? A He was perfectly sober.

Q What did you do then? A I investigated the case, and I asked him if he knew --

Q No, do not say what you said to him. When did you next see Walsh? A About an hour after.

Q Where? A I saw Walsh and Kelly coming on Eleventh Avenue.

Q Whereabouts? A At 37th Street and Eleventh Avenue.

Q Go on. A I placed them under arrest, and asked them if they had been in 448 Eleventh Avenue, and they denied it; said they had not been in there that night. I made a search of them and found the watch and chain on Kelly, which was subsequently identified by Mr. Foster as his property.

Q Did you find anything on Walsh? A Only a knife. I found a long knife on Walsh.

Q Let us see it. Is that it (showing)? A That is the knife.

Q Was it open or closed? A Closed.

Q When you arrested Walsh and Kelly, how far apart were they standing? A They were right together.

Q Did you have any conversation with either of them?
A I did.

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Q Was any other officer with you? A Yes, Officer Wanamaker.

Q Who is outside now? A Yes.

Q What did they say? A I accused them of being in there, in 448 Eleventh Avenue, and asked them what they were doing there. They said they were not in there at all that night. They claimed that they were in a saloon all night.

CROSS EXAMINATION BY MR. COHEN:

Q Now, did you make this arrest, or did Officer Wanamaker make it? A Both together.

Q And you say that about half past eleven, you were standing at 37th Street and Eleventh Avenue? A No, I did not say half past eleven.

Q What time was it? A I said about half past one in the morning.

Q And how away from the corner of 37th Street and Eleventh Avenue, where you were standing, is 448 Eleventh Avenue? A It is about the middle of the block, between 36th and 37th Streets.

Q What sort of night was this? A Well, it was not a very bright night.

Q Was it stormy? A No.

Q Snow or rain? A No, it was a clear night.

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Q Did anybody else come out of that house before that time? A Nobody else came out of there.

Q That you saw? A No, they could not have come out of there without me seeing them.

Q Well, you were not paying any attention to any particular person or house at that time? A After I had been notified of the robbery I was.

Q When were you notified of the robbery? A About 10 or 15 minutes afterward.

Q After these men coming out ? A Yes.

Q So, I say, that 10 or 15 minutes before you were notified, you were not paying any particular attention to persons coming out of the house? A No, but I was facing in the direction, most of the time.

Q Now, did any other persons enter in there, any other house on that block about that time? A No, I didn't see any.

Q So that, how long would you say, altogether, you had your eyes turned in that one direction watching people coming out of any particular house on that street? A About, probably five minutes or ten minutes.

Q And for all you know, people may have gone in and out of 448 Eleventh Avenue without you noticing them? A Well, I didn't see any going in or out.

Q That is to say, all you saw was two men coming out?

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A Yes.

Q How many feet were you distant? A I was within two or three feet of them as I was passing by.

Q Didn't you say you were standing at the corner of 37th Street and Eleventh Avenue when these men came out of the house? A Yes, that's where I arrested them, but not when they came out of the house.

Q Didn't you say you were standing on the corner of 37th Street and Eleventh Avenue when you saw two men coming out of 448 ? A No, I did not say that.

Q You did not say that? A No, I did not. I was standing there when I arrested them, when I saw them go along the avenue about an hour after.

Q Now, you say you did not testify that way? A I say I did not.

Q You want to change your testimony? A I do not. I say I stood at the corner and saw them walk down towards 36th Street

Q That is what I am asking you. A Yes.

Q You were standing on the corner of 37th Street and Eleventh Avenue, and you saw them? A No, I saw them come out, as I say, as I was passing along the avenue, as I was passing in front of the house.

BY THE COURT:

Q Where were you when they came out of the door?

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A I was passing along, right in front of the door.

BY MR. COHEN:

Q You were? A Yes.

Q You were within how many feet of these men?

A A couple of feet.

Q Well, what is this testimony about your being at the corner? A I stood at the corner of 37th Street and Eleventh Avenue.

Q Before you arrested them or after? A After I arrested them.

Q Now, you did not mean that, after you arrested them?

A Before I arrested them.

Q You do not mean that at all, do you, after you arrested them you stood at the corner? A No, I stood at the corner before I arrested them, and stood there after I arrested them.

