No. 05-1492

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL ANTHONY MAHONE,

Defendant, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRIEF OF THE APPELLEE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

Original Jurisdiction. Mahone was charged with attempted armed robbery of a credit union, and interstate transportation of a stolen motor vehicle (Superseding Indictment; Docket # 22). District courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231.

Appellate Jurisdiction. Pursuant to 28 U.S.C. § 1291, the federal courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." An appeal from a final judgment of the U.S. district court in Maine shall be taken to the United States Court of Appeals for the First Circuit. See 28 U.S.C. § 1294. Sentencing appeals are authorized pursuant to 18 U.S.C. § 3742. Judgment entered on March 28, 2005 (Docket # 117). Pursuant to Fed. R. App. P. 4(b)(1)(A)(I), the notice of appeal shall be filed within 10 days after entry of the judgment. The notice was timely filed on March 31, 2005 (Docket # 118).

STATEMENT OF ISSUES PRESENTED

I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE GOVERNMENT'S FORENSIC EXPERT'S EVIDENCE OF FOOTWEAR IMPRESSION COLLECTION AND HER OPINION THAT SHOES FOUND OUTSIDE OF THE CREDIT UNION, AND ON WHICH WAS FOUND MAHONE'S DNA, HAD MADE THE FOOTPRINTS LEFT INSIDE THE CREDIT UNION DURING THE ATTEMPTED ROBBERY.

II. WHETHER THE DISTRICT COURT CORRECTLY ORDERED RESTITUTION TO THE INSURANCE COMPANY IN THE AMOUNT OF $5,477.75.

STATEMENT OF THE CASE

This is an appeal from a conviction for attempted armed robbery of a credit union, and from the sentence of restitution for interstate transportation of a stolen motor vehicle, entered against Michael Mahone in the U.S. District Court for the District of Maine (Hon. John A. Woodcock, Jr., J.) (Judgment; Docket # 117).[1] Mahone was charged in a two-count Superseding Indictment with attempted armed robbery of the Gardiner Federal Credit Union, in violation of 18 U.S.C. §§ 2113(a), 2113(d) and 2, and with interstate transportation of a stolen Ford Explorer, in violation of 18 U.S.C. §§ 2312 and 2 (Superseding Indictment; Docket # 22). A pretrial motion seeking the exclusion of the Government's evidence of footwear impression collection and analysis was denied. See United States v. Mahone, 328 F. Supp. 2d 77, 92 (D. Me. 2004) (Docket ## 51, 52, 73).

Trial began before the court and a jury on September 27, 2004 (T. 1). The jury returned verdicts of guilty on October 4, 2004 (Docket # 106). The court sentenced Mahone on March 28,

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[1]Documents referenced on the district court's docket are cited by name and docket number. References to the transcript of the pretrial motion hearing and to the Government's exhibits appear as (H.) and (GX), respectively. The transcript of trial is cited as (T.). A presentence report prepared by the U.S. Office of Probation is denoted as (PSR). Citations to the transcript of the sentencing hearing appear as (S.).

2005 to 140 months in prison for the attempted robbery, and 120 months on the interstate theft charge, to be served concurrently (Judgment; Docket # 117). Concurrent supervised release terms of five years and three years for the robbery and interstate theft, respectively, were also imposed (Judgment; Docket # 117). Among other restitution amounts, $5,477.75 was ordered paid to Concord Group Insurance for the stolen Explorer (S. 115). Judgment entered the same day, and this appeal followed (Judgment; Docket ## 117, 118).

STATEMENT OF FACTS

A man dressed entirely in black and wearing gloves and a ski mask with white makeup around the eyes, and armed with a knife and a gun, attempted to rob the Gardiner (Maine) Federal Credit Union shortly after 5:00 p.m. on November 19, 2003 (T. 190, 191-92, 206-07). He pointed the gun at one of the tellers, and bound the teller and her manager with duct tape before fleeing (T. 193, 197-98, 396-97, 402-03). Clothing disposed of in a garbage bag in woods near the credit union included items the man wore during the attempted robbery, and Appellant Michael Anthony Mahone's DNA was found on the latex gloves, the ski mask, and the shoes, which had been taken from Mahone's roommate (T. 332-33, 442, 447, 454, 464, 466, 480, 683-86). Mahone's fingerprints were also discovered on three makeup kits tossed in a nearby dumpster (T. 480, 729-30). Over objection, the district court permitted a forensic expert to testify to her opinion that the shoes made the footprint impressions discovered on both a stairway and the teller counter in the credit union (T. 699, 736-37).

Mahone testified in his own defense, and insisted that he prepared for the robbery under threats from someone known as "T" (T. 867, 871-72). Although he dressed in the clothes found in the garbage bag, Mahone said he abandoned the robbery plans, discarded the clothes, and never entered the credit union (T. 881-82, 885, 887, 891-93, 909). Nevertheless, the jury found him

guilty of both the attempted robbery and the interstate theft of a Ford Explorer found in Mahone's possession in New Hampshire three weeks after the attempted robbery (T. 85-87; Docket #106).

The court sentenced Mahone to 140 months in prison for the armed robbery, 120 months for the interstate theft of the Explorer, to be served concurrently, and to pay restitution to the automobile insurer in the amount of **$5,477.75** (Judgment; Docket #117).

A. Pretrial Motion

Cynthia Homer, a forensic scientist employed for two-and-a-half years with the Maine State Police Crime Laboratory, testified that her specialty concerned latent impressions, including fingerprints, palm prints, footprints, footwear impressions, and tire tread impressions (H. 24-26). Homer stated she had performed "well over 11,000 . . . footwear comparisons" and had never made a false identification (H. 48, 74). Further, she observed that footwear impression evidence has been introduced in courts since the eighteenth century, and courts in the United States have accepted such expert evidence since the 1930s (H. 71). Homer herself had previously testified in court as an expert in footwear impression comparison (H. 74).

Homer's education included a BS in chemistry and an MS in forensic science (H. 26). Her training included attendance at

lectures as well as laboratory work which required her to collect impression evidence and determine which unknown shoe or boot made the impressions (H. 26). She also attended conferences and workshops concerning footwear and tire impressions, and had completed a 40-hour FBI course on footwear evidence (H. 27). The professional conferences included presentations by widely published footwear impression practitioners and theorists (H. 66-68; GX B-3, B-4). Moreover, Homer taught classes to members of the Maine Evidence Response Team concerning the processing of crime scenes, including the collection and development of footwear impressions (H. 29-30).

Homer held active memberships in the International Association for Identification (IAI), the IAI's New England Division, and the Canadian Identification Society (H. 28-29). She was also certified by the American Board of Criminalistics (H. 29). Homer noted that the IAI disseminates knowledge and information about footwear identification through its peer reviewed professional journal, and that the IAI offers certification in footwear analysis, although she was not IAI certified (H. 65, 73).

She explained that the goal of footwear evidence examination is to take the universe of footwear available and progressively

to narrow it based upon the impression made until the focus is on one particular class of shoes as determined by class characteristics such as size, design/pattern, or mold, and eventually to the one shoe which made the impression (H. 32). Homer conceded that class characteristics of shoe impressions typically are subject to easy determinations by any potential juror (H. 33). However, beyond class characteristics there are "accidental characteristics" produced by "random damage that occurs to the sole of a shoe as a result of its being worn" (H. 33). Duplication of such characteristics does not occur, and "therefore, identifications are possible" by a trained eye (H. 57). When the sole comes in contact with a "receptive surface" it produces an impression that is "representative of the characteristics" of the sole (H. 35). A test impression of a known particular shoe may be compared to the impression of an unknown shoe collected at a crime scene (H. 35-36).

According to Homer, crime scene impressions may be collected in a number of different ways (H. 36-37). One is simply to take a photograph of the impression (H. 37). Another is electrostatic dust lifting which permits the collection of impressions left in dust (H. 37). A third is the use of fingerprint powder to find or enhance a shoe impression that is then lifted with tape to

remove it from the surface (H. 37). The fourth manner relies upon gelatin (H. 37). It works in the same manner as the tape except that a gel is placed on the surface to "create[] a tack that helps to lift the impression" (H. 37). Finally, casting is used where footwear or tires produce three-dimensional impressions such as might be found in snow or mud (H. 38).

Homer testified that the impression sciences rely upon an examination methodology which she identified as "ACE-V," meaning "analysis, comparison, evaluation and verification" (H. 38). Her work begins first with an analysis of the crime scene for both the quantity and quality of impressions (H. 38-39). In the comparison phase Homer looks at both class and accidental characteristics in the crime scene impressions and compares them to an actual known shoe (H. 44). She also compares them to test impressions to "see how those characteristics may or may not correlate" (H. 45). This process may involve the overlay or "superimposition comparison" of the crime scene impression with the test impression (H. 45).

