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TO PETITION FOR WRIT OF MANDAMUS OR IN THE
ALTERNATIVE, A WRIT OF PROHIBITION
AND REQUEST FOR STAY OF TRIAL

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CLERK OF COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.
.....

. CASE NO. C-250630

. DEPT. NO. 17

. TRANSCRIPT OF
. PROCEEDINGS

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

THURSDAY, MARCH 19, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 4

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

1 LAS VEGAS, NEVADA, THURSDAY, MARCH 19, 2009, 10:02 A.M.
2 (Outside the presence of the jury)
3 THE COURT: On the record?
4 THE CLERK: Yes, on the record.
5 THE COURT: Okay, we're on the record. We're outside
6 the presence of the jury. You had something, Mr. Pike?
7 MR. PIKE: Yes, your Honor. The State introduced a
8 redacted judgment of conviction. Rather than bring any
9 attention to it by raising an objection at that time, I had
10 raised all of our objections at the time of the Petrocelli
11 hearing, so I believe that the issue was preserved for appeal.
12 Because of that hearing, and it was not that I wasn't
13 aware that there may have been a contemporaneous objection, but
14 I believe that that issue had been protected for appeal, and it
15 was a tackle decision not to raise that contemporaneous
16 objection and bring unnecessary attention to it.
17 THE COURT: Okay.
18 MS. PALM: And I was -- I'm sorry. Did you want to
19 comment on that one?
20 THE COURT: Anything else, Mr. Pike?
21 MR. PIKE: No. I just wanted that for the record.
22 THE COURT: Anything, Mr. Smith, on that issue?
23 MR. SMITH: No, Judge. I think it's been litigated,
24 your Honor.
25 THE COURT: All right. Okay.

Page 2
ROUGH DRAFT TRANSCRIPT

1 way --
2 MR. SMITH: -- of his testimony.
3 MS. PALM: -- it was -- I was objecting to --
4 THE COURT: You objected.
5 MR. SMITH: She's objecting either way.
6 MS. PALM: -- his testimony.
7 MR. SMITH: I got it. Fair enough.
8 MS. PALM: Thank you.
9 THE COURT: And that's another grounds for appeal.
10 Okay. Anything else?
11 MS. PALM: No, that's it. Thank you.
12 THE MARSHAL: You may be seated, ladies and
13 gentlemen. Let's check to make sure our cell phones are turned
14 off. All rise and come to order. Department 17 of the Eighth
15 Judicial District is again in session. Honorable Judge Michael
16 P. Villani presiding. Please be seated. Remain in order.
17 Make sure your cell phones are turned off, please.
18 THE COURT: Morning, ladies and gentlemen. Apologize
19 for the delay, but the Court's (indiscernible) the calendar
20 which we thought would go a lot quicker. It went a lot slower
21 this morning, so I appreciate your patience, and State, please
22 call your next witness.
23 MR. SMITH: Judge, the State rests.
24 THE COURT: Okay, the State has rested. Defense.
25 MS. PALM: The defense would call Chelsea Collins.

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ROUGH DRAFT TRANSCRIPT

1 MR. SMITH: Rule that it comes in.
2 THE COURT: Okay.
3 MR. SMITH: I understand the purpose of Mr. Pike's
4 putting it on the record right now.
5 THE COURT: Okay. And Ms. Palm, you had one.
6 MS. PALM: Thank you. I just wanted to preserve that
7 yesterday I made a contemporaneous objection to testimony
8 coming in through the detective regarding his opinion on
9 whether the wounds could have been defensive wounds or not. I
10 objected on the basis he wasn't an expert, and it was beyond
11 the scope of my cross because it came back in on redirect, and
12 the Court overruled my objection. I just wanted to preserve
13 that.
14 THE COURT: All right. Mr. Smith.
15 MR. SMITH: And Judge, the State's recollection of
16 Detective Wildemann's testimony was not that they could be
17 defensive wounds. And, in fact, I don't even recall asking her
18 that question -- or asking him that question. His testimony
19 was that in his training and experience as a homicide detective
20 working stabbings, that it was relatively -- not relatively
21 uncommon for suspects to have wounds in the same location that
22 the defendant did. And that was the --
23 MS. PALM: You know what, I would agree with that.
24 MR. SMITH: -- extent of --
25 MS. PALM: That's a better way to say it, but either

Page 3
ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right.
2 THE MARSHAL: Ms. Collins, if I can get you to raise
3 your right hand, please, and face the clerk.
4 CHELSEA COLLINS, DEFENDANT'S WITNESS, SWORN
5 THE CLERK: Please be seated. Will you please state
6 your name and spell it for the record.
7 THE WITNESS: Chelsea Collins, C-h-e-l-s-e-a,
8 C-o-l-l-i-n-s.
9 THE CLERK: Thank you.
10 DIRECT EXAMINATION
11 BY MS. PALM::
12 Q Good morning, Ms. Collins.
13 A Good morning.
14 Q Will you please tell the jury how you're employed.
15 A I am a crime scene analyst two with the Las Vegas
16 Metropolitan Police Department.
17 Q And were you working on the morning of November 6th,
18 2008?
19 A That's correct.
20 Q And were you called to a crime scene at 5001 El
21 Parque?
22 A Yes.
23 Q And did you arrive with another crime scene analyst?
24 A Yes.
25 Q And who was that?

Page 5
ROUGH DRAFT TRANSCRIPT

1 A Jocelyn Maldonado.
2 Q And what was your role and what was her role?
3 A We split the responsibilities on a scene like this.
4 I'm responsible for taking the notes and doing the photography
5 of the scene. These responsible for doing a diagram and
6 recovering the evidence.
7 Q So generally, she would follow along with you from
8 item to time. You would photograph, she would impound?
9 A Later in the scene. Initially overalls are taken of
10 the way the scene is. And then after that, then we'll start
11 recovering the evidence, and it will be photographed
12 individually.
13 Q Okay. Did the detectives direct you to evidence that
14 they want to have photographed?
15 A They have certain things they like photographed, yes.
16 Q Okay. Did they direct you to a car that they wanted
17 to are photographed?
18 A Yes.
19 MS. PALM: May I approach the witness, your Honor?
20 THE COURT: Yes.
21 BY MS. PALM::
22 Q Would you look at these photographs, and they are
23 Defense BB, DD, CC, and EE, and tell me if you recognize what's
24 depicted in them.
25 A Yes, this is the vehicle I photographed.

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ROUGH DRAFT TRANSCRIPT

1 A I couldn't tell you.
2 Q Do you know what time you arrived at the scene?
3 A Yeah, we arrived at 0034 hours which would be 12:34
4 in the morning.
5 Q And this is Defense Exhibit CC. What does that
6 depict?
7 A The interior of the front of the vehicle.
8 Q Now, I noticed there's a couple of glasses there.
9 Did you happen to notice whether they contained any liquid?
10 A No. It appears as they do, but no, I didn't look at
11 the time.
12 Q Okay. Did you open up the door of the car to take
13 this photograph?
14 A No.
15 Q You took it through the window?
16 A Yes, the windows were closed. It's taken through the
17 window.
18 Q Okay. And is this another angle of basically the
19 same thing from the other side of the car?
20 A Yes, that's correct.
21 MS. PALM: May I approach the witness, your Honor?
22 THE COURT: Yes.
23 BY MS. PALM::
24 Q I'm showing you another series of photographs, and it
25 would be Defense AA, BB -- or AAA -- four As. BBBB, CCCC,

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ROUGH DRAFT TRANSCRIPT

1 MS. PALM: Move for admission of EE, CC, BB, and DD
2 Defense Exhibits.
3 MR. SMITH: No objection, your Honor.
4 THE COURT: They'll be admitted.
5 BY MS. PALM::
6 Q So looking on the monitor, is this a photograph of
7 the Hyundai?
8 THE COURT: Counsel, can you zoom out a little bit
9 because we're missing part of the picture.
10 BY MS. PALM::
11 Q This is a Hyundai that you photographed?
12 A Hyundai accent, correct.
13 Q Okay. And that is the one the detectives directed
14 you to?
15 A Yes.
16 Q Okay. And what is -- and this is Defense DD. What
17 is this a photograph of?
18 A That's a photograph of the entry of the vehicle
19 through the window.
20 Q And this was the condition the vehicle was in when
21 you were there at the scene; is that correct?
22 A That's correct.
23 Q And what time was that?
24 A This photograph was taken?
25 Q Yes?

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ROUGH DRAFT TRANSCRIPT

1 DDDD, EEEE, FFFF, GGGG four Hs, four I's and four Js. Do you
2 recognize those photographs?
3 A Yes, I do.
4 Q And were those taken at the crime scene?
5 A Yes.
6 MS. PALM: Move for admission of those exhibits, your
7 Honor.
8 MR. SMITH: Can we see them, Judge?
9 MS. PALM: Oh, I'm sorry.
10 MR. SMITH: That's okay.
11 MS. PALM: And for the record, I think most of these
12 have already been admitted in another form, but these are a
13 better quality photographs or copies.
14 MR. SMITH: No objection, Judge. Thank you.
15 THE COURT: They will be admitted.
16 BY MS. PALM::
17 Q Okay, just going through them, can you tell me what
18 CCCC depicts.
19 A That's a bird's eye view of the bed in the bedroom.
20 Q And the same question for BBBB.
21 A That's a photograph of a pillowcase that was
22 recovered.
23 Q And that's the same pillowcase we just saw folded up
24 on the bed.
25 A Can I see that photograph again, I'm sorry.

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ROUGH DRAFT TRANSCRIPT

1 Q Yes.
2 A Yes, that's correct.
3 Q Okay. So you took photographs with it folded up and
4 then unfolded?
5 A Correct.
6 Q Okay. And is this the other side of that same
7 pillowcase?
8 A That's correct.
9 Q And these are what?
10 A A pair of pants.
11 Q And where did you find those?
12 A Those were in the bathroom on the floor.
13 Q Okay. And this is after you've unfolded them to take
14 the photograph?
15 A Correct.
16 Q And this is the other side of those same pants?
17 A Yes.
18 Q This is as the pants were originally discovered?
19 A Correct.
20 Q And just a footprint, and do you recall where that
21 was recovered from?
22 A That was on the bathroom floor.
23 Q And this photograph depicts what?
24 A The knife that was found on the bed.
25 Q And this IIII depicts what?

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ROUGH DRAFT TRANSCRIPT

1 your right hand, please, sir.
2 DETECTIVE CLIFFORD MOGG, DEFENDANT'S WITNESS, SWORN
3 THE CLERK: Please be seated. Will you please state
4 your name and spell it for the record.
5 THE WITNESS: Clifford, C-l-i-f-f-o-r-d, Mogg,
6 M-o-g-g.
7 THE CLERK: Thank you.
8 DIRECT EXAMINATION
9 BY MS. PALM:
10 Q Good morning. Can you please tell the jury how you
11 are employed.
12 A I'm a detective with the Las Vegas Metropolitan
13 Police Department, homicide section.
14 Q And how long have you been in that section?
15 A Almost six years.
16 Q Do you work with Detectives Wildemann and Bunn?
17 A I do.
18 Q How large is that section at Metro?
19 A We have 24 detectives, four sergeants and a
20 lieutenant.
21 Q And were you subpoenaed here today with a request
22 that you bring copies of documents in Event No. -- Metropolitan
23 Police Department Event No. 070408-0444?
24 A That's correct.
25 Q And were you detective on that case?

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ROUGH DRAFT TRANSCRIPT

1 A The same knife.
2 Q Just the other side of it?
3 A Yeah, different angle.
4 Q Okay. And this photograph, and that's JJJJ.
5 A It appears to be an injury on his thumb.
6 Q And that would be on thumb of Mr. O'Keefe?
7 A Correct.
8 Q And is Mr. O'Keefe in the courtroom today?
9 A Yes.
10 Q Is it the gentleman over there in the blue jacket and
11 red tie?
12 A Yes.
13 MR. SMITH: We'll stipulate to identity, Judge.
14 THE COURT: All right.
15 MS. PALM: Court's indulgence. Pass the witness.
16 THE COURT: Any cross-examination?
17 MR. SMITH: Judge, we have no questions.
18 THE COURT: All right. Okay, thank you, Ma'am, for
19 your testimony. You're instructed not to discuss your
20 testimony with any other witness involved in this case until
21 this matter is finally resolved. Thank you for your time.
22 THE WITNESS: Thank you.
23 THE COURT: Next witness for the defense.
24 MS. PALM: That would be (indiscernible).
25 THE MARSHAL: And Detective Mogg, if you'll raise

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ROUGH DRAFT TRANSCRIPT

1 A I was one of the detectives assigned to that case.
2 Q And did that case -- what did that case involve?
3 A It involves the --
4 MR. SMITH: Judge, I'm going to object at this point
5 to the relevance of this testimony.
6 THE COURT: Would counsel approach.
7 (Bench conference).
8 MS. PALM: I'm sorry, detective, I have no more
9 questions for you.
10 THE COURT: Any cross-examination?
11 MR. SMITH: No, Judge.
12 THE COURT: All right. Thank you, detective.
13 THE WITNESS: Thank you, your Honor.
14 THE COURT: Any other witnesses for the defense?
15 MR. PIKE: Louis DeSalvio.
16 MR. SMITH: Actually, Judge, I do have one question
17 for -- is it too late?
18 THE COURT: Are you sure?
19 MR. SMITH: Just one.
20 THE COURT: Okay.
21 MR. SMITH: Okay.
22 THE COURT: You're still under oath, detective. You
23 understand that?
24 THE WITNESS: Yes, your Honor.
25 THE COURT: All right.

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ROUGH DRAFT TRANSCRIPT

000498

1 CROSS-EXAMINATION
2 BY MR. SMITH::
3 Q The event number that Ms. Pike -- I keep doing that
4 -- Ms. Palm asked you about has nothing to do with this current
5 instant case; is that correct?
6 A That's correct.
7 Q Okay.
8 MR. SMITH: No further questions.
9 THE COURT: Any direct for that? All right, thank --
10 now you're excused.
11 THE WITNESS: Thank you, your Honor.
12 THE COURT: Thank you. Did Cliff go to get your
13 other witness?
14 MR. PIKE: Yes, Louis DeSalvio.
15 THE COURT: I'm sorry, were there any questions from
16 the jurors? Okay.
17 THE CLERK: Please remain standing and raise your
18 right hand.
19 LOUIS DeSALVIO, DEENDANT'S WITNESS, SWORN
20 THE CLERK: Please be seated. Will you please state
21 your name and spell it for the record.
22 THE WITNESS: Louis DeSalvio, L-o-u-i-s,
23 D-e-s-a-l-v-i-o.
24 THE CLERK: Thank you.
25 DIRECT EXAMINATION

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ROUGH DRAFT TRANSCRIPT

1 A That is correct.
2 MR. PIKE: May the record reflect identification?
3 THE COURT: Yes, it will.
4 BY MR. PIKE::
5 Q How did you come to know Brian?
6 A He applied for the apprenticeship program which
7 consists of an application process, some testing and some
8 interviews. You have to score at least a 70 or above. I do
9 believe he scored a 74, and he gets put in our pool. And as we
10 need people to come in as the demands are in the field, we
11 bring them in and then we offer them a general construction
12 course. And if they successfully complete that, then they
13 became a -- then they become a union member.
14 Q And as he was proceeding through the apprenticeship
15 program, was he on his way to what's called a journeyman?
16 A Absolutely.
17 Q And what is a journeyman position?
18 A A journeyman's position, of course, pays
19 substantially more than an apprentice because you are in the
20 process of learning. But then you, you know, you have an
21 opportunity to go become a boss and lead other people and maybe
22 have some apprentices work under you at that point in time.
23 Q And was Mr. O'Keefe working his way towards a
24 journeyman in a satisfactory condition?
25 A Absolutely.

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ROUGH DRAFT TRANSCRIPT

1 BY MR. PIKE::
2 Q Mr. DeSalvio, how are you employed?
3 A I'm with the labor's union.
4 Q Which labor's union is that?
5 A Labors Local 872.
6 Q When you say local, that's local here to Las Vegas?
7 A Correct.
8 Q And can you describe what the union is and what your
9 capacity is in that union.
10 A I am the apprenticeship coordinator for Labors Local
11 872. I basically assist with the director in running that
12 training center, and we basically train our up and coming
13 trade.
14 Q And so the apprenticeship program is where you take a
15 new hire or a new member to the union, and forgive me for
16 leaving, but then you put them together with a training program
17 and with more senior employees?
18 A Correct.
19 Q Okay. And in your capacity as doing that, did you
20 have occasion to become acquainted with Brian O'Keefe?
21 A That is correct.
22 Q Is Mr. O'Keefe in the courtroom?
23 A Yes, he is.
24 Q He's the gentleman seated over next to Ms. Palm in
25 the red tie?

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ROUGH DRAFT TRANSCRIPT

1 Q Did there come a time when Brian came to you because
2 he was having problems with alcohol?
3 A Yes, he did.
4 Q What did you do when he came to you?
5 A I got with our patient advocate that is employed by
6 our local union. Basically looks out for our membership, if
7 they have problems or needs medical attention and they're
8 getting the runaround, this guys handles it. Sent him -- sent
9 Brian to him. The same day, actually just a few hours later
10 after he left me, went home, showered, cleaned up, and actually
11 went and met with this gentleman, and then that gentleman
12 passed him onto Mike Thompson who is basically overseeing his
13 rehabilitation, help, whatever you want to call it.
14 And with the stipulation that whoever got assigned to
15 Brian had to also keep me in the loop so I knew exactly how he
16 was progressing because I was not going to put him on that
17 out-of-work list until I knew that he was not going to be
18 hurting himself or anybody else by maybe being under the
19 influence of alcohol on a job site.
20 Q But that hadn't been a problem with any of the
21 employers that you assigned Mr. O'Keefe to go.
22 A That is true.
23 Q In fact, he hadn't missed any work as a result of
24 drinking or anything up to that point in time.
25 A That is true, too.

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ROUGH DRAFT TRANSCRIPT

000499

1 Q Having come forward to you in dealing with that, do
2 you -- the program you referred him over to is called MIND
3 (phonetic)?

4 A That is correct.

5 Q And that is a provider that the union uses for its
6 members.

7 A That is correct.

8 Q Now, during the time that Brian was in this alcohol
9 program, he was still allowed to come in and participate in
10 union activities, wasn't he?

11 A That is correct.

12 Q What sort of union activities were available to him
13 during the period of time that he was in that treatment
14 program?

15 A Volunteer work, maybe helping out with some political
16 campaigning for some, you know, political people that had
17 election going on at that time, whether it be the president or
18 local. You know, driving signs, and whatever he could do to
19 help out just to kind of keep him busy until we were able to
20 feel comfortable enough to place him on a job site. So it was
21 strictly volunteer on his part. He just basically didn't want
22 to sit at home and was looking for something to do.

23 Q So the union more than just directing people to jobs
24 also is a very social organization?

25 A Absolutely.

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ROUGH DRAFT TRANSCRIPT

1 hall and take care of some business and came across Keef
2 (phonetic), and he was more than happy to introduce his wife to
3 me.

4 Q Did you have a chance to see the two of them
5 interacting together with other people at the union?

6 A On that same day.

7 Q And would you describe their -- how would you
8 describe their relationship or what you saw the two of them
9 doing together?

10 A It seemed to be great like as if any of you
11 introduced your significant other, you know.

12 Q And did they -- did both Victoria and Brian work the
13 phone bank?

14 A I believe she did the phone banking, and he was with
15 some of the other volunteers out hitting the streets hanging up
16 political signs, taking some down, doing -- you know, basically
17 that kind of -- the physical part of it. She was more in the
18 office on the phones calling people.

19 Q And from your contact with her, did she seem excited
20 about these activities?

21 A Oh, yes. Actually, she got praised by the man that
22 she worked under said it was pretty much the best he's ever
23 seen, and I caught wind that she had done this for the
24 Democratic party before, so it was like a perfect fit. It
25 actually took some stress off him to concentrate on other

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ROUGH DRAFT TRANSCRIPT

1 Q Its members are almost like a family.

2 A That is correct.

3 Q As part of that social activity, are members allowed
4 to bring family members or friends or girlfriends into them for
5 these social or political activities?

6 A That is correct, yes, they are.

7 Q And did Brian do that?

8 A Yes, he did.

9 Q Do you recall who he brought in with him?

10 A His wife.

11 Q Okay. I'm showing you a picture of -- it's a
12 driver's license. The name on it is Victoria Witmarsh. Do you
13 recognize the person depicted --

14 A Yes, I do.

15 Q -- in that picture? Is that the person that he
16 described to you as his wife?

17 A Yes, it is.

18 Q You had a chance to see the two of them together?

19 A On one occasion, actually. It was the first day that
20 I actually had an opportunity to meet her. Like I said, I'm
21 usually with the workers. I don't get to see their families,
22 maybe at a picnic or some kind of social gathering or may it be
23 Christmas party or something when you actually get to see the
24 other side of the family.

25 And at this point in time I had to go over to our new

Page 19

ROUGH DRAFT TRANSCRIPT

1 things while she actually pushed the other people that was
2 phone banking. So he was in love with her as far as that's
3 concerned.

4 Q And Brian was out hanging signs, doing other
5 political activities on behalf of the union. Was he happy
6 about the relationship that he -- let me ask, from your
7 observations and between the two of them and the conversations
8 that you had, did the two of them seem happy and forward
9 directed?

10 A In my opinion, for the distance that I got to see it,
11 absolutely. I didn't see anything out of the norm. I mean, he
12 was actually very excited to introduce his wife to me. He's
13 like this was the guy I was telling you about, you know, that
14 helped me, whatever. So he very up beat, very up beat.

15 MR. PIKE: I have no further questions. Thank you
16 very much.

17 THE COURT: Cross-examination.

18 MS. GRAHAM: Yes, Judge.

19 CROSS-EXAMINATION

20 BY MS. GRAHAM::

21 Q You said Mr. DeSalvio?

22 A DeSalvio. Close enough.

23 Q DeSalvio. And what union is that again?

24 A Labors Local 872.

25 Q And you would agree with me, sir, that unions --

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ROUGH DRAFT TRANSCRIPT

000500

1 members of unions are kind of family like?
2 A Yes.
3 Q Yes? Now, did I understand you correctly in saying
4 you were his direct supervisor?
5 A For the apprenticeship program, that is correct.
6 Q Okay. And what dates were those?
7 A I believe he came in the program in February of 2006,
8 and currently he's still involved technically. He hasn't been
9 --
10 Q I question was when were you his supervisor?
11 A At the point of entry into the program.
12 Q Entry into the apprenticeship program?
13 A That's correct.
14 Q And when he actually went into the MINDS (phonetic)
15 recovery program, were you his supervisor at that point?
16 A Yes, I am.
17 Q Okay. Now, what is MINDS? Do you know what MINDS
18 is?
19 A It's an organization that was passed down to us
20 through our business manager who -- when I came across this
21 problem, I had asked the advice of who would be the best suit
22 person to deal with this problem, and I was told that this guy
23 is top notch, he's good at what he does, and recommended that I
24 kind of direct him in that matter.
25 Q And when you him, you're talking about the defendant

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ROUGH DRAFT TRANSCRIPT

1 somewhere around in there.
2 Q Okay. If I told you it was November 5th, 2008, would
3 you have any reason to disagree with me?
4 A I don't know the date. I just know it's about --
5 about that time frame.
6 Q Okay.
7 A I wouldn't argue it.
8 Q All right. And did you have any contact with the
9 defendant and Victoria on November 5th, 2008?
10 A Are we talking about the day of the incident or the
11 day of --
12 Q The day of the murder, yes.
13 A No, none.
14 Q No contact?
15 A I actually found out through the Internet.
16 Q Okay. All right. Let me ask you this, you indicated
17 that you thought Brian was in love with Victoria.
18 A From what I seen for the brief 10, 15 minutes that I
19 was around them, yes.
20 Q Okay. And would you agree with me, sir, that if you
21 loved somebody you don't hit them?
22 A Absolutely.
23 MR. PIKE: Objection, your Honor.
24 THE COURT: Sustained.
25 MR. PIKE: Motion to (indiscernible).

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ROUGH DRAFT TRANSCRIPT

1 here?
2 A That is correct.
3 Q Okay. So you were his supervisor that recommended
4 defendant go to MINDS; is that correct?
5 A Yes, it is.
6 Q Okay. And you testified that the defendant never
7 missed a day of work; is that correct?
8 A From what has been reported to me by his employer, he
9 hadn't missed any work due to my problems and had never been
10 reported to me.
11 Q Never had been reported to you?
12 A That is correct.
13 Q So it would surprise you, then, if a report from
14 MINDS indicated that he was actually fired from his position
15 for missing three days in a row out of five?
16 A That would be, yes.
17 Q It would be surprising to you?
18 A Yes, it would.
19 Q Okay. Now, the day that you met Victoria, what date
20 was that; do you recall?
21 A Exactly, no. I do believe it was two days prior to
22 this incident.
23 Q This incident. Do you know what date this incident
24 was?
25 A I want to say somewhere maybe in October, November,

Page 23

ROUGH DRAFT TRANSCRIPT

1 BY MS. GRAHAM::
2 Q Did you interact with the defendant on a social level
3 at any other time than you've just mentioned today?
4 A No, it was strictly business.
5 Q Okay. And had you ever met Victoria or had any
6 interaction with her prior to that day that you --
7 A No.
8 Q So just the one day?
9 A That's correct.
10 Q Okay.
11 MS. GRAHAM: Court's indulgence. Nothing further,
12 Judge.
13 THE COURT: Any redirect?
14 MR. PIKE: Thank you.
15 REDIRECT EXAMINATION
16 BY MR. PIKE::
17 Q In fact, on the day that this tragedy occurred, you
18 actually were attempting to call Brian to let him know that
19 there was a job available for him.
20 A That is true.
21 Q He'd made every qualification and was prepared and
22 you were prepared to place him back on jobs?
23 A That's correct. I received a call from Mike. He
24 called me and said I feel that he's good to go. He has never
25 missed a meeting. We're working together. We're constant

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ROUGH DRAFT TRANSCRIPT

000501

1 contact. I said okay, if your professional tells me -- because
2 I was kind of leery with the length of time, September 11th,
3 and I believe he called me on the 29th. I'm like, okay. I
4 mean, you're the professional. I just get them the work, you
5 know. If that's what you're telling me, then so be it, and
6 that's -- that's how it worked out.

7 Q Thank you.

8 MR. PIKE: No further questions.

9 THE COURT: Any recross?

10 MS. GRAHAM: No, Judge.

11 THE COURT: All right. Thank you, sir, for your
12 testimony. You are instructed not to discuss your testimony
13 with any other witness involved in this case until this matter
14 is finally resolved. Thank you for your time, sir.

15 MS. GRAHAM: Judge, I think a juror has a question.

16 THE COURT: Oh, I'm sorry, sir. We do allow our
17 jurors to ask questions of witnesses so we're going to check
18 out --

19 THE WITNESS: Feel free.

20 (Off-record bench conference).

21 THE COURT: All right, sir, we have a couple
22 questions from one of the jurors. First question is what is
23 the union's policy on employees requesting assistance with
24 their problems?

25 THE WITNESS: If they come to me and I know that --

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ROUGH DRAFT TRANSCRIPT

1 am not going to put you in jeopardy or anybody else's life in
2 jeopardy, especially with the problems we've been having on the
3 city center and stuff like that. With that, I'm not going to
4 do it.

5 So until you're -- whoever helps you convinces me
6 that you're going to go, however long it takes, that's when
7 I'll then put you on the at work list.

8 THE COURT: Thank you. Any follow-up questions,
9 actually, by you Mr. Pike?

10 MR. PIKE: None by me, your Honor.

11 THE COURT: Any by the State?

12 RECROSS-EXAMINATION

13 BY MS. GRAHAM::

14 Q So basically he wasn't allowed to come back to work
15 until he went through a treatment program; is that correct?

16 A That is correct. Came to me --

17 Q That's a yes or no question.

18 A Okay.

19 Q Thank you.

20 THE COURT: Anything else, Mr. Pike?

21 MR. PIKE: No.

22 THE COURT: All right, thank you, sir.

23 THE WITNESS: Okay. Next witness for the defense.

24 MR. PIKE: Robert Paisano.

25 THE MARSHAL: Mr. Paisano, if you'll remain standing,

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ROUGH DRAFT TRANSCRIPT

1 and if they tell there's a problem, I'm going to do everything
2 I can for them. Like the counsel stated, they're like family.
3 I mean, if we don't lookout for them, who's going to, so if
4 they come to me with a problem, I'm going to do the best I can
5 to try to find the best help I can find them. I mean, it's
6 just that's all there is to it.

7 But I can't fix something I don't know nothing about,
8 so he came to me. I sent him to the best place that I thought
9 I could send him to get the best help, and, you know, the
10 hall's then in that court with the stipulation that wherever
11 you go to, please make sure they keep me in the loop so we can
12 make sure that your progress is moving along properly. You
13 know, that's kind of like baby sitting. Making sure it's all
14 going down right.

15 THE COURT: All right. Next question is when did Mr.
16 O'Keefe notify you of his drinking problem? Do you have a
17 date?

18 THE WITNESS: September 11th. How do you forget
19 that, you know.

20 THE COURT: And what type of rehab did the union send
21 him to? Mandatory, volunteer -- is it volunteer or mandatory,
22 and how long was the program, if you know.

23 THE WITNESS: The treatment that I believe he was
24 going to receive was whatever it took to get him out from this
25 problem, okay. I didn't set a time on it. I just said that I

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ROUGH DRAFT TRANSCRIPT

1 please. Raise your right hand and face the clerk.