Q And you were standing at the corner when you saw them coming out of the hallway? A No, I was going up Eleventh Avenue, passing the house as they came out.

Q You were? A Yes.

Q Who was with you? A Nobody.

Q Where was Officer Wanamaker? A I met him when I went up to the corner.

Q When? A Right at that time, a few moments after.

Q Which corner? A 37th Street and Eleventh Avenue.

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Q Well, you had been at 37th Street, hadn't you?

A Yes.

Q And you said you came down; where had you been in the first place? A I came from 36th Street, towards 37th Street. I only came as far as 37th Street.

Q You had come from 36th Street up towards 37th?

A I was travelling north.

Q And they came out of this house in the middle of the street? A Yes.

Q And you were within a few feet of them? A Yes.

Q And you saw them? A Yes.

Q Both of them? A Yes.

Q Did they have any property with them? A No.

Q Any trousers or vests or anything? A No.

Q Did you hear any noise about that time? A No.

Q No yelling or anything? A No.

Q Nothing at all? A Nothing at all.

Q Did you see a woman just about that time come out?

A About 15 minutes afterwards I did.

Q And Officer Wanamaker was on the corner of 37th Street and Eleventh Avenue when you got there? A Well, a few minutes after I got there he came along.

Q Where did he come from? A He came from towards 38th Street.

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Q Is he in the same precinct with you? A Yes.

Q Your post is not the same as his, is it? A It runs the same, parallel.

Q Your post is up to 38th Street too, is it? A Yes.

Q Did you a moment ago say your post only reached 37th Street? A I came as far as 37th Street.

Q Your post goes as far as 37th? A Yes.

Q Now, does your post go as far as 38th? A No, from 32nd to 37th.

Q Does Officer Wanamaker's go down as far as 37th?
A Yes. His went from 37th to 42nd.

Q Did you speak to these two men? A No.

Q Do you know either of them? A Yes, I knew Walsh before that.

Q Where did you know him from? A From around that neighborhood. I used to see him around there every day or every night.

Q You have seen him around there every day and every night? A Yes, for a good while.

Q You were standing with Officer Wanamaker when a woman approached? A Yes.

Q Did you know her? A I did not know her, no.

Q By the way, when these men came out of the house, had you already passed the doorway and turned around to look at

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them? A I turned around and looked at them. I came as far as 37th Street, half the block, and I turned around and looked at them. I wondered what they were doing there. I knew Walsh did not live there.

Q You had passed the house? A Yes.

Q And you turned around to look where they were going?

A Yes.

Q How did you know they were coming out of there?

A I saw them coming out of there as I was passing.

Q Where did they go? A They went down past 36th Street.

Q Did they separate? A No, they were together.

Q Now, you were standing at 37th Street corner and a woman came up? A Yes, about fifteen minutes after.

Q Was she drunk or sober? A She appeared to be sober.

Q Did her clothing appear to be disarranged or her hair disarranged? A No, not that I noticed.

Q Did you know the woman? A No.

Q Have you ever seen her in the neighborhood at all?

A No.

Q Have you endeavored to get her here for this trial?

A I did not want her, no.

Q You made no effort, did you? A No.

Q Now, you went back with this woman to the barber shop?

A Yes.

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Q And went in the front door? A Went in the hall door.

Q Didn't you go in the front door? A No.

Q Didn't you go in the barber shop? A No, I went in the hall door.

Q And was the hall door open? A Yes.

Q And the door open leading into the apartment in the back? A Yes. No, the door was shut; the door leading to the apartment was shut.

Q Did you see where the key was? A No.

Q Did you see the key at all? A I did not see the key, no.

Q Where was the defendant, or the complainant, when you got there? A He was in bed.

Q What did he say? A He told me that two men assaulted him and robbed him.

Q Where was the woman at this time? A She was in the room at the time. She was sitting in a chair.

Q Didn't the woman say at that time --

(Question withdrawn)

Q Did you find any property in the hallway? A I did.

Q Where? A Right back of the door leading to the street, I found a vest and pants and umbrella.

Q Did you search this woman? A No.

Q You did not search her? A No.

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Q And you allowed her to go away? A I allowed her to go away.

Q She went to the station house with you, didn't she?

A Yes.