Next comes the evaluation stage to determine similarities and differences between the known shoe or test impression, and the unknown crime scene impression (H. 46-47). If differences are detected, the examiner must determine if they are explainable

or unexplainable (H. 47). Explainable differences are those one would expect to see because "every time you step . . . it's going to look a little bit differently" (H. 47). Unexplainable differences would be differences in pattern, size or shape for which "there would be no explanation . . . other than this impression was not made by that shoe" (H. 47).

Finally, the examiner verifies conclusions reached through confirmation of the conclusions by another qualified examiner (H. 53). The verifications, Homer testified, are "a form of peer review and quality control" (H. 53). Verification is accomplished by the second examiner conducting his or her own comparisons among the various impressions and with the known shoe (H. 53-54).

Accepted theories and techniques of footwear impression analysis have been published in numerous texts and professional journals (H. 66-67; GX B-3, B-4). Homer cited Michael Cassidy's 1980 text, Footwear Impression Evidence, for theories and techniques of footwear impression analysis (H. 54). She testified that both she and others in the field relied upon Cassidy's text (H. 55). Other footwear impression evidence textbooks include Footwear Evidence by John Abbott, two editions of William Bodziak's Footwear Impression Evidence, and Footwear,

The Missed Evidence, by Dwane Hilderbrand (H. 71). Yet other general forensic science textbooks include discussions of footwear impression evidence, including Henry Lee's Forensic Science, An Introduction to Criminalistics (H. 72).

Although Cassidy reports that single characteristics are duplicated and found on multiple shoes, "the duplication of the position of multiple characteristics does not occur, and therefore, identifications are possible" (H. 57). Moreover, Cassidy concludes that no particular number of points of comparison are needed to conclude that a particular shoe produced a particular crime scene impression (H. 57-58). Generally speaking, "the poorer the crime scene impression the greater number of characteristics are needed to be in agreement to form an opinion of identification" (H. 58). Where there are highly individual characteristics, however, fewer characteristics of agreement are needed for an opinion to be formed (H. 58).

Homer is subject to annual proficiency testing by an outside agency for each of her forensic disciplines (H. 61). Such testing is required as part of the Maine Crime Lab's accreditation process (H. 64). Homer had undergone three such tests during her employment (H. 62). Moreover, all of Homer's opinions are subject to verification by another qualified

examiner outside of the Crime Lab (H. 74).

According to Homer, the error rate for footwear impression methodology is zero (H. 63). Any error is therefore attributable to the individual examiner for failure to follow the proper methodology rather than to the methodology itself (H. 63). Errors are minimized through proper training and through verification (H. 63-64). Homer testified that she has "never made a false identification in training, in casework, or in my proficiency tests" (H. 74). The known test impression is the standard by which the footwear impression science verifies its analysis (H. 65).

On November 19, 2003 Homer was called to the Gardiner credit union to process the crime scene for footwear impression evidence (H. 79). Six footwear impressions were photographed and later enlarged to natural size (H. 84-85; GX R-1-P, R-2-P, R-3-P, R-4-P, R-5-P, R-28-P). Using the electrostatic dust lifting technique, she collected two impressions made in dust on the stair landing in the credit union's vestibule (H. 81, 83-84; GX R-4, R-5). She instructed Maine State Police Trooper Jason Richards to collect three such impressions located on stairs leading from the landing to the second floor (H. 79, 81). These were gelatin lifts (H. 83; GX R-1, R-2, R-3). Homer observed

that all five impressions, taken from the wooden surface of the stairs and landing, had a similar pattern on the outsoles (H. 81, 92).

Next, Homer collected a footwear impression left on the credit union's counter top which she had dusted with fingerprint powder "to add contrast" (H. 80, 81). She lifted this impression with an adhesive lifter (H. 81, 84; GX R-28). State investigator Ken MacMaster discovered a bag of clothing near the credit union, and inside the bag was a pair of shoes (H. 82, 85; GX K-1, K-2).

Homer later made test impressions of the shoes (H. 89-90; GX K-1-T, K-2-T). She then compared a photograph of a footwear impression taken from the credit union stairs with a test impression that she made using the right shoe found in the bag of clothes (H. 99-102; GX R-1-P, K-1-T). Homer found the same patterns, the same indications of wear, and the same texture in both (H. 99-100). Accidental characteristics were also similar, although not identical (H. 100-01). However, Homer did not expect them to be exactly the same because "I weigh more than the person who left the crime scene impression, [or] I stepped in a different way than the person who stepped in the crime scene impression" (H. 101). As a result of her analysis, Homer

concluded that one of the impressions taken from the credit union stairs was made by the left shoe found in the bag of clothes (H. 108; GX R-1, K-1).

Performing a similar analysis Homer concluded that another impression from the credit union stairs, GX R-2, was made by the right shoe, GX K-2, found in the bag of clothes (H. 108). A third impression from the stairs, GX R-3, was "associated with the left shoe," GX K-1, but Homer could not say whether the shoe made the impression (H. 108-109). GX R-4 "could have been made" by the known right shoe, GX K-2, "or any other shoe having that same size and outsole design" (H. 109). Again, she could not say whether the shoe actually made the impression (H. 109). However, Homer concluded that GX R-5 "was made by the [GX] K-1 left shoe" (H. 109). Finally, Homer determined that the footprint left on the credit union's counter top was made by the right shoe found in the bag of clothes (H. 109; GX R-28, K-2). Following Crime Lab procedure, Homer's conclusions were reviewed and verified by another qualified examiner, her "technical leader" (H. 109-10, 157, 160).

On cross-examination Homer agreed that she had no knowledge concerning how long the shoes found in bag of clothes near the credit union had been worn (H. 114). Homer also conceded that

what is a "minor" difference between a crime scene impression and an impression of a known shoe, and what is a "major" difference "would be very subjective to the examiner" (H. 114). Moreover, such opinions might depend upon the different examiners' level of education, training or experience (H. 114). Further, Homer conceded that "identification is established through a sufficient number of unique characteristics, in sequence, aligning, but sufficient depends on the impression itself," and she could not give a particular number of characteristics that are required before an identification can be made (H. 117, 121). Instead, her evaluations and conclusions were based upon "all of the training and experience that [she] had and the education . . . that a layperson does not have" (H. 149).

Although Homer was a member of IAI, she conceded that she was not IAI certified (H. 134). She also agreed that no supervision, training updates, or testing was required to be an IAI member (H. 135). Beyond visual information, Homer testified that her specialized knowledge concerning how the sole of a shoe acquires damage with wear along the edges, and how to differentiate among the slight differences between crime scene impressions and test impressions assisted her in reaching her identification opinion (H. 144). Asked how many "elements" she

found in comparing one of the impressions taken from the credit union stairs with the left shoe found in the bag of clothes, Homer replied, "I have no idea. I don't count elements. I don't count shapes or anything like that. I just don't count anything" (H. 150).

B. The Court's Ruling

The court denied Mahone's motion to exclude the expert evidence (Docket # 52); United States v. Mahone, 328 F. Supp. 2d 77, 92 (D. Me. 2004). First, the court reviewed the evidence to assure itself that Homer's opinion was reached in a manner that was "scientifically sound" and "methodologically reliable." Id. at 87. The burden of proof in this review was on the Government as the party seeking to introduce the evidence. Id. Following the review, the court concluded:

> **Ms. Homer's lengthy testimony provided ample evidence that her proposed testimony meets or exceeds *Daubert* requirements for admissibility. The science of footwear analysis is neither new nor novel; expert testimony on footwear comparisons has been admitted in courts in the United States for years. Ms. Homer established that the theory and technique of footwear comparisons have been tested, that the science has been subject to peer review and publication, that the scientific technique has been evaluated for its known or potential error rate, and that the science of footwear analysis has by now been generally accepted.**

Id. at 89 (internal citations omitted).

Second, the court addressed the relevance of Homer's

proposed testimony, and whether it would assist the jury in its determination of a disputed fact. Id. The court concluded that Homer's opinion was relevant because the testimony would link Mahone to the crime scene. Id.

Next, the court addressed Mahone's objections, beginning with Homer's qualifications. Id. After recounting her education and experience, the court concluded that "[t]he sum of Ms. Homer's academic training and practical experiences qualifie[d] her as an expert to opine on" footwear impression analysis. Id. at 90. It did not matter that she was not IAI certified Id. The court observed there was no evidence that the IAI was the sole certifying body for such experts or that such certification is a prerequisite for this particular expertise. Id. Further, neither Daubert nor Fed. R. Crim. P. 702 required an individual to be "an outstanding practitioner" or possess certificates of training in order to provide expert testimony. Id.

Turning to Mahone's complaint about methodology, the court noted that Mahone alleged a lack of objective standards of footwear identification, and that the expert's conclusions amounted to no more than observations that jurors themselves are capable of making. Id. However, the court recounted Homer's "ACE-V" methodology of analysis, comparison, evaluation, and

verification; her testimony that the method's error rate is zero, and that any resulting error is due to the examiner and not to the method itself; and evidence that the methodology is used and accepted by experts in the field who review each other's work. Id. at 90-91. Moreover, the "ACE-V" methodology had been accepted by other courts. Id.

The court rejected Mahone's contention that any juror could make a footwear comparison, and compared the footwear impression expert with a radiologist:

> **[I]t is apparent the process [of footwear identification] requires a critically trained eye to ensure accurate results. [Mahone's] contention that any lay person can perform the comparisons presumes any lay person will know what to look for and how to apply the information--the significant versus insignificant markings and the weight to ascribe each. In this way, the examiner functions like a radiologist, directing attention to the relevant aspects of the impression or medical image. That the conclusion is readily apparent after the professional explains the image more likely speaks to the effectiveness of the professional, not the simplicity of the science.**

Id. Additionally, even if a lay person could reach the same conclusion on her own, the evidence would still assist the jurors to determine whether the robbery scene impressions matched those made with the shoes found in the bag. Id.

Last, the court addressed Mahone's suggestion that Homer misapplied the "ACE-V" methodology. Id. at 92. Although the

record contained no evidence of the qualifications of the reviewer who verified Homer's conclusions, or that the review was "blind"--that is, conducted without the examiner knowing the conclusions which Homer had reached--the record did show that such a review was undertaken by a qualified examiner and that the examiner separately confirmed her opinions. Id. The court also rejected Mahone's complaint that Homer did not collect all of the crime scene impressions, but left the collection of some of them to a policeman who may not have been trained. Id. The record showed that Homer directed a member of the state police evidence response team to retrieve the footwear impressions knowing that the team member was sufficiently trained to do so. Id. In the court's view, Mahone's arguments about Homer's particular use of the methodology concerned only the weight to be given the evidence, not its admissibility. Id. The pretrial motion was denied. Id.

C. The Trial

1. The Government's Evidence[2]

Christopher Gaudet, the owner of Sigma Imports in Gorham, Maine, and Timothy McKenzie, Sigma's sales manager, testified

[2]**The parties stipulated that on the day of the attempted robbery, the deposits of the credit union were insured by the National Credit Union Administration Board (T. 1, 38).**

that Mahone worked with the company selling books and novelties to businesses door-to-door first in Arkansas, then in Rhode Island, and finally in Maine (T. 264-66, T. 353-55). Sigma rented an apartment on Roosevelt Trail in Windham where McKenzie lived with Mahone and three other company employees (T. 266, 267, 355). McKenzie and another employee, Russell Humberd, recalled that Mahone owned a silver Ford Probe (T. 268, 312). In July 2003, Mahone visited the Gardiner credit union to peddle Sigma products such as books and an onion chopper (T. 137, 138, 143-44). Both the credit union CEO and one of the tellers remembered Mahone's visit, and the CEO recalled that Mahone was polite, articulate and intelligent (T. 137, 407). However, such sales were not allowed on credit union property, and after the CEO explained the situation Mahone said he understood and politely left (T. 137).

Gaudet remembered that Mahone was thin and sometimes wore two sets of clothes at the same time, which Mahone had told him "made the outside set fit better" (T. 362). In September 2003 Mahone left Sigma for three weeks to visit his father in Chicago (T. 356, 363). Upon his return, Mahone told Gaudet he was going to save some money in order to go back to school (T. 356). After the Chicago trip Gaudet noticed that Mahone was not as motivated,

and his sales numbers fell by half (T. 357).

Another Sigma employee, Christopher Shroyer, recalled that four of the occupants of the Roosevelt Trail apartment purchased BB guns that were replicas of a .45 Glock handgun (T. 295-96). They used the guns for target practice and for "war games" (T. 296). Shroyer and another Sigma roommate, Joshua Lemieux, bought ski masks and goggles to protect themselves from the BBs (T. 299-300, 330-31). Lemieux testified that they also had duct tape which they used to attach paper targets to trees or cans (T. 327).

Mahone's girlfriend, Zuzana Prcikova, worked at a fast food restaurant in Portland (T. 599). After completing work on Saturday, November 15, 2003, she placed the day's proceeds, $1,300, in a bank deposit bag and with a deposit slip (T. 599, 600). Prcikova did not have a car that evening and did not want to walk to the bank with so much cash (T. 600). Instead, she took the money to her apartment across the street from the restaurant (T. 600). However, once she arrived at home, she forgot about the deposit until the next morning when she was due at work (T. 600). In a rush to pick up a co-worker and to get to work on time, Prcikova asked Mahone to make the deposit for her and he replied, "No problem" (T. 600-601).

On Monday November 17 or Tuesday November 18, Prcikova's boss called her to ask if she had made the deposit of Saturday's cash receipts (T. 603). Although she said she had, her boss told her the money was not at the bank (T. 603). Prcikova called Mahone, asked him if he had deposited the money as she had asked, and he told her he did (T. 603).

At 3:00 p.m. on Tuesday, November 18, Officer Bruce Hurley of the Gardiner Police Department was checking for speeders when a citizen stopped to report that a car was parked suspiciously on the road near the school, and asked Hurley to investigate (T. 153). The citizen said that a black male was sitting in the car and the manner in which the car was parked raised suspicions (T. 163). Upon investigation Hurley found a silver Ford Probe parked on the road (T. 153-54). When Hurley stopped his cruiser the driver got out of the car and approached him (T. 154). Hurley identified the driver as Mahone (T. 155, 169). When Hurley asked if everything was all right, Mahone replied that the car had overheated and that he was waiting for it to cool (T. 154). Checking the car, Hurley noticed no signs of overheating such as steam or water dripping from the engine, but he had no way of knowing how long the car had been sitting (T. 154, 166). The car was so full of boxes that there was no room for any occupant

other than the driver (T. 155). From where the car was parked facing south, one could see through the trees to the back of the Gardiner credit union, but there was no view of the front (T. 158, 159, 164).

Hurley suggested that Mahone get his car off the road by moving it to a nearby parking lot (T. 157). Mahone complied (T. 157). When Hurley checked the parking lot an hour later, after school had closed for the day, Mahone and his car were no longer there (T. 157).

That evening, Gaudet recalled, Mahone was "very upset," "pink in the face, around the eyes . . . like he had been rubbing them," and was also crying and "very shaken" (T. 358-59). Asked what the problem was, Mahone explained to Gaudet that his girlfriend had broken up with him (T. 359). McKenzie also recalled that Mahone was depressed and "visibly upset" and did not want to talk about it, and McKenzie assumed the mood was attributable to the break-up (T. 269-70). Each day McKenzie collected $10 from Mahone and the others for rent, but Mahone told him he did not have the money "right then," although he owed two days' rent (T. 271). Shroyer confirmed that Mahone had been "digging for pocket change" (T. 297).

At 11:45 a.m. on Wednesday, November 19 Gaudet saw Mahone's

car parked at the apartment (T. 360). Gaudet told the landlord "to go wake Mike and tell him to go make some money" (T. 360). Vickie Lemieux, loan manager at the Gardiner Federal Credit Union testified that she was at work in her upstairs office late that afternoon and at approximately 5:05 p.m. she left the office for the day (T. 122). Although a stairway leads from her office to the lobby, that evening she descended the stairway leading from the employee break room to the area behind the teller line (T. 122, 123-24). Operations manager Tracie Curtis and teller Mary White were still at work and both confirmed that Lemieux used the back staircase (T. 124, 187-88). After saying goodnight to Curtis and White, Lemieux walked to her car and noticed a silver Ford Probe parked on the street near her own car, and facing away from the credit union (T. 125, 126, 128). Lemieux said that the car "piqued [her] curiosity" because it was "after hours" and she knew it did not belong to either Curtis, who drove a black pickup truck with a cap on it, or White (T. 125, 205).

Curtis recalled that as she walked to the credit union's vestibule to drop off a courier bag with the day's checks and deposits, someone was descending the staircase from the second floor to the lobby and carrying a box "directly in front of [the person's] face," concealing it (T. 189-90, 212). At first Curtis

thought that the person on the stairs was Lemieux, who might have returned after forgetting something (T. 191). However, when Curtis spoke and said, "[O]h, you scared me[!]," the individual threw the box to the floor, tackled Curtis from the left side, and together they crashed into the wall underneath the surveillance camera (T. 191). Curtis testified that the person wore a ski mask with white paint or makeup around the eyes and was dressed entirely in black, including black gloves and black low-top canvas sneakers, and carried a knife and a handgun (T. 191, 192, 206-07, 209, 404; GX 15-E).

Shown Government Exhibit 16-A, Curtis testified that "[i]t looks to be like the gun I saw that night" (T. 206). Curtis also identified Government Exhibits 15-I-K-1 and 15-I-K-2, with distinctive V-shaped stitching, as "the sneakers I saw that night" (T. 209). Once Curtis saw a gun, she decided to follow her training and to do exactly what the person told her to do (T. 213).

Placing Curtis "sort of in a choke hold," the individual pulled her through the glass doors and back inside the credit union (T. 192). The individual pointed the gun at White, who was still behind the teller counter, and told her to put her hands up (T. 193, 396-97). Hearing the voice, White concluded the person

was a man (T. 404). While holding onto the back of Curtis' shirt the man jumped up onto the teller counter "with one swift jump" and over to the other side, trying to pull Curtis with him (T. 193, 397). As he did so "a shoe flew off his foot, and it landed" untied beside White (T. 399, 406). Curtis' shirt went up over her head and she said, "I'm not going up over the counter with you" (T. 194).

The man let go of Curtis, grabbed White, and ordered Curtis to get behind the counter (T. 195). He then directed both women to lay face down on the floor where he bound their hands behind their backs with duct tape (T. 195, 397, 398). He also used duct tape to bind their ankles and to cover their eyes (T. 196-97). Nevertheless, White was able to see beneath the tape as the man slid his foot back into the shoe (T. 399, 406). Curtis also heard the man drop the shades on the credit union windows (T. 203-204).

After asking how the phone system worked, Curtis remembered that the man picked up the handset but she could hear no button tones (T. 200). Then both Curtis and White heard the man say, "This is No. 2 . . . I have two people tied up. The place is secure" (T. 200, 400). However, the credit union's telephone records showed there were no calls made from the credit union

between 5:00 p.m. and 5:30 p.m. on November 19 (T. 549).

The man asked which of them was the manager, and after Curtis identified herself as the manager, he cut the tape around her ankles and led her to a back room used for safe deposit boxes, ordered her to sit in a chair, and then used duct tape "completely around [her] body," including her ankles, to bind her to the chair (T. 197-98). He took White to the bathroom where he also bound her to a chair (T. 198, 402-03). The man wanted to know when the vault opened, and how much money was in it (T. 198, 200, 400, 410). Curtis told him it was set to open "between 6:00 and 7:00 in the morning" and that it contained "about a hundred thousand dollars" (T. 198-99, 200). He also asked about the location and operation of the security camera (T. 199). Although Curtis told him where the camera was, she said that only the credit union president knew how it worked (T. 199).

Asked where there was a key to the building, Curtis told the man it was in her pocketbook in her office, and she heard him as he went through all of her keys to find it (T. 199, 216). The man also wanted the keys to her vehicle, and she told him that she drove a black pickup truck that was parked on the side of the road, and that the keys were in it (T. 199, 202). A glove fell from the man's hand and Curtis "got a good look" (T. 208). She

recalled that "[i]t didn't look like the normal color of my hand. It looked more like a latex glove is the best way I can describe it" (T. 208; GX 15-J). When the telephone began ringing the man asked who would be calling at that time, and Curtis told him "probably one of our husbands" wondering why his wife was not yet at home (T. 200). Curtis described the man as calm and articulate throughout her ordeal (T. 196).

After hearing what she thought was the outside door closing, Curtis yelled "hello," and received no answer (T. 201). She yelled again, "Excuse me, sir?" (T. 201). Again there was no answer (T. 201). A third time she yelled, "Excuse me, is there anybody out there?" (T. 201). There still being no answer, Curtis began to free herself from the duct tape (T. 201). Once free, she sneaked into the bathroom where she found White with her hands already free (T. 201-02). After helping White with the rest of the duct tape, Curtis again checked to see if anyone was in the lobby (T. 202). Finding no one, and hearing White mention the alarm, Curtis ran back to the teller area and hit one of the silent alarms (T. 202).

Curtis and White then ran outside where Curtis noticed that her black Chevrolet S-10 pickup truck, plate number 4775 KY, was missing (T. 202-03, 205). The two ran down through a ditch,

through the yard of a nearby home, and into the house (T. 203). Once inside the neighbor's home, they locked the door and called the police (T. 203).

Gardiner Police Officer Gallego responded to the call and put out a bulletin for Curtis' black Chevrolet S-10 pickup truck (T. 440). He also asked law enforcement officers to check the area surrounding the credit union for "anything out of the ordinary" (T. 442). Officers discovered Mahone's silver Ford Probe parked in the lot behind the nearby Lions Club facility (T. 442, 468, 469, 549-50). The car attracted attention because it was in a small lot in the rear, not visible from the street, and where it was unusual to see a car parked, especially when nothing was going on at the Club (T. 451, 452-53). Lewis Small, a volunteer at the Lions Club kitchen, had left the Club's small rear lot in the middle of the afternoon of November 19 (T. 102, 103). When he returned that evening police cruisers with lights were in the lot, and a car was parked without permission in his parking place (T. 102, 103, 108). A later search of the car revealed Mahone's wallet on the front passenger seat, and many items with the name Sigma Imports (T. 535, 537).

In the woods to the left of the Probe and behind a mobile concession stand was a garbage bag which contained black clothing

matching the description of the clothes worn by the credit union intruder (T. 442, 447, 454, 464, 466, 480). Footprints located on the stairs were "positively identified" by forensic impression analyst Cynthia Homer as having been made by the left and right shoe found in the garbage bag (T. 736; GX R-1, GX R-2). A third and fourth footprint "could have been made" by the left shoe and right shoe, respectively, but Homer reached no positive identification (T. 736; GX R-3, GX R-4). A fifth footprint on the stair landing was "positively identified" as having been made by the left shoe (T. 736, 737). The footprint left on the teller counter was "positively identified" with the right shoe (T. 736-37).

Three makeup kits were also found in the Lions Club's dumpster (T. 480). Later analysis showed nine fingerprints on the three make-up kits, and all nine matched known prints of Mahone's (T. 729). Two prints on the inside of one make-up kit were from Mahone's left thumb (T. 729). A print on the inside of another kit matched Mahone's right thumb (T. 729). The same kit also had prints of Mahone's right index and middle fingers on the outside lid (T. 730). Mahone's prints were also on both the inside and outside lids of a third kit (T. 730).

When McKenzie got back to the Roosevelt Trail apartment on

the evening of November 19 all of Mahone's belongings were gone (T. 271). McKenzie's black Brinks lockbox, in which he kept his day's receipts and approximately $280 in rent money he had collected, was also missing, along with Shroyer's and Lemieux's BB guns and one of their ski masks (T. 272-73, 298, 330-31). Lemieux identified his Wal-Mart brand shoes which he could not find after Mahone's disappearance (T. 332-33; GX 15-I-K-1, 15-I-K-2). McKenzie also discovered a note which Mahone had left behind (T. 276). It read:

> **Tim, my apologies, but I need something to get out of here. I don't know how much is there, but when I get on my feet, I will pay you back. Sorry for being such a disappointment. You were a good friend to me and everybody. Michael A.**

(T. 276). Mahone's mother later paid McKenzie $300 to cover the loss (T. 273). Shroyer and McKenzie reported the thefts to the Windham Police Department (T. 67, 68).

Jade Lanning Haynes, a receptionist at a law office in Portland, testified that on Thursday morning November 20, she awoke at her rural Windham farm where there was little or no vehicle traffic and prepared to walk the family dog (T. 38-39, 50). Looking outside at approximately 7:45 a.m., she noticed a black Chevrolet S-10 pickup truck with a cap parked next to her father's Ford Explorer in front of the barn (T. 39, 47). After

she took the dog outside, Haynes stood in the house driveway and watched the black truck back out of the barn driveway, drive toward her, pass the house, and drive away towards Route 302, also known as Roosevelt Trail (T. 39, 40, 48). Haynes was able to see the license plate number and remembered it (T. 40). Although she could not see the driver's face, Haynes was able to determine that the driver of the truck was alone, and was a dark skinned male who was either bald or had short hair, and who wore a light blue or white shirt (T. 41, 49).

After checking the Explorer to make sure nothing was missing, Haynes walked back toward the house and at approximately 7:50 or 7:55 a.m. the black truck drove by again heading in the opposite direction (T. 40, 47). Once inside, Haynes looked out and saw that the black truck was again parked beside her father's Explorer (T. 40). Haynes wrote the truck's license plate number, as well as the make and model, on a slip of paper which she found in her kitchen and left it on a shelf (T. 41). She watched the truck as it backed out of the barn driveway and drove toward Vance Drive, in the opposite direction from Route 302 (T. 45-46). The truck belonged to Curtis and had been stolen from outside the credit union the previous evening (T. 46, 205, 541; GX 16-P-1).

At 10:00 or 11:00 that morning, Mahone met his girlfriend, Prcikova, at the restaurant in Portland where she worked (T. 603). According to Prcikova, Mahone appeared "stressed" and "in a rush," and she agreed that he was not his usual self (T. 604, 616). He told her he had left his cell phone in his silver Ford Probe, which had been towed away (T. 604). When he called that evening, Mahone said he could not tell Prcikova where he was (T. 605). By that time she had heard about the robbery and asked him about it (T. 605). Mahone told her "he didn't do anything" (T. 605). However, Mahone admitted that he was at the credit union at the time of the robbery and "he said he was supposed to give a ride to some guy away from the bank, but that he never did, and he changed his mind, and he left" (T. 605-06).

Haynes spent Friday night November 21 with her boyfriend (T. 41). Her father walked the dog that evening and noticed that the Explorer, which he had been left parked in the driveway in front of the barn, was no longer there (T. 55-56). On Saturday morning Haynes' parents called to ask if she had taken the Explorer (T. 41). After telling them she had not, Haynes told them about the black truck which earlier had raised her suspicions (T. 42). Haynes' mother and father called the police, reported the Explorer stolen, and gave them the information their daughter had

written down about the black truck (T. 52-53, 55, 56-57, 60). The authorities recalled that Shroyer and McKenzie, who lived on Roosevelt Trail approximately a half mile away from the Haynes farm, had reported thefts the previous evening (T. 67).

In late November a grocery store worker discovered Curtis' black truck parked in a grocery store parking lot in Scarborough (T. 562, 570; GX 16-P-3). When the worker returned from a two-week vacation in December, the truck was still there (T. 563). She became suspicious and convinced her husband to report the truck to the local police (T. 563). When Scarborough authorities discovered the truck was reported stolen during an attempted robbery, they notified the state police (T. 567-68). Tucked beneath the front seat of the truck was the gun which had been stolen from Shroyer and used in the attempted robbery and pointed at White (T. 206, 299, 545; 721; GX 16-A).

Heather Teabout testified that she became friends with Mahone in the summer of 2003, and that in mid-November he came to stay with her at her home in Saco (T. 641-42). On the third day of his stay the two were watching television when a news story mentioned Mahone and a bank robbery, and Teabout told Mahone that "he should clear it up at the police station in Saco" (T. 644). The next day Teabout drove Mahone to his home (T. 645).

A week after the attempted robbery Prcikova visited Mahone in Conway, New Hampshire where he had begun working at an Applebee's restaurant (T. 606, 607). On December 12, 2003 Detective Broyer of the Conway Police Department received information that Mahone, a federal fugitive, was in the area and in possession of a stolen vehicle (T. 85-86). Broyer located the stolen Explorer at a local motel where Mahone was staying (T. 86). He also learned that Mahone was at work at a restaurant next door (T. 86). Lt. Edward Wagner, also with the Conway Police Department, testified that Mahone was working as the restaurant host seating patrons (T. 78, 80). Wagner entered the restaurant with a partner, and Mahone seated the two of them (T. 80). After Mahone entered the restaurant kitchen, Wagner and his partner followed, grabbed Mahone by the arms, told him who they were, and asked, "Do you know why we're here[?]" (T. 80-81). According to Wagner, Mahone replied, "Yes, I do" (T. 81).

A search of the Explorer revealed McKenzie's black Brinks cashbox located on the rear seat (T. 88). The box contained cash and other items (T. 88). When McKenzie received the lockbox back from the Conway Police Department, it contained a consignment receipt for Mahone although McKenzie had never stored Mahone's receipts in the box (T. 275).

In the front of the Explorer was an Applebee's envelope for newly hired employees (T. 89-90). It contained documents, handwritten notes, and a cell phone billing statement in Mahone's name (T. 89). The keys to the Explorer were discovered at the restaurant where Mahone had left them (T. 89). When Prcikova retrieved Mahone's belongings after his arrest, she discovered the night deposit bag she had prepared on November 15, including the deposit slip (T. 608). However, only some change was left inside it (T. 608).

Prior to her testimony, Mahone gave Prcikova written instructions in a question-and-answer format about what to say in the courtroom (T. 609-10; GX 39-L-1). If asked whether he had written letters to her about her court appearance, Mahone instructed her to answer, "No," and that "[m]ost of his letters were stupid poems and cards" (T. 622-23; GX 39-L-1). Further, he told her to testify that "mostly everything you asked me today I already told detectives and [the] FBI" (T. 623; GX 39-L-1). If asked how Mahone got to New Hampshire, he instructed Prcikova to reply, "I think maybe Heather [Teabout] took him" (T. 623). However, Prcikova did not know how Mahone got to New Hampshire (T. 623). Finally, if asked for Teabout's telephone number Mahone instructed Prcikova to respond that she did not have the

number (T. 623). In fact, however, Prcikova did have Teabout's telephone number (T. 623).

Following his arrest, fingerprints and blood were taken from Mahone (T. 545-46). Chemical analysis showed that the DNA sample from Lemieux's shoes in the garbage bag was "mixed," that is it came from one or more donors and "most likely two individuals contributed to that DNA profile" (T. 683). Nevertheless, the "major profile" matched that of Mahone (T. 683). The "estimated probability of selecting an unrelated individual at random from the FBI African-American population database would be 1 in 2.82 billion" (T. 683). Mahone's DNA was also discovered on the latex gloves, the gun, and the ski mask (T. 684, 685, 686; GX 15-E, GX 15-E-a, GX 15-J, GX 15-J-a, GX 16-A, GX 16-A-a).

2. The Defense Case

Marcella Martin, a teller at the Fleet Bank in Orono, testified that she recalled a black male entering the Fleet Bank near closing time on November 14, 2003 (T. 801-02). He wanted to speak with someone about accounts, and Martin told him to have a seat until the customer service representative could assist him (T. 802). Both Martin and Debra Davis-Gero, the customer service representative, recalled that he was dressed in black and carried a duffel bag (T. 802, 803, 810). Another teller, Donna

Aleksiewicz, also remembered that the young man was dressed in black and had a duffel bag (T. 819, 821). On cross-examination, Martin and Davis-Gero testified that with the University of Maine located in Orono it was not unusual to see young, black males enter the bank (T. 807-08, 815). Indeed, Martin said it happened "[e]very day" (T. 808). Neither she nor Aleksiewicz could pick the young man's picture out of a photographic line-up, although Aleksiewicz narrowed her choice to two of the photographs (T. 805-06, 823).

However, Davis-Gero spent fifteen to twenty-five minutes with the young man answering his questions about a possible loan, and she identified him in the courtroom as the defendant, Mahone (T. 810-11). Asked if she was sure, Davis-Gero testified, "Yes" (T. 811). She recalled that Mahone shifted the duffel bag "from one hand to the other, back and forth" (T. 811). After receiving the information about a loan, Mahone said he would think it over and left the bank, saying he might return the following week (T. 811). Davis-Gero remembered that Mahone returned, still carrying the duffel bag, on November 19, 20, or 21 (T. 812-13). On cross-examination, Davis-Gero testified that Mahone told her he had a high credit card debt and was unsure of whether the bank would approve him for a personal loan (T. 814).

As Mahone took the witness stand to testify in his own defense, he broke down and sobbed (T. 824-26). However, after a fifteen-minute recess Mahone regained his composure and testified that he was born in Chicago in 1977 and grew up in Arkansas (T. 826). He attended the University of Central Arkansas where he met Sherina Durgon, and the two had a daughter born in 2000 (T. 834, 838, 839). However, Mahone left school when his grades faltered and after being convicted of forgery and felony theft by receiving (T. 835-37).

Mahone worked for a short time for UPS and then began work for Chris Gaudet of Sigma Imports in Arkansas and Rhode Island (T. 838, 839, 840, 842-43). In May or June 2003 the Sigma employees moved to Maine and into an apartment on Roosevelt Trail in Windham (T. 844, 845). Mahone acknowledged that he drove a Ford Probe that he bought in Maine in June or July, but the car ran poorly and would overheat (T. 857-58). He met his girlfriend, Zuzana, in August (T. 850). In September Mahone visited his father in Chicago, and his father "talked [him] into going back to school" (T. 852). However, Gaudet became upset when Mahone returned to Maine and announced that he was quitting Sigma (T. 854).

In October in a Portland bar Mahone met a man named "T" (T.

860). He saw "T" again the following weekend, spent the evening with him, and got his telephone number (T. 862, 864). Toward the end of October, Mahone called "T" and the two met in South Portland (T. 865). After Mahone expressed dissatisfaction about his job with Sigma, "T" "mentioned something about, you know, another job" (T. 866). Mahone testified, "I didn't really know what--exactly what [the job] was. But he got into a few details" and that was when Mahone said he had to pick up Zuzana, and "T" left (T. 866). As Mahone described it, "T" had "told me different things, and it was just something I wasn't really interested in" (T. 868). "T" asked Mahone about his handwriting and had him write "early procedures or something," and "T" "pulled out I think--I'm not sure which it was--I think it was gloves or something" (T. 868-69, 870). Mahone testified that the gloves were "[p]retty similar, if not the same ones" admitted in evidence as GX 15-J (T. 869). "T" also pulled out duct tape and a ski mask and said something about a building (T. 870, 871). Mahone thought "T" was talking about a burglary (T. 871).

Mahone next met "T" on November 18 (T. 866). When Mahone was driving back to the Sigma office, car lights began to flash behind him (T. 867). Mahone pulled off the road, a car pulled in behind him, and Mahone saw "T" get out of the car (T. 867). "T"

approached Mahone, hit him and knocked him to the ground, saying "[W]hy did you tell the police?" (T. 867-68). When Mahone said, "I don't know . . . what you mean," "T" grabbed Mahone's arm and held it behind his back, and asked "[W]hy [are you] lying [to me]?" (T. 868). Continuing to hold Mahone's arm behind his back, "T" declared, "[T]his time . . . you're going to help me. You have no choice" (T. 868). Mahone replied, "[N]o, if you're thinking about what I think you're thinking about, no" (T. 871). However, "T" insisted that Mahone had no choice and told him, "[I]f you don't do it for you, do it for Zuzana" (T. 871).

"T" added, "I know where you live" and also where Zuzana lives (T. 871, 872). "T" also reminded Mahone that he had Mahone's "handwriting, fingerprints, or something" (T. 872). Eventually, Mahone "just said, yeah" (T. 871). "T" then gave Mahone a black bag and said, "[D]on't forget what I told you" (T. 872). Inside the bag was "pretty much everything you see there" marked as Government exhibits (T. 876). He specifically identified Government exhibit 15-L as the pants that were in the bag when "T" gave it to him (T. 877). However, Mahone identified Government exhibits 15-A and 15-B as his own towels which were not in the bag when "T" gave it to him (T. 876-77). Mahone had used these towels to remove the makeup from his face (T. 892).

On November 19 Mahone awoke "[s]ore and just really confused" (T. 873). After thinking about matters, Mahone decided to go to the police in Westbrook (T. 874). However, Mahone explained that:

> **I just sat there, and I was going to go in. I was trying to figure out what I was going to say to them, how I was going to explain it, and I just didn't know how. I knew they were going to have a lot of questions, questions I couldn't answer, and just I was just really confused . . . So I went back home, and I tried to figure something else out . . . I decided to follow the instructions that ["T"] gave me.**

(T. 874-75).

"T" had told him to drive north on I-95 to Gardiner, to follow Route 201, and that next to an armory was a bank, and to be there "next to the bank" at 3:30 p.m. (T. 875-76, 877, 878). Mahone had been there before while working for Sigma (T. 876). Other instructions included directions to "put everything on, use the white makeup, or something" (T. 880). Mahone testified that "It was something I didn't want to do, but yet I was doing it" (T. 881). Asked if he also put on the shoes, Mahone answered "Yes" (T. 882).

Mahone testified that he then parked on the side of the road (T. 884). However, he "got scared" and left (T. 885). It was then that his car overheated (T. 885). Because he did not want to be seen by "T," Mahone pulled his car into the lot behind the

Gardiner Lions Club (T. 886). He removed the clothing and put it in his car trunk (T. 887). Relieved "to be out of the trouble that I probably was about to be in," Mahone also removed the makeup, threw the makeup kits into the dumpster, got back into his car, and fell asleep (T. 887).

When Mahone awoke it was dark (T. 887). He tried to drive away but his car overheated again (T. 888). While waiting for it to cool, Mahone saw a black truck driving around the area (T. 888). He then drove to the interstate where his car again overheated (T. 889). At that point he decided to drive back to the Lions Club lot to add water to the radiator (T. 889). Again waiting for the car to cool, Mahone heard police sirens (T. 890). He took the clothes from his car trunk and disposed of them "behind this little tanker," or snack wagon, and went to a nearby driveway where he sat in a truck and watched (T. 891-92, 893, 895, 923). He found "some kind of suit or something, like a big suit" in the truck and he put it on because it was cold (T. 897). Eventually he saw his car being towed away by the police (T. 894, 899). After "a few hours or so" Mahone walked to the interstate and hitched a ride to Portland "from some trucker or something" (T. 895-96).

Mahone walked to Zuzana's apartment but no one opened the

door for him (T. 896). He fell asleep in "a barn or something" and the next morning he walked in the rain to the fast food restaurant where Zuzana worked (T. 896-97). However, Zuzana was busy and could not talk to him (T. 898). He left and took a cab home to Windham (T. 898).

After getting cleaned up, Mahone said he decided to leave because he "was afraid of not only T, but I was also afraid of the police now" (T. 898-99). He called his friend, Heather, who picked him up and took him to her home where he stayed a few days (T. 899-900). At Heather's he saw his picture on television in connection with a robbery at the Gardiner Federal Credit Union (T. 900). Although Heather advised him to get the matter cleared up, he did not (T. 901). This was because "T" suddenly appeared at Heather's and stuck a gun in Mahone's back (T. 901).

"T" asked why Mahone had not shown up in Gardiner, and Mahone "was in shock" and "just broke down" (T. 901-02). Mahone was on his knees and "T" told Mahone to leave or "I'm going to kill you" (T. 902). When Mahone said he had no place to go, "T" gave him some keys and said "[H]ere's your way out . . . a friend owes me a favor" (T. 902). Heather drove him to the car, a green Ford Explorer, which they found "on the side of the road," and Mahone drove to New Hampshire where he landed a job at

Applebee's Restaurant (T. 904, 905-06).

Mahone acknowledged that he wrote a letter to Zuzana from jail admitted in evidence as Government exhibit 39-L-1 (T. 908). He wrote out the questions and answers for Zuzana because, as he explained:

> **I knew that if I went to court, they were going to find me guilty if I didn't have somebody to sort of--that offset all this stuff that wasn't true about me.**

(T. 908-09). Finally, Mahone denied that he was in the credit union on November 19 and also denied that he was ever in Curtis' black truck (T. 909). Nevertheless, the jury returned guilty verdicts on both the attempted armed robbery and interstate theft of the Ford Explorer (Docket #106).

D. <u>Sentencing</u>

The PSR calculated a base offense level of 20 (PSR ¶ 19). Eight levels were added because the property of a financial institution was the object of the offense, a dangerous weapon was used, and the victims were restrained (PSR ¶¶ 20-22). An obstruction of justice enhancement of two levels was assessed in part because Mahone had prepared a script for Prcikova's testimony (PSR ¶¶ 15, 25). There was no multiple-count adjustment for the interstate theft offense (PSR ¶¶ 32-37). Thus, the total offense level was 30 (PSR ¶ 42).

One criminal history category (CHC) point was assessed for each of two prior Arkansas convictions for theft of property and possession of a controlled substance (PSR ¶¶ 44, 46a). Three other Arkansas convictions--for aggravated assault, theft by receiving, and forgery--produced a total of only one point (PSR ¶ 45). Two additional Arkansas convictions for driving with a suspended license and for failing to appear in court resulted in no CHC points (PSR ¶ 46). However, two CHC points were calculated because Mahone committed the attempted robbery while on probation from Arkansas (PSR ¶ 48). Five CHC points placed Mahone in CHC III (PSR ¶ 49). With an offense level of 30 his Guideline sentencing range became 121 to 151 months (PSR ¶ 67). Nothing in the view of the probation officer warranted departure (PSR ¶ 78).

Restitution was set at $5,477.75 to the Concord Group Insurance Company after it compensated the owner of the stolen Explorer (PSR ¶ 75). Another $250 was due to the Explorer's owner for the insurance deductible (PSR ¶ 75). Still another $6,373.07[3] was due the credit union for its losses (PSR ¶ 75).

Among Mahone's objections to the PSR was his complaint that

[3]The credit union restitution was later reduced to $5,615.38 because of "certain items that were not compensable" (S. 93).

the Conway Police Department valued the Explorer at $5,000 at the time of its recovery, yet Concord disposed of it for only $750 (PSR Addendum at 20). However, the author of the PSR did not modify the report because Mahone provided nothing "that would indicate that the amount paid by the insurance company does not reflect the actual value of the vehicle or repairs made to the vehicle" (PSR Addendum at 20).

At the sentencing hearing Mahone introduced the Conway Police Department report which reflected that the Explorer's condition was "good" at the time of its recovery and that the police estimated its value at $5,000 (S. 3). Also admitted was an Internet "Kelly Blue Book" report which stated that a 1996 Explorer with 196,000 miles had a value of $5,760 (S. 3). Mahone raised two issues concerning restitution (S. 11-12). First, Mahone suggested that the constitutionality of the Restitution Act was in question following the Supreme Court's opinion in Booker (S. 11). Second, Mahone argued that the court should reduce the amount of restitution "by the value of that Ford Explorer on the day that it was recovered" (S. 12).

Although Mahone disagreed, the court concluded that the theft of the Explorer was a crime of violence because it facilitated Mahone's escape after the attempted robbery and also

assisted him in maintaining his fugitive status (S. 12-13). The court summarized the facts as follows:

> **[W]hat I understand happened is that, after the vehicle was stolen, the owner made a claim against her or his insurance policy with the Concord Group, which was the automobile insurer. The victim in this case, paid a $250 deductible and Concord ended up paying $6,277.75 to the victim. Concord then took possession or legal title of the vehicle after--presumably after trial and sold the vehicle for only $750. That $750 was applied to the [$]6,277.75, resulting in a net loss to Concord of [$]5,477.75.**

(S. 13). Asked if those figures were correct, defense counsel replied, "I have no reason to disagree" (S. 13-14). Counsel's argument was that instead of deducting the $750 from the value of the vehicle at the time it was taken, the court should deduct the vehicle's current "Blue Book" value, thus resulting in a lesser amount (S. 14).

The court announced its ruling, as follows:

> **[D]espite the rather extreme variation between the $750 for which the insurance company sold the automobile and the Internet-indicated value, which is in excess of $5,000, I think at this point, the--it's more likely than not that the value was actually the value reflected in the price that the insurance company paid and received as a consequence of its dealings with the automobile.**
>
> **I take it as a given that the insurance company is not in the business of paying to its insureds more money than the value of the vehicles it has insured. And I also take it as a given that the insurer has every incentive to receive full value for any vehicle that it receives title to that has been damaged or**

> **stolen. In this case, absent some information that the sale of the--that Concord's sale of the vehicle was conducted under less than optimal circumstances, the court really has to conclude that the $750 for whatever reason is what Concord could have received on the date of sale since it is what it did in fact receive.**
>
> **Otherwise, the court is left to speculate on the condition of the vehicle, the impact that its being stolen may have on its value, the impact of its being held in police custody for an extended period of time while the trial of this case took place, and absent some indication that the auction or sale by Concord was not for fair market value and circumstances that would indicate another value, I am going to accept the figures reflected in the probation office report.**

(S. 14-16). After stating its view that "the tale that [Mahone] told this jury [was] the most preposterous, far-fetched bit of testimony I've ever heard in this courtroom," and in light of "a mountain of evidence that established [Mahone] committed both these crimes," the court sentenced Mahone to 140 months in prison (S. 104-05, 112). Among other restitution amounts, $5,477.75 was ordered paid to Concord Group Insurance for the stolen Explorer (S. 115).

SUMMARY OF THE ARGUMENT

1. There was no abuse of discretion in admitting the expert's opinion that footwear impressions, discovered inside the credit union following the attempted robbery, were made by shoes discarded in a garbage bag found near Mahone's car parked near

the crime scene. Because other evidence showed that the shoes contained Mahone's DNA, and had been taken from his roommate at the time of Mahone's disappearance on the day of the attempted robbery, the expert's opinion connected Mahone to the crime and thus was relevant and assisted the jury. Further, as the district court found, "[t]he science of footwear analysis is neither new nor novel" and "expert testimony on footwear comparisons has been admitted in courts in the United States for years." Consistent with the district court's conclusion, the expert's testimony established that "the theory and technique of footwear comparisons have been tested, that the science has been subject to peer review and publication, that the scientific technique has been evaluated for its known or potential error rate, and that the science of footwear analysis has by now been generally accepted." Although not certified by the International Association of Identification (IAI), the expert's educational credentials included a masters degree in forensic science and she had made 11,000 footwear identifications without error. IAI certification is not a prerequisite to footwear impression expertise.

Even if error occurred, it was harmless. In the district court's words, there was "a mountain of evidence" against Mahone.

His DNA was on the shoes, the gun, the ski mask, and the latex gloves used during the attempted robbery. The gun, which belonged to Mahone's roommate, was found in a black pickup truck stolen from one of the credit union employees by the perpetrator of the attempted robbery. The shoes, which also belonged to one of Mahone's roommates, and the latex gloves, were found disposed of near Mahone's car near the credit union. Nearby were discarded makeup kits with Mahone's fingerprints and which were used to disguise the ski mask. The Explorer was stolen from a driveway in Windham just a half mile from where Mahone lived, and shortly after a dark skinned man driving a black pickup truck was seen parked in the driveway. Finally, Mahone possessed the Explorer in Conway, New Hampshire where he was arrested. Even without the expert evidence, the circumstantial case was strong.

2. Restitution was properly ordered to the Concord Group Insurance Company for $5,477.75. The insurer compensated its insured $6,277.75 for the loss of the Explorer. That amount was reduced by the $750 which the insurer received from the vehicle's disposition. In the absence of any evidence that the sale was for any less than for full value, the court concluded "that the $750 for whatever reason is what Concord could have received on the date of sale since it is what it did in fact receive." There

was no clear error in that determination, and no abuse of discretion in the restitution order.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE GOVERNMENT EXPERT'S EVIDENCE OF FOOTWEAR IMPRESSION COLLECTION AND HER OPINION THAT SHOES FOUND OUTSIDE OF THE CREDIT UNION, AND ON WHICH WAS FOUND MAHONE'S DNA, HAD MADE THE FOOTPRINTS LEFT INSIDE THE CREDIT UNION DURING THE ATTEMPTED ROBBERY.

Mahone's primary argument is that the district court abused it discretion when it admitted the expert's opinion that Mahone's roommate's shoes, which had Mahone's DNA on them and which were found discarded near Mahone's car near the credit union, made the footprint impressions found inside the credit union following the attempted robbery. He maintains that such evidence was unreliable. However, the record establishes the expert's qualifications, the reliability of her scientific methodology, and the verification of her opinion by peer review. Moreover, the evidence connected Mahone to the attempted robbery. Thus, it was both reliable and relevant, and therefore properly admitted at trial. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993); Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998) (requiring that expert opinion be "scientifically sound" and "methodologically reliable.").

A. Standard of Review

This Court reviews the admissibility of expert testimony for manifest abuse of discretion. See Diefenbach v. Sheridan Transp., 229 F.3d 27, 29 (1st Cir. 2000); see also United States v. Corey, 207 F.3d 84, 88 (1st Cir. 2000) (reviewing admission of expert witness testimony for "clear abuses of discretion"). Stated differently, the Court will not reverse the district judge's evidentiary ruling admitting expert testimony unless it was based upon "an incorrect legal standard" or unless the Court reaches a "definite and firm conviction that the [district] court made a clear error of judgment." Id. (quoting United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995)). Indeed, Mahone concedes at pages 9 and 12 of his brief that he must show "manifest error." As shown below, no clear or manifest abuse of discretion occurred here.

B. Expert Footwear Impression Evidence Was Properly Admitted at the Trial

Fed. R. Evid. 702 provides that:

> **If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.**

In Daubert, 509 U.S. at 597, the Supreme Court assigned to the trial court the task of determining whether an expert's testimony

"both rests on a reliable foundation and is relevant to the task at hand." The Court then identified four factors to guide that determination: testing, peer review, error rates, and "acceptability" in the relevant scientific community. See id. at 593-94. As this Court has explained, the ultimate purpose of the Daubert inquiry is to determine whether the expert's testimony "would be helpful to the jury in resolving a fact in issue." Hochen v. Bobst Group, Inc., 290 F.3d 446, 452 (1st Cir. 2002).

In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the Supreme Court clarified ambiguities that remained after Daubert. First, the Court explained that trial courts' "gatekeeping" duties apply to all expert testimony. See id. at 147, 150. Second, the Court made clear that Rule 702 grants experts wide latitude and the Daubert factors are neither mandatory, exclusive nor exhaustive. Id. at 141. Instead, they should be applied flexibly to help trial courts assess the reliability of the evidence. Id. at 141, 153. Finally, the Court clearly stated that trial courts enjoy broad discretion in applying Rule 702. Id. at 142; see also United States v. Mooney, 315 F.3d 54, 62 (1st Cir. 2002). At bottom:

> Daubert does not require that the party who proffers expert testimony carry the burden of proving to the

> **judge that the expert's assessment of the situation is correct . . . It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.**

Mooney, 315 F.3d at 63 (quoting Ruiz-Troche, 161 F.3d at 85).

The Government's expert footwear evidence admitted at Mahone's trial was both reliable and relevant. Cynthia Homer was qualified as an expert in footwear impressions collection and analysis by both training and experience. She possessed a masters degree in forensic science, had made over 11,000 footwear comparisons, had worked as a footwear examiner for more than two years, and had previously testified in court as an expert in footwear impressions analysis and collection. Moreover, she had read widely in the field, attended conferences and lectures, and trained others. Her work was also subject to review and verification by her expert peers, including both general annual proficiency testing and verification of specific comparison opinions.[4] See, e.g., United States v. Rose, 731 F.2d 1337 (8th

[4]Mahone laments at page 13 of his brief that Homer was not certified by the IAI as a footwear examiner. However, as the district court observed, "There is no evidence that the IAI is the sole footwear examiner certifying body or that its footwear examining certificate is a prerequisite for expertise in the field." United States v. Mahone, 328 F. Supp. 2d 77, 90 (D. Me. 2004). Neither is there any requirement that the expert be "an outstanding practitioner." Id.

Cir. 1994) (upholding the expert qualifications of a police department employee comparing shoe prints).

Nevertheless, Mahone argues that Homer's "ACE-V" methodology was not reliable because it lacked "objective identification standards" such as a "known number of clues which dictate a match." However, in the case of handwriting analysis, this Court has already rejected such a claim. See Mooney, 315 F.3d at 63 (rejecting a claim that handwriting analysis "lacks a set standard regarding the number of handwriting similarities required to make a 'match.'"). Moreover, as the district court pointed out, the "ACE-V" methodology has been subject to peer review, it is generally accepted in the forensic community, and its reliability has been upheld by the courts. See, e.g., United States v. Hendershot, 614 F.2d 648, 654 (9th Cir. 1980) (addressing footwear impression evidence prior to Daubert).

The evidence was also "relevant to the task at hand." Daubert, 509 U.S. at 597. Other evidence showed that the shoes belonged to Mahone's roommate, Lemieux; contained Mahone's DNA; and were discovered disposed of in a garbage bag located near Mahone's Ford Probe not far from the credit union. Thus, expert opinion that the shoes produced the footprint impressions located inside the credit union following the robbery helped the jury to

determine whether Mahone was the perpetrator of the attempted robbery as the Government charged. Compare United States v. Ferreira, 821 F.2d 1, 8 (1st Cir. 1987) (excluding opinion for lack of relevancy). Here, the evidence "assist[ed] the trier of fact to . . . determine a fact in issue. . . .," Fed. R. Evid. 702, and was appropriately admitted. In the court's words, the testimony showed that "the theory and technique of footwear comparisons have been tested, that the science has been subject to peer review and publication, that the scientific technique has been evaluated for its known or potential error rate, and that the science of footwear analysis has by now been generally accepted." There was no abuse of discretion in the admission of Homer's testimony, and Mahone's conviction should stand.

C. If Error Occurred, It Was Harmless

If the Court should somehow find that the district court erroneously admitted the expert opinion evidence, the error was harmless. See United States v. Melvin, 27 F.3d 703, 708 (1st Cir. 1994) (ruling that an evidentiary error is harmless if it is highly probable that the error did not contribute to the verdict). As the district court stated at Mahone's sentencing, the Government presented "a mountain of evidence that established [Mahone] committed both these crimes." The record showed that

Mahone's DNA was on the shoes, the gun, the ski mask, and the latex gloves used during the attempted robbery. The gun, which belonged to Mahone's roommate, was found in a black pickup truck stolen from one of the credit union employees by the perpetrator of the attempted robbery. The shoes, which also belonged to one of Mahone's roommates, and the latex gloves, were found disposed of near Mahone's Ford Probe not far from the credit union. In a dumpster near the car authorities discovered the discarded makeup kits apparently used to put white makeup on the ski mask. Mahone's fingerprints were all over them. The Explorer was stolen from a driveway in Windham a half mile from where Mahone lived, and shortly after a dark skinned man was seen driving the credit union manager's stolen black pickup truck and which he parked in the driveway next to the Explorer. Finally, Mahone was in possession of the Explorer in Conway, New Hampshire where he was arrested. Clearly, even without the footwear impression evidence, the circumstantial case against Mahone was staggering. Given the totality of the circumstantial evidence, the expert's opinion could not have been alone responsible for the jury's guilty verdicts, nor even have tipped the scale against him.[5] It

[5]Mahone contends at page 12 of his brief that without the footwear comparisons, nothing placed Mahone inside the credit union. However, the contention overlooks the eye witness

was just one more piece of "a mountain of evidence" of his guilt. Again, Mahone's conviction should stand.

II. THE DISTRICT COURT CORRECTLY ORDERED RESTITUTION TO THE INSURANCE COMPANY IN THE AMOUNT OF $5,477.75.

Mahone's secondary argument is that the amount which Concord Group compensated its insured for the stolen Explorer, $6,277.75, should have been reduced by $5,760, the asserted "Blue Book" value of the Explorer, rather than by only $750, the amount Concord Group received at the vehicle's sale. However, the court concluded "that the $750 for whatever reason is what Concord could have received on the date of sale since it is what it did in fact receive." Accordingly, there was "a modicum of evidence" supporting the amount of restitution, there was no clear error in fact finding, and no abuse of discretion in the order of restitution. See United States v. Burdi, 414 F.3d 216, 221 (1st Cir. 2005), citing Vaknin, 112 F.3d at 587.

A. Standard of Review

An order of restitution is subject to review for abuse of

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testimony of the two credit union employees who identified the clothing worn during the attempted robbery. Even without the expert evidence, the jury would have been justified in finding that the clothing, including the shoes with distinctive V-shaped stitching which Curtis **described as "the sneakers I saw that night,"** was indeed inside the credit union and on the person of Appellant Mahone.

discretion. See Burdi, 414 F.3d at 221. However, any "subsidiary findings of fact" underlying the amount of restitution are reviewed for clear error. Id. If an error of law is alleged, then de novo review applies. Id. Here, where Mahone argues only about the alleged lack of evidence in the record that $750 "even approaches [the Ford Explorer's] value at the time of its recovery," review is for clear error. See United States v. Antonakopoulos, 399 F.3d 68, 83 (1st Cir. 2005) (stating that findings of fact survive unless clearly erroneous).

B. A Modicum of Reliable Evidence Supports The Order of Restitution

Title 18 U.S.C. Section 3663A(a)(1) provides that when sentencing a defendant convicted of a crime against property, courts

> **shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .**

Under Section 3663(b)(1)(B)(ii), the court may order a defendant to pay "the value of the property on the date of sentencing, less the value . . . of any part of the property that is returned." In reaching an amount, absolute precision is not required. See United States v. Vaknin, 112 F.3d 579, 587 (1st Cir. 1997)

(addressing restitution under 18 U.S.C. § 3663).[6] Instead, the court should aim "to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view towards achieving fairness to the victim." Id. Although the Government must bear the burden of establishing the loss underlying restitution, the court needs only "a modicum of reliable evidence" from which it may draw commonsense inferences to select the amount. Id.

[6]Although Vaknin deals with the Victim Witness Protection Act, and not with the Mandatory Victims Restitution Act applicable to Mahone, the language of the two statutes concerning calculation of restitution is identical. See United States v. Burdi, 414 F.3d 216, 221 n.6 (1st Cir. 2005).

Here, the record shows that the Concord Group compensated the victim for the loss of the Ford Explorer in the amount of $6,227.75. However, once the stolen vehicle was recovered, Concord Group was able to dispose of it for $750. That resulted in a net loss to the Concord Group of $5,477.75.[7] Defense counsel admitted he had "no reason to disagree" with those figures, and Mahone presented nothing below to dispute those figures other than the claimed "Blue Book" value for a 1996 Ford Explorer with an odometer reading of 196,000 miles. From this evidence, the district court drew the reasonable inferences that Concord Group would not have paid its insured more than the value of the vehicle, and that the insurer had every incentive to receive full value for the Explorer at the time of its sale.

Moreover, the Explorer was stolen for nearly a month before its recovery. After that, it was in police custody for an extended time and was also subject to thorough search by law enforcement personnel. Finally, as the district court observed, nothing in the record showed "that the auction or sale by Concord was not for fair market value. . . ." To reach any other

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[7]Although the math is not precise ($6,227.75 less $750.00 is actually $5,527.75), Mahone concedes at page 16 of his brief that $6,227.75 represented the value of the Explorer on the date of sentencing.

conclusion, "the court [was] left to speculate." Under the circumstances, the court accepted the amount of restitution supported by the record.

On appeal, Mahone reiterates the arguments he pursued in the lower court and claims that "[t]he Government produced absolutely no evidence that [$750] even approaches [the Explorer's] value at the time of its recovery." Appellant's brief at 17. To the contrary, the Government showed that after the Explorer's recovery, the Concord Group disposed of it for $750. In the lower court's words, "the $750 for whatever reason is what Concord could have received on the date of sale since it is what it did in fact receive." This modicum of evidence is all that was necessary. There was no clear error in the sentencing court's determination, see Burdi, 414 F.3d at 221, and there was no abuse of discretion in the court's order imposing restitution to the insurer in the amount of $5,477.75. Id.

CONCLUSION

The judgment of the district court should be affirmed.

Dated at Portland, Maine this 17th day of February 2006

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of the Appellee United States, and a copy on disk, were served this date upon the Appellant by depositing them it into the United States mail, postage prepaid, and addressed as follows:

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