2 ROBERT FRANCIS PAISANO, DEFENDANT'S WITNESS, SWORN

3 THE CLERK: Please be seated. Will you please state
4 your name and spell it for the record.

5 THE WITNESS: Robert Francis Paisano.

6 THE CLERK: And the spelling.

7 THE WITNESS: Oh, P-a-i-s-a-n-o.

8 THE CLERK: Thank you.

9 DIRECT EXAMINATION

10 BY MR. PIKE::

11 Q Okay, Mr. Paisano, how are you employed?

12 A I'm a private therapist can Star Counseling. I also
13 do contract work with a group called Minds & Associates
14 (phonetic).

15 Q And in your capacity as doing contract work with
16 Minds & Associates, do you conduct alcoholism treatment
17 programs?

18 A Yes.

19 Q During the time that you have been doing that, did
20 you have occasion to meet with an individual by the name of
21 Brian O'Keefe?

22 A Yes.

23 Q Is Brian here in the courtroom?

24 A Yes.

25 Q Is he the gentleman seated over there with the red

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ROUGH DRAFT TRANSCRIPT

000502

1 tie?
2 A Yes.
3 MR. PIKE: May the record reflect identification of
4 the defendant?
5 THE COURT: Yes, it will.
6 BY MR. PIKE::
7 Q How was Brian referred over to you?
8 A Brian was a self-referral coming through his union,
9 UF -- I'm sorry, Labors Local 872.
10 Q And after you had an opportunity to meet with him,
11 did you make a determination as to whether he become involved
12 in individual and/or group counseling?
13 A Yes.
14 Q What was your determination?
15 A When he first came to me, one of the primary issues
16 we -- that was concerning was that he was under the influence,
17 and so we sent him to a detox process. Once he completed that,
18 then he came back to me. I did a further assessment, which
19 deemed that he needed to be in a more intensive out-patient
20 treatment process as well as individual counseling.
21 Q Can you describe the detox program that was necessary
22 to refer him to in order to get to the point where he could
23 even participate in the counseling program.
24 A I referred him to a group called Las Vegas Recovery
25 Center that's up on Buffalo and Cheyenne. I believe he was

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ROUGH DRAFT TRANSCRIPT

1 Nevada want my training consists of I have to participate in 40
2 hours of CEU process. Currently as a licensed professional you
3 have to have a graduate degree in order to obtain the -- that
4 licensure.
5 Q During the time that you went through this program
6 and in the group therapy, during the group meetings were the
7 participant encouraged to bring any family members or support
8 members of the community with them?
9 A Yes.
10 Q Did Brian bring somebody to those group meetings with
11 him?
12 A Yes, he brought a young lady who was considered to be
13 his significant other.
14 Q And besides handling the individual counseling, you
15 often participated in the group counseling, too; is that
16 correct?
17 A Yes.
18 Q Did you have occasion to meet the woman that he
19 identified as his significant other?
20 A Yes. I had the opportunity to meet her at the
21 individual session. She never participated in that, but I met
22 her in the lobby. And also, too, she attended the group
23 sessions that Brian attended.
24 Q I'm showing you what has been admitted into evidence
25 as Defendant's Exhibit XX. This is a driver's license of

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ROUGH DRAFT TRANSCRIPT

1 there for approximately three or four days, and at that time
2 what they did, they completely detoxed him from the alcohol
3 substance that he had in his system.
4 We're able to, I guess, treat any withdrawal process
5 that he may have had at that time.
6 Q Based upon the observations that you incurred --
7 based upon the observations that you made and the detox -- the
8 length of the detox program, did you consider Brian's
9 alcoholism to be mild, moderate, acute or how did you assess
10 it?
11 A I assessed his situation as very severe because he
12 was using the substance almost on a daily basis, and the extent
13 of time of his consumption and the amount of his consumption
14 warranted that.
15 Q Once you got him in detoxed after that four day
16 period to get the alcohol out of his system, did you engage in
17 any individual and group counseling with him?
18 A Yes, I did. I was his primary therapist as far as
19 individual counseling. I referred him back to the Minds &
20 Associates chemical dependency intensive outpatient treatment,
21 and that was an 18 session program where he attended three days
22 a week for three hours per session.
23 Q And what sort of training do you have to being a
24 counselor therapist for alcoholism?
25 A I've been a therapist since 1982 with the state of

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ROUGH DRAFT TRANSCRIPT

1 Victoria Witnarsh. Is this the same lady that came to those
2 individual and group sessions with Brian?
3 A Yes.
4 Q So based upon her participation in those group
5 sessions, was she present when Brian addressed some of his
6 issues regarding alcohol?
7 A Yes.
8 Q Was she aware from your conversations with her that
9 Brian was an alcoholic?
10 A Yes.
11 Q Did she ever indicate to you that she had an alcohol
12 problem?
13 A No.
14 Q In going through this group session, do the
15 significant others or wives or girlfriends sit in during the
16 group session?
17 A Yes.
18 Q What do the group sessions -- you indicated it was an
19 18 week program. Can you describe what's -- what occurs during
20 that 18 week program.
21 A Each session is primarily focused on individual
22 concepts that usually apply to the disease, to the recovery
23 process, to what we call the relast (phonetic) prevention, and
24 then the other areas will be focused in on identification of
25 what we call critical thinking and ineffectiveness thinking of

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ROUGH DRAFT TRANSCRIPT

000503

1 that process. We also help the individuals to identify certain
2 problematic behaviors that if not corrected would lead back to
3 the use of alcohol and/or any other substance they were using.
4 Q Okay. And problematic behaviors, would that include
5 maintaining contact with someone that would -- let's delicately
6 call it an unhealthy relationship.
7 A Yes.
8 Q And do you find that relationships -- that as part of
9 your counseling that relationships often can cause lapses of
10 alcohol consumption?
11 A Well, they contribute to that behavior.
12 Q So if a couple is not -- if a couple is not
13 addressing their problem together, then only half of the
14 problem may be being solved?
15 A True.
16 Q And in this case Victoria was just coming as a
17 support person. Did she actively participate in these group
18 sessions?
19 A In the sessions that I conducted, yes, she did.
20 Q So in the sessions that you participated in, the
21 risks, difficulties and problems that ensued from over
22 consuming alcohol is that was discussed?
23 A Yes.
24 Q As part of the training or these counseling sessions
25 that you had and the group sessions, did you also talk about

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ROUGH DRAFT TRANSCRIPT

1 limit or an amount of alcohol in the blood system at .08, which
2 is illegal to drive. Are you aware of that?
3 A Yes.
4 Q And .24 would be approximately three times that legal
5 limit?
6 A Yes.
7 Q Now, during the time that you saw Victoria and Brian
8 together, did they appear to be a couple?
9 A Yes, they did.
10 Q Did they attempt to hide her name or their
11 relationship?
12 A No.
13 Q Did the two of them while you were involved in this
14 group session make plans forward? Were they planning a future
15 together?
16 A Yes, from my understanding.
17 Q And during the time that you ever saw the counseling
18 together, they were both participating in these actions that
19 were related to their future?
20 A Yes.
21 Q In your opinion, did they appear to be a loving
22 couple?
23 A I would say that they were -- they shared very strong
24 affection toward each other.
25 MR. PIKE: Court's indulgence.

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ROUGH DRAFT TRANSCRIPT

1 the -- or was the problem addressed of using drugs in
2 consumption with the use of alcohol?
3 A Yes.
4 Q What's what called? Does that have a specific name?
5 A It's probably just a combination of use and the
6 effects would be somewhat of a synergistic type. It would
7 either add to the chemical effects that were being used.
8 Q And can you give us -- synergy, that's a term of art.
9 Can you describe what that is maybe like in mathematical terms
10 or something?
11 A If one were using alcohol and then they were taking
12 another central nervous depressant chemical, that would enhance
13 the effects of the alcohol and or the other chemical.
14 Q And some of the detrimental effects of alcohol, what
15 are those?
16 A Well, situation that we're in today is one of them.
17 Legal, family, employment, physiological, and marital issues
18 are usually contributing factors to the problem.
19 Q Does the use of alcohol affect somebody's ability to
20 observe and understand situations --
21 A Oh, very much.
22 Q -- properly?
23 A And it's determined upon the use of and the amount of
24 chemical being used.
25 Q As part of your counseling there, there is a legal

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ROUGH DRAFT TRANSCRIPT

1 BY MR. PIKE::
2 Q Now, in going through this program, that the referral
3 -- you indicated this was a voluntary referral.
4 A Yes.
5 Q They came to you from the union, and you were
6 reporting back to the union?
7 A Yes.
8 Q During the time that you are conducting this program,
9 do you obtain a history of when alcohol use first started?
10 A Yes.
11 Q In this relation or in relationship to Brian O'Keefe,
12 were you able to ascertain when the overuse of alcohol started?
13 A Not without my documentation I can't. But I do know
14 that it started probably after military service.
15 Q And you discussed his military service with him and
16 things that occurred during that?
17 A Briefly, yes.
18 Q And in order to adequately assess and treat an
19 individual that suffers from alcoholism, you have to determine
20 how far advance that alcoholism is, how advance the disease is?
21 A Yes.
22 Q During that do you make inquiries as to whether or
23 not blackouts have occurred?
24 A Yes.
25 Q And were you able to ascertain whether or not Brian

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ROUGH DRAFT TRANSCRIPT

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1 had suffered from blackouts in the past?
 2 A I believe that he did answer that question yes, that
 3 he did experience blackouts. As far as onset, I have no idea
 4 without the documentation.
 5 Q Can you describe what an alcoholic blackout is and
 6 how it affects people?
 7 A An alcoholic blackout takes place when a certain
 8 amount -- and again, the amount differs within individual is
 9 consumed. What happens is the individual loses memory of
 10 actions and behaviors. They're still conscious that they're
 11 still interacting, but when they come to a point of sobriety,
 12 they have very little recollection or no recollection of the
 13 behaviors.
 14 Q And is that a point where the alcoholism has become
 15 so acute that it actually affects the cognitive functions of
 16 the brain?
 17 A Yes.
 18 MR. PIKE: I have no further questions.
 19 THE COURT: Cross-examination.
 20 MS. GRAHAM: Yes, Judge.
 21 CROSS-EXAMINATION
 22 BY MS. GRAHAM::
 23 Q Good morning.
 24 A Morning.
 25 Q Okay, so just so I understand, you were the counselor

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ROUGH DRAFT TRANSCRIPT

1 A No.
 2 Q Okay. Now, you say -- you indicated that the
 3 defendant was voluntarily came to you; is that correct?
 4 A Yes.
 5 Q But it is true, sir, that he came to you because he
 6 was fired from his for missing three days of work out of five;
 7 is that correct?
 8 MR. PIKE: Misstates the evidence. We had the
 9 witness testify that it was a referral from the union over to
 10 MINDS.
 11 THE COURT: That's correct. Sustain the objection.
 12 BY MS. GRAHAM::
 13 Q If the client would have told you that he was fared
 14 from work because he called in sick three days out of five in
 15 one week, would you have any reason to dispute that if it's in
 16 your report?
 17 A No.
 18 Q Okay. But you don't recall him telling you that?
 19 A No.
 20 Q Okay. The defendant indicated to you that he had
 21 severe substance abuse; is that correct? Or that's your
 22 determination?
 23 A Right, that was my determination.
 24 Q Because of the amount of substance he was using,
 25 correct?

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ROUGH DRAFT TRANSCRIPT

1 that first assessed the defendant when he came to you for
 2 treatment?
 3 A Yes.
 4 Q Is that -- okay. And when you do an assessment,
 5 there's a lot of self-reporting by the client; is that true?
 6 A Yes.
 7 Q So for you to gather the information, the client
 8 actually has to tell you the information himself --
 9 A Yes.
 10 Q -- would that be correct? And do they fill out a
 11 questionnaire?
 12 A No, actually, my assessment is an oral process. I do
 13 the questioning.
 14 Q You do the questioning. And then do you document
 15 that in some fashion?
 16 A Yes.
 17 Q Okay. And is that through a report?
 18 A It's through what we call a psychosocial assessment.
 19 Q Psychosocial --
 20 A Um-h'm.
 21 Q -- assessment?
 22 A Yes.
 23 Q Did you review that today?
 24 A No.
 25 Q Before you came here?

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ROUGH DRAFT TRANSCRIPT

1 A Right, and the history.
 2 Q And the history. And he did indicate you the amount
 3 of consumption of alcohol that he was using on a daily basis,
 4 did he not?
 5 A Yes.
 6 Q And would -- if you indicated that he was drinking,
 7 let's see, five to eight quarts of beer an daily basis, would
 8 that sound accurate?
 9 A I can't answer that truthfully because I don't have
 10 the documentation in front of me.
 11 Q You don't have any documentation in front of you
 12 regarding his assessment today?
 13 A No, because --
 14 Q You didn't review it before you came to court today
 15 here, sir?
 16 A No.
 17 MR. PIKE: Your Honor, the complete copy available at
 18 the clerk's if she wants to refresh his recollection.
 19 THE COURT: I'll leave it up to --
 20 MS. GRAHAM: Well, Judge, I don't think he compiled
 21 this report so --
 22 THE COURT: Let's ask questions. Don't --
 23 MS. GRAHAM: Okay.
 24 BY MS. GRAHAM::
 25 Q Did you review any documentation before you came to

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ROUGH DRAFT TRANSCRIPT

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1 court here today?
2 A No.
3 MS. GRAHAM: May I approach the witness?
4 THE COURT: Yes.
5 BY MS. GRAHAM::
6 Q Do you recognize that? Just take a look at it.
7 A I guess -- I don't know if I've seen this before.
8 Q You never seen it? Could you just read that
9 paragraph for me right there.
10 A Which one?
11 Q This paragraph starting with the diagnoses and then
12 that paragraph.
13 THE COURT: Is he reading it to himself?
14 BY MS. GRAHAM::
15 Q Read it to yourself, please.
16 A Oh, okay.
17 MR. PIKE: For the record, I haven't been shown the
18 document. May I approach the witness, Judge?
19 THE COURT: Yes.
20 MR. PIKE: It's the document that defense provided.
21 THE COURT: Well, let --
22 MR. PIKE: Okay.
23 THE COURT: Well, let's see -- let's refresh Mr.
24 Pike's recollection so he can look at it.
25 THE WITNESS: Okay.

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. Well, if --
2 MR. PIKE: Objection, your Honor.
3 BY MS. GRAHAM::
4 Q Would you have --
5 MR. PIKE: For purposes of cross-examination, she's
6 addressing a document that has not been introduced into
7 evidence, and he's offering information contained from that.
8 If she wants to publish it, if she wants the entire records,
9 we'll move for the admission of Defendant's Exhibit A, which
10 contains all of the records so that this could be a proper
11 cross-examination.
12 THE COURT: I'm going to sustain the objection. Are
13 you offering the reports?
14 MS. GRAHAM: Judge, may we approach?
15 THE COURT: Are you offering it?
16 MS. GRAHAM: I'm not offering the document at this
17 time. I think it's subject for impeachment, absolutely.
18 THE COURT: Well --
19 MR. PIKE: He has no personal knowledge of it.
20 THE COURT: -- he didn't author it, did he?
21 MS. GRAHAM: No, he just read it, your Honor. I'm
22 going to ask him --
23 THE COURT: Well, he didn't author it, he didn't
24 direct it, he hasn't seen it before today, I'm sustaining the
25 objection.

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ROUGH DRAFT TRANSCRIPT

1 BY MS. GRAHAM::
2 Q Okay. Does that refresh your recollection of
3 anything that the defendant would have told you when he came to
4 you for the first interview for counseling?
5 A That report or that information you have is coming
6 from the detox facility.
7 Q Okay.
8 A That's not any of --
9 Q And he was referred by you?
10 A Yes.
11 Q So this information that you just read, you have no
12 knowledge ever existed?
13 A Well, this is the first time I've seen that document.
14 Q Okay. Would you have any reason after reviewing this
15 document that came from the MINDS facility to dispute the
16 accuracy of the content of this document that I just showed
17 you?
18 A That document is what he was presenting to the
19 facility.
20 Q Okay.
21 A It does not reflect what he reported to me.
22 Q Okay. So he reported to you something different than
23 what you read that he would have reported to MINDS; is that a
24 correct statement, then?
25 A Yes and no.

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ROUGH DRAFT TRANSCRIPT

1 MS. GRAHAM: And what objection -- just so I
2 understand the objection.
3 THE COURT: Why don't you restate your objection, Mr.
4 Pike.
5 MR. PIKE: Thank you, your Honor. Lack of
6 foundation. Lack of personal knowledge. He didn't prepare the
7 document. Improper foundation for impeachment based upon a
8 document that's not been introduced into evidence.
9 THE COURT: That's what I'm sustaining.
10 BY MS. GRAHAM::
11 Q Were you asked by the defense to provide a copy of
12 your evaluation of the defendant in this case?
13 A No.
14 Q Okay. And you neither reviewed that nor provided it
15 to the defendant?
16 A No.
17 Q And you recalled the date, though, that the defendant
18 came to you for counseling?
19 A No, I do not.
20 Q You do not. So you don't recall the date, sir; is
21 that correct?
22 A Yes.
23 Q You don't recall what's actually in your report, your
24 assessment of the defendant at this point; is that correct?
25 A Yes.

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1 Q And you didn't review any documents before coming
2 here today, before testifying on what the defendant may have
3 said to you regarding his problems with alcohol; is that
4 correct?
5 A Yes.
6 Q Okay. You referred him to MINDS; is that correct?
7 A No. MINDS is the group that his union utilizes for
8 the EAP process, Employee Assistance Program.
9 Q Okay. Exactly sir -- I'm confused. What was your
10 involvement in the case? In his actual recovery process as
11 opposed to MINDS? Just if you could educate the jury on your
12 involvement in the process and then MINDS involvement on the
13 process.
14 A Okay. My involvement with MINDS, at that time I was
15 a contract employee. They would refer all assessments to me
16 because I was their primary alcohol and drug specialist. So
17 when he came to me, I did the assessment because that's
18 basically what I was supposed to do. I then after he was
19 referred to the detox facility, then I assumed responsibility
20 as being his primary therapist.
21 Q Okay. And so the reason for his admission into MINDS
22 would have been reported by you?
23 A Actually, no, because his union referred him to minds
24 whom I was a contractor with.
25 Q Okay. All right. The document that I just showed

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ROUGH DRAFT TRANSCRIPT

1 Q And tolerance, sir, basically means that your ability
2 to function on alcohol is better than the average person that
3 doesn't drink that amount of alcohol?
4 A Yes.
5 Q So for instance -- for example, if somebody had a BAC
6 of over .08 which is we've established a legal limit, correct?
7 A Yes.
8 Q Their BAC could be .24, .38, and if they had a
9 tolerance to alcohol while consuming that much alcohol on a
10 daily basis since their teen years, they would be able to
11 function more normally than the average person on that alcohol;
12 is that correct?
13 A They --
14 Q The effects of alcohol -- let me rephrase.
15 A Okay.
16 Q The effects of alcohol do not affect their motor
17 skills as it would a person that doesn't drink that mass amount
18 of alcohol daily; is that correct? That's a yes or no
19 question.
20 A Okay. Could you read the question or give me the
21 question again?
22 Q Well, basically, you know, simply put, when somebody
23 has a tolerance to alcohol, it's usually because they consume
24 masses amounts of alcohol a day; is that correct?
25 A No.

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ROUGH DRAFT TRANSCRIPT

1 you, who generates that document?
2 A That would be the facility at which he was admitted
3 to for detox because that's what it was. It was a detox
4 assessment.
5 Q Okay. And you had nothing to do with the detox
6 assessment?
7 A No.
8 Q Okay. Are you familiar with diagnosis 303.9?
9 A Yes.
10 Q And do you know if Brian was diagnosed with 303.9?
11 A Yes, that was my primary diagnosis.
12 Q Okay. And you're aware, sir, that 303.9 (sic)
13 indicates that the use of alcohol despite adverse consequences
14 and distortions in thinking most notably denial is one of
15 those?
16 A Yes.
17 Q Yes? Would you say that the defendant was a chronic
18 alcoholic?
19 A Yes.
20 Q Are you familiar with the term tolerant, sir?
21 A Yes.
22 Q If someone were to drink five to eight quarts of beer
23 on a daily basis coupled with shots of hard liquor, say for
24 instance vodka, would they build up a tolerance to alcohol?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 Q You can become tolerant to alcohol once -- if you
2 consume masses of alcohol each day.
3 A True.
4 Q For several years?
5 A Yes.
6 Q And what the word tolerance means is that your motor
7 skills and your functions that alcohol normally would effect,
8 they don't affect you like that anymore after you consume
9 alcohol over and over for years and years and more and more and
10 more alcohol; is that correct?
11 A I can't -- that's kind of a variable because the
12 alcohol -- or actually, the use of that affects people
13 differently. Whereas a person who, let's say has a .42 level or
14 4.2 level is still under the influence, but they may not have
15 any recollection of their abilities or their actions. Whereas,
16 again, you could have less and still be functioning as well.
17 Q And that's basically my question. You can develop a
18 tolerance to alcohol.
19 A Oh, yes. Yes.
20 Q And essentially -- you know, the definition of
21 tolerance is that it doesn't affect you once you drink and
22 drink daily and daily for years and years massive amounts of
23 alcohol, it doesn't affect you like it would somebody that
24 doesn't drink at all; is that a fair statement, sir?
25 A Yes.

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1 Q Okay. Would you have any reason to dispute your
2 earlier testimony that defendant had indicated that he never
3 had blackouts?
4 A I'm sorry?
5 Q Would you have any reason to dispute your earlier
6 testimony that the defendant indicated to you that he never had
7 -- that he had blackouts with alcohol?
8 A He did have blackouts, yes.
9 Q He indicated to you he had blackouts?
10 A Yes.
11 Q If he told somebody else that he never blackouts,
12 would you have any reason to dispute that?
13 A No.
14 Q Are you a member of the union, sir? You a member of
15 the union?
16 A Me, no.
17 Q And how long have you been treating persons with
18 alcohol addiction?
19 A I was first certified in April of 1982.
20 Q So that's 25 years, 26 years or so?
21 A Close to 27, yeah. 26.
22 Q And you would agree with me, sir, in those 26 years
23 somebody has a severe problem with alcohol, as you've
24 indicated, that their sensitivity to alcohol is lessened even
25 if the BAC would be very high? It's a yes or no. Would you

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right. All right, it will be
2 admitted, and what's the -- just for the record, what's the
3 number?
4 MR. PIKE: A. We do need to lay a bit of a
5 foundation in reference to these. Maybe if I could have three
6 questions on voir dire just from the --
7 THE COURT: All right.
8 BY MR. PIKE::
9 Q Sir, as a contract employee with MINDS, you send your
10 records to the MINDS headquarters which is located in another
11 state.
12 A Yes.
13 Q And the custodian of records would prepare a copy of
14 those and then provide them pursuant to subpoena, and so these
15 records would come from another state and would contain some
16 much your records; is that correct?
17 A Yes.
18 Q Along with other records that they accumulate during
19 the time of treatment?
20 A Yes.
21 Q Okay. Thank you.
22 THE COURT: All right. Go ahead, Ms. Graham.
23 MS. GRAHAM: Okay. May I approach the witness again?
24 THE COURT: Yes.
25 MS. GRAHAM: Judge, I'm going to show him my copy, is

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ROUGH DRAFT TRANSCRIPT

1 agree or not?
2 A Well, I have difficulty with answering that in that
3 capacity.
4 Q Well, would you agree or not? If you don't agree,
5 just tell me you don't agree.
6 A No, I don't agree.
7 Q You don't agree that somebody's sensitivity can -- is
8 lessened if they're BAC's very high? If they're an alcoholic
9 and they consume quarts and quarts of alcohol on a daily basis
10 for several years.
11 MR. PIKE: Objection. Compound question.
12 THE COURT: Sustained.
13 MR. PIKE: Cannot be answered with a yes or no.
14 THE COURT: Sustained.
15 MS. GRAHAM: Court's indulgence. Would you like to
16 stipulate to the admission of the entire packet
17 (indiscernible)?
18 MR. PIKE: Yes, we have custodian of records
19 authentication of all the records of MINDS. They're marked --
20 previously marked as Defendant Exhibits A and by stipulation
21 with the State, then we'd like to have them admitted.
22 THE COURT: Is that correct, State?
23 MR. SMITH: Can we review it --
24 MS. GRAHAM: That is correct.
25 MR. SMITH: -- together real quick just to make sure.

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ROUGH DRAFT TRANSCRIPT

1 that okay, because these pages are not numbered.
2 THE COURT: All right.
3 MR. PIKE: Absolutely.
4 THE COURT: Why don't you show the defense counsel
5 which --
6 MR. PIKE: We --
7 MS. GRAHAM: I think they know what I'm --
8 MR. PIKE: We have a complete copy on this.
9 MS. GRAHAM: -- referring --
10 THE COURT: No, I'm saying as far as the specific
11 page.
12 MR. PIKE: What page that she's going to use, thank
13 you.
14 MS. GRAHAM: I believe Mr. Pike reviewed it. It's
15 the same paragraph that I showed him before.
16 MR. PIKE: Okay. And then with the Court's
17 permission, I'll just approach with counsel.
18 THE COURT: All right.
19 MR. PIKE: Thank you.
20 BY MS. GRAHAM::
21 Q I'm showing you, sir, a previous document that you've
22 had a chance to review. It comes -- it's been admitted as
23 Defense Exhibit 1. Specifically -- well, these pages are not
24 numbered. It's patient chart. The date --
25 THE COURT: First, that's Defendant's A, for the

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ROUGH DRAFT TRANSCRIPT

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1 record.
2 MS. GRAHAM: Yeah, Defendant's A.
3 BY MS. GRAHAM::
4 Q Patient chart, inpatient. This date is 9/30/08, 1146
5 a.m., that's the date on the page.
6 MS. GRAHAM: Judge, for the record, the pages are not
7 numbered, but the date on the page is 9/30/08.
8 BY MS. GRAHAM::
9 Q Sir, if you would -- right there reason for
10 admission. You've reviewed that --
11 A Um-h'm.
12 Q -- previously?
13 A Right.
14 Q You want to read that out loud to the jury?
15 A Reason for --
16 Q Or actually, you know what, you've reviewed it. Let
17 me just ask you some questions. In this report, State's
18 Exhibit A, reason for admission, you've read it, sir, right?
19 A Yes.
20 Q It indicates that the defendant started drinking at
21 age 17.
22 A Yes.
23 Q How would that information get into this report?
24 A He would acknowledge that.
25 Q Okay. It's also indicates that the defendant had

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ROUGH DRAFT TRANSCRIPT

1 treatment program. I have no idea because he was in compliance
2 when he was with me.
3 Q Okay. It says discharge review. Discharge review,
4 ongoing risk factors, non-compliant with after-care
5 recommendations. Who would have written that in the report?
6 A The primary therapist of that facility.
7 Q Do you know who that is?
8 A I have no idea.
9 Q Sir, there are several -- are you familiar with these
10 -- I mean, do you ever review these documents, sir, the MINDS
11 documents?
12 A As far as on a -- I'm not too sure because when I --
13 Q In conjunction with your treatment and with your
14 participation in somebody's alcohol recovery process.
15 A Do I review them?
16 Q Yes.
17 A Usually if they -- if they come to me, I review the
18 previous session on the plans that we had to conduct for the
19 next session, and then I follow up with that to see whether or
20 not compliance was done.
21 Q Okay.
22 A And that would be the only time.
23 Q Now, I noticed that there are different sessions
24 labelled, and do you know how many sessions the MIND program
25 is?

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ROUGH DRAFT TRANSCRIPT

1 been out of control since early 20s when he was in the service.
2 How would that report -- how would information get into this
3 report?
4 A That would be self admit.
5 Q Okay. It indicates that the defendant drinks quarts
6 of beer, 15 per day -- 15 quarts of beer per day and has drank
7 as much as a case a day. How would that information get into
8 in report?
9 A Self report.
10 Q Defendant denies ever blacking out. How would that
11 get into this report?
12 A Self report.
13 Q Defendant was fired from work because he called in
14 sick three days out of five in one week. How would that
15 statement get into this report, sir?
16 A Self report.
17 MS. GRAHAM: May I approach the witness?
18 THE COURT: Yes.
19 BY MS. GRAHAM::
20 Q Sir, I'd ask you to look down at the bottom of the
21 page, ongoing risk factors. Do you see that?
22 A Um-h'm.
23 Q Same page dated 9/30/06. Does that indicate to you
24 that he is non-compliant with after-care recommendations?
25 A I don't know. That -- that may be from a prior

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ROUGH DRAFT TRANSCRIPT

1 A Well, the CDIOP is 18 sessions. Initially when they
2 come to us, we have five EAP sessions and then we request
3 additional managed care sessions after that.
4 Q And when you say EAP, what do you mean?
5 A It means these are sessions that are provided to the
6 member at no cost.
7 Q Do you know what happens during these group sessions?
8 Are these group sessions?
9 A In the IOP program, you mean?
10 Q No, in the MIND sessions.
11 A Well, that's the IOP.
12 Q Oh, okay.
13 A That's the chemical -- yes, it's three hours of
14 education as well as process.
15 Q Okay. Three hours of education each session?
16 A Yes.
17 Q Okay. And after those sessions are -- is there a
18 caseworker involved in each of those sessions? How does that
19 work?
20 A Well, there is a therapist who conducts the sessions,
21 yes.
22 Q Do you know how many people are involved in each
23 session?
24 A No, I don't because it varies from a daily
25 participation.

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ROUGH DRAFT TRANSCRIPT

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1 Q Okay. And so during these group sessions you have
2 like one caseworker, usually, if you know, sir?
3 A Yes.
4 Q And during these sessions, is -- are there like
5 written exercises that they do or is it all kind of oral
6 presentation?
7 A There are some written assignments that are done in
8 the sessions.
9 Q Okay. And I noticed progress notes. Would it be
10 typical for a caseworker that's involved in the recovery
11 process during each session to notate progress?
12 A Yes.
13 Q That's just something that's done on a normal basis?
14 A Yes.
15 Q Okay. And there's a couple of lines of progress I
16 note on each session. Is that just through observation, what
17 -- how do they come up with those progress notes?
18 A Usually with the group progress note. It documents
19 what took place, what interaction was conducted by the patient.
20 Q If a progress note would indicate that a client is
21 abstinent from alcohol, would that be something that the client
22 would have to tell the therapist or would they actually perform
23 BACs at each session?
24 A No. There usually is not any kind of forensics done
25 at these sessions.

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ROUGH DRAFT TRANSCRIPT

1 Q Have you heard that phrase?
2 A Yes.
3 Q Where does that phrase come from?
4 A I'm sorry?
5 Q Does that phrase come out of the big book for
6 alcoholics anonymous?
7 A That I choose into the to drink today?
8 Q That's the exact phrase, I'm sorry.
9 A Yes.
10 Q Okay. What does that mean to you? Does it mean that
11 alcoholism is a daily event?
12 A Alcoholism is a chronic progressive illness. Once we
13 cross the line of addiction, there is no not being an alcoholic.
14 So yes, it's an ongoing process.
15 Q And is there a higher failure rate recidivism rate or
16 redrinking rate among alcohols, particularly alcoholic with a
17 long history of alcohol consumption?
18 A Yes.
19 Q So it's not uncommon for someone to maintain a period
20 of sobriety while they're in a program and then fall off as
21 soon as the program stops?
22 A Yes.
23 Q Is that one of the reasons why alcoholics anonymous
24 has daily meetings?
25 A Alcoholics anonymous does provide support, yes, on a

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. So during these sessions there's no blood
2 draw, no breath test?
3 A In.
4 Q So any report of abstaining from alcohol would be
5 self reported?
6 A Self report or observed.
7 MS. GRAHAM: I'll pass the witness. Or actually --
8 MR. PIKE: It's my turn.
9 MS. GRAHAM: -- your witness.
10 MR. PIKE: Thanks. I just have a few questions.
11 MS. GRAHAM: If I could gather my stuff --
12 MR. PIKE: Oh, you bet.
13 MS. GRAHAM: -- for a minute here.
14 REDIRECT EXAMINATION
15 BY MR. SMITH::
16 Q I didn't have a drink today. Sobriety is a
17 day-by-day basis or an ongoing --
18 MS. GRAHAM: Objection. Leading.
19 MR. PIKE: Okay. Thank you.
20 BY MR. PIKE::
21 Q You've heard the phrase I cannot take a drink today
22 or something similar to that, haven't you?
23 MS. GRAHAM: Objection. Leading.
24 THE COURT: Try have you heard the phrase, sir.
25 BY MR. PIKE::

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ROUGH DRAFT TRANSCRIPT

1 daily basis.
2 Q And by providing support, they provide a sponsor. Is
3 that term a correct term?
4 A Yes.
5 Q What's a sponsor's duty?
6 A As I understand, a sponsor's duty is to be available
7 for when the patient is in time of crisis or if they are
8 working on the steps of recovery, then that would be their
9 guiding person through that process.
10 Q They're guiding their support person?
11 A Yes.
12 Q And during the time that this program was on going,
13 you were never informed that Victoria was an alcoholic.
14 A No, never.
15 MS. GRAHAM: Objection.
16 THE COURT: Assumes facts not in evidence.
17 MS. GRAHAM: Yes.
18 THE COURT: Sustained.
19 BY MR. PIKE::
20 Q She appeared to be supportive or assuming that role
21 that would normally --
22 MS. GRAHAM: Judge, asked and answered. It exceeds
23 the scope --
24 MR. PIKE: It --
25 MS. GRAHAM: -- of cross-examination --

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1 THE COURT: Overruled.
2 MS. GRAHAM: -- at this point.
3 BY MR. PIKE:
4 Q So Victoria would be assuming that role, that
5 supportive role by attending those classes?
6 A Yes.
7 Q In order to obtain a complete report -- well, let me
8 just strike that.
9 MR. PIKE: Court's indulgence.
10 BY MR. PIKE:
11 Q In your previous testimony you indicated that there
12 are certain areas that alcohol affects people. One of them is
13 legal.
14 A Yes.
15 Q One of them's employment?
16 A Yes.
17 Q And the other one is what?
18 A Family.
19 Q In relationship to the employment issues, it is -- if
20 an individual reports that they suffer from blackouts, does
21 that often dictate a longer treatment program than someone who
22 does not?
23 A Yes, that would indicate there's more severity.
24 Q And it's not uncommon during the initial phase --
25 initial phases of evaluation for an alcoholic for them to

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1 MS. GRAHAM: Nothing further, Judge.
2 THE COURT: Anything, Mr. Pike?
3 MR. PIKE: I'm not going to step into that box. So
4 no, I don't have any further questions. Thank you very much,
5 sir.
6 THE COURT: Any questions from any of the jurors?
7 All right, thank you, sir, for your testimony. You're
8 instructed not to discuss your testimony with any other witness
9 involved in this case until in matter is finally resolved.
10 Thank you for your time.
11 THE WITNESS: Thank you.
12 THE COURT: Do you have another witness for this
13 morning --
14 MS. PALM: Not until 1:30.
15 THE COURT: -- before the lunch break?
16 MR. PIKE: Not until 1:30, your Honor, we have --
17 THE COURT: 1:30?
18 MR. PIKE: Yes.
19 THE COURT: Okay, ladies and gentlemen, because of
20 scheduling issues, we're not able to start at 1:00. We'll
21 start at 1:30. We will start promptly at 1:30. So during this
22 lunch recess it is your duty not to converse among yourselves
23 or with anyone else on any subject connected with the trial or
24 to read, watch or listen to any report over commentary on the
25 trial by any person connected with the trial or by any medium

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1 minimize their use of alcohol.
2 A Yes.
3 Q But in this case you thought it was severe enough
4 that you directed Mr. O'Keefe to go into an actual detox
5 program?
6 A Yes.
7 MR. PIKE: I don't have any further questions.
8 THE COURT: Any recross?
9 RECROSS-EXAMINATION
10 BY MS. GRAHAM:
11 Q How long did the detox last?
12 A I would imagine from -- anywhere from three or four
13 days. I'm not accurate on that.
14 Q And that was because he would have been intoxicated
15 at the time?
16 A Yes.
17 Q Okay. And sir, in your opinion -- let me ask you
18 this. Somebody who drinks 15 quarts of beer on a daily basis
19 for several years, would you agree if they drink a couple
20 bottles of wine one day, it probably wouldn't affect them that
21 much? Would you agree, yes or no?
22 A No.
23 Q Have you ever heard the term I can really hold my
24 liquor? Have you heard the term, sir?
25 A Yes.

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1 of information, including without limitation newspaper,
2 television, radio or Internet.
3 And you're not to form or express an opinion on any subject
4 connected with this case until this matter is finally submitted
5 to you. We'll see you back at 1:30. Thank you.
6 (Outside the presence of the jury)
7 We're outside the presence of the jury panel. If I
8 could have counsel back about 1:15. We can start working on
9 some of the jury instructions. I've had an opportunity to
10 review.
11 MR. SMITH: I think it might take a little longer
12 than 15 minutes, Judge.
13 THE COURT: No, we won't finish it.
14 MR. SMITH: Oh, okay.
15 THE COURT: We'll start it.
16 MR. SMITH: Okay.
17 MS. PALM: Your Honor, can we put a couple of things
18 on the record before we break or do you want to do it when we
19 come back?
20 THE COURT: No, let's do this now.
21 MS. PALM: Okay. I just wanted to preserve the issue
22 on Detective Mogg's testimony. He would have testified
23 recording the Franco Ardonia's (phonetic) case which was the
24 event number that he read. That was a case where he was one of
25 the detectives. It was a murder case. He claimed that he

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1 couldn't remember the murder, so they gave him a breath test,
2 and they did that by Detective Mogg ordering it and Officer
3 Lyle's (phonetic) who came and took it.

4 So we wanted to show that they had the ability to do
5 that and they chose not to do it here, and that Detective
6 Wildemann through his training would have been aware of that
7 ability to do that and aware of the availability of having that
8 be done. It's part of our theory of defense that the State has
9 not conducted themselves properly in this case by hiding
10 evidence and minimizing evidence of Mr. O'Keefe's alcohol
11 consumption, and for that reason we don't have a quantified
12 number.

13 And that problem was enhanced by the
14 cross-examination of the last witness when they were talking
15 about tolerance levels based on blood alcohol levels. It just
16 proves the point we don't have that number, and so I think we
17 should have been able to present the testimony, and the Court
18 ruled that it was collateral. We don't believe it is. It -- I
19 believe it was admissible as impeachment under Labado
20 (phonetic) because it impeaches their motives with
21 regard to Mr. O'Keefe and their conduct in that case and
22 supports our theory of defense.

23 THE COURT: Mr. Smith.

24 MR. SMITH: Judge, there's nothing to suggest that
25 there was a motive for Detective Wildemann to order a blood

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1 also testified that there's nurses at the jail who could
2 provide that service, and so, you know, the testimony with this
3 particular detective here today related to a different case,
4 and he just said that he's done it in a case. It doesn't mean
5 it doesn't exist and it doesn't really attack the credibility
6 of Detective Wildemann. So that's why I sustained the
7 objection. Can I have Mr. Pike and Mr. Smith, and I think you
8 were here during -- we're off the record.

9 (The court recessed at 12:02:25 p.m. until 1:19:31
10 p.m.)

11 (In the presence of the jury)

12 THE MARSHAL: Come to order. Department 17 of the
13 Eighth Judicial District is now in session. Honorable Judge
14 Michael P. Villani presiding. Please be seated. Remain in
15 order. Let's make sure our cell phones are turned off.

16 THE COURT: Mr. Pike, are -- we're outside the
17 presence of the jury panel, and Mr. Pike, did you have that
18 copy of yours with some cites?

19 MR. PIKE: I do, your Honor.

20 MR. SMITH: I'm sorry, I don't have you guys'
21 instructions.

22 MS. PALM: We filed them.

23 MR. SMITH: I know.

24 MS. PALM: I only have the clean set.

25 THE COURT: I have a non-annotated set. I have two.

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1 alcohol test. I mean, the detective testified that that's not
2 protocol, and that the only time officers generally request
3 blood alcohol information from a defendant is when they're
4 charged with DUI. Obviously, here this defendant is charged
5 with murder. So for them to suggest that there was some kind
6 of nefarious motive or malicious intent and that's why the
7 detective didn't do it, it just doesn't comport with the
8 evidence.

9 Furthermore, what the detective said was that to his
10 knowledge, that had never happened. Furthermore, it appears
11 the defense were only able to produce one witness that we know
12 of from an event that transpired in 2007. That was the event
13 number. Something that happened two years ago that one
14 detective did. So it was the State's position that they were
15 attempting to impeach Detective Wildemann using extrinsic
16 evidence on a collateral issue, and that's whether or not
17 Detective Wildemann should have or should have not requested
18 BAC evidence from the defendant.

19 Now, they're going to be able to argue that, so it's
20 also the State's position that there really isn't any prejudice
21 anyway. They're going to be able to argue that yes, the
22 detective could have done it, and he chose not to for whatever
23 reason. The detective admitted as much on the stand.

24 THE COURT: And the detective testified that he
25 wasn't aware of or he wasn't aware of people doing that, and he

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1 (Off the record colloquy).

2 THE COURT: I think, in one of the packets we had, we
3 had an instruction about defendant testifying and what the
4 jury's not to consider. I just can't locate that with a tab
5 here. Does someone have that handy? I just want to go over
6 that with the defendant at this time.

7 MR. SMITH: I think I have --

8 (Off the record colloquy).

9 MS. PALM: It's our instruction?

10 THE COURT: I think you proposed it. I don't think
11 there's one of those in the State's packet. Has anyone found
12 that one yet? Here we go, I've got it.

13 MS. PALM: Is it in our instructions?

14 THE COURT: It is in Mr. Pike's. Page 30.

15 MS. PALM: Okay.

16 THE COURT: All right, Mr. O'Keefe, can you please
17 stand up.

18 THE WITNESS: Yes, sir, your Honor.

19 THE COURT: I just want to go over this with you.
20 You have the right under the Constitution of the United States
21 of America and the Constitution of the State of Nevada not to
22 be compelled to testify in a criminal proceeding. Do you
23 understand that, sir?

24 THE WITNESS: Yes, your Honor, I do.

25 THE COURT: You may, if you wish, give up that right

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1 and take the witness stand and testify. If you do, you will be
2 subject to cross-examination by one of the deputy district
3 attorneys, and anything you say either on direct or
4 cross-examination would be fair comment for either counsel to
5 address during closing argument in front of the jury. Do you
6 understand that, sir?

7 THE WITNESS: Yes, your Honor.

8 THE COURT: If you choose not to testify, the Court
9 will not permit the deputy district attorneys from making any
10 comment to the jury regarding the fact that you have not
11 testified. Do you understand that, sir?

12 THE WITNESS: Yes, sir, your Honor.

13 THE COURT: And if you elect not to testify, the
14 Court will instruct the jury as follows, if your attorney and
15 you agree as follows. This would be the instruction the Court
16 would be inclined to give. As a Constitution right of a
17 defendant in a criminal trial that he may not be compelled to
18 testify. Thus, the decision as to whether he should testify is
19 left to the defendant on the advice and counsel of his
20 attorney.

21 You must not draw any inference of guilt from the
22 fact that he does not testify, nor should this fact be
23 discussed by you or discussed by you or enter into your
24 deliberations in any way. Do you understand that, sir? If
25 your attorney request that instruction, I will give that to the

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1 If the matter were to be reversed by an opinion of
2 the supreme court or a decision or any other -- or a mistrial
3 or anything else that may happen in this case, having once
4 waived his right to not testify and to testify on the stand, he
5 cannot subsequently at any subsequent trials reinvoke his right
6 to not testify because at subsequent trials his testimony -- if
7 he does not testify, his testimony would be able to be read in
8 by the District Attorney's Office if they desire to publish it
9 to any juror.

10 So this is a one time thing, and I explained to him
11 the possible consequences of that, that that is a collateral
12 consequence if he does testify.

13 THE COURT: Do you understand that, sir?

14 THE WITNESS: Yes, your Honor, and he did so.

15 THE COURT: All right. All right, thank you. You
16 can have a seat, sir.

17 THE WITNESS: Yes, your Honor.

18 THE COURT: Thank you. Let's go over the State's
19 packet, and there's someone's here that (indiscernible).
20 They're not numbered by page, obviously, but if you go to page
21 four, five, seven. I think it's seven. It's you are here to
22 determine the guilt -- guilt of the defendant from the evidence
23 in the case not called upon regarding any other person. Is
24 that applicable to this case?

25 MR. PIKE: No. If we could go through --

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1 jury.

2 THE WITNESS: Yes, your Honor.

3 THE COURT: Okay. And sir, if you do have a prior
4 felony conviction, you do testify on the convictions within
5 last ten years, you understand that State can confront you with
6 that conviction and that will be utilized to attack your
7 credibility. Do you understand that, sir?

8 THE WITNESS: Yes, your Honor.

9 THE COURT: The State would be allowed to ask you if
10 you've been convicted of a felony or your attorney can do this,
11 what was the felony, when did it happen, but no specific
12 details of the felony can be discussed. Do you understand
13 that, sir?

14 THE WITNESS: Yes, your Honor.

15 THE COURT: All right. I'm not going to ask you at
16 this time whether or not you've made that decision. We'll wait
17 until closer to the end of your case in chief. But I just
18 wanted to make sure you understand those rights, sir.

19 THE WITNESS: Yes, your Honor. Thank you.

20 MR. PIKE: Your Honor, in reference to that, to make
21 a complete record, I also advised Mr. O'Keefe that if he makes
22 the election to testify at the time of this trial, by waiving
23 his right against or exercising his right to testify and not --
24 let put it this way. Once he testifies, he has forever waived
25 the right to not testify.

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1 MS. PALM: Can we go --

2 MR. PIKE: -- from the beginning?

3 MS. PALM: -- page by page?

4 MR. PIKE: We've got some --

5 MS. PALM: Objections along the --

6 MR. PIKE: -- objections before that.

7 MS. PALM: -- way.

8 THE COURT: No, I was going to -- I had some ones I
9 thought right off the bat.

10 MR. PIKE: Okay.

11 MS. PALM: Oh, okay.

12 THE COURT: We're not going to get them done now. I
13 just wanted to -- like I said --

14 MR. PIKE: Right.

15 THE COURT: -- I like to chip away at these.

16 MS. PALM: Okay.

17 MR. PIKE: Oh, okay. It isn't relevant. It's

18 misstates the burden and has no relevance under these factors.

19 MR. SMITH: Well --

20 MR. PIKE: Facts.

21 MR. SMITH: -- I -- I don't know if it restates the

22 burden because they are here to determine the guilt meaning

23 whether or not we've proven case beyond a reasonable doubt. I

24 mean, they're not here to determine whether the defendant is

25 innocent. They're here to determine whether or not he's guilty

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1 because we proved our case.
2 THE COURT: All right, the last line of that
3 instruction talks about even though you may believe one or more
4 persons are guilty.
5 MR. SMITH: We can strike that. That's just a stock
6 instruction, Judge.
7 THE COURT: No, I understand.
8 MR. SMITH: Yeah.
9 THE COURT: That's all I'm going. We don't need this
10 one, correct?
11 MR. SMITH: Correct.
12 THE COURT: All right. I just want to hit some
13 highlights that I was looking at.
14 MR. PIKE: Okay, thank you.
15 THE COURT: Towards the end there's an instruction, a
16 bear fear of death or great bodily injury is not sufficient to
17 justify killing. Should we go through about two-thirds or
18 three-quarters through the packet. Do you have a cite for
19 that, Mr. Smith?
20 MR. SMITH: That's straight from Runyon (phonetic),
21 Judge. Runyon v. State. I don't know the cite --
22 THE COURT: Okay.
23 MR. SMITH: -- off the top of my head, but it's
24 straight out of Runyon. Runyon lists the seven instructions
25 applicable to self-defense. These are the same seven

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1 THE COURT: All right. State your objection, please.
2 MR. SMITH: My objection is that it's confusing
3 because it says if you find -- if you find the State has
4 established that the defendant has committed murder, you shall
5 select the appropriate degree of murder as your verdict. Then
6 it says the crime of murder may include the crime of voluntary
7 or involuntary manslaughter. I mean, it just sounds confusing.
8 It sounds like the jury could determine that we have, in fact,
9 proven beyond a reasonable doubt that he's guilty of murder,
10 but nonetheless they can decide that it's manslaughter, too.
11 I mean, it's confusing. As written it's confusing.
12 I understand the concept they're attempting to import upon
13 them, but as written it is confusing.
14 THE COURT: Mr. Pike or Ms. Palm.
15 MR. PIKE: Probably a better way to state it that is
16 that then to go to the next line and say if you find that the
17 State has not established the defendant has committed murder,
18 you shall determine whether or not the State has established
19 that the defendant has committed the crime of voluntary or
20 involuntary manslaughter. And that would clear up the
21 language, but it certainly is -- follows the language of Lizbi
22 (phonetic) versus State, 82 Nevada 183.
23 MR. SMITH: Judge --
24 THE COURT: I think the way it's written is
25 confusing. If you want to draft a new one for consideration --

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1 instructions that I have used in every case where self-defense
2 has been alleged.
3 THE COURT: Okay, what's the defense view on that?
4 MS. PALM: We need to find it first.
5 MR. PIKE: No, that appears to be consistent with
6 Runyon.
7 THE COURT: All right. And the next one thereafter.
8 MR. PIKE: That -- well, that may -- we've got to go
9 through the definitions of reasonable or unreasonable. We do
10 accomplish that in some of the other instructions, but that is
11 a correct statement concerning self-defense. I don't -- and
12 indicating that an insufficiently or unreasonable aspect of
13 self-defense is a second degree murder -- supports a second
14 degree conviction and not a voluntary manslaughter.
15 So I can't say that it violates any case law or any
16 statutes.
17 THE COURT: We will look at that again when we
18 discuss the other self-defense instructions. Actually, let's
19 jump to Mr. Pike's Page 10 of his packet. Does anyone need an
20 -- I've got an extra copy of Mr. Pike's if anyone needs it.
21 MS. GRAHAM: Thank you, Judge.
22 THE COURT: Page 10.
23 MS. GRAHAM: Thank you.
24 MR. SMITH: Yeah, for the record, I do have an
25 objection to this instruction.

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1 MR. PIKE: I will.
2 THE COURT: -- more than happy, and we'll just have
3 this marked as it's been offered and Court's not going to
4 provide that. And if we can go to --
5 MR. SMITH: And Judge, one more thing just in regards
6 to this instruction, I would note that it's the State's
7 position that this is covered by the State's proposed
8 instructions that describe what open murder is and that there
9 are lesser included offenses of open murder.
10 THE COURT: Well, that's what I said, I'm not giving
11 it.
12 MR. SMITH: Oh, okay. All right. Oh, I'm sorry,
13 Judge, I missed that part.
14 THE COURT: Okay.
15 MR. SMITH: Sorry.
16 THE COURT: Never argue with someone who's agreeing
17 with you.
18 MR. SMITH: You're right, Judge. You're right.
19 You're right.
20 THE COURT: Let's go to instruction 20 or Page 20.
21 MR. PIKE: This is offered under Sandborn (phonetic)
22 versus State. And I think --
23 THE COURT: I didn't have a cite on -- because
24 unfortunately the cite version you gave me didn't have the
25 numbers at the bottom of the page so I'm trying to --

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1 MS. PALM: 107 --
2 THE COURT: -- match those up.
3 MS. PALM: 107 Nevada 399, 812 Pacific 2nd.
4 THE COURT: 1073 --
5 MS. PALM: 399.
6 MR. PIKE: 107, 399.
7 THE COURT: State, have you had an opportunity to
8 look at that?
9 MR. SMITH: I have, Judge, and I will inform the
10 Court that I read that case in its entirety, and I didn't see
11 any case law or legal concept in that case that would support
12 a, giving instruction -- giving this instruction at all, and b,
13 giving it under these circumstances. So we did want to object
14 to it being given, for the record.
15 THE COURT: I'm going to review that case. The next
16 one is the non-flight. I haven't seen that one before.
17 MR. PIKE: It --
18 THE COURT: It's creative, Mr. Pike.
19 MR. PIKE: Thank you.
20 MR. SMITH: All right, we have an objection to that
21 one as well.
22 MR. PIKE: And honestly, I've seen the flight
23 instruction offered so many times. The fact that Mr. O'Keefe
24 stayed in the location, didn't attempt to flee even after he
25 had been discovered by private individuals and had the

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1 cite for that? I didn't -- and like I said, I didn't have an
2 opportunity to compare that the version that you gave the
3 citations on.
4 MR. SMITH: And Judge --
5 MR. PIKE: In reference to this, the -- it -- there
6 must exist a union between a joint operation of an act and the
7 conduct and voluntariness as opposed to a reaction based upon
8 training or circumstances. Voluntariness is a way of
9 describing the actual mind set that must be produced along with
10 the fact there's voluntary acts and then there's mens rea that
11 involves premeditation deliberation. So voluntary acts are
12 directed towards an end.
13 And I think they have to show that's just part of the
14 mental state and it's voluntary committed towards act. I --
15 other than interpreting Kaljick 3.3 -- 31.5, I don't have
16 Nevada case law to support that.
17 THE COURT: Isn't that covered by the State's
18 instructions to constitute the crime charged there must exist a
19 union or joint operation of an act (indiscernible) and the
20 intent to do the act?
21 MR. PIKE: Yes, but not quite completely, and so --
22 and I think it does -- well, I'd request that it give more
23 definite or suggest that it gives more definite guidance to the
24 jury. If you feel that it's confusing or duplicative, then
25 we'll submit it.

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1 opportunity to flee, I think the fact that he remained in there
2 certainly is evidence that he did not, in his mind, believe
3 that he had committed a crime. So it is simply an inverse
4 statement of a case -- or of an instruction that's been given
5 by the State in numerous occasions.
6 It is kind of a reverse of a standard instruction
7 we've seen. And also the inverse of Kaljick (phonetic)
8 instruction number 2.52 which is a statement of a -- is a
9 similar instruction to the Nevada instruction for flight.
10 MR. SMITH: Judge, I tried to search the case law to
11 see if an instruction like this has ever been given, and I
12 couldn't find one. I looked at the Kaljick instruction, and it
13 mimics our own, like Mr. Pike just stated. I mean, I can
14 appreciate the creativeness of this instruction, but I do
15 object to it, for the record, and I submit that there's no
16 basis for it in the case law.
17 THE COURT: Okay. The Court's not going to give that
18 instruction. And we have -- this will be the last one and then
19 we can call the jury in.
20 MR. PIKE: So that will be made a court exhibit --
21 THE COURT: Yes, yes.
22 MR. PIKE: -- as offered -- defendant's offered --
23 THE COURT: Right.
24 MR. PIKE: -- but not admitted. Thank you.
25 THE COURT: Instruction 31 or Page 31. Do you have a

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1 THE COURT: All right, Mr. Smith.
2 MR. SMITH: Judge, I do have a problem with this
3 instruction. I do that it's confusing, and I do think it's
4 covered by the other instructions.
5 THE COURT: I agree. I think it's covered by the
6 instruction I previously read. So this will be marked not
7 given. Let's call the -- are we ready?
8 MR. SMITH: Judge, well, actually I do -- it's my
9 understanding that -- and I had addressed this with Mr. Pike
10 previously. But it's -- as we understand, they're getting
11 ready to call a Dr. Christensen who is an ER doctor. After
12 that the afternoon break we received a note with pretty much a
13 complete medical history of the named victim, including some
14 prior suicide attempts.
15 So we want to either make a motion in limine right
16 now to preclude any mention that Ms. Witmarsh ever committed
17 suicide or an offer of proof as so what this doctor is actually
18 going to testify to. Especially considering that she's only an
19 ER doctor and is not noticed to talk about any of these other
20 things.
21 MR. PIKE: I gave that to the State because it was a
22 note of the medical history of the deceased, and these were the
23 doctor's notes that she put together. I don't anticipate
24 calling her to testify about her complete medical history. I
25 will ask her to testify about the dosages when she started on

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1 anti-depressants because there is a question that's been
2 brought up by the State when they called the ME about the --
3 whether or not the amount of medication was within the
4 therapeutic range or not.

5 I'm not going to ask about suicide attempts. If they
6 want to get into that, that certainly is their prerogative.
7 But I had Dr. Christensen prepare a report specifically along
8 these areas and as she was a substitute expert regarding
9 toxicology, so I plan on limiting it. This was simply some
10 notes that were prepared by her, and I didn't want to withhold
11 those from the State, so I gave them to him. This is just for
12 her reference if --

13 THE COURT: So she's going to testify that --

14 MR. PIKE: -- there's any questions.

15 THE COURT: -- if you're on this medication at
16 certain levels, this is the reaction? Is that --

17 MR. PIKE: There's certain --

18 THE COURT: -- sort of summarizing what she's going
19 to say?

20 MR. PIKE: Right. She's going to testify that
21 basically she -- Victoria Witmarsh had been placed on
22 anti-depressants since about 1983 and that she had gone through
23 a number of different medications during that period of time.

24 Just prior to the time of events in question here on
25 October 21st, I believe, she was -- this became a new

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1 MR. SMITH: Well, he just said he's going to ask her
2 when did she start taking anti-depressants.

3 THE COURT: Okay, what you can do because yeah, we're
4 not going to get into that because I know you have other
5 issues, what were her other problems, et cetera.

6 MR. PIKE: Oh, just the medications.

7 THE COURT: But she started on the new medication
8 when?

9 MR. PIKE: On the 21st. October 21st.

10 THE COURT: Okay. Can't you ask her -- I'm assuming
11 she was treating her or examining her -- that on October 21st
12 she started --

13 MR. SMITH: She wasn't. She wasn't treating her.

14 THE COURT: -- she started with this drug, this
15 medication. And it was --

16 MR. PIKE: On August -- on August 5th she was changed
17 from Lexapro to Effexor. The target dose at that time was 115
18 milligrams per day. And on October 21st she started the trial
19 of Effexor with Southern Nevada Mental Health.

20 THE COURT: Okay. How does this doctor know? Is
21 there a foundation --

22 MR. PIKE: Through her medical -- we provided her the
23 full medical records.

24 THE COURT: Are those medical records part --

25 MR. PIKE: We provided them to the State, and we have

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1 medication to her and therapeutic levels were supposed to be at
2 a certain level. The amount that she had in her system when
3 she -- as part of the autopsy -- exceeded that therapeutic
4 level, and that in conjunction with the alcohol possibly could
5 have caused these effects.

6 It was a new medication to her, and so I'm not going
7 to get into the history of it and the fact to say that she
8 reviewed her complete medical history to determine when she
9 started on these medications and when she transferred to this
10 drug because it's important when you change medication, you
11 don't know what it does to you, and she was overdosing on it
12 during that period of time.

13 I'm not going to get in the history. I -- and I gave
14 that to Counsel not to prepare them for that I was going to get
15 into that, but they're her notes. She may refer to them if
16 they ask some -- her questions about that, but that's where I'm
17 going with it. And --

18 THE COURT: Mr. Smith.

19 MR. SMITH: Judge, I understand what Mr. Pike is
20 saying. However, it's our contention that, you know, the fact
21 that Ms. Witmarsh started anti-depressants in 1983 isn't
22 relevant to what happened --

23 THE COURT: No, no, we're not --

24 MR. SMITH: -- in 2008.

25 THE COURT: No, this is --

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1 them here marked as an exhibit in the event that they question
2 that. I'm simply going through because there is -- when you
3 change these --

4 THE COURT: No, I understand that.

5 MR. PIKE: -- medications -- yeah.

6 THE COURT: I'm just concerned about the foundation
7 issue. I understand what you're saying, that there's --

8 MR. PIKE: Yeah. And that --

9 THE COURT: -- you change --

10 MR. PIKE: And it's just based -- I'm just going to
11 ask you reviewed her medical records, when did she start on
12 that in I'm not going to get into details of the -- what she
13 was being treated for or anything else. If they want to get
14 into that, that's fine.

15 I'm -- but it's important to know that there was --
16 that she knew the deceased, Mrs. Witmarsh, had been taking
17 anti-depressants, she was familiar with some of them, this was
18 a new one, and she had too much, so some of the possible
19 effects of that would have been this. And then I'm going to
20 let Dr. Christensen go because I don't want to exceed what the
21 purpose that I was allowed to call her as a substitute witness
22 for.

23 THE COURT: All right, Smith.

24 MR. SMITH: Judge, I don't think that this witness
25 should be allowed to testify as to like the fact that she was

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1 on Lexapro before she started taking this. I don't really have
2 an objection to the admissibility of the effects
3 (indiscernible) because I think I agree with Mr. Pike that
4 that's relevant here. But that should be all that's relevant.
5 I mean, they shouldn't -- and I have to be careful
6 because I know they noticed a toxicologist, and I -- we, the
7 State, as a courtesy agreed to let them substitute this ER
8 doctor in. But this ER doctor shouldn't be allowed to testify
9 to things that not only are outside of her area expertise, but
10 would be outside the expertise of a toxicologist. That's what
11 they noticed, a toxicologist to talk about -- to make
12 interpretations regarding to the toxicity of the venlafaxine in
13 her blood. Not that well, if you combine these together, these
14 are the types of effects you get.
15 That's outside of the scope of this witness'
16 knowledge, and it's outside the scope of a toxicologist's
17 knowledge.
18 MR. PIKE: Well --
19 MR. SMITH: I mean, they --
20 MS. PALM: (Indiscernible).
21 MR. SMITH: I mean, that would be more appropriate
22 for say, a representative from the drug itself or a pharmacist
23 or something like that. Not just an ER doctor who's going to
24 be able to say it's my opinion that if you mix alcohol and
25 venlafaxine, even though I don't know what concentration it was

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1 No, this doctor is imminently qualified and
2 appropriately and significantly so, and I'm limiting it
3 strictly to the toxicology issues in relationship to that.
4 MR. SMITH: Just so I understand what you're trying
5 to get because I think I may be confused. Can you just tell me
6 one more -- and I'm not trying to infuriate you at all. I just
7 want to understand what you're putting this doctor up on the
8 stand for.
9 MR. PIKE: To indicate that with the amount of --
10 when -- with the prescription when it started this was to be
11 the basis of her therapeutic level. The amount that was found
12 in her at the time that she -- the autopsy was performed was in
13 excess of that therapeutic level, and that directly deals with
14 what the medical examiner testified to.
15 Based upon her research and her experience as an
16 emergency room physician, what are the possible effects that
17 the combination of alcohol and Effexor have in combination?
18 Not that they didn't know this -- this wasn't her patient.
19 Didn't know it was a new medication to this patient. Were some
20 of them the same ones that the last doctor had indicated.
21 MR. SMITH: Which -- I'm sorry, which last doctor?
22 MR. PIKE: The medical examiner. And that's --
23 THE COURT: Yeah, because the medical examiner
24 testified that she had therapeutic levels.
25 MR. PIKE: Right. And she did not. It was in excess

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1 and I'm not a toxicologist, but if you mix those together, the
2 person's going to be aggressive, because that's exactly the
3 testimony that they're going to try and elicit.
4 MR. PIKE: And it's unusual that the State would say
5 that when they called a medical examiner, a doctor that doesn't
6 treat anybody, never prescribes medication, and they asked the
7 exact same questions. Now, they're a doctor, they researched
8 it. She testified about Dr. Christensen's report. She relied
9 upon that when she offered her testimony.
10 They want to try and keep out Dr. Christensen based
11 upon that when they've already allowed examination in
12 relationship to her report, then let them go ahead raise the
13 objection now. I'm happy to try this again. I -- that -- this
14 objection is infuriating. It's not based in any -- it's not
15 based in law, it's not based in fact. I've limited everything
16 that this doctor was going to testify.
17 And medical examiner -- or excuse me, emergency
18 doctors, they have to know the effects of alcohol. They have
19 no know the effects of drug. They have to be able to do that
20 in a short triage period of time so they don't put in an
21 adverse drug into a patient so that they kill them by putting
22 in the wrong medication. If they put more Effexor into this
23 person and kill her, then certainly, what happens if the
24 medical examiner makes a misdiagnosis like that? Somebody
25 becomes alive again?

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1 --
2 THE COURT: Oh, all right.
3 MR. PIKE: -- of the therapeutic level. And we're
4 contesting that and certainly, we can call about her to testify
5 --
6 THE COURT: Okay, but --
7 MR. PIKE: -- regarding that, but I just --
8 THE COURT: -- you need to tell --
9 MR. PIKE: I'm not going to get into the history. I
10 --
11 THE COURT: I'm going to -- okay, if you lay the
12 proper foundation that this ER doctor knows what the
13 interactions are, okay --
14 MR. PIKE: She did the same research that the other
15 --
16 THE COURT: Well --
17 MR. PIKE: -- doctor did.
18 THE COURT: -- if you lay that foundation what the
19 adverse reactions are, okay --
20 MR. SMITH: Potential adverse reactions.
21 MR. PIKE: Right.
22 THE COURT: Right, potential. And then on cross you
23 can say well, you don't know -- not everyone gets these
24 reactions.
25 MR. SMITH: Okay. I got it.

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1 MR. PIKE: And I'm not going to try and bring in any
2 medical records --
3 MR. SMITH: And that's what I'm concerned about and
4 talk about prior suicide and how long she's been on
5 anti-depressant and what anti-depressant she was on before
6 venlafaxine.
7 THE COURT: So Mr. Pike, what I'd like you to do is
8 you or Ms. Palm can talk to the doctor. She's not going to
9 blurt that out. You're not going to ask her that. You're not
10 going to ask her how long she was on this other medication.
11 You can say on September 11th, as far as your review of her
12 records, she switched to Effexor.
13 MR. PIKE: Okay.
14 THE COURT: And then you move forward.
15 MR. PIKE: All right.
16 MR. SMITH: Can we say that she began Effexor, Judge,
17 because it implies that she was on --
18 MR. PIKE: That's just fine. I'll use language.
19 THE COURT: Okay.
20 MR. PIKE: And I've already cautioned her because I
21 told the State I'm not calling her for the past history. Just
22 the -- this medical --
23 THE COURT: Okay, can you -- before you call her --
24 is she the next witness?
25 MR. PIKE: She's the next witness.

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1 THE COURT: Then why don't you just --
2 MR. PIKE: Okay.
3 THE COURT: -- lay the ground rules for her. All
4 right.
5 MR. PIKE: Okay, do you want to go ahead and put the
6 witness on the stand? We're ready?
7 THE COURT: Sure. And you spoke to the doctor about
8 parameters?
9 (In the presence of the jury)
10 THE MARSHAL: Officers and members of court,
11 Department 17 jurors. You may be seated, ladies and gentlemen.
12 Let's make sure our cell phones are turned off, please.
13 THE COURT: All right, Mr. Pike, please call your
14 next witness.
15 THE WITNESS: Dr. Tawni Christensen.
16 THE CLERK: Please raise your right hand.
17 DR. TAWNI CHRISTENSEN, DEFENDANT'S WITNESS, SWORN
18 THE CLERK: Please be seated. Will you please state
19 your name and spell it for the record.
20 THE WITNESS: Tawni Christensen, T-a-w-n-i. Last
21 name's Christensen, C-h-r-i-s-t-e-n-s-e-n.
22 THE COURT: Go ahead, Mr. Pike.
23 DIRECT EXAMINATION
24 BY MR. PIKE::
25 Q Dr. Christensen, are you a doctor here in Las Vegas,

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1 Nevada?
2 A Yes, I am.
3 Q And what type of a physician are you?
4 A Emergency medicine physician.
5 Q And where did you receive your medical training?
6 A I went to medical school in Cincinnati, Ohio.
7 Q When did you graduate?
8 A I graduated in 1990, and then I went to -- 1994, and
9 then I went to an emergency medicine residency in Tucson, and
10 that was from 1994 to 1997.
11 Q When did you come to Las Vegas to begin practice in
12 medication? Or excuse me, practicing medicine.
13 A 2002.
14 Q And you are licensed within the state of Nevada?
15 A Yes, I am.
16 Q You have any areas of specialties?
17 A Emergency medicine specialty.
18 Q As part of your work in emergency -- or excuse me, as
19 an emergency physician, is -- you have to be able to identify
20 different drugs within a patient?
21 A Yes, I do.
22 Q You have to be able to determine any possible
23 reactions that a patient may be having to a drug?
24 A Yes, I do.
25 Q And this would include both beneficial and adverse

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1 effects that may be occasioned by the use of drugs?
2 A Correct.
3 Q In addition to that, do you see -- in the emergency
4 room do you see people there that are there because of the
5 affects of alcohol?
6 A Yes, I do.
7 Q And as a result of that, you have to be familiar
8 also, with the effect of alcohol upon individuals.
9 A Yes.
10 Q Have you ever had occasion to testify as an expert
11 before in the state of Nevada?
12 A No.
13 Q Okay. Is this your first time testifying --
14 A Yes.
15 Q -- before -- okay.
16 MR. PIKE: Based upon her qualifications, your Honor,
17 I'd ask that she be allowed to offer her opinions in
18 (indiscernible).
19 MR. SMITH: Judge, I have no objection.
20 THE COURT: All right.
21 MR. PIKE: Thank you.
22 BY MR. PIKE::
23 Q You were retained by my office in order to review the
24 possible effects of the combination of Effexor and alcohol; is
25 that correct?

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1 A Yes.
2 Q And in this case you have never met Brian O'Keefe or
3 Victoria Witmarsh, have you?
4 A No.
5 Q You were provided records of -- to show that Mrs.
6 Witmarsh on the date of her death was prescribed Effexor as a
7 medication --
8 A Correct.
9 Q -- is that correct? And will you identify for the
10 jury what that type of a medication is.
11 A It's an SSNRI. It's a selected serotonin
12 norepinephrine reuptake inhibitor. It's for depression.
13 Q And alcohol, what kind of drug is that?
14 A It's -- has depressing qualities to it. It's a
15 central nervous system depressant.
16 Q You were able to ascertain as to the dosage amount
17 that was prescribed for Mrs. Witmarsh prior to the time of her
18 death, weren't you?
19 A Yes.
20 Q What was dosage that was prescribed to her?
21 A She was to meet a target dose of 150 milligrams per
22 day.
23 Q Okay. Now, the autopsy showed that she had a certain
24 level of Effexor within her system. How much was in her
25 system?

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1 cause seizures. It can cause some high blood pressure
2 problems.
3 Q Can it cause anxiety?
4 A It can cause anxiety, confusion.
5 Q Anger?
6 A Potentially.
7 MR. SMITH: Objection to the leading.
8 MR. PIKE: I'm sorry.
9 THE COURT: Sustained.
10 MR. PIKE: Thank you.
11 BY MR. PIKE::
12 Q Now, and from the research that you did -- the
13 research that you conducted, that was done through medical
14 documents or reports, what did you review in determining the
15 adverse -- possible adverse effects?
16 A I reviewed some of my emergency medicine textbooks,
17 and then I also have an article about Effexor. It's a summary
18 of basis for regulatory position related to the Effexor.
19 Q And you did not have an opportunity to treat either
20 -- or to treat Mrs. Witmarsh, so you don't know which, if any
21 of these effects may have affected her with this dosage.
22 A Correct.
23 Q But those are possible adverse side effects that that
24 combination may have occurred -- may have caused?
25 A If she were to come into the emergency room, I'd be

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ROUGH DRAFT TRANSCRIPT

1 A 990 nanograms per milliliter.
2 Q Was that different than what you would expect that
3 the normal target dose would have rendered within her system?
4 A They showed a target dose for the 150 milligram per
5 day should have a peak plasma level at 93 to 330 nanograms per
6 day.
7 Q So if math serves me correct, the dosage that she had
8 was about three times that of her target dosage?
9 A Yes.
10 Q In addition to that at the time of the autopsy, her
11 blood alcohol was found to be a.24.
12 A Yes.
13 Q Is that correct?
14 A Yes.
15 Q What would you consider the possible effects upon a
16 person of having an alcoholic level -- or excuse me, an alcohol
17 level of .24?
18 A Very concerning, very drowsy, concerns about
19 protecting her airway, difficulty walking, confusion.
20 Q And during your preparation or reviewing the medical
21 reports in relationship to this, were you able to find out any
22 possible adverse reactions of combining Effexor with alcohol?
23 A Yes. In high amounts it can cause -- affect the
24 heart, can lead cardiac arrhythmias that can be fatal. It can
25 also lead to a syndrome called serotonin syndrome. It can

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ROUGH DRAFT TRANSCRIPT

1 looking for those things.
2 Q Thank you very much, Dr. Christensen.
3 MR. PIKE: I have no further questions.
4 CROSS-EXAMINATION
5 BY MR. SMITH::
6 Q Good morning, doctor. Now, as Mr. Pike just asked
7 you, you testified that you have no idea -- actually strike
8 that. Is it -- would it be your testimony, then, that you have
9 no idea as to what side effects may are may not have affected
10 Victoria Witmarsh; is that correct?
11 A I did not physically examine her, but just cutting
12 the high alcohol level with the high level of Effexor in her
13 system, putting that combination, there can be possible side
14 effects that come from that.
15 Q Sure, okay. My question is is you don't know --
16 actually, let back up. Can you tell me, again, what the
17 possible side effects of Effexor are.
18 A In lower -- in high dosages, like what she had, you
19 can run into some cardiac arrhythmias, you can have seizures,
20 you can have a situation called serotonin syndrome, you can
21 have high blood pressure. She -- confusion, central nervous
22 system depression.
23 Q Okay.
24 A Anxiety.
25 Q How about what are the normal side effects of the

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1 drug?
2 A It's initially they can cause some tremors, some
3 anxiety, there's some constipation. It's a long list of
4 initial side effects that the person can become more resistant
5 to as time goes on after they've been on the medicine for
6 awhile.
7 Q Okay. And you'd agree that practically every drug
8 has a side effect or potential side effect?
9 A True.
10 Q And you'd agree with me that not every side effect
11 affects every person who takes a drug?
12 A Right.
13 Q And you'd agree with me that despite your
14 assumptions, you really have no way of knowing what, if any,
15 side effects may or may not have affected Victoria Witmarsh?
16 A Just the concerns that the levels that were in her
17 system were beyond what her normal therapeutic dosage was.
18 Q Okay, let's talk about that. What types of
19 references did you review in order to determine what the
20 therapeutic level was?
21 A Her autopsy report.
22 Q Okay. But I mean, what types of documents did you
23 consult to establish what the baseline was?
24 A Her baseline medication.
25 Q No. Okay.

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1 presumably you looked at.
2 A Yes.
3 Q And that says that the level in her system was 990
4 nanograms per milliliter; is that correct?
5 A Yes.
6 Q And you're saying that a peek dosage or excuse me,
7 you would expect a therapeutic dosage to be 93 to 334 nanograms
8 per day, so I'm a bit confused because it sounds like are we
9 comparing apples to oranges?
10 A Do you have the laboratory results --
11 Q Yes, I do?
12 A -- that are a part of the -- for the purpose the 150
13 milligrams per day it says that she should be at 93 to 334
14 nanograms per milliliter.
15 Q Okay. Now --
16 A But then she's at 990 nanograms per milliliter.
17 Q Okay. I'm confused. I just want to make sure that
18 we're on the same page.
19 A Okay.
20 Q Are you -- you're looking at the report from Quest
21 Diagnostics; is that correct?
22 A Yes.
23 Q Okay. And that says that the amount of venlafaxine
24 in her system at the time of death was 990 nanograms per
25 milliliter.

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ROUGH DRAFT TRANSCRIPT

1 A Her baseline level.
2 Q Right.
3 A Okay.
4 Q What would be the normal level?
5 A Right. Her dosage actually was 150 milligrams per
6 day.
7 Q Okay.
8 A And if you were to call up poison control center
9 they're going to deal more with the dosages that a person
10 takes. Not with serum levels.
11 Q Okay.
12 A Yeah.
13 Q When Mr. Pike asked you what would be the normal
14 level of, I believe you said it was nanograms per milliliter.
15 A True.
16 Q Do you recall what that answer was?
17 A Yes.
18 Q What was it?
19 A For her level of 150 milligrams per day, her peek
20 plasma level should have been 93 to 334 nanograms per day.
21 Q Okay. Well, now, let's talk about the actual report,
22 the autopsy report. You reviewed that, correct?
23 A Yes.
24 Q Okay. Let me get it so that we're on the same page.
25 And then specifically referring to the toxicology report that

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ROUGH DRAFT TRANSCRIPT

1 A Right.
2 Q Okay. And then you're saying that you did some
3 independent research where you discovered that the therapeutic
4 levels for a person taking 150 milligrams of venlafaxine --
5 A Right.
6 Q -- per day was 93 to 334 nanograms per day. That's
7 what you initially said.
8 A Right, here's it's 90 -- it's on this 93 to 334
9 nanograms per milliliter.
10 Q Okay, so that was just kind of a mistake when you
11 said nanograms per day?
12 A That should be nanograms per milliliter.
13 Q So again, that was a mistake?
14 A I'd like to correct that to milliliters.
15 Q Okay. Now, incidentally, what document were you
16 referencing to arrive at the information of the 93 to 334
17 nanograms per milliliter?
18 A I'm using the Quest range that they give.
19 Q Okay. Okay, did you consult any other outside
20 treatises or reports or anything like that?
21 A I did do an Internet search and I also called poison
22 control.
23 Q Okay. Are you familiar with -- as an ER physician
24 and a former medical student, are you familiar with a treatise
25 called the Disposition of Toxic Drugs and Chemicals in Man?

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1 A Is that from a certain textbook or --
2 Q Well, it's a treatise that -- I mean, have you --
3 strike this. I mean, excuse me, strike that. We've heard
4 testimony from a medical examiner that a treatise called the
5 Disposition of Toxic Drugs and Chemicals in Man is a commonly
6 accepted and referenced textbook in the medical profession.
7 Would you have any reason to dispute that?
8 A I'm assuming you're speaking the truth on that.
9 Q Okay.
10 A But there's a lot of different toxicology books that
11 people will study in medical school and residency.
12 Q Okay. Did you consult any of these textbooks?
13 A I essentially looked at the Internet and I also
14 talked to a specialist at poison control.
15 Q Okay. Have you ever heard of a publication called
16 Winicks Drug and Chemical Blood Level Data (phonetic)?
17 A No.
18 Q So just so I'm clear, the only things that you did to
19 try and determine the therapeutic level was to look on the
20 Internet and call a person at a poison control center?
21 A Well, I also looked through some emergency medicine
22 textbooks also.
23 Q Okay, and what --
24 A And how I would treat a patient that come into the
25 emergency room with this kind of overdose.

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1 A Yes.
2 Q Since they're recording everything here. And so
3 based upon your evaluation and your research, the -- certainly
4 the medication amount that was in Mrs. Witmarsh body at the
5 time of the autopsy was in excess of her prescribed amount?
6 A Yes.
7 Q That was consistent with a report of Quest
8 Diagnostics; is that correct?
9 A That's right. They have reference ranges that they
10 list underneath that -- her high dose.
11 Q Okay. And for the record, because the autopsy report
12 has not been introduced into evidence, the Quest Diagnostics is
13 a company here in town that examines or determines level of
14 blood or levels of alcohol, chemical or drugs in blood; is that
15 correct?
16 A Correct.
17 Q And, in fact, you will often send out specimens to be
18 analyzed by Quest Diagnostics and you rely upon them?
19 A That's right, and you have to know what those
20 reference ranges are on these specialized tests.
21 Q And so Quest Diagnostics the reports that you
22 received them just similar to that report that's attached to
23 the autopsy, they include on that the amount that should be or
24 is generally allowable of that drug in the blood as part of the
25 report.

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1 Q Okay. Now, okay, you just said overdose. So is it
2 now your opinion that the level was actually a level of
3 overdose?
4 A I think it's beyond what her normal daily regimen
5 was. It's excessively high.
6 Q According to the person at the poison control center
7 and the Internet?
8 A And her levels that were taken at Quest Laboratory.
9 Q Okay.
10 MR. SMITH: Court's indulgence, Judge.
11 BY MR. SMITH::
12 Q Ma'am, are you aware of, excuse me, the cause of
13 death of Victoria Witmarsh in this case?
14 A I did look at the autopsy report.
15 Q And you'd agree that it's not due to an overdose?
16 A The autopsy report said it was a single stab wound.
17 Q Okay.
18 MR. SMITH: No further questions.
19 THE COURT: Any redirect?
20 MR. PIKE: Yes, please.
21 REDIRECT EXAMINATION
22 BY MR. PIKE::
23 Q Thank you, Dr. Christensen. And the term overdose
24 may mean that an individual is taking an excess of the
25 prescribed amount? Is that yes?

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ROUGH DRAFT TRANSCRIPT

1 A That's true.
2 Q And that report that was part of the autopsy that was
3 done in this case indicated also that it was an overdose.
4 A It's much higher than what her daily should have
5 been.
6 Q And in addition to determining whether or not
7 something is also an overdose, you not only look to the actual
8 drug that is involved, but something that's called a
9 metabolite.
10 A Yes.
11 Q What is a metabolite?
12 A It's the breakdown product much the initial
13 medication, and that was high also.
14 Q Okay. So you actually have the drug and then the
15 metabolite is kind of like the trail of what is done with that.
16 How much of the metabolite of the Effexor was in the blood
17 specimen that was retrieved from Victoria Witmarsh's body at
18 the time of the autopsy?
19 A It says 870 nanograms per milliliter.
20 Q And what should have been the level of that?
21 A It should have been 85 to 472 nanograms per
22 milliliter.
23 Q And that's consistent with the report from Quest
24 Diagnostics also?
25 A That's right.

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1 MR. PIKE: Thank you. I have no further questions.
2 THE COURT: Any recross?
3 MR. SMITH: May I approach the witness, Judge?
4 THE COURT: Yes.
5 RE CROSS-EXAMINATION
6 BY MR. SMITH::
7 Q Ma'am, I'm showing you a page of a Winicks Drug and
8 Chemical Blood Level Data 2001. Do you see the line --
9 actually, I apologize.
10 MR. PIKE: That's -- okay.
11 MR. SMITH: Let me show -- I'm sorry.
12 MR. PIKE: That's okay.
13 BY MR. SMITH::
14 Q Showing you a page out of Winicks Drug and Chemical
15 Blood Level Data 2001 edition. Do you see that there's a line
16 that talks about the therapeutic or normal levels of a person
17 taking Effexor?
18 A Yes.
19 Q And do you see that there's actually a column where
20 it has the therapeutic or normal levels of Effexor in the body
21 for microgram -- excuse me, yeah that is micrograms.
22 Micrograms per milliliter?
23 A Okay.
24 Q Do you see that?
25 A Yes.

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1 nanograms, we would simply, using the rules of Algebra and
2 multiplication, have to multiply these numbers by 1,000. Would
3 you agree?
4 A Yes.
5 Q Okay. And if we do that -- and this should be .07.
6 That was wrong. The simplest way to do that is to simply move
7 the decimal point over three points, correct?
8 A Correct.
9 Q Okay. So if we do that, one, two, three, that's 70,
10 and then with the 3.93, we move that over one, two, three,
11 that's 3930, so that gives us 70 to 3930 micro grams per
12 milliliter. Would you agree with those calculations?
13 A That seems reasonable.
14 Q Okay. So then basically, according to Winicks Drug
15 and Chemical Blood Level Data, which is apparently acceptable
16 authority, the therapeutic level is .07 to 3.93 micrograms per
17 milliliter which converted to 70 to 3,930 micrograms per
18 milliliter, correct?
19 A Correct.
20 Q And we've already heard testimony that Victoria's was
21 somewhere in the 900 range, right?
22 A Right.
23 MR. SMITH: No further questions.
24 THE WITNESS: But I -- I had one --
25 MR. SMITH: Your attorney --

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1 Q Can you tell us what it says?
2 A It says it has milligrams percent at .007 to .393, and
3 then a micrograms per milliliter at .07 to 3.93.
4 Q Okay. So this says that the therapeutic levels of
5 Effexor is .007 -- the range at least is .007 to 3.93 micrograms
6 per milliliters; is that correct?
7 A Yes.
8 Q Okay. Now, we could actually convert that to
9 nanograms per milliliter by doing some simple Algebra; would
10 you agree?
11 A Yes.
12 Q Okay. Let's try and do that. Okay. So we have .007
13 to 3.93, and that's the sign for micrograms, correct?
14 Actually, let me zoom in on this. Micrograms per milliliter.
15 Is that -- does that seem accurate?
16 A Yeah, whatever is on your --
17 Q Okay.
18 A -- chart there.
19 Q And would you agree that there are 1,000 nanograms in
20 1 microgram?
21 A Yes.
22 Q Okay. So we have 1,000 nanograms equals 1 microgram.
23 So in order for us to figure out -- in order for us to change
24 this to represent what would be -- and actually, I wrote this
25 wrong. It should be (indiscernible). And what would be

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1 THE COURT: Mr. Pike will ask you any questions.
2 FURTHER REDIRECT EXAMINATION
3 BY MR. PIKE::
4 Q And in relationship to that, you have additional
5 information that -- to finish answering the question --
6 A I just noticed on --
7 Q -- from the DA?
8 A -- his chart that it never had any toxic level, so
9 was that to say that then a patient could just take whatever
10 they want and there is no toxic level.
11 Q And in a situation like this, then, where you're
12 relying upon an individual to self-regulate their dosage, we
13 know that Mrs. Witmarsh exceeded her prescribed amount, based
14 upon the amount that was inside of her body. Is that yes?
15 A Yes.
16 Q We know that there is a potential range of acceptable
17 levels, and that's for the entire human population that may
18 take this drug.
19 A That's correct. They didn't look at her risk
20 factors.
21 Q She had risk factors that would have militated --
22 that would have made her toxic level much lower, such as
23 cirrhosis of the liver.
24 A Correct, because it's broken down by the liver and
25 the kidney.

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1 Q And Hepatitis C.
2 MR. SMITH: I'm going to object to the leading --
3 MR. PIKE: He opened the door.
4 THE COURT: No, he's --
5 MR. SMITH: I'm going to object to the leading.
6 THE COURT: -- objecting to the leading nature of the
7 question. I'm going to sustain the objection. Just ask it in
8 a different way.
9 MR. PIKE: All right, thank you.
10 BY MR. PIKE::
11 Q And what are the -- what are some of the things that
12 would have from her medical condition, medical, strictly
13 medical condition, that would have reduced the amount that she
14 could tolerate in her body?
15 A Her liver dysfunction could have decreased her
16 ability to break down the Effexor, plus's it also
17 contraindicated to be drinking alcohol with Effexor.
18 Q And in addition -- so the amount that was shown you,
19 the diagram, for this to have any real meaning in the case at
20 bar, would you have to take these amounts and say plus a.24
21 alcohol, and that would give you a real basis for the potential
22 overdose amount in this case?
23 A Correct.
24 Q In addition to that, the amount that a 300 pound man
25 may take because apparently there's nothing in that report

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1 in five deaths attributed solely to venlafaxine intoxication
2 was 41 milligrams per liter.
3 Q Now, would you agree that that would provide a useful
4 standard of comparison as to determine what kind of levels of
5 venlafaxine we might expect to find in the blood of someone who
6 was taking it at a toxic level?
7 MR. PIKE: Your Honor, I'd object to the question.
8 It's irrelevant to the case at bar because it does not add in
9 the effects of alcohol and the synergistic effect of the
10 alcohol --
11 THE COURT: Well, I'm --
12 MR. PIKE: -- and this drug that's been indicated.
13 THE COURT: I'm going to overrule the objection
14 because I'll let you follow up on this issue, if you want to,
15 because I think she has to do one step at a time.
16 MR. PIKE: Thank you.
17 THE WITNESS: It doesn't go into the dose that the
18 person took, though, on here.
19 BY MR. SMITH::
20 Q Well --
21 A It goes into a blood level, and most the time with
22 case reports, you're looking at what dose did the person take
23 to have a fatal outcome.
24 Q So, okay, I understand your answer, but -- so it's
25 your testimony that this does not provide any basis for

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1 regarding weight, would be very different than what the woman
2 that weighed approximately 100 pounds could take.
3 A Correct.
4 MR. PIKE: Nothing further.
5 THE COURT: Mr. Smith.
6 MR. SMITH: Briefly.
7 FURTHER RECROSS-EXAMINATION
8 BY MR. SMITH::
9 Q Ma'am, but you would agree, however, that this is a
10 range with a minimum range and a maximum range, correct?
11 A It doesn't have any maximum range because it has no
12 level -- it has no information under the toxic. If someone
13 were to take too much of it, it has -- see the stars? It never
14 lists anything for the toxic level.
15 Q Okay. If I --
16 MR. SMITH: May I approach the --
17 THE COURT: Yes.
18 MR. SMITH: Actually, let me show defense counsel.
19 May I approach the witness, Judge?
20 THE COURT: Yes.
21 BY MR. SMITH::
22 Q Ma'am, I'm showing you a page from the Disposition of
23 Toxic Drugs and Chemicals in Man, the 8th edition. And I'd
24 like you to read this highlighted portion.
25 A The average femoral blood venlafaxine concentration

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1 comparison whatsoever to determine what types of levels we
2 might expect in a person who's actually taking the drug at a
3 toxic level?
4 A Well, this could be used as -- this is a case report,
5 but there's a wide range in what people can take, and there can
6 be deaths at a dosage of 2 grams, was one of the lowest dosage
7 that killed a person, but then some people can live at taking
8 so grams.
9 Q Okay.
10 A Yeah.
11 Q But that did say 41 milligrams per liter?
12 A Yes.
13 Q Okay. And one of the things that you said was that
14 the information that I showed you didn't take into account the
15 synergistic possibilities combining the two together as they
16 were of alcohol and venlafaxine; is that correct?
17 A I didn't read the whole article, but I -- is that one
18 talking about --
19 Q No, I'm talking about --
20 A -- the alcohol?
21 Q -- what you said on the stand.
22 MR. PIKE: She didn't say that. That was the
23 testimony of Mr. Paisano in my argument.
24 MR. SMITH: No, I think she -- I think --
25 THE COURT: Well, why don't you ask her if that's

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1 what she said, and we can go from there.
2 MR. SMITH: Okay.
3 BY MR. SMITH::
4 Q In your opinion, what are the potential side effects
5 from combining venlafaxine and alcohol?
6 A In central nervous system depression, in high
7 amounts, seizures, cardiac arrhythmias serotonin syndrome are
8 some of the things that can happen.
9 Q And you said, in fact, your research revealed that
10 the two were contraindicated; is that correct?
11 A They're not supposed to be -- it's -- you're not
12 supposed to drink alcohol when you're taking Effexor.
13 Q And isn't it a fact that the danger of doing that is
14 actually that the combination of the two might affect a
15 person's motor skills more so than each one separately?
16 A It would affect her whole body to include her central
17 nervous system also.
18 Q So is that a yes?
19 A Wouldn't just the fact one part of her body that will
20 just -- not just her motor skills. It would like her movement.
21 It would be other things also.
22 Q Okay. But motor skills including one of them?
23 A Yes.
24 Q Thank you, doctor, I appreciate it.
25 THE COURT: All right.

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1 MR. SMITH: No, Judge.
2 MR. PIKE: No.
3 THE COURT: All right.
4 MR. PIKE: No, your Honor.
5 THE COURT: Counsel approach. We have two questions
6 from the jurors.
7 (Off-record bench conference).
8 THE COURT: Doctor, under our rules, we're allowed to
9 -- our jurors are allowed to ask questions of witnesses, and we
10 have two questions from one of our jurors here, and they may be
11 somewhat related. We'll leave that up to you if they are or
12 not. I'll ask both at the same time --
13 THE WITNESS: Okay.
14 THE COURT: -- and you can answer them how you feel
15 it would be appropriate. Would cirrhosis of the liver cause
16 the drug, Effexor, to move slower through the system? The next
17 question, the amount in her system, could it be attributed to
18 the liver not processing it instead of taking too much?
19 THE WITNESS: Cirrhosis of the liver can affect the
20 breakdown of Effexor, but she actually was on a lower dose the
21 maximum dose. The maximum dose per day was 375 milligrams and
22 they actually had decreased that to only put her on 150
23 milligrams per day as a target.
24 So I would hope that her liver would be able to break
25 down that lower dose that she was supposed to be taking. If

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1 FURTHER REDIRECT EXAMINATION
2 BY MR. PIKE::
3 Q In high amounts, then, from the evidence that's been
4 presented, this drug is potential toxic.
5 A It can be toxic. It's -- the range at which it's
6 toxic is hard to determine, but some people can't tolerate too
7 much of it, and in come by nation with alcohol, it could be a
8 real problem.
9 Q And alcohol can in itself be death producing or toxic
10 also.
11 A That's true.
12 Q Okay.
13 MR. PIKE: Nothing further. Thank you.
14 THE COURT: Actually, I have a question, doctor. If
15 you can just define for us the phrase toxic as it relates to
16 the medication that she was taking.
17 THE WITNESS: It's just that the level that they
18 found in her system on her autopsy was higher than what her
19 daily dose would have been. And so usually -- and then her
20 alcohol was much higher than just a one or two glasses of
21 alcohol. She had a very high amount in her system, so toxicity
22 can be a few extra pills or it can be a large amount of pills
23 and other substances. So it's whenever you're affected
24 adversely by a substance, it can be referred to as toxic.
25 THE COURT: Any follow-up, Mr. Smith to my question?

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1 she was taking extra doses because she has a history of taking
2 extra doses when she's stressed, then that would elevate her
3 levels. And I attributed more of what they found in her system
4 at autopsy as taking much more than her daily dose.
5 THE COURT: Any follow-up, Mr. Smith?
6 MR. SMITH: Judge, the answer was rather
7 non-responsive.
8 THE COURT: Okay, well follow up.
9 FURTHER RECROSS-EXAMINATION
10 BY MR. SMITH::
11 Q Can you answer the question directly? I believe --
12 THE COURT: Maybe she -- maybe there's --
13 BY MR. SMITH::
14 Q Right, but the question was, and I don't want to try
15 and do the yes or no, but the question was could Mrs. Witmarsh
16 liver condition contribute to how her body processed the
17 venlafaxine?
18 A It could, but her dose had already been decreased to
19 the 50 percent. Anyone in -- with renal or -- with renal
20 failure or liver conditions, they would actually go with a much
21 lower dose, target dose, and she was on a lower target dose.
22 She was not on the maximum dose.
23 Q Okay.
24 A So I attributed most of her high dose that was found
25 at autopsy to taking too much.

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1 Q Okay. And that's what you did, but the answer is
2 that yes, her liver could have, in fact, affected her ability
3 to process the drug?
4 A The liver is involved in the breakdown of Effexor.
5 Q Thank you.
6 THE COURT: Mr. Pike.
7 MR. PIKE: Nothing further.
8 THE COURT: Any other questions from the jurors? All
9 right, thank you, doctor. You're instructed not to discuss
10 your testimony with any other witness involved in this case
11 until this matter is finally resolved. Thank you for your
12 time.
13 THE WITNESS: Okay. Thanks.
14 THE COURT: Defense, please call your next witness.
15 MR. PIKE: George Schiro. Released Dr. Christensen
16 from her subpoena at this time.
17 THE MARSHAL: If you'll remain standing, please.
18 Raise your right hand and face the clerk.
19 DR. GEORGE SCHIRO, DEFENDANT'S WITNESS, SWORN
20 THE CLERK: Please be seated. Will you please state
21 your name and spell it for the record.
22 THE WITNESS: My name is George Schiro, that's
23 S-c-h-i-r-o.
24 THE CLERK: Thank you.
25 DIRECT EXAMINATION

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1 Q And are you a member of any professional groups?
2 A Yes. I'm a fellow of the American Academy of
3 Forensic Sciences. I'm a member of the International Society
4 of Forensic Genetics. I'm a member of the Association of Crime
5 Scene Reconstruction. I'm a fellow of the American Board of
6 Criminalistics. I'm on the American Society of Testing
7 Materials E30 Committee on Forensic Science Standards. I'm
8 former chairman and current fellow in the Association of
9 Forensic DNA Analysts and Administrators. I'm a member of the
10 Southern Association of Forensic Scientists, the Louisiana
11 Association of Forensic Scientists and the Louisiana
12 Association of Scientific Crime Investigators.
13 Q Okay, can you tell the jury about your experience
14 working as a forensic scientist?
15 A Yes, I began over 20 years ago. I started off in
16 Jefferson Parish Sheriff's Office Crime Lab which is a crime
17 laboratory located just outside of New Orleans. I began
18 working in what's known as general criminalistics, and that's
19 things like marijuana analysis, arson analysis, gunshot residue
20 detection, shows sort of things.
21 After doing that for about a year and a half, was
22 moved into the serology section which is the analysis of blood
23 and body fluids and trying to determine if it may have come
24 from a victim or a suspect. After working there for about
25 three and a half years, I was hired by the Louisiana State

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1 BY MS. PALM::
2 Q Good afternoon, Mr. Schiro.
3 A Good afternoon.
4 Q Can you please tell the jury what your profession is?
5 A I'm a forensic scientist.
6 Q And how long have you been a forensic scientist?
7 A Over 20 years.
8 Q Can you explain what a forensic scientist is?
9 A A forensic scientist, much like you see on TV, takes
10 evidence, examines evidence, does scientific tests on the
11 evidence, and draws conclusions based on that evidence.
12 Q Do you specialize in that field?
13 A Yes.
14 Q Do you specialize in any other fields?
15 A Primarily my areas of speciality are primarily DNA
16 analysis, crime scene investigation, crime scene
17 reconstruction, bloodstain pattern analysis and shoe print
18 identification.
19 Q Okay. I'd like to talk about your training and
20 experience for a minute. Can you tell the jury what your
21 education is.
22 A Yes. I have a bachelor of science degree in
23 microbiology from Louisiana State University. And I have a
24 master of science degree in industrial chemistry and forensic
25 science from the University of Central Florida.

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1 Police Crime Laboratory. I continued working in the area of
2 serology and also became part of their crime scene
3 investigation time. So we would get called out anywhere in the
4 state any hour to go work a crime scene.
5 Continued working in serology and then probably my
6 last three years I was there began setting up the DNA labs at
7 the state police, validated all the systems, trained the
8 personnel, and then in 2000 -- at the beginning of 2002 I was
9 hired by the Acadiana (phonetic) crime lab to be their DNA
10 technical leader. And I've been there -- that's where I
11 currently work and have been there ever since, and I continue
12 to do DNA analysis and crime scene investigation at the
13 Acadiana crime lab.
14 Q And is the lab you're currently working for
15 accredited?
16 A Yes.
17 Q Have you testified in a court of law before?
18 A Yes.
19 Q What jurisdictions?
20 A I've testified over 140 times in 29 parishes in
21 Louisiana. We don't have counties. We have to be different,
22 we have parishes. So 29 parishes in Louisiana. I've testified
23 in federal court, two Louisiana city courts. I've also
24 testified in Lee County, Florida; St. Louis County, Missouri;
25 Pope County, Arkansas; Washington County, Mississippi; San

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1 Bernardino County, California; and here in Clark County,
2 Nevada.
3 Q And how testified as an expert in crime scene
4 reconstruction, DNA collection --
5 A Yes.
6 Q Okay. Have you written my papers on the collection
7 of evidence?
8 A Yes.
9 Q Do you conduct any training in your field?
10 A Yes, I do.
11 Q And have you been retained by the defense in this
12 case?
13 A Yes.
14 Q And have you ever worked for the government and
15 testified for the government?
16 A Yes.
17 Q And in this case we asked you to review records.
18 A Yes, that's correct.
19 Q Okay. Tell the jury what records you reviewed?
20 A I reviewed documentation that was sent to me from
21 this case, mostly crime scene investigated related. Also
22 examined photographs and a DVD that was taken.
23 Q And did you review the DNA evidence reports?
24 A Yes.
25 Q And did we ask you to assess the thoroughness of the

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1 or behavior at the time of the incident.
2 Q It would have given some indication of factors which
3 might have affected how he was behaving?
4 A Yes.
5 Q Did you look at the collection of evidence in the
6 penile swab collections?
7 A Yes.
8 Q Did you make any conclusions about that collection?
9 A Yes. Those swabs were improperly collected.
10 Q Can you explain why?
11 A Well, for one thing, a lot of what is done when
12 evidence is collected and analyzed is there may be certain
13 interpretations associated with how that evidence is perceived.
14 And it's imperative that proper collection techniques be used
15 so that there's no inadvertent contamination of one source to
16 another. Cross contamination occurs when two items of
17 evidence, you know, for instance, DNA from one item gets
18 transferred to the DNA of another item.
19 It could make the interpretation of that evidence
20 difficult or maybe even unknown if it's not collected properly.
21 And in this case I felt that the way the swabs were collected
22 was improper.
23 Q And what was improper, specifically about it?
24 A Well, what should have been done in this case was the
25 crime scene analyst who was wearing gloves should have

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1 crime screen and crime lab investigation?
2 A Yes.
3 Q And doing that, were you able to make any
4 conclusions?
5 A Yes.
6 Q Okay. First I would like it talk about any
7 conclusions you were to able to reach on -- at the issue of
8 toxicology and whether blood or urine specimens should have
9 been collected from Mr. O'Keefe.
10 A Yes, they should have been collected in the hours
11 after Mrs. Witmarsh's death to determine if there were any --
12 if there was a quantitative analysis of any alcohol or drugs
13 and what was the nature of any drugs that may be in his system
14 and how they may have affected his behavior. So yes,
15 toxicology specimens should have been collected.
16 Q And if it had been collected, could it have been
17 subjected to toxicological analysis?
18 A Yes.
19 Q And that analysis would determine a quantitative
20 level of blood -- or of alcohol in his system?
21 A Yes.
22 Q Did you reach any other conclusions with regard to
23 toxicology issues?
24 A No, other than the fact that they should have
25 collected, and that may give an indication into state of mind

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1 collected the swab himself as opposed to letting Mr. O'Keefe
2 collect his own swabs while not -- while his hands were bloody,
3 he had injuries to his hands. At the very least what could
4 have been done was they could have collected -- they could have
5 documented his hands, collected any evidence they needed off
6 his hands, then allowed him to maybe clean his hands and then
7 put gloves on him and let him collect it. That would have been
8 alter method of collecting. Bnt in this case none of that was
9 done.
10 Q And is the way the evidence was collected in this
11 case an acceptable practice under any standard that you know
12 of?
13 A No.
14 MR. SMITH: And Judge, I'm going to object to that --
15 the form of the question. He's talking -- is he talking about
16 penile swabs or the evidence collection in general?
17 THE COURT: Which were you referring to, sir?
18 THE WITNESS: Just the penile swabs.
19 MR. SMITH: Thank you.
20 BY MS. PALM::
21 Q And going back to the previous question on alcohol
22 because I forgot to ask you. In talking about that the breath
23 or blood level should have been collected from Mr. O'Keefe, in
24 reaching that conclusion, did you rely on any source of
25 authority for that or just your own knowledge?

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1 A No, there is a source of authority, one of which is
2 Techniques of Crime Scene Investigation published by Barry
3 Fischer (phonetic). It's a text that's -- it's standard in the
4 industry. The International Association For Identification
5 uses that as one of the texts for people who want to get
6 certified in crime scene analysis to use that text as a study
7 guide.
8 Q Did we also ask you to look at the wounds to Mr.
9 O'Keefe's hands, at least the photographs of them?
10 A Yes.
11 Q And assess whether you thought those wounds might
12 have been made in self-defense?
13 MR. SMITH: Objection, Judge. Calls for speculation
14 and it's asking for a legal conclusion.
15 THE COURT: Sustained.
16 MS. PALM: I'm asking him if we asked him to do that.
17 THE COURT: Okay, well, just leave it right there.
18 MS. PALM: That was the question.
19 THE COURT: This question calls for a yes or no, sir.
20 THE WITNESS: Yes.
21 BY MS. PALM::
22 Q And did you examine the photographs of his injuries?
23 A Yes.
24 Q Showing you what's been admitted on -- and you can
25 look at your monitor. That's been admitted as Defense Exhibit

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1 of the thumb and forefinger?
2 MR. SMITH: Objection, Judge. It calls for a legal
3 conclusion.
4 THE COURT: What are your observations?
5 BY MS. PALM::
6 Q What are your observations?
7 A I observed, as I said, one cut which appeared to be
8 right here on the inside right thumb joint and also a cut here
9 on the inside between the first and second joints of the index
10 finger. So kind of in this type of position.
11 Q And did you consider any other evidence and asking
12 another question be asked (indiscernible). We asked you to
13 consider whether it could be determined when Mr. O'Keefe's
14 injuries were sustained.
15 A Yes.
16 Q And what other evidence did you rely onto determine
17 whether you could answer that question?
18 A I also relied upon the DNA analysis reports and crime
19 scene photos. I think that was primarily what I used.
20 Q And were you able to determine a time frame?
21 A Given the fact that his blood, according to the DNA
22 report, was found on a light switch, it was found on one side
23 of the knife which was on the bed, and found on the pants, then
24 his injuries most likely occurred around the same time that Ms.
25 Witmarsh received her injury.

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1 JJJJ. I'll zoom it out. Is that one of the photographs that
2 you relied on?
3 A Yes.
4 Q And what did that photograph tell you?
5 A That photograph appears to depict an injury to the
6 right thumb of Mr. O'Keefe.
7 MS. PALM: Court's indulgence. May I approach the
8 witness?
9 THE COURT: Yes.
10 BY MS. PALM::
11 Q Did you look at all of these photographs in
12 considering the other injuries?
13 A Yes.
14 Q All of them?
15 A Yes.
16 THE COURT: Counsel, for the record, are you going to
17 identify the numbers so the jury can follow along?
18 MS. PALM: I will. It's Defendant's LLLL, KKKK, IIII
19 and JJJJ. And Mr. Schiro's indicated that he has looked at all
20 of them.
21 BY MS. PALM::
22 Q And showing you JJJJ on the monitor, that's one of
23 the photographs that you looked at.
24 A Yes.
25 Q And were you able to determine from the photographs

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1 Now, it could have happened just before she received
2 her injury, while she received her injury or just after she
3 received her injury.
4 Q Can you explain why you determined it was most likely
5 at the same time or shortly after?
6 A Well, my conclusions were that, you know, again,
7 given the three possibilities. First off, one possibility is
8 it occurred shortly after. This would have required -- this
9 would have either been through Mr. O'Keefe self-inflicting it
10 or through some sort of accident that he got the cut on his
11 hand.
12 Another likely scenario is that he received it before
13 Ms. Witmarsh received her injury. The other possibility, which
14 I found to be the least likely, is that he received at the same
15 time she received her injury.
16 MR. SMITH: And Judge, I'm going to object to this
17 line of testimony. It's purely speculative.
18 MS. PALM: I'm going to ask him on his basis for
19 those conclusions.
20 THE COURT: Well, ask him the basis of that. I'm
21 going to overrule the objection at this point.
22 MS. PALM: Thank you.
23 BY MS. PALM::
24 Q Can you explain the basis for each of those
25 conclusions?

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1 A Yes. Like I said, the first one is let's say he
2 received it after -- after the injury. I mean, after Ms.
3 Witmarsh received her injury. I have no other explanation
4 other than it's either self-inflicted or accidental. So that's
5 one possibility.

6 The other possibility that he received it at the same
7 time she received hers is less likely based on his injuries,
8 where they're located, the angle of her wound, the fact that
9 according to the autopsy report no wounds were struck.

10 Typically when a stabbing event occurs, there are typically
11 three types of mechanisms where a person who's stabbing someone
12 will get an injury to their hand.

13 One is if they hit bone. The stabbing and the motion
14 of the blade suddenly stops and their hand slides onto the
15 blade. That's one mechanism of how they could cut their hand.

16 Another mechanism is if the handle of the knife becomes very
17 bloody and slips onto the knife blade. And the third
18 possibility is that while stabbing someone they may stab the
19 backs of the fingers, backs of the hands. So those are three
20 primary ways a person while stabbing someone could get that
21 injury.

22 But based on where his injury's located, I found that
23 to be the least likely of the three scenarios, unless it
24 possibly could be through some sort of accident or some sort of
25 awkwardly placed position in his hand of the knife.

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1 Q Could you demonstrate on me (indiscernible)?
2 A Yes.
3 Q Could you step down and --
4 A Yes. If your hand was let's say here, it would have
5 to be coming in kind of like this going through when you
6 receive that cut (indiscernible).
7 Q Okay. And that -- per -- that was the angle per
8 injury (indiscernible)?
9 A Correct, right. Like I said, this would be slightly
10 angled up and it would kind of come down (indiscernible).
11 Q Okay. And I'm sorry, I didn't mean to cut you off.
12 A That's okay.
13 Q Were you still explaining the basis for your time
14 determinations?
15 A Oh, and then finally the other possibility is that he
16 received the injury prior to her receiving her wound. And
17 hands -- typically hands -- cuts on the hands are referred to
18 as defense wounds. They can be defensive in nature. When
19 someone's trying to ward off a knife attack or they're trying
20 to deflect the blade, and what will happen is if someone grabs
21 the knife blade, they could grab it in such a way that they
22 could cause an injury to their hand or if they're trying to
23 block the knife out the way, some sort of mechanism like that,
24 that would be the other possibility that would lead to a person
25 getting an injury on their hand.

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1 Q Okay. And when you were talking about based on the
2 angle of the injury --
3 MS. PALM: May I approach the witness?
4 THE COURT: Yes.
5 BY MS. PALM:--
6 Q Can you with this ruler demonstrate to me how the
7 knife went into Ms. O'Keefe or Ms. Witmarsh.
8 A Okay. May I stand up?
9 THE COURT: Yes.
10 THE WITNESS: Okay. Okay, assuming this is the blade
11 of the knife, okay, and in order for him to get the cut on his
12 hand at the same time she received her injury, his hand would
13 have to be in a position like this. It can't be like this
14 because if that's the case, the cuts would be on this end of
15 the hand or if it's turned around this way, it would be on this
16 side of the hand. So it has to be somehow in this sort of
17 position.

18 The other thing is the blade would have to be turned
19 in such a way that it would cut both this thumb and index
20 finger here, so that puts it at a very awkward angle. The
21 angle that she -- from her injury based on autopsy report is
22 that the knife was tilted slightly upward, that it came from
23 front to back kind of left to right and downward.

24 So like I said, it makes for kind of a very awkward
25 angle for someone --

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1 Q And you feel this latter scenario have the more
2 likely scenario?
3 A It's more likely than, I think, him receiving it at
4 the same time she received her injury, but I can't say whether
5 it's more likely or not if it occurred after she received her
6 injury. Just, like I said, given the nature that that could
7 either be accidental or self-inflicted, I don't know. But I do
8 feel it's more likely that than having received at the same
9 time that she received her injury.
10 Q Okay. I'm showing you what's been marked as Defense
11 Exhibit HHHH. Did this photograph help you in your
12 determination?
13 A Yes.
14 Q Can you explain to the jury how.
15 A Well, for one thing the -- it shows the position of
16 the knife where it was found on the bed as the crime scene
17 investigators found it, and there was also some DNA results
18 relating to some of the stains that were on the knife.
19 Q And can you explain how those DNA results helped your
20 analysis.
21 A Yeah, one -- given that the stains appear only on one
22 side of the knife, it appears more likely that those
23 bloodstains got on there after the knife was used, after the
24 knife was on that bed because on the other side of the knife
25 there are no stains of this nature that look like what we call

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1 transfer stains.
2 The other thing is given the depth, according to the
3 autopsy report of Ms. Witmarsh's injury, the very first kind of
4 blood spot that you see coming from the point of the blade
5 back, that type --
6 THE COURT: Sir, you can draw on the screen.
7 THE WITNESS: Oh, okay.
8 THE COURT: You know, make mark on that.
9 BY MS. PALM::
10 Q Yeah, if you just touch it.
11 A Just touch it. Okay, this one right here, okay, that
12 stain, that would be beyond the depth of -- I'm sorry, it would
13 be within the depth of what the pathologist said in their
14 report as far as the depth of the wound. He had -- had that
15 bloodstain got on there beforehand, then it would have smeared.
16 It wouldn't have been a distinct spot like you're seeing there.
17 MS. PALM: May I approach the witness, your Honor.
18 THE COURT: Yes.
19 BY MS. PALM::
20 Q Did you create this photograph?
21 A Yes.
22 Q And what is it?
23 A This photograph is a composite of, I believe it's
24 this photograph from the crime scene and a photograph used by
25 the DNA analysis in her Power Point and also combined the

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1 was not the same kind of bleeding on the bottom side of the
2 knife.
3 A Correct.
4 Q I'm showing you Defense Exhibit III. Is that what
5 you saw?
6 A Yes. There's no spotting of blood on this side of
7 the knife which had -- you know, if someone had grabbed that
8 prior to or if there was some sort of -- some sort of blood, I
9 would expect to see it on both sides of the knife as opposed to
10 just one. So like I said, I believe all the bloodstains that
11 are on the knife on that other side came after she received her
12 injury.
13 Q Okay. And this side of the knife that's now facing
14 up was actually done on the bed when it was photographed.
15 A Correct.
16 Q Okay. And the side that was facing up had a
17 (indiscernible) on top of it?
18 A Yes.
19 Q Showing you Defense Exhibit CCC. That's what I'm
20 talking about, you reviewed this photograph?
21 A Yes.
22 Q And did you find any notes of interest regarding the
23 photographs of the pillowcase that was wadded up over the
24 knife?
25 A Yes, there were a couple of things that I was able to

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1 information from the autopsy report in this -- in that
2 particular photo.
3 MS. PALM: I didn't realize I didn't get it mark yet,
4 so I apologize. I'm going to admit Defense KKKK.
5 MR. SMITH: Oh, I'm sorry. No objection.
6 THE COURT: It will be admitted.
7 MS. PALM: Thank you.
8 BY MS. PALM::
9 Q Sir, looking at the composite photograph you made,
10 does this help you explain to the jury what you were just --
11 A Yes. If you look at that mark, that line on the
12 blade, that was the depth, according to the autopsy report, of
13 Ms. Witmarsh's injury. This stain over here, this first stain,
14 is the ones DNA analyst typed and said that that was a mixture
15 of blood with Mr. O'Keefe being the major contributor of the
16 blood.
17 Like I said, had that stain been deposited there
18 after -- before Ms. Witmarsh received her injury, then that
19 stained would have smeared. It would be a mixture of their
20 bloods, and it would be a smear there. Given the nature of the
21 spots on the knife blade, all through this and this, and the
22 lack of it on the other side of the knife, indicates to me that
23 those bloodstains were deposited there after the knife had been
24 down on this side.
25 Q And one of the things you indicated was that there

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1 determine. One thing, and you know, in terms of crime scene
2 reconstruction sometimes we can't sequence all the events in
3 the exact order. We can only sequence portions of what may
4 have happened. One of the sequences involved the knife getting
5 on the bed, Mr. O'Keefe's blood getting deposited on the knife,
6 and then the pillowcase landing on top of the knife, okay.
7 So we can kind of see that sequence of events based
8 on the evidence in the photographs. The other thing is that
9 the pillowcase was removed at some point possibly held together
10 or bunched up, and then it came in contact with Ms. Witmarsh's
11 blood.
12 Q And I'm showing you Defense Exhibit AAAA. Does that
13 photograph help you explain what you're talking about?
14 A Yes. If you look at these patterns along here,
15 there's void of blood within these areas indicating that that
16 was bunched up. It could have either been held together and
17 maybe placed up against Mrs. Witmarsh or came in contact with
18 her blood somehow or it could have been bunched at the time it
19 came in contact with her blood. But that's what those void
20 areas indicate to me is that at some point the pillowcase was
21 bunched up.
22 Q And showing you the Defense Exhibit BBB. Is that the
23 other side of that same pillowcase?
24 A Yes.
25 Q And does it demonstrate the same thing.

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1 A It's hard to tell on this side. There is a void --
2 sort of a semi-void pattern around here, but it's difficult to
3 tell and make any type of interpretation of this side of the
4 pillowcase.
5 Q Could you make any other sequencing determinations?
6 A The only other -- there were only two other items of
7 sequencing information. One was that Mrs. Witmarsh's pants
8 were moved after they had been saturated with blood and then
9 they were placed in the bathroom.
10 Q And I'm showing you Defendant's Exhibit FFF. And
11 what do you understand that to show?
12 THE COURT: Can you turn the photo?
13 THE WITNESS: Yes, this is a photograph of the pants
14 in the bathroom.
15 BY MS. PALM::
16 Q And Defendant's Exhibit DDD.
17 A Yes, this is a photograph of the pants as they are
18 laid out evidently. And you can kind of see the blood along
19 here which indicates that it was in contact with her for awhile
20 before they were actually removed. It's also sort of difficult
21 to see in this photograph and on the monitors, but there's also
22 sort of a line of -- oops, sorry. Sort of a line of blood on
23 this area -- on these areas also indicating, again, that it was
24 in contact with her for some time before they were removed.
25 Q So meaning she was probably wearing the pants for

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1 A No, that was -- that was essentially it.
2 Q Did you notice anything about the locations of Mr.
3 O'Keefe's blood at the scene?
4 A Yes. Based on the documentation I reviewed and
5 photographs, when someone receives cuts to the hand, they're
6 typically going to drip blood around the crime scene. In some
7 of the -- in one of the photographs it showed some of his blood
8 on the light switch. And there was definitely the blood that
9 was on the knife, but there's not like a lot of blood around
10 the area, so he probably used something to either slow the
11 blood flow down, wrapped his hand or used something to slow
12 down the bleeding because there's not any drip trails around
13 that I could see in the documentation that I reviewed.
14 MR. SMITH: Objection to the last part of the answer,
15 Judge. It's completely speculative. Complete speculation.
16 THE COURT: I'm going to sustain that because we
17 don't have photos of every ground surface as far as --
18 MS. PALM: He's saying the evidence that he reviewed
19 did not show any other blood drops.
20 THE COURT: Just the photographs you reviewed,
21 correct?
22 THE WITNESS: That's correct.
23 THE COURT: Doesn't apply to throughout the house?
24 THE WITNESS: Correct.
25 THE COURT: All right.

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1 awhile bleeding, and then the pants were removed?
2 A Correct.
3 MR. SMITH: Objection, Judge. That calls for
4 speculation.
5 THE COURT: Sustained.
6 BY MS. PALM::
7 Q And you noted in Defendant's Exhibit GGG, which I'm
8 showing you now. Do you know how to clear the screen?
9 THE COURT: It's clean.
10 THE WITNESS: Yeah.
11 THE COURT: It's clear.
12 BY MS. PALM::
13 Q All right. Anything significant about that
14 photograph?
15 A This indicates some shoe prints most likely in blood.
16 You notice they have a purple coloration to them? This is a
17 chemical called leuco-crystal violet, which is used to enhance
18 bloody shoe prints when you can't -- when they're barely
19 visible, you can add this chemical to it, and it brings them up
20 -- adds more contrast so that you can visualize them. And this
21 just indicates to me that those shoe prints were made sometime
22 after blood was stepped in.
23 Q So that's the last sequencing determination?
24 A Yes.
25 Q And did you find any other notes of interest?

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1 BY MS. PALM::
2 Q In your opinion, could any other kind of DNA testing
3 been done on that knife?
4 A One area that could have been tested is the handle
5 could have been tested for what we call contact DNA. In
6 someone handles, you know, like let's say I handle this paper
7 or a pen, then some people tend to leave more DNA than others.
8 It's possible that that could be swabbed and then that analyzed
9 and determine if someone had come in contact with that
10 particular item.
11 So it's possible that -- and again, it's just going
12 to depend on the surface and maybe how much blood is present on
13 a surface, but it would be possible, perhaps, to swab a handle
14 and determine who came in contact with that knife handle.
15 Q And that would be DNA from the person's skin versus
16 just the blood DNA?
17 A Correct.
18 Q Just the blood DNA was done here?
19 A Right, just the distinct areas of bloodstains that
20 were observed appeared to be the only ones that were tested for
21 DNA.
22 Q Is there anything inconsistent with the pillowcase
23 photographs or is there anything about the pillowcase
24 photographs that's inconsistent with them having been used to
25 stop bleeding?

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1 MR. SMITH: Objection, Judge. Calls for speculation.
2 THE COURT: I'm going to sustain the objection. Ask
3 it in a different way and also make sure you have the proper
4 foundation for his ability to make that determination.
5 BY MS. PALM::
6 Q Do you have expertise in crime scene reconstruction?
7 A I'm sorry, in crime scene what?
8 Q Your expertise is in crime scene reconstruction also?
9 A Yes.
10 Q And are you sometimes asked to determine how evidence
11 was used --
12 A Yes.
13 Q -- in your field of work? And as a forensic
14 scientist is that a determination you're qualified to make?
15 A Yes.
16 Q So is there anything --
17 THE COURT: Well, I think your question has to do
18 with stopping blood, stopping the bleeding.
19 MS. PALM: I asked if there's anything inconsistent,
20 any evidence with that having been used to stop bleeding?
21 MR. SMITH: And Judge, my -- I mean, that -- I object
22 to the form of the question, and I just I don't know if this is
23 within the scope of his knowledge or his expertise that he's on
24 the stand for today.
25 THE COURT: I'll let you take him on voir dire on

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1 A Not in terms of any fresh cuts on her hands or arms.
2 Didn't see anything like that which is typically indicative of
3 defense wounds.
4 Q Considering all of the evidence which you've reviewed
5 and just testified about, can you rule out accident?
6 MR. SMITH: Objection, Judge. It's calling for a
7 legal conclusion.
8 THE COURT: Sustained.
9 BY MS. PALM::
10 Q As part of your job as a crime scene analyst and
11 crime scene reconstructionist, have you been asked to consider
12 whether a death might be accidental or purposeful?
13 A Yes.
14 MR. SMITH: Objection, Judge. It's outside the scope
15 of his knowledge. It's not a medical examiner.
16 THE COURT: He's not, is he?
17 BY MS. PALM::
18 Q Mr. Schiro, is that a determination you make on a
19 regular basis?
20 A I have been asked to do that, and I have made certain
21 determinations based on the physical evidence.
22 THE COURT: No, I'm going to sustain the objection.
23 MS. PALM: Court's indulgence.
24 BY MS. PALM::
25 Q Have you been allowed to testify as an expert in

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1 this issue.
2 MR. SMITH: It's not necessary, Judge.
3 BY MS. PALM::
4 Q Could that pillowcase --
5 THE COURT: Do you have that expertise to make that
6 conclusion, sir?
7 THE WITNESS: The conclusion that I could make would
8 be that the pillowcase was either folded or bunched up and that
9 it came in contact with her blood. And that would not be
10 inconsistent with what Ms. Palm just said.
11 THE COURT: Are there other options for that finding
12 or --
13 THE WITNESS: There are other options, yes.
14 THE COURT: And who are those?
15 THE WITNESS: Well, for instance, like I said, the
16 pillowcase could be bunched up, and if it came in contact with
17 her blood somehow while it's bunched up, it could also have at
18 that appearance.
19 BY MS. PALM::
20 Q Did you consider the question of whether Ms. Wilmarsh
21 had any defensive wounds on her body?
22 A I did examine the autopsy photographs and the scene
23 photographs and read the autopsy report.
24 Q And did you note any wounds that could have been
25 defensive wounds on her body?

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1 other courts in Clark County on the issue of whether a wound is
2 defensive or accidental?
3 A Yes.
4 Q And so other courts in Clark County have recognized
5 you as an expert in that field?
6 A Yes.
7 Q And what qualifies you to be an expert and give such
8 an opinion?
9 THE COURT: Ms. Palm, I think your other question was
10 the -- I don't know if you were referring to the stab wound to
11 her side or are you just referring to --
12 MS. PALM: I'm just referring to the stab wound her
13 side, could that have been an accidental wound? Can that be
14 ruled out?
15 THE COURT: Okay, but he's -- your question now is
16 asking about defense wounds on the hand.
17 MS. PALM: No, my question now --
18 BY MS. PALM::
19 Q Have you been accepted as an expert in Clark County
20 courts to testify on the issue of whether injuries to a person,
21 injuries received by a person or a deceased person are
22 accidental or appear to be accident?
23 MR. SMITH: And Judge, I'm going to object. This
24 witness wasn't noticed for those purposes, first of all. And
25 he's not a medical examiner. He can't offer his opinion on the

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1 ultimate legal conclusion in this case.
2 MS. PALM: I'm not asking him for opinion. I'm
3 asking if it --
4 THE COURT: Counsel approach.
5 MS. PALM: -- could be ruled out.
6 (Off-record bench conference).
7 THE COURT: Ladies and gentlemen, it's a good time
8 for us to take your afternoon break. During this recess it is
9 your duty not to converse among yourselves or with anyone else
10 on any subject connected with the trial, read, watch or listen
11 to any report over commentary on the trial by my any person
12 connected with the trial or by any medium of information,
13 including without limitation, newspaper, television, radio or
14 the Internet.
15 You're not to form or express an opinion on any
16 subject connected with this case until this matter is finally
17 submitted to you. We'll just take a short recess.
18 Sir, you can come down from the stand. If you don't
19 mind, sir, we have is a little ante room right --
20 THE WITNESS: Uh-huh.
21 THE COURT: -- after the first doors.
22 THE WITNESS: Okay.
23 THE COURT: You can just have a seat in there.
24 (Outside the presence of the jury)
25 THE COURT: And we're outside the presence of the

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1 office with her stab wound. I mean, I've never heard of a body
2 being a crime scene.
3 MS. PALM: The crime scene extends to the
4 instrumentality of death.
5 THE COURT: Okay.
6 MS. PALM: And the collection of evidence and the
7 body that was at the crime scene.
8 MR. SMITH: Judge, there's another problem. This
9 isn't listed in his report at all that he was going to offer
10 this conclusion. The report that was provided says the
11 conclusions were going to go to toxicology, improper evidence
12 collection, and Mr. O'Keefe's wounds, and that's it. It
13 doesn't say anything about offering an opinion as to whether or
14 not this was a homicide or an accidental death.
15 THE COURT: Is that part of his report that was
16 provided to the DA?
17 MR. SMITH: No, it's nowhere in the one that I'm
18 reading.
19 THE COURT: I'm asking Ms. Palm.
20 MS. PALM: No, I don't --
21 THE COURT: I mean, she can --
22 MS. PALM: -- I don't believe it's in the report, but
23 he does include his conclusion that Mr. -- that he concludes
24 conclusions about the angle of Ms. Witmarsh's wounds, Mr.
25 O'Keefe's injuries, the fact that the timing of the injury

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1 jury. The notice of expert says that Mr. Schiro will testify
2 in the area of crime scene analysis, crime scene investigation,
3 processing of crime scenes, collection and preservation of
4 evidence, latent print comparison, footwear comparison, and DNA
5 evaluations, okay.
6 Now you've asked him to render opinion as to whether
7 or not the stabbing was accidental; is that correct?
8 MS. PALM: No, I asked him to render an opinion
9 whether an accident can be ruled out.
10 THE COURT: Okay want where in what you've identified
11 as to his area of testimony have you identified that topic?
12 MS. PALM: I --
13 MR. SMITH: Not only that, Judge, it's not in his
14 report.
15 THE COURT: Well, hang on. Let's go one step at a
16 time.
17 MS. PALM: I think it's part of crime scene
18 reconstruction and analysis.
19 THE COURT: Well, isn't crime scene the location of
20 the bed, the blood splatter, the detection of blood, the
21 measurements?
22 MS. PALM: Interpretation of all the evidence is part
23 of what he does and what he's qualified to do. And the other
24 thing is --
25 THE COURT: The crime scene is not in the coroner's

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1 could have been an accident. So that's all in there. I just
2 want him to say so an accident can't be ruled out.
3 And they got their ME to testify that it's a
4 homicide, but the ME does not look at any of the physical
5 evidence, she doesn't do crime scene reconstruction, so she's
6 just limited to the body. This is his area of expertise.
7 THE COURT: Can I see his report? I just have a CV
8 here.
9 MR. SMITH: And Judge, it's the ME's job to rule out
10 whether or not it's an accidental death, not this chemist.
11 THE COURT: Do you know which paragraph I should be
12 looking at?
13 MS. PALM: Well, I think probably all of them on the
14 injuries. Actually, O'Keefe's wounds and it talks about the
15 angles of Ms. Witmarsh's wound and the depth of her injuries.
16 THE COURT: In the report under conclusions it
17 appears to me that there are four conclusions that he
18 identified. One is toxicology, which we're not dealing with
19 right now. Number two is improper evidence collection. Number
20 three is Mr. O'Keefe's wounds. And number four is basically
21 miscellaneous. I don't see under -- I'm assuming it would be
22 under miscellaneous where he gives notice to the State that
23 that will be one of his conclusions.
24 MS. PALM: So --
25 THE COURT: Tell me where to look and I'll review it.

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1 MS. PALM: -- I think the State has notice from his
2 area of expertise from the kind of evidence that he's
3 considering in that report that I might ask that question. It
4 doesn't have to be conclusion in his report.

5 And aside from that, we didn't have a notice that
6 they were going to have an officer blurt out a racial slur, but
7 they got to do that, and that's not harm. I can't ask an
8 expert that they have notice of the subjects that he's going to
9 be covering --

10 THE COURT: Okay, we don't -- okay, hang on. In this
11 court we don't go fit for tat, first off. If there was an
12 error on one side that doesn't mean we commit an error on the
13 other side. So, the fact that someone may have blurted out a
14 racial slur doesn't mean that I ignore the rules of evidence
15 nor the requirements under noticing of experts.

16 And so if you want to start over with your argument,
17 I'll be more than happy to listen to it.

18 MS. PALM: My argument is that I think that they had
19 fair notice given his area of expertise and the kind of
20 evidence that he was reviewing and the comments in his report
21 about looking at the angle of the wound and those kind of
22 things that questions about the injuries to either one of them
23 could have come up in the context of crime scene reconstruction
24 and that kind of determination.

25 And again, you know, the ME does not consider that

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1 can in his report. I don't see -- please tell me which page
2 and which paragraph where it says he's going to render an
3 opinion on this question.

4 MS. PALM: It's not addressed in there.

5 THE COURT: Well, isn't it required to if he submits
6 a report?

7 MS. PALM: I think it's fair game for a crime scene
8 reconstructionist given the kind of evidence that he's looking
9 at that I can ask him if something can be ruled out. I'm not
10 asking him is it an accident. I'm not asking him is it
11 self-defense. I'm just asking him in his experience can that
12 be ruled out.

13 And the difference between the State's CSAs and him
14 is he's a crime scene reconstructionist in addition to being a
15 crime scene analyst.

16 MR. SMITH: Well, Judge, where is his crime scene
17 reconstruction? Where is the body? Where's a mannequin of a
18 woman with a body and a knife in it? We don't -- I mean, that
19 -- he wants to draw a conclusion based on the crime scene,
20 which is now Mrs. Witmarsh's body, but there's no evidence that
21 he actually did anything but look at some photographs.

22 THE COURT: I think the question that is being posed
23 to Mr. Schiro is beyond his expertise, beyond what's identified
24 in his report, and also beyond the notice of expert that was
25 filed in this court February 20th, '09. So I'm sustaining the

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1 kind of evidence. That's -- he's perfect impeachment for the
2 ME who testifies that it's a homicide just based on looking at
3 the body.

4 MR. SMITH: Judge, and the problem is that the State
5 calls crime scene analysts and crime scene investigators,
6 people who actually go to crime scenes and reconstruct crime
7 scenes and impound evidence. And I think it goes without
8 saying that the State couldn't ask one of its crime scene
9 analysts whether noticed as an expert or not to render opinion
10 as to the mechanism of death in a case. That's not -- that's
11 outside of their area of expertise.

12 It's no different -- this guy is a crime -- this is a
13 chemist posing as a crime scene analyst for today. He's been
14 noticed as a crime scene analyst. So for them to argue that we
15 are on notice that he was going to get up on the stand and say
16 that this was an accidental stabbing because he was noticed as
17 a crime scene analyst and an expert in DNA collection, I just
18 that that kind of flies in the face of reason.

19 MS. PALM: And --

20 THE COURT: Doesn't under the notice statute state
21 that a report's supposed to be provided?

22 MS. PALM: If a report is made, then you need to
23 provide it. It doesn't say you're limited to only discussing
24 every sentence that in that report.

25 THE COURT: Well, he didn't even address this top he

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1 objection. Everyone take their break. As soon as the jury's
2 ready, we'll get back on the stand. We do have some questions,
3 if you want it come up and review these. Have I not looked at
4 them yet.

5 MS. GRAHAM: Judge, can we take a bathroom break real
6 quick, too, or --

7 THE COURT: That's fine. Just --

8 (Court recessed at 3:14:45 p.m. until 3:26:34 p.m.)

9 (In the presence of the jury)

10 THE MARSHAL: Come to order. Department 17 of the
11 Eighth Judicial District is again in session. Honorable Judge
12 Michael P. Villani presiding. Make sure your cell phones are
13 turned off, please.

14 MR. PIKE: Your Honor, during the break --

15 THE COURT: We're outside the presence of the jury
16 panel.

17 MR. PIKE: Thank you. During the break Mr. Smith and
18 I had the opportunity to review the three questions
19 (indiscernible) by Juror No. 7.

20 THE COURT: I haven't even looked at them yet.

21 MR. PIKE: Okay. We -- one question is could a
22 scenario of the knife being wiped off cause that injury? Mr.
23 Smith and I both have the concern about a scenario. That term
24 being used may open the door to questions of other scenarios
25 are possibilities, so if you strike the scenario and if you

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1 want to phrase the question or if you want to ask it in a
2 different way that just says could the notify be wiped off
3 cause the wound, certainly that would be within the Court's
4 discretion or if you don't want to ask it, that's fine, too.
5 Other than that --
6 THE COURT: You said could they --
7 MR. PIKE: The scenario --
8 THE COURT: Could the knife have been wiped off. Is
9 that it? I mean --
10 MR. PIKE: Well, could wiping the knife off have
11 caused the wound -- it just causes -- it's too inarticulate.
12 THE COURT: Right.
13 MR. PIKE: We don't know which wound it is, so maybe
14 it just be better to not try and rephrase what we think they're
15 saying.
16 THE COURT: The parties agree? They agree.
17 MR. PIKE: Okay.
18 THE COURT: This the next one?
19 MR. PIKE: Could the bruises on Mrs. Witmarsh's body
20 be considered defensive wounds? I don't think either of us
21 want that.
22 THE COURT: Okay.
23 MR. PIKE: Can the handle of the knife still receive
24 DNA testing at this time? I have no objection to that. The
25 State --

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1 please.
2 THE COURT: Sir, you understand you're still under
3 oath?
4 THE WITNESS: Yes.
5 THE COURT: All right. Next question.
6 MS. PALM: Pass the witness, your Honor.
7 CROSS-EXAMINATION
8 BY MR. SMITH:
9 Q Now -- good afternoon, sir.
10 A Good afternoon.
11 Q On direct examination you talked a little bit about
12 defensive wounds. Do you recall that?
13 A Yes.
14 Q And one of the answers that you gave was that you
15 reviewed the autopsy photos and you saw no evidence of any
16 injuries on Mrs. Witmarsh's hands. Do you recall that?
17 A I didn't say any injuries. There were some injuries,
18 but it appeared to be an older injury, I know, at least one on
19 her hand.
20 Q Older by how long?
21 A I have no idea.
22 Q So do you mean older like it was scabbed over already
23 or it was fresh or --
24 A It looked like it was scabbed and may have maybe been
25 a couple of days old.

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1 MR. SMITH: (Indiscernible).
2 MR. PIKE: -- has an objection to it.
3 THE COURT: Yeah, because there's nothing that can be
4 done now, so -- I mean, he's already testified that they could
5 have done it.
6 MR. SMITH: Right.
7 THE COURT: So that's --
8 MR. PIKE: But it's still preserved. The evidence is
9 preserved for any --
10 THE COURT: Right.
11 MR. PIKE: -- additional testing.
12 THE COURT: New trial that you're going to get. Is
13 that what you're saying?
14 MR. PIKE: No. That's right. Think positively. No,
15 so that -- and that's strictly up to the -- I'm not going to
16 push for it if your Honor doesn't want to give it.
17 THE COURT: No, because I think it's --
18 MR. PIKE: Then they're considering speculation.
19 THE COURT: Right.
20 MR. SMITH: Yeah, they may take (indiscernible).
21 THE COURT: All right, are we ready?
22 MS. PALM: Yes.
23 THE MARSHAL: Officers and members of the court,
24 Department 17 jurors. You may be seated ladies and gentlemen.
25 Let's check to make sure your cell phones are turned off,

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1 MR. SMITH: And for the record, I'm holding State's
2 Exhibit 39.
3 BY MR. SMITH::
4 Q Were you talking about this injury?
5 A Yes.
6 Q And you're saying that looks older?
7 A Yes.
8 Q Okay. Now, I'd like to talk a little bit about your
9 training and experience. We've already heard testimony that
10 you received a bachelor of science degree in microbiology.
11 A Yes.
12 Q And it appears that you also received a master of
13 science in industrial chemistry.
14 A In forensic science, yes.
15 Q Okay. And those are generally -- that's generally
16 the education that a person who wants to become a chemist goes
17 into; is that correct?
18 A It depends. Microbiology, you know, typically a
19 biology area; industrial chemistry, a chemist, but those are
20 the types of analyses we do in crime labs.
21 Q Okay. And also, the type of analyses you do if
22 you're a DNA person?
23 A Correct.
24 Q But that education doesn't necessarily help you
25 formulate opinions about mechanism of injuries now, does it?

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ROUGH DRAFT TRANSCRIPT

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1 A Not those particular aspects of my education.
2 Q Okay. So let's talk a little bit about your
3 training. How many classes have you had in crime scene
4 documentation?
5 A Training classes I know I've attended several
6 classes. I've attended over 35 continuing education classes,
7 some of which were dealing with evidence collection,
8 preservation, crime scene investigation maybe three.
9 Q Okay. So three classes total, but some continuing
10 education?
11 A Yes.
12 Q Okay. And, in fact, on your CV that you provided
13 both to the defense and the State, you list professional
14 training attended; is that correct, sir?
15 A Yes.
16 Q And that CV -- actually, why don't you describe what
17 a CV is.
18 A A CV is a collection of information about a person.
19 Kind of like a resume. Has all the person's, I guess,
20 accomplishments and professional organizations, things like
21 that.
22 Q Okay. And what training they've gone through?
23 A Yes.
24 Q And it's important to kind of list everything on that
25 CV; is that correct?

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ROUGH DRAFT TRANSCRIPT

1 remember that class?
2 A Yes.
3 Q How long was that?
4 A That was also a week long, and I believe that one was
5 in May of '95.
6 Q July of '95.
7 A July of '95.
8 Q Okay. Now looking at your CV, you'd agree with me
9 that it appears you've never taken a class in the mechanism of
10 injury, correct?
11 A Not according to my CV, but then my CV doesn't list
12 like seminars that I may have attended. For instance, death
13 investigation conferences, things like that that may be shorter
14 in nature.
15 Q Nothing in depth, correct?
16 A Other than my reading and being exposed to it through
17 my job and in these short training classes, that would be about
18 it.
19 Q Okay. Now let's talk about your job. You're
20 currently employed as a forensic chemist, right?
21 A Yes, that is my title, yes.
22 Q And is that your major job description?
23 A Major job description would be DNA technical leader,
24 actually.
25 Q Okay. Now, you don't actually go out to the scene

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1 A Yes.
2 Q Okay. And on your CV you list a class blood stain
3 pattern analysis and crime scene documentation. Do you recall
4 taking that class?
5 A Yes.
6 Q And how long was that class?
7 A That was a week long course.
8 Q Okay. And when did you take that class?
9 A Let me think, that was -- I know the date's
10 specifically on the CV, but I think --
11 Q August, 1996 sound appropriate?
12 A Yes.
13 Q Okay.
14 A Yes.
15 Q And so from August 1996 through up until the present
16 time you'd agree that there's no other classes in crime scene
17 documentation listed on your CV; is that correct?
18 A There may not be.
19 Q Okay.
20 A That's correct.
21 Q Okay. And so that was a class you took 13 years ago,
22 correct?
23 A Correct.
24 Q Okay. And then it says here that you also took a
25 class personality profiling and crime scene assessment. Do you

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ROUGH DRAFT TRANSCRIPT

1 and operate as a crime scene investigator, correct?
2 A Yes, we still do at my lab, yes.
3 Q You do at your lab?
4 A Yes.
5 Q Okay. Is there a person that works at your lab --
6 MR. SMITH: Court's indulgence.
7 BY MR. SMITH::
8 Q What's the name of the director at your lab?
9 A The director of my lab a currently Kevin Arduwin
10 (phonetic).
11 Q Is it your lab's practice to go out to crime scenes?
12 A Yes, if we're called upon by our local law
13 enforcement agencies, yes, we'll go out.
14 Q Okay. So it's your testimony that it's a practice
15 DNA analysts go out to crime scenes?
16 A Yes.
17 Q Now, if Kevin Arduwin said differently, would you
18 have a reason to dispute that?
19 A If he said differently, I would, yes.
20 Q Even though he's the director?
21 A If you were to call him and he says no, we don't go
22 to crime scenes, I would definitely dispute that.
23 Q Okay. So you also have some experience in crime
24 scene reconstruction?
25 A Yes.

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1 Q But you didn't actually reconstruct a crime scene in
2 this case, did you?
3 A Well, in this case there were only certain elements
4 that could be reconstructed and those were the elements that I
5 discussed towards the end of my direct testimony.
6 Q Okay. And sir, it's correct that your primary job
7 function is to merely evaluate DNA samples once they arrive at
8 your lab; is that correct?
9 A Well, as a technical leader I'm also responsible for
10 the quality assurance and the results that come out of our lab,
11 our DNA lab, yes.
12 Q But your primary job is to -- is handling DNA,
13 correct?
14 A Yes, handling and analyzing it and supervising the
15 technical aspects of it, yes.
16 Q Your primary job duty is not drawing conclusions as
17 to what happened at a crime scene based on photographs; is that
18 correct?
19 A I would say that's not my primary duty, but that can
20 be one of my duties, yes.
21 Q Is it kind of like a hobby of yours?
22 A No, we do it as part of our investigations a lot of
23 times when the law enforcement agency may bring us crime scene
24 photographs and ask us to assess the crime scene photographs to
25 try and determine any information we can that may help them in

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 Q Okay. Now looking at your report, do you have your
3 report with you?
4 A Yes.
5 Q Okay. Now I'm looking at and I'm on Page 3, and
6 we're looking at the conclusion -- the paragraph where we're
7 talking about Mr. O'Keefe's wounds; is that correct?
8 A Which paragraph? There are several paragraphs.
9 Q Okay. I'm talking about the first paragraph.
10 A Okay.
11 Q Now the third line down starting with the first
12 complete sentence, starting with the exact mechanisms. Do you
13 see that part?
14 A Yes.
15 Q So in your report you acknowledge that the exact
16 mechanism by which the defendant received those injuries is
17 unknown; is that correct?
18 A That's correct.
19 Q Okay. Then you attempt to come up with a sequence of
20 events nonetheless based on your interpretations of the
21 evidence, correct?
22 A Well, based on, again, where his blood was found. I
23 believe it was most likely occurred either just before Ms.
24 Witmarsh received her injury, while she received her injury or
25 just after she received her injury.

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1 their investigation.
2 Q Okay. Now, let's talk about of the testimony you
3 gave regarding the collection of the penile swabs in this case.
4 Do you recall that?
5 A Yes.
6 Q Okay. Now, despite what you testified to, you have
7 no reason to doubt the integrity of the buccal swabs conducted
8 in this case, do you?
9 A No, considering that they gave a pure profile, no.
10 Q Okay. It's no reason to question those integrity
11 (sic)?
12 A That's correct.
13 Q And, in fact, you relied on the buccal swabs to make
14 some conclusions in your report, correct?
15 A Well, based on what the DNA analyst found in the
16 buccal swab, yes.
17 Q Okay. Let's talk a little bit about the report
18 itself. Specifically with regards to your conclusions that you
19 drew about Mr. O'Keefe's wounds. It appears that you attempted
20 to come to a conclusion as to the sequence of events in this
21 case; is that correct?
22 A Certain aspects of the sequence of the events, yes.
23 Q Okay. Specifically with regards to the injuries that
24 we've all now seen that were apparently on Mr. O'Keefe's hands;
25 is that correct?

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ROUGH DRAFT TRANSCRIPT

1 Q Well, I mean, those are the only three possibilities,
2 correct? It's either before, at the same time or after.
3 A Given the evidence, yes.
4 Q Okay. But your ultimate conclusion was that it's
5 your opinion that he received those injuries at the same time
6 she -- Ms. Witmarsh received her injuries?
7 A No, I believe that it was more likely that he
8 received them before or after.
9 Q Okay. Now, looking at the same -- the first
10 paragraph. Now I'm going one, two, three, four, five, six
11 lines down. Can you see the part where it says and his blood
12 on the pants found in the bathroom? Are you with me?
13 A Yes.
14 Q Okay. Then there's a part where it says it is most
15 likely that he received these injuries around the same time
16 that Ms. Witmarsh received her injury. Do you see that part?
17 A Yes.
18 Q Okay. Now, if we go down to the third paragraph
19 where it says another possibility is that he received his
20 injuries at the same time Ms. Witmarsh received her injury,
21 then you say this scenario is less likely than the other two
22 scenarios. So those two sentences are somewhat inconsistent,
23 are they not?
24 A No, I don't believe so because sentence after the one
25 I said that he received his injury around the same time she

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1 received hers.
2 Q Okay, just so we're on the same page, are you
3 referring to the first paragraph?
4 A Yes, first paragraph, and then the line after that
5 says he could have received his injuries just prior to her
6 injury, at the same as her injury or shortly after her injury.
7 Q Right, and we understand the possibilities, but the
8 conclusion that you drew in your paragraph was that it is most
9 likely that he received these injuries around the same time
10 that Mrs. Witmarsh received her injury; would you agree?
11 A Yes, given --
12 Q Okay.
13 A -- the time frame just before, just after or during.
14 Q Okay.
15 A Yes.
16 Q So just so the record's clear, the conclusion you
17 reach in your first paragraph is that it's most likely they
18 received the injury at the same time?
19 A No, no, no, no. Around the same time.
20 Q Around the same time?
21 A Yes. Yes.
22 Q So clearly that means not before and not after?
23 A Yes, it could be before or after, as I state at the
24 end of the first paragraph.
25 Q Okay, but when you first talk about it, you actually

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1 what it says right there; is that correct?
2 A Correct.
3 Q It doesn't say before, right?
4 A The next -- the next sentence does.
5 Q Okay, the next sentence says he could have received
6 his injuries just prior, at the same time or shortly after.
7 A Correct.
8 Q But the sentence before then you conclude that it is
9 most likely that he received them around the same time; would
10 you agree?
11 A Again, around the same time being just before, just
12 after or during.
13 Q Okay. So are you saying that that's what you meant?
14 Is that basically what you're saying?
15 A I think that's what I stated in the report.
16 Q Okay. Now, there's another part in your report where
17 you talk about defensive wounds, and you say that their
18 commonly found on the palms of the hand, correct?
19 A Correct.
20 Q Okay. Have you ever actually been a CSA in the feed
21 collecting evidence yourself?
22 A Yes.
23 Q How long ago?
24 A Well, like I said, we continue to route the crime
25 scenes now, but when I was with Louisiana State Police Crime

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ROUGH DRAFT TRANSCRIPT

1 delineate those three choices.
2 A Correct.
3 Q Let me finish, right?
4 A Yes.
5 Q Before, around the -- at the same time --
6 MS. PALM: Objection, your Honor.
7 BY MR. SMITH::
8 Q -- or after.
9 MS. PALM: Argumentative. He's answered the
10 question.
11 THE COURT: Well, he's going for clarification.
12 Overruled. I don't think it's argumentative at this time.
13 THE WITNESS: Could you repeat that?
14 BY MR. SMITH::
15 Q Okay. So when you first talk about it, you outline
16 three choices; before --
17 A Correct.
18 Q -- same time --
19 A Correct.
20 Q -- or after.
21 A Correct.
22 Q Correct? So that's three choices?
23 A Yes.
24 Q And then in the first paragraph you determine it is
25 most likely that he received them around the same time. That's

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ROUGH DRAFT TRANSCRIPT

1 Lab, as I said earlier, I was part of the crime scene
2 investigation team, and we would get called out anywhere in the
3 state, any hour, to go work a crime scene. And we would
4 collect the evidence, gather it, document it, and bring it back
5 and sometimes interpret what we found.
6 Q How often would you say that forensic chemists, who
7 are charged with collecting DNA evidence at your present
8 occupation, actually go out and collect evidence?
9 A We probably get called out once -- about once every
10 other month or so, and it's not always me that will go out. It
11 usually depends on who's available or, you know --
12 (Recording was corrupted from 3:44:13 p.m. to 3:44:55
13 p.m.)
14 A -- and so we can kind of put certain things together
15 and perhaps sequence certain events.
16 Q Now, showing you what's been admitted as Defendant's
17 Exhibit quadruple H. Do you recall seeing this photograph?
18 A Yes.
19 Q And do you recall making some conclusions based upon
20 the type of blood that was apparent on this side of the knife
21 by what was apparent on the other side of the knife?
22 A Yes.
23 Q Okay. And this being the other side of the knife,
24 correct?
25 A Yes.

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1 Q And you'd agree that there's still some blood, in
2 fact, on this side of the knife, correct?
3 A Oh, absolutely, yes.
4 Q And it looks like it's apparently been smeared,
5 correct?
6 A Yes.
7 Q Okay. And then you'd agree that this appears to be
8 the photograph of the knife in its initial position upon police
9 becoming involved with it?
10 A Yes.
11 Q Okay. With the blanket laying on top of it?
12 A The pillowcase on top of it.
13 Q Excuse me --
14 A Yes.
15 Q -- the pillowcase laying on top of it?
16 A Yes.
17 Q And the other edge apparently laying against in
18 sheet.
19 A Which edge are you talking about?
20 Q The edge that's opposite the side that's facing up.
21 A Yes.
22 Q Okay. Would you agree that that could certainly
23 explain how the blood appears on either side of the knife?
24 A I'm -- I don't understand what you're asking.
25 Q Okay. Let me get the picture. My question is would

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ROUGH DRAFT TRANSCRIPT

1 Your reconstruction merely consisted of the photographs; is
2 that correct?
3 A Photographs, as well as the documentation, autopsy
4 report, and a DVD that was provide.
5 Q Okay. And speaking of the autopsy report, you also
6 tried to demonstrate what you interpreted the wound path was.
7 Do you recall that?
8 A Yes.
9 Q Okay. Did you happen to like maybe get a mannequin
10 or something when you were reconstructing the scene and try and
11 do some experiments to see if they corroborated what your
12 opinion was?
13 A No, I didn't use a mannequin, but, you know, I used
14 my imagination as to how, you know -- I mean, I had a knife in
15 hand to demonstrate how the knife would be in the person's hand
16 that received the cuts in that position, and, you know, just
17 used my imagination as to how someone was standing.
18 Q And it is entirely possible that -- actually, strike
19 that.
20 MR. SMITH: Judge, I'll pass the witness.
21 THE COURT: Redirect.
22 MS. PALM: Thank you.
23 REDIRECT EXAMINATION
24 BY MS. PALM::
25 Q Mr. Schiro, in addition to your education, and I

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1 you agree that one side of the blade facing down apparently
2 resting against the sheet that's underneath it --
3 A Okay.
4 Q -- could that explain why the blood on one -- on that
5 side of the knife might look different than the other side?
6 A I think it's possible.
7 Q Okay. And that based on that, your conclusions that
8 you draw based on the DNA that was actually obtained from the
9 side that was tested might be speculation?
10 A Well, there's no doubt that Mr. O'Keefe's blood was
11 found on the other side of the knife, because that's shown in
12 the DNA report.
13 Q Agreed.
14 A It appears that on the other side there are no
15 distinct spots, and I believe they tested the tip end of the
16 knife, and only Ms. Witmarsh's blood was found. That's what I
17 recall from the DNA reports.
18 Q Right. But you -- didn't you testify on direct that
19 the lack of blood spots on one side of the knife you relied on
20 that in determining the sequence of events?
21 A Yes.
22 Q Okay. Did you go out to the crime scene in this
23 case?
24 A No.
25 Q Okay. And you talk about crime scene reconstruction.

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1 believe you that have a master of science in industrial
2 chemistry and a bachelor's of science in microbiology; is that
3 correct?
4 A Yes. My master's also is a forensic science degree
5 as well.
6 Q Okay. In addition to that formal education, your
7 continuing education classes, does your experience in the field
8 also help you form opinions as to the mechanism of injury?
9 A Absolutely, yes.
10 Q Okay. I just would like to talk about that
11 experience a little bit again. How long did you work for
12 Jefferson Parish Sheriff's Office Crime Lab?
13 A I was there for about three and a half years.
14 Q And what did you do for them?
15 A For them again, it was general criminalistics,
16 marijuana analysis, arson analysis, gunshot residue detection,
17 and then I moved into the serology area. In the interim I was
18 also assisting working crime scenes at Jefferson Parish.
19 Q And in the -- did you analyze biochemical -- using
20 biochemical and chemical techniques?
21 A Yes.
22 Q Okay. And then how long did you work for the
23 Louisiana State Police Crime Lab?
24 A I was there for about 14 years.
25 Q And what did you do for them?

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1 A Again, it was primarily serology, but also doing a
2 lot of crime scene investigation, crime scene reconstruction,
3 bloodstain pattern analysis, latent fingerprint development. A
4 lot of what we did when he would go to crime scenes and bring
5 back the evidence is we would do the follow up on the evidence
6 as well.
7 Q And in that job did you interpret blood spatter?
8 A Yes.
9 Q Did you train other personnel?
10 A Yes.
11 Q You were a supervisor?
12 A Not at the Louisiana State Police Crime Lab, I
13 wasn't.
14 Q Okay. So after 14 years there, you went to the --
15 your current job which is --
16 A Acadiana.
17 Q Acadiana.
18 A Acadiana crime lab, yes.
19 Q Criminalistics, right? Okay.
20 A Yes.
21 Q And in your current job you are a supervisor?
22 A Yes.
23 Q And you do train other people?
24 A Yes.
25 Q And you're also still doing analysis of crime scenes?

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ROUGH DRAFT TRANSCRIPT

1 Q After they stabbed her, correct?
2 A That's a possibility, yes.
3 Q Okay. And your ultimate conclusions in this case are
4 -- they're basically just your opinion, correct?
5 A My opinion based on having reviewed the autopsy
6 information, crime scene information, photographs, et cetera.
7 Q And it's an opinion that you came to at the request
8 of the defense; is that correct?
9 A They asked me to examine the items and evaluate them.
10 Q And are you being paid for that?
11 A Yes.
12 Q Okay.
13 MR. SMITH: No further questions.
14 MS. PALM: No more questions, Judge.
15 THE COURT: We did receive a question from one of the
16 jurors. Under rules of evidence we're not allowed to ask the
17 witness those particular questions. Were there any other
18 questions from the jurors? All right, thank you, sir, for your
19 testimony.
20 THE WITNESS: Thank you.
21 THE COURT: You're instructed not to discuss your
22 testimony with any other witness involved in this case until
23 this matter is finally resolved. Thank you for your time, sir.
24 THE WITNESS: Thank you.
25 THE COURT: Next witness for the defense.

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1 A Yes.
2 Q And crime scene reconstruction?
3 A Yes.
4 Q Do you have any other accomplishments that I failed
5 to ask you about?
6 A I have publications on collection preservation of
7 evidence, some on crime scene reconstruction. I've trained
8 people internationally in aspects of forensic science and
9 collection of preservation of evidence.
10 Q And with regard to Mr. Smith's final questions, the
11 knife on blood -- the knife on the blood, he asked about why on
12 one side it might be cleaner on the other and asked whether it
13 could be because it was laying on the bed. You said that's
14 possible.
15 A Yes.
16 Q But what are the other possibilities?
17 A The other possibility is as it's being withdrawn from
18 Ms. Witmarsh the blood smeared.
19 MS. PALM: No more questions. Thank you.
20 THE COURT: Recross.
21 RECROSS-EXAMINATION
22 BY MR. SMITH::
23 Q Another possibility is if the person who stabbed Ms.
24 Witmarsh wiped the knife off; isn't that correct?
25 A That's a possibility.

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1 MS. PALM: May I approach the bench, your Honor?
2 THE COURT: All right.
3 (Off-record bench conference).
4 THE COURT: All right, Mr. Pike, please call your
5 next witness.
6 MS. PALM: Brian O'Keefe.
7 THE MARSHAL: If you'll remain standing. Raise your
8 right hand and face the clerk, please.
9 BRIAN O'KEEFE, DEFENDANT'S WITNESS, SWORN
10 THE CLERK: Please be seated. Will you please state
11 your name and spell it for the record.
12 THE WITNESS: Brian O'Keefe, B-r-i-a-n, O, apostrophe
13 capital K-e-e-f-e.
14 THE CLERK: Thank you.
15 DIRECT EXAMINATION
16 BY MS. PALM::
17 Q Good afternoon, Brian.
18 A Good afternoon, Ms. Palm.
19 Q Can you tell the jury how old you are today?
20 A Yes, I'm 46.
21 Q And we heard a little testimony earlier in the day
22 that you started drinking at age 17; do you recall that?
23 A Yes.
24 MR. SMITH: What was the question?
25 THE COURT: There was testimony that was drinking

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1 since age 17.
2 MR. SMITH: Oh, okay.
3 MS. GRAHAM: I can't hear.
4 MS. PALM: Okay.
5 BY MS. PALM::
6 Q You recall that testimony?
7 A Yes.
8 Q And at what age did you go into the military?
9 A 17.
10 Q And what branch of the military was that?
11 A 82nd Airborne.
12 Q And when you went into the military, did you receive
13 any kind of training from them?
14 A Yes.
15 Q Did they train you in the area of self-defense?
16 A Yes.
17 Q Did they train you how to treat wounds in a battle
18 field?
19 A Yes.
20 Q And did you actually serve in combat?
21 A Yes.
22 Q Where was that?
23 A In Grenada.
24 Q In Grenada?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 military?
2 A I started drinking more frequently.
3 Q Did you eventually leave the armed forces service?
4 A I'm sorry, I--
5 Q Did you leave the --
6 THE MARSHAL: You're going to have to speak up
7 because we can't even hear --
8 MS. PALM: You can't hear me?
9 MS. GRAHAM: I can't hear Counsel.
10 THE MARSHAL: -- him (indiscernible) hear you.
11 MS. GRAHAM: I can't hear Counsel.
12 BY MS. PALM::
13 Q When did you end up leaving the arms forces service?
14 A 1987.
15 Q Okay. And how did you end up leaving?
16 A I left active duty honorably, but I went into the
17 reserves also.
18 Q At some point did you and Pamela Sue (phonetic) get
19 divorced?
20 A Yes, we did.
21 Q What year was that?
22 A 1993.
23 Q And was that in Ohio?
24 A Yes. Fairfield County (indiscernible) my home town.
25 Q And at the time what was your drinking pattern like?

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1 Q And were you decorated for that service?
2 A Yes.
3 Q And what was that decoration?
4 A Bronze star. It was the highest award. I received
5 also an arms forces expeditionary metal, multiple awards. They
6 -- (indiscernible).
7 Q During your service in the military, did you marry
8 anybody?
9 A Yes, I did.
10 Q And what was her name?
11 A Pamela.
12 Q And how old were you when you got married?
13 A I just turned 20.
14 Q Okay. And did you and Pamela have children together?
15 A Yes, ma'am, three. My first, Desiree (phonetic),
16 Desiree Nicole (phonetic). She was born in 1983, a week before
17 I was deployed to Grenada. Kyle Christopher (phonetic), 1987.
18 And Trevon Michael (phonetic), 1989.
19 Q Okay. When you were in the military, we heard
20 testimony today that a medical report says that you some time
21 reported having gone wild in the military or gone crazy or
22 something with your drinking. Is that a correct
23 interpretation?
24 A Yes.
25 Q Did you start drinking a lot when you were the

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1 A. Excessive.
2 Q After the divorce, you end up in Las Vegas. Can you
3 tell us how you got here.
4 A Yes, I came out to visit my father. I went to junior
5 high school out here, and after my divorce I came out and
6 visited family and met Elizabeth.
7 Q And who is Elizabeth?
8 A She was my wife, my second wife.
9 Q Okay. When did you marry Elizabeth?
10 A In 1997.
11 Q And did you and Elizabeth have children?
12 A Yes, we did. We had two children. Valiela Jamel
13 (phonetic) in 1999, and Merlana Marie (phonetic) in 2000.
14 Q Both daughters?
15 A Yes, ma'am.
16 Q At some point was there trouble in that marriage?
17 A Yes.
18 Q And what was the problem?
19 A Alcohol.
20 Q Your alcohol or her alcohol?
21 A My alcohol.
22 Q Okay. And how did you address it?
23 A I sought some treatment, but it was kind of too late
24 in the marriage.
25 Q Did your problem continue?

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 Q And did you eventually get divorced?
3 A Yes, I did.
4 Q When did you get divorced?
5 A 2001 it was finalized I do believe.
6 Q Okay. Had you been living separately before that?
7 A Yes.
8 Q Was it an amicable divorce between the two of you?
9 A Yes, we did -- we did our own divorce. Took the
10 class together and just parted ways.
11 Q Did you both agree that divorce was the best thing?
12 A Yes, we did.
13 Q And why did you agree that it was the best thing?
14 A My alcohol. It was best for her to have the kids.
15 I'm just being honest. It just --
16 Q Are you saying you did not want your children exposed
17 to your alcohol problem?
18 A Yes.
19 Q And at the time you couldn't keep it under control?
20 A That's correct.
21 Q And after the divorce, you ended up meeting Victoria
22 Witmarsh.
23 A Yes, that's correct.
24 Q Where did you meet her?
25 A I met Victoria after my divorce. I voluntarily went

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: And understand, sir, the microphones that
2 we have throughout the courtroom, they do not amplify. They
3 only record. So a lot of people think they amplify when they
4 don't.
5 THE WITNESS: Okay, your Honor.
6 THE COURT: Okay?
7 THE WITNESS: Yes, sir.
8 BY MS. PALM::
9 Q And I will try to speak up also. Okay, what were you
10 in Monte Vista Hospital for?
11 A For alcohol recovery.
12 Q And was the Victoria there at the same time as you?
13 A Yes, she was. She was in a different ward.
14 THE COURT: Okay, sir, the question was was she there
15 at the same time. Yes or no.
16 BY MS. PALM::
17 Q Just, again, try and listen real careful to my
18 questions, okay. And do you remember when that was,
19 specifically?
20 A October 2001.
21 Q Okay. And so the two of you meet there. Did you
22 establish a relationship?
23 A Yes, we did.
24 Q While you were both in the hospital?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 to Monte Vista (phonetic). It's --
2 Q Can you stop just a second.
3 MR. SMITH: Objection, Judge.
4 BY MS. PALM::
5 Q Let me ask you a question at a time.
6 THE COURT: Sustained. Non-responsive?
7 MR. SMITH: Yes.
8 THE COURT: Sustained.
9 BY MS. PALM::
10 Q Just answer the -- if you can just -- I know it's
11 difficult, but if you could just listen real carefully to my
12 question and just respond to that question, and I'll ask you
13 more questions after that, okay. All right. You said you met
14 Victoria at Monte Vista. Is that Monte Vista Hospital?
15 A It's --
16 Q Just a yes or no. Is that Monte Vista --
17 A Yes.
18 Q -- Hospital? Okay. And what is Monte Vista
19 Hospital?
20 MR. SMITH: Objection, Judge. Can we approach?
21 THE COURT: All right.
22 (Off-record bench conference).
23 THE COURT: Sir, if you can just speak up. Some of
24 the jurors are having difficulty hearing you.
25 THE WITNESS: Sorry.

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ROUGH DRAFT TRANSCRIPT

1 Q And how long were you in the hospital together?
2 A About ten days.
3 Q When you got out, where did you go to reside?
4 A To my home.
5 Q Where did Victoria go?
6 A To my home.
7 Q And at the time had you begun a romantic
8 relationship?
9 A No.
10 Q Why did she go to your home?
11 A I had a house.
12 MR. SMITH: Objection. Irrelevance, Judge.
13 THE COURT: It's foundation. I'm going to allow it.
14 Overruled.
15 THE WITNESS: I had a house. I lived alone, and she
16 needed a place, I needed a roommate.
17 BY MS. PALM::
18 Q And during this time that you're living together did
19 you begin confiding in each other regarding your past
20 experiences?
21 A Absolutely.
22 Q And without telling me what the problems were, did
23 Victoria tell you about any problems she had?
24 A Yes, she did.
25 Q Do you know whether she was separate from her husband

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ROUGH DRAFT TRANSCRIPT

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1 at the time she went into Monte Vista?
2 A Yes.
3 Q She was?
4 A Not legally.
5 Q Okay. While you were living together, what was
6 Victoria like from day to day when you first started living
7 together?
8 MR. SMITH: Objection, Judge. Irrelevant.
9 THE COURT: Are you talking from --
10 MS. PALM: I'm talking about --
11 THE COURT: -- early 2000?
12 MS. PALM: -- 2001.
13 MR. SMITH: I mean, that's a really vague question,
14 Judge.
15 THE COURT: And also --
16 MS. PALM: I'll wait until we get --
17 THE COURT: All right.
18 MS. PALM: -- to later in time.
19 THE COURT: Sustained.
20 BY MS. PALM::
21 Q Did anything happen in May of 2002?
22 A Yes, it did. I had to take her to the hospital.
23 Q Okay. And without telling me what for, were you
24 aware of reason for taking her to the hospital?
25 A The incident happened in my house.

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ROUGH DRAFT TRANSCRIPT

1 Q While you were incarcerated in prison?
2 A Not in prison, no. In jail.
3 Q I'm asking just about the prison time, so try and
4 listen to the question, okay?
5 A Yes, ma'am.
6 Q All right. When were you released to parole?
7 A Around the end of -- April, 2007.
8 Q So you spent about a year -- a little over a year in
9 prison?
10 A Yes.
11 Q And how did you feel about Victoria when you got out
12 of prison?
13 A I felt that chapter was closed. I was angry some
14 sometimes. I'm -- but as far as she was out of my mind. I
15 mean, out of sight, out of mind. It was just best to move on.
16 Q Okay, so when you got out, you had planned to go on
17 with your life --
18 A Yes, absolutely.
19 Q -- without Victoria in it?
20 A Yes, I did.
21 Q Then you got out. What did you do about finding
22 work?
23 A I applied all over town. I was fortunate enough to
24 be able to apply at the Northern Pipeline Construction,
25 simultaneously applying at the union hall.

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ROUGH DRAFT TRANSCRIPT

1 Q Okay.
2 A Yes.
3 Q Now, you had some felony convictions that the DA
4 addressed one of them, and that was a conviction for felony
5 domestic battery in March of 2006. Do you recall that?
6 A Yes, I do.
7 Q Okay. And do you have another earlier conviction in
8 the Clark County courts for burglary in 2005?
9 A Yes, I do.
10 Q And did you get a probationary sentence in that case?
11 A Yes, I did.
12 Q And in April of 2006, were you convicted in Ohio of a
13 fifth degree felony for failure to pay child support?
14 A Yes, I did.
15 Q And did that crime carry a year in jail in Ohio?
16 A Yes, it did.
17 Q The conviction that we heard about yesterday
18 involving Victoria, you actually went to prison for a time on
19 that one, did you not?
20 A Yes, I did.
21 Q Okay. And do you remember when you went into prison?
22 A April, 2006.
23 Q And did you have any contact with Victoria while you
24 were incarcerated?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 Q And when you say applied at the union hall, are you
2 talk being about the union apprenticeship?
3 A Yes, ma'am, I am.
4 Q Okay. And was that a program -- do they have a
5 rehabilitation program?
6 A Yes, they do. They offer a fantastic program to
7 rehabilitate, train yourself.
8 Q And so you participate in that. And through them,
9 you ended up working for whom?
10 A I was dispatched immediately, I was fortunate and
11 started working for MJ Dean Construction?
12 Q And is MJ Dean the same company that Tracy Berger
13 works for that we heard from on Tuesday?
14 A Yes, it is.
15 Q And did you start a new relationship after you got
16 out?
17 A With?
18 Q Did you start a love relationship?
19 A Yes, I did.
20 Q Who was that with?
21 A With Cheryl Morris.
22 Q And when did you two start dating?
23 A Actual dating might have been around March, 2008.
24 Q Did you tell her about Victoria when you met her?
25 A In some aspects, yes, I did.

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ROUGH DRAFT TRANSCRIPT

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1 Q Okay. You heard her testimony before this jury. Did
2 you ever tell her that you wanted to kill Victoria?
3 A No.
4 Q Did you tell her you were angry with Victoria?
5 A Yes, I did.
6 Q Did you tell her you wanted to hurt Victoria?
7 A No.
8 Q We also heard her say you demonstrated to her how you
9 could kill somebody with a knife.
10 A Yes.
11 Q Did you ever do that?
12 A Not demonstrate, no.
13 Q What interfered with your relationship with Cheryl
14 Morris?
15 A Victoria.
16 Q Did you cheat on Ms. Morris with Victoria?
17 A Yes.
18 Q And you weren't honest about that at first, were you?
19 A No.
20 Q And did that hurt Cheryl Morris?
21 MR. SMITH: Objection, Judge. Calls for speculation.
22 THE COURT: Sustained.
23 BY MS. PALM::
24 Q Did Ms. Morris express to you that that hurt her?
25 MR. SMITH: Objection, Judge. Calls for hearsay.

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ROUGH DRAFT TRANSCRIPT

1 hearsay. Jury's instructed to disregard the last answer from
2 the witness.
3 MS. PALM: Well, I'm offering it for his state of
4 mind why he would meet with her, not for the truth of the
5 matter.
6 MR. SMITH: Then objection, Judge. What's the
7 relevance of that at this point?
8 THE COURT: I'm going to sustain the objection.
9 BY MS. PALM::
10 Q Did you meet with Victoria?
11 THE COURT: Ms. Palm, I'm having difficulty hear you.
12 BY MS. PALM::
13 Q Did you meet with Victoria?
14 THE COURT: So I don't know if the jury is as well.
15 THE WITNESS: Yes, I did.
16 BY MS. PALM::
17 Q Okay. And did you meet about her on Father's Day of
18 2008?
19 A It was like a day later I --
20 Q Just not Father's Day, a day later is fine.
21 A Yeah. It was like a day or two later.
22 Q Okay. So when you met, what happened?
23 A We went up into a friend's condo and --
24 Q Did you talk?
25 A Yeah. She confided in me and --

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Sustained.
2 BY MS. PALM::
3 Q Tell me about how you and Victoria began talking
4 again. When did that happen?
5 A I received a phone call on Father's Day 2008.
6 Q Okay. Tell me about that phone call.
7 A She was very distraught and said that she had to see
8 --
9 MR. SMITH: Judge, I'm going to object and ask that
10 another question be posed. I'm going to object to the
11 narrative form of the question.
12 MS. PALM: Okay.
13 MR. SMITH: Under these circumstances.
14 THE COURT: All right, sustained.
15 BY MS. PALM::
16 Q So Victoria called you and said that she had to see
17 you?
18 A Yes, she said she had something very important to
19 tell me, and she said she was going to kill herself.
20 MR. SMITH: Objection. Objection, Judge.
21 MS. PALM: Just wait and answer my --
22 MR. SMITH: Move to strike.
23 MS. PALM: We heard the same testimony already, I
24 think.
25 THE COURT: Well, he's objecting now that it is

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ROUGH DRAFT TRANSCRIPT

1 MR. SMITH: Objection, Judge. Non-responsive. It's
2 hearsay.
3 THE COURT: Sustained.
4 BY MS. PALM::
5 Q After talking with Victoria, did you spend a little
6 more time with her?
7 A Yes.
8 Q Okay. Did Cheryl express that she was upset by that?
9 MR. SMITH: Objection, Judge. Calls for hearsay.
10 THE COURT: Sustained.
11 BY MS. PALM::
12 Q Did you observe that she Cheryl was upset with that
13 when you returned back home?
14 A Yes.
15 Q Because you and Cheryl continued a relationship after
16 that; is that true?
17 A Yes.
18 Q Just -- you can say yes or no.
19 A Yes.
20 Q Don't try and -- okay. Did you and Cheryl purchase a
21 car together?
22 A Yes.
23 Q And it was on her credit?
24 A Yes.
25 Q That's because your credit was not good at the time.

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ROUGH DRAFT TRANSCRIPT

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1 A Yes.
2 THE COURT: Sir --
3 BY MS. PALM::
4 Q Okay, speak up a little bit louder --
5 A Yes.
6 Q -- so the jury can -- I'm trying, too. And you and
7 Cheryl eventually moved into the El Parque apartment together?
8 A Yes.
9 Q How did that come about?
10 A We lived with a mutual friend, and I put money down,
11 I looked around, and moved into a place, and I mean, it's as
12 simple as that. I mean --
13 Q Okay. At the time that you moved in, when was that
14 that you moved into the El Parque apartment?
15 A I put down a payment in August, and we moved in
16 September 1st of 2008.
17 Q And were you and Cheryl still dating at that time?
18 A Yes, kind of. It's --
19 Q Did Cheryl know you were still seeing Victoria at
20 that time?
21 A Yes.
22 Q And by the time that you had moved into that
23 apartment, were you released from parole on your prison case?
24 A Yes, I received an honorable discharge in June of
25 2008, I do believe.

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ROUGH DRAFT TRANSCRIPT

1 said she wanted to move in there.
2 A Yes.
3 MR. SMITH: And again, Judge, that misstates the
4 testimony.
5 THE COURT: Counsel approach, please.
6 (Off-record bench conference).
7 BY MS. PALM::
8 Q Brian, how did it happen that Victoria ended up
9 moving in there? Tell me about the phone call, who called
10 whom.
11 A I called Cheryl, and I said I want to come home to my
12 place after five days. I mean, she was out. She into I was
13 with her --
14 MR. SMITH: Objection, Judge. Non-responsive.
15 THE COURT: Sustained.
16 BY MS. PALM::
17 Q Okay, try and listen to my question, okay. So you
18 called Cheryl because Cheryl had been at the apartment?
19 A She wasn't at the apartment.
20 Q Okay. But you called her and said I want to go to
21 the apartment?
22 A I was checking to see if she was there, what her
23 intentions were.
24 Q Okay. And did she express that she was going to
25 leave?

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. And were you off probation in your other case?
2 A I received another honorable discharge in -- I think
3 it was September 11th.
4 Q And we heard during Ms. Morris' testimony that about
5 four or five days after you two moved into El Parque that
6 Victoria called her because she wanted to come live there with
7 you. Do you remember that testimony?
8 A Yes.
9 Q Is that how it happened?
10 MR. SMITH: And Judge, I'm going to object.
11 Actually, that wasn't the testimony. She said that the
12 defendant called Cheryl Morris and said Victoria's coming to
13 live with us.
14 MS. PALM: That's --
15 MR. SMITH: Not that --
16 MS. PALM: That's correct, the defendant called and
17 then she -- he put --
18 THE COURT: I'm going to sustain the objection.
19 MS. PALM: Okay.
20 THE COURT: Just restate the question --
21 MS. PALM: Okay.
22 THE COURT: -- so we're clear.
23 BY MS. PALM::
24 Q You hear the testimony that you called and then you
25 handed Victoria the phone, and Victoria spoke with Cheryl and

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 MR. SMITH: Objection, Judge. Calls for hearsay.
3 THE COURT: I'm going to allow that because I -- she
4 did testify to that.
5 BY MS. PALM::
6 Q Yes, she did?
7 A Yes, she did.
8 Q Okay. And then you end up bringing Victoria home
9 with you?
10 A Yes.
11 Q And were you aware at the time that you and Victoria
12 began residing together that she had Hepatitis C?
13 A That's what she called me for that she wanted to tell
14 me when she first contacted me.
15 Q Okay. So you were aware --
16 A Yes.
17 Q -- she had it. Were you aware that that can be
18 sexually transmitted?
19 MR. SMITH: Objection, Judge, to the relevance.
20 THE COURT: Sustained.
21 BY MS. PALM::
22 Q Did you -- did you have a sexual relationship with
23 Victoria?
24 A Yes.
25 Q Were you aware that you could have gotten Hepatitis C

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ROUGH DRAFT TRANSCRIPT

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1 from her?

2 A Yes.

3 Q So you understood that you were risking your health

4 by going into this relationship?

5 A Yes.

6 Q At the time that Victoria moved in, what was going on

7 in your working? Were you working for JD still or MJ Dean

8 still?

9 A I was -- I was working for MJ Dean working on the

10 Eastside Cannery, what we completed. We built it. It was

11 completed. I was temporarily laid off, put on the out-of-work

12 list, and I was reassigned to the city center with a new

13 company Perini (phonetic).

14 Q Okay.

15 A And I was working at Perini city center, and that's

16 where I was when this -- in September.

17 Q So you were still working?

18 A Yes.

19 Q Okay. When did you get involved in the MINDS

20 treatment. Do you remember what time it was?

21 A Late, mid September, late September. I want to --

22 September, maybe, 19th. September 20th.

23 Q Okay. And why did you end up doing that?

24 A I needed some help.

25 Q Problem getting bad or had it remained bad?

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ROUGH DRAFT TRANSCRIPT

1 A Yes. I was -- one woman this, one woman that to

2 drinking to working six days a week. The woman I loved and

3 want to be with --

4 MR. SMITH: Objection, Judge.

5 MS. PALM: Just --

6 THE COURT: Sustained.

7 MR. SMITH: Move to strike all after yes as

8 non-responsive.

9 MS. PALM: Just listen to the question, Brian.

10 THE COURT: The jury's instructed to disregard all

11 answers after his answer of yes.

12 BY MS. PALM::

13 Q So you had some stress going on in your life at the

14 time? Yes?

15 A Yeah.

16 Q And you decided to seek treatment on your own?

17 A Yes.

18 Q Okay. So you go to MINDS, and then they put you in a

19 detox?

20 A Yes, I -- I admit I missed three days in a row, and I

21 was drinking really heavily and had a lot of things going on,

22 but, you know, I called late again, and then I had talked to my

23 boss, and we had a great relationship, and I reported the truth

24 that I had a lot going on and all the hours, and I was working

25 six and seven days a week for two, three months, and --

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ROUGH DRAFT TRANSCRIPT

1 Q Okay, let me stop you there. So you talked to your

2 boss, and you told him you were having problems, and he helped

3 you get into the detox?

4 A No, she did. She told me to get ahold of Lou and --

5 Q Okay.

6 A -- they laid me off so I could qualify for -- because

7 of the work I did for them and --

8 Q Okay. Try and not do a run on response to me, all

9 right. I just want you to focus on the question and just try

10 and limit your answers to answering the question, okay.

11 A Yes.

12 Q Take a second to think. And Victoria was your

13 sponsor when you were doing the after-care after detox?

14 A Yes, she was.

15 Q Was she still drinking at that time?

16 MR. SMITH: Objection, Judge. What's the relevance?

17 THE COURT: Sustained.

18 BY MS. PALM::

19 Q Did you have a history of drinking with Victoria?

20 A Yes.

21 Q And she was going to your group meetings?

22 A Yes, she was.

23 Q But the only focus of the group meeting was to

24 address your problem?

25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 Q So during the relationship, you're doing the

2 after-care counseling. We heard testimony that you also took

3 her to meet your friends, some union people?

4 A Yes, that's correct.

5 Q Okay. Who did she meet?

6 A Oh, I've introduced her to about five big hosses and

7 friends at the union hall.

8 Q How did you introduce her?

9 A She had moved in, and I was done counseling, and I

10 was out of work. I was volunteering because I was trying to

11 keep myself busy.

12 Q Okay, Brian, we're going to draw an objection. How

13 did you introduce her? Do you -- how did you refer to her at

14 the time?

15 A The union allowed me to take her to -- for some

16 volunteer work, and I was able to introduce her.

17 Q I mean, by a term. Did you say this is my

18 girlfriend, this is my wife? How did you introduce her to your

19 friends?

20 A I'm not quite sure, my girl. My -- they assumed she

21 was my -- the way -- my significant other.

22 Q During this time period did you bring Victoria over

23 to see your daughters that live here in Las Vegas?

24 A Yes. Yes, I did.

25 Q Okay. And how old are those daughters?

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1 A One just turned ten and the other one's -- will be
2 turning nine.
3 Q Without telling me what they were -- did Victoria
4 confide in you about any problems she had while you were in
5 prison?
6 A When we got back together, yes she --
7 Q Okay.
8 A -- told me she had multiple --
9 Q You don't need to say what it is. Just yes. Okay.
10 So by November of 2008 what did you know about -- your Honor,
11 since the Court is limiting me, he doesn't know I've been
12 limited, so may I approach him for a minute?
13 THE COURT: Why don't we have counsel approach here.
14 MS. PALM: Okay.
15 THE COURT: Make sure we're on the same page.
16 (Off-record bench conference).
17 THE COURT: Ladies and gentlemen, we're just -- I'm
18 just going to meet with counsel in the hallway in the back room
19 in my chambers here, so you can stay there. If you want to
20 stand up and stretch or whatever. I'll just read you the
21 admonishment.
22 During this recess it is your duty not to converse
23 among yourselves or with anyone else on any subject connected
24 with the trial or to read, watch or listen to any report over
25 commentary on the trial by any person connected with the trial

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ROUGH DRAFT TRANSCRIPT

1 newspaper, television, radio or the Internet.
2 You're not to form and express an opinion on any
3 subject connected with this case until this matter is finally
4 resolved. I think all of you can memorize that or can state
5 that back to be tested later. All right. Thank you, we'll see
6 you back tomorrow at 9:00.
7 You know what, actually if we can have you come back
8 at 9:30. Just give us a little extra time, 9:30. You can go
9 back down there, sir, with your attorney. We're outside the
10 presence of the jury panel. We're off the record.
11 (Court recessed at 4:52:28 p.m. to 4:53:17 p.m.)
12 (Outside the presence of the jury)
13 THE COURT: Okay, at 8:00 o'clock tomorrow morning
14 I'm -- both couple need to provide the Court with any case law
15 regarding the self-defense issue that we've discussed. Must be
16 received in my chambers by 8:00 a.m. tomorrow or I won't be
17 able to consider it.
18 MS. GRAHAM: Judge, can we settle jury instructions
19 tonight so we can do our closing?
20 MR. SMITH: I think that's why we're coming back at
21 8:00.
22 THE COURT: Right. That's why I'm giving an extra
23 hour and a half. It's not going to take an hour and a half to
24 resolve this self-defense issue. Okay.
25 THE CLERK: All right, 8:00 o'clock.

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1 or by any medium of information, including without limitation,
2 newspapers, television, radio or the Internet.
3 And you're not to form or express an opinion on any
4 subject connected with this case until this matter is finally
5 submitted to you. Again, if you need to stand up and stretch
6 or the marshal will get you some water if you need that.
7 (Court recessed at 4:33:44 p.m. until 4:50:36 p.m.)
8 (In the presence of the jury)
9 THE COURT: We're back in the presence of the entire
10 jury panel. Ladies and gentlemen, we have some legal issues
11 that need to be resolved. I don't want to have you sit there,
12 and I want to move the case along as expeditiously as possible.
13 It won't be fair to you just to have you sit there. We've got
14 to resolve some certain things, so -- before we go any further.
15 So we're going to adjourn for the day. I think we can come
16 back at 9:00 o'clock tomorrow morning.
17 I do not have a calendar tomorrow, so we will start
18 -- I'm going to probably meet with counsel at 8:00 in the
19 morning, so we'll be done with our issues. So if we can have
20 you here at 9:00 o'clock.
21 During this recess it is your duty not to converse
22 among yourselves or with anyone else on any subject connected
23 with the trial or to read, watch or listen to any report over
24 commentary on the trial by any person connected with the trial
25 or by any medium of information, including without limitation,

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: 8:00 o'clock.
2 THE CLERK: Off the record.
3 (Court recessed at 4:53 p.m., until,
4 Friday, March 20, 2009.)
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* * *

EXHIBITS

DESCRIPTION:	ADMITTED
Exhibit aaaa-jjjj	9
Exhibit bb, ee, cc, dd	7
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ACKNOWLEDGEMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

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Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.
.....

.
. CASE NO. C-250630

.
. DEPT. NO. 17

.
. TRANSCRIPT OF
. PROCEEDINGS

FILED

JUL 10 2009

[Signature]
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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1 LAS VEGAS, NEVADA, FRIDAY, MARCH 20, 2009, 7:59 A.M.
2 (Outside the presence of the jury)
3 THE MARSHAL: Department 17 of the Eighth Judicial
4 District is now in session. The Honorable Judge Michael P.
5 Villani presiding. Please be seated, remain in order. Make
6 sure your cell phones are turned off, please.
7 THE COURT: Let the record reflect we're outside the
8 presence of the jury panel. Mr. Smith, where's your
9 co-counsel?
10 MR. SMITH: Judge, I'm ready to proceed without her.
11 THE COURT: All right.
12 MR. SMITH: She's going to be here. She's late.
13 THE COURT: All right.
14 MR. SMITH: Apparently she was on the phone with her
15 granddaughter while her granddaughter was having the baby, and
16 she's running late, so --
17 THE COURT: All right.
18 MR. SMITH: I didn't go it in detail.
19 THE COURT: Okay.
20 MR. SMITH: Okay.
21 THE COURT: I received the supplement points and
22 authorities on the issue of the self-defense issue. The
23 defense wants to either admit into evidence or have Mr. O'Keefe
24 testify regarding an October 2001 admission in Monte Vista
25 Hospital, and the following was highlighted for me by defense

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1 Past history of heavy alcohol use. History of pain medication
2 abuse.
3 There's an admission at Southern Nevada Adult Mental
4 Health in October '07. And the record show that in October --
5 I'm assuming referring to October '07 -- that the victim took
6 an overdose of pills and another apparent suicide -- attempt
7 suicide. And then there was a situation two or three days
8 prior to the incident in question at their residence that the
9 victim came after Mr. O'Keefe with -- is it knife or scissors?
10 Was it a knife?
11 MS. PALM: Knife.
12 THE COURT: Okay. And so defense wants to bring in
13 the medical records release those situations of the prior
14 attempt suicide, self-mutilation, her various mental health
15 counseling and diagnosis. Most recent case that I've been
16 referred to is Daniel v. State, 119, 498, 2003. It does
17 address the decision in Petty (phonetic). It says here and at
18 the admission of the victim's specific acts regarding --
19 regardless of its source is within the sound discretion of the
20 court.
21 It's limited to the purpose of establishing what the
22 defendant believed about the character of the victim. It
23 further states that when a defendant claims self-defense and
24 knew of relevant specific acts by a victim, evidence of the
25 acts can be presented through the defendant's own testimony,

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1 counsel:
2 In October '01, very cut her -- both of her wrists
3 with a knife, and she then she had reported of her fourth
4 suicide attempt and also it was information that she was on
5 numerous medications. She was diagnosed with major depression,
6 panic disorder, agoraphobia.
7 And in 2002 she was again admitted to Monte Vista
8 Hospital. She was taking three drugs, Xanax, Lortab,
9 Oxycotton. She had some blacking out episodes. She wasn't
10 functioning properly at work. She was diagnosed to having
11 severe anxiety and depression. She was hospitalized -- talk
12 about her hospitalization of '01. And it also talks about that
13 she was continued dependents on opiates, Xanax and major
14 depression. And that was again, from '01.
15 '06, Monte Vista admission, and I guess this was
16 during Mr. O'Keefe's incarceration, but my understanding is
17 that the victim had confided in Mr. O'Keefe --
18 MS. PALM: That's correct.
19 THE COURT: -- and provided him with this
20 information. And talked about again, her attempt suicide,
21 self-mutilation. There's drug abuse, alcohol abuse, and her
22 plan as of September '06 was anger management, therapy or
23 counseling sessions. Diagnosed that she had racing thoughts,
24 mood swings since 2000. Again, refers to suicide attempt.
25 Attempt, excuse me. History of high moods and anger problems.

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1 through cross-examination of a surviving victim and through
2 extrinsic proof. And I don't think there's any real
3 disagreement with that. Both parties cite Daniel or discuss
4 that. Both parties talk about Petty. Is there anything
5 further to add, Ms. Palm, to your brief?
6 MS. PALM: Just for the Court's information that --
7 THE COURT: These will be part -- the briefs or the
8 supplemental information will be made part of the record.
9 MS. PALM: Okay. And we were going to provide a
10 formatted clean copy to file today also. But just to clarify,
11 we also want to admit her medical records as extrinsic
12 evidence. I think that we're entitled to under Daniels and
13 Petty to corroborate his testimony because as Daniels notes, a
14 defendant's testimony is often viewed as self-serving, and he's
15 entitled to corroborate that with other extrinsic evidence.
16 And we don't have an authenticity problem. The DA
17 agreed to stipulate to the authenticity of records if we had a
18 foundation for them. And we did -- we did not want to submit
19 the medical records from the 2007 admission because as to those
20 medical records, they contained prejudicial prior bad acts of
21 Mr. O'Keefe. And so we wanted to admit medical records from
22 2001, 2002, and 2006. And we submitted those as our Proposed
23 Exhibit B.
24 And then finally, the State has introduced evidence
25 of Mrs. Witmarsh's peaceful character. They did that through

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1 their witness, Ms. Morris, who testified that Mr. O'Keefe said
2 that she was submissive. I think they intended to show the
3 jury that she was submissive and a peaceful person, and we're
4 allowed to impeach that with extrinsic proof. That would be
5 all I add to that.

6 THE COURT: Mr. Smith.

7 MR. SMITH: Judge, following up on the last thing Ms.
8 Palm said, we introduced evidence that Mr. O'Keefe said that
9 she was submissive to show Mr. O'Keefe's state of mind with
10 regards to his vision of her character. If it also happens to
11 infer that she was, in fact, submissive, well, then, so be it.
12 But we certainly weren't going there. We were just trying to
13 go to show what Mr. O'Keefe thought about her.

14 With regards to the proffer testimony that the
15 defendant is going to say that Ms. Witmarsh tried to tackle him
16 with a knife two nights before the incident, the State
17 conceives that that is admissible evidence. But we maintain
18 that evidence that she committed suicide -- well, not
19 committed, but attempt to commit suicide is not contemplated
20 under Daniel or Petty because it is not a specific act of
21 violence.

22 I mean, people can commit suicide not because they're
23 anger, but only because they're depressed or sad or no longer
24 see a reason for living. It's not a violent act. It's
25 contemplated. With regards to extrinsic proof, the proof that

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1 the Court's ruling. Anything else we need to address?

2 MR. SMITH: I just that you admonish the defendant,
3 Judge, because he seems really eager to state these things.

4 THE COURT: Well, just --

5 MR. SMITH: He's already blurted out that she called
6 him and told him she wanted to kill herself, so --

7 THE COURT: Well, Mr. O'Keefe as your attorney had
8 mentioned a couple times during your testimony, you know,
9 please listen very carefully to the question and, you know,
10 just listen -- I mean, she's leading you where she wants you to
11 go. I don't mean leading questions, but she's asking questions
12 of what she feels would be, you know, your theory of the case,
13 and you'd be wise to follow her advice and direction in that
14 regard.

15 It never looks good for a witness or for a party
16 where the court has to admonish a witness on the stand in front
17 of a jury. I'm not doing it to embarrass you or to hurt your
18 case, but if there's an objection, I'm going to rule, you know,
19 accordingly. And also, if I need to, you know, advise the jury
20 that to disregard your testimony, again, it's just not
21 something that looks good for a witness. Okay, do you
22 understand that, sir?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: All right. And as your testimony went on
25 yesterday afternoon, at parts got lower and lower and lower.

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1 we were talking about in these two cases or that the court was
2 addressing in those two cases was actual other witnesses that
3 had been attacked by the same defendant. That was to show
4 corroboration. Not that -- I mean, it's kind of -- it's not
5 analogous to this current situation where they want to get in
6 evidence that she tried to kill herself and/or that she was in
7 anger management classes.

8 I mean, it's too attenuated for one. And it's -- we
9 submit it's not contemplated by the case law.

10 THE COURT: All right. The Court has reviewed all
11 the cases cited by the parties and their supplemental briefs in
12 this matter. It's -- both parties agree that in a claim of
13 self-defense that specific acts of violence by the victim would
14 be admissible. The Court does not find her attempted suicide
15 to be a specific act of violence.

16 So the Court's ruling that her records from '01 or
17 those situations from '01, '02 and '06 as well as '07 are not
18 coming in. The defense can -- Mr. O'Keefe can testify that two
19 or three days prior to the incident that the victim, I guess,
20 came at him with a knife or -- I'm sorry, I know you just told
21 me. Knife or scissors at their residence. So he'll be allowed
22 to testify in that regard.

23 But as far as also the fact that she had in the past
24 was going to therapy classes for anger management is not a
25 specific act as identified in Daniel or Petty, and so that's

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1 And again, it just looks better -- I mean, I don't want to keep
2 reminding you, and I know your attorney was helping to remind
3 you to raise your voice. I know it's a emotional situation,
4 but the 12 individuals, you know, to your right need to hear
5 your testimony, you know, hear your side of the story, and if
6 we have to keep asking you to raise your voice, it interferes
7 with their evaluation of your testimony. That's to help you,
8 that's why I'm saying that. Just please raise your voice so
9 they can hear you. All right?

10 THE DEFENDANT: I will do so, your Honor.

11 THE COURT: Okay. Anything else on this issue?
12 Anything else?

13 MR. PIKE: Just in reference to the understanding of
14 defense counsel and our obligation in presenting testimony.
15 Again, the Court has cautioned about -- the defendant about
16 blurring out any testimony that's been disallowed. If that
17 occurs, it's my understanding that at that point in time or if
18 there's any indication to us that testimony that may be
19 unsupportable or patently untrue, that at that point in time we
20 have an obligation to discontinue asking questions altogether.

21 And that would surely impinge the defendant's ability
22 to present his entire story because we would have to stop at
23 that point in time and just discontinue asking questions, so I
24 explained that to him again last night. I went over and went
25 over the testimony with him while Ms. Palm was working on her

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1 brief that was -- went to the Court.
2 But that is always a cautionary portion, and we
3 didn't really address that during the canvassing of the client,
4 but he controls how long his testimony runs, and we have
5 certain restrictions on what we can and how far we can go with
6 testimony. Thank you.
7 THE COURT: Do you have any questions in that regard,
8 Mr. O'Keefe, because I'm not going to answer those onto
9 something that you would do in private with your attorney, but
10 you understand what he just said?
11 THE DEFENDANT: Yes, your Honor.
12 THE COURT: Okay. Like I said, I don't want you to
13 hurt your case.
14 THE DEFENDANT: I think damage has already been done,
15 your Honor.
16 THE COURT: Well, that's fine, but if you believe
17 that, that's fine, but you don't want to make it worse, all
18 right.
19 THE DEFENDANT: Yes, sir, your Honor.
20 THE COURT: Okay.
21 MS. PALM: Your Honor, I have one additional thing.
22 I just wanted to inform the Court that I have been on
23 antibiotics for treatment of an ear infection since last Friday
24 and I have a bulging eardrum on one side. I have not
25 intentionally, as Ms. Graham accused me of yesterday, been

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1 believe, recalling Dr. Benjamin to the stand. We do not have a
2 surrebuttal for Dr. Benjamin's testimony. I would not be
3 recalling Dr. Christensen, and I think absent any other
4 witnesses --
5 MR. SMITH: The only potential snag is that Dr.
6 Benjamin is performing an autopsy this morning, and so she
7 can't be here number 1:00 o'clock. I will represent that her
8 testimony is going to be really short. I'll have it now to
9 like five or six questions, but that's the earliest she can be
10 here because she has to cut somebody this morning. But I
11 anticipate --
12 THE COURT: How many other witnesses --
13 MR. SMITH: That's it.
14 THE COURT: Oh, you're just going to have one --
15 MR. SMITH: Just Dr. Benjamin.
16 THE COURT: -- rebuttal?
17 MR. SMITH: That's it. So I anticipate if we settle
18 jury instructions this morning and we get done with the
19 defendant, we can take, you know, a longer break, come back at
20 1:00, put her on the stand, and then put this thing to bed.
21 THE COURT: Okay.
22 MR. PIKE: And if we can advise the jury that there
23 is just that one short witness --
24 MR. SMITH: Yeah, I'm sure they --
25 MR. PIKE: -- they'll get it early this morning.

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1 trying to speak loud at the bench. When the white noise is on,
2 I can't hear up there, and so when you remind me, I try to
3 lower the volume, but it's -- actually I have a hearing issue
4 going on right now.
5 Mr. Pike just inched that if I come around to this
6 side, the white noise is not so bad, and I will try to do that
7 for bench conferences in the future. But I just want the Court
8 to know I'm not intentionally trying to make the jury hear
9 anything I say.
10 THE COURT: I appreciate that, and I didn't -- I did
11 not interpret that you were trying to do that intentionally.
12 MR. SMITH: Neither did I.
13 MS. PALM: Thank you.
14 THE COURT: Okay. Anything else on --
15 MR. PIKE: No.
16 THE COURT: Anything else?
17 MR. SMITH: No.
18 THE COURT: Now, we do -- I'm just finishing up some
19 of the review on the jury instructions so we can -- now, the
20 jury's coming at 9:30; is that correct?
21 THE CLERK: Yes.
22 THE COURT: All right, so we have about 15, 20
23 minutes and I'll meet with counsel again and --
24 MR. PIKE: I think that we should be able to finish
25 up today. Mr. O'Keefe is our last witness. They anticipate, I

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1 MR. SMITH: Yeah, I agree.
2 MR. PIKE: Then they have some confirmation as to --
3 MR. SMITH: And they have some idea --
4 MR. PIKE: -- the time frame.
5 MR. SMITH: Exactly.
6 MR. PIKE: And they've alleviate their anxiety.
7 MR. SMITH: I agree. And you can -- and, in fact, if
8 you want to just ask me about the witness, and they can hear me
9 say we have one witness that's going to be short.
10 THE COURT: Okay.
11 MR. SMITH: We can do it that way.
12 MR. PIKE: And if he wants to make a representation
13 that it's Dr. Benjamin, she's in the middle of an autopsy,
14 otherwise she'd be here earlier --
15 MR. SMITH: Right. I'll --
16 MR. PIKE: -- that's fine, too.
17 MR. SMITH: -- put that on the record. Okay, great.
18 MR. PIKE: In front of the jury, I --
19 MR. SMITH: That's great.
20 MR. PIKE: -- that -- I just want -- they've been
21 nervous --
22 MR. SMITH: Yeah.
23 MR. PIKE: -- they've been anxious.
24 MR. SMITH: We don't want them pissed.
25 MR. PIKE: So we want them to be able to focus when

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1 they deliberate.
2 THE COURT: All right. Mr. Pike, I do know -- like I
3 said, I'm judgment finalizing, putting all the instructions
4 together, yours and theirs that match up and some differences.
5 But there was one of your instructions that said there was a
6 irrebuttable presumption that Mr. O'Keefe was intoxicated.
7 MR. PIKE: That's correct, your Honor. And that --
8 THE COURT: I wasn't quite clear where the authority
9 was for that.
10 MR. PIKE: Well, if you look in Sandborn, I took the
11 Sandborn opinion out, and I specifically marked that paragraph
12 with a post-it before I sent the book back. In Sandborn there
13 was a failure to collect, a failure to test and when the
14 supreme court reversed it, they sent it back with instructions
15 that because that was not done, that they ordered an
16 instruction that said you are -- there is an irrebuttable
17 presumption that would have been favorable for the defense.
18 Fortunately, Mr. Sandborn -- I did the post conviction on it,
19 and then Mr. Sheek (phonetic) got the retrial after we got the
20 instruction, and he won it. But in reference to that, when in
21 circumstances such as this, that's where that comes from and so
22 I specifically marked it.
23 THE COURT: All right. I'll review that. Okay, and
24 like I said, I'll be back in about 15, 20 minutes, and --
25 MR. PIKE: Okay.

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1 THE CLERK: Go ahead and have a seat.
2 THE COURT: All right. Okay. All right. Go ahead,
3 Ms. Palm.
4 MS. PALM: Thank you.
5 DIRECT EXAMINATION (RESUMED)
6 BY MS. PALM::
7 Q Brian, yesterday when we left off, we had discussed
8 your background, and so I want to take you up to November 2008,
9 the beginning of November 2008. Were you facing any unusual
10 stressors at that time financially?
11 A Yes, ma'am, I was.
12 Q What were they?
13 A I was behind a little bit in my rent being out of
14 work, and my car payment was a couple payments behind. I had
15 spent -- well --
16 Q Was Victoria facing any additional stressors?
17 A Yes, she was.
18 Q And what were they?
19 A Well, she had --
20 MR. SMITH: Judge, I'm going to object because it
21 calls for speculation as to what Victoria was suffering.
22 MS. PALM: Okay, I'm talking about --
23 THE COURT: Sustained.
24 MS. PALM: -- her financial condition.
25 BY MS. PALM::

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1 THE COURT: Okay.
2 MR. PIKE: Thank you.
3 (Court recessed at 8:15:17 p.m. until 9:39:02 a.m.)
4 (In the presence of the jury)
5 THE MARSHAL: -- cell phones are turned off, please.
6 THE COURT: Good morning, ladies and gentlemen. I'm
7 going to advise you of our schedule for today. We're going to
8 complete the testimony of Mr. O'Keefe, and hopefully this
9 morning, and the State may be calling one rebuttal witness, and
10 that witness cannot be here until 1:30. Immediately after that
11 witness, I believe at --
12 MR. SMITH: 1:00 o'clock.
13 THE COURT: 1:00 o'clock. Okay, 1:00 o'clock.
14 Immediately after that witness, we will -- I will read you the
15 jury instructions and closing arguments will commence, okay.
16 We can tell you that counsel and myself, we've been here since
17 8:00 o'clock this morning resolving a lot of legal issues as
18 well as resolving the jury instructions because we want to
19 minimize your downtime today, so we just want to today as
20 smooth as possible. All right, why don't we -- since we've had
21 evening recess, why don't you swear in Mr. O'Keefe today.
22 THE CLERK: Please stand. Raise your right hand.
23 BRIAN KERRY O'KEEFE, DEFENDANT'S WITNESS, SWOR
24 THE CLERK: Please be seated.
25 THE WITNESS: Thank you.

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1 Q Were you aware of her financial condition?
2 THE COURT: Okay, I'm sustaining the objection but
3 I'm going to allow that question.
4 MS. PALM: Thank you.
5 THE COURT: Yes or no, sir?
6 THE WITNESS: Yes, I -- yes.
7 BY MS. PALM::
8 Q Okay. And what was her financial situation?
9 A She had no employment. She had unemployment and she
10 had one week left on it. She was highly, you know, concerned
11 about that trying to get an extension, and they told her she
12 was more than likely going to be denied because there was no
13 money available.
14 Q Okay. Now, let me take you to the date of her
15 birthday. What was her birthday? What date was that?
16 A November -- November 2nd, Sunday.
17 Q Okay. What was Victoria's behavior like -- just her
18 behavior -- on November 2nd?
19 MR. SMITH: Objection to the form of the question,
20 Judge. Why is her behavior on November 2nd, 2008 relevant?
21 THE COURT: If you're getting to that situation that
22 we -- that's allowable, why don't you just get straight into
23 that.
24 MS. PALM: Okay.
25 BY MS. PALM::

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1 Q Did anything unusual startling happening on November
2 2nd, 2008?
3 A Yes, it did.
4 Q And what happened?
5 A Later in the evening Victoria had been drinking some
6 wine, and, you know, I realized that I wasn't drinking, which,
7 you know, I wanted to, but, you know, I didn't, and --
8 Q Let me stop you for a second. Had you completed your
9 MINDS counseling at that time?
10 A Yes.
11 Q And you were still dry?
12 A Yes. Two days before on the 31st. Friday was the
13 last night.
14 Q Okay. So Victoria's drinking, and what happens?
15 A Later in the evening she's cooking, and I passed out
16 on the couch. Was watching TV, just, you know, letting her do
17 her own thing. Everything was -- seemed to be okay, and her --
18 can I say? I don't --
19 Q Well --
20 A She wasn't acting with her medication. She was a
21 little -- it wasn't going good with the wine, and I'm asleep,
22 and she's cooking, and she comes over and is telling me to get
23 up, and I'm asleep. And she had this same knife in her hand,
24 and --
25 Q What was she doing with the knife, Brian?

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1 A Yes, I did.
2 Q What was going on in your home? What were you doing
3 when you got up?
4 A We spent the whole night on the couch watching the
5 election until wee hours of the morning. She had been drinking
6 a little bit. I didn't have a problem. I was excited. You
7 know, I wanted to see. I'm sure a lot of people did, and she
8 retired maybe about 1:00. I was up until like 3:30 on the
9 couch. It was still made up, as you seen, from the night
10 before we were on it.
11 Q Tell me about your -- the daily events after you both
12 woke up. What were you doing?
13 A She had started acted up a little bit, and I
14 basically convinced her just to go bed. To let me watch TV.
15 She come out in the morning, got up. She was a little
16 embarrassed. Goes into the kitchen to make something to eat.
17 I'm up already on the couch trying to make some phone calls.
18 She slept in until about probably about 10:00.
19 And I had done been up some format, coffee. I'm an
20 early riser. I get up early, and basically, you know, what are
21 we going to do. And I informed her Obama had won, and, you
22 know.
23 Q Okay. Let's just go to what did you do in
24 particular. Did you make any phone calls that day?
25 A I made 30 calls to prospective employers. Tracy

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1 A She was pointing it at me, and I mean, I didn't know
2 -- she was pointing at me yelling, arguing. I mean, you know,
3 not screaming crazily, but she was severely agitated. The
4 medication wasn't working. It was a new medication.
5 MR. SMITH: Objection