Q Now, when you got into the street, you arrested Kelly, didn't you? A When I got there?

Q You arrested Kelly about an hour afterwards? A I arrested Kelly, and Walsh, both about an hour afterwards.

Q Were they together? A They were together.

Q Isn't it a fact that you had Kelly arrested, that Walsh went there with a man named Gallagher, to whom he was talking, to see what the trouble was, and to see what Kelly was being arrested for, or who it was that was being arrested; didn't that happen? A No, that did not happen.

Q Weren't you standing on the south side of 37th Street, talking to Officer Wanamaker, when Walsh and a man named Gallagher standing on the uptown corner for close on to 15 minutes before you arrested Kelly? A No.

Q (Continuing) Who came along alone? A No.

Q Did Kelly come along alone? A No, he came along with Walsh; came up Eleventh Avenue from 36th Street.

Q Where did you come from, the time you came out of the apartment of this man Foster, until the time you arrested the defendants? A I stayed right on the corner.

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Q The whole time? A The whole time.

Q When did Officer Wanamaker appear for the first time?

A About two or three minutes after I getting that.

Q Then you were talking with Officer Wanamaker before the arrest? A Yes.

Q For about fifteen minutes? A For about an hour.

Q Do you know whether or not there were a ny persons standing on the uptown side of the street talking? A Not at that time.

Q At any time before youarrested Walsh or Kelly?

A I did not see any before I arrested them.

Q Did the two of you arrest these men? A Yes.

Q Both of you? A Yes.

Q And you insist that Kelly was not arrested alone, and that Walsh did not come over and ask what the trouble was, and that then you arrested Walsh? A I arrested both of them.

BY THE COURT:

Q At the same time? A Yes, sir.

BY MR. COHEN:

Q Was the woman there? A Yes, she was there. She said "Them are the two men".

Q She said that Walsh was the man, did she? A She said the two of them.

Q And she said the two of them were the men that did it

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when she was in the station house? A She said the two men were the right men.

Q Do you know what it is to be under oath? A Yes.

Q Would it surprise you to know that the complainant testified that the woman said that Walsh is not the man and had nothing to do with it? A I didn't hear anybody say that.

Q But you testify that you did hear her say that Walsh is the man? A I testify that she said "You have the right men."

Q What is her address? A I don't know.

Q Where does she live? A I don't know.

Q Where does she work? A I don't know.

Q Didn't you think she was an important witness?

A In which direction?

Q Didn't she say in the station house that Walsh had nothing to do with it? A I did not hear her.

Q Will you swear she did not? A No.

Q Now, you remember when you were in the Police Court?
A I do.

Q Do you remember after the examination, that you had a conversation with the complaining witness Foster? A Well, I may have had a conversation with him.

Q Didn't you tell him that he ought to have been certain as to his identification of Walsh? A I don't remember saying that to him.

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Q You think you might have said it? A Well, I might possibly have said it.

Q Now, what occasioned you to say to Foster that he ought to have been positive in his identification of Walsh?
A Well, Foster told me he had not been in court before, and that the man mixed him up.

Q And then you told him he ought to have been positive Walsh was the man? A I don't remember saying that.

Q You might have said it? A I don't remember saying it.

Q Didn't you state to the defendant Walsh that if possible you would send him to the electric chair? A I don't remember saying that.

Q What do you mean that you don't remember having said you would send a man to the electric chair? A Well, he has spoken so much to me about the case, Walsh did, at different times --

Q Well, don't you know whether you said to a man you would send him to the electric chair? A I told him if he committed that crime that warranted it, I would.

Q You feel very bitter against this man?

A Not at all.

Q Absolutely no feeling? A No feeling. It is immaterial to me what becomes of him. I have no interest one

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way or the other.

Q You did not find any property on Walsh that was identified by the complainant, did you?

A No.

Q You remember there were two examinations in the Police Court? A Yes.

Q Don't you remember that the first examination did not produce this knife by you? A I have the knife there (indicating).

Q You know you did not produce a knife at the first examination?

A I produced everything there.

Q At the first examination in the Police Court, did you or not produce this knife?

A I had that evidence there, yes.

Q Did you show the knife to the Judge on the first examination? A No.

Q And on the second one you did? A I did. He did not require it the first time.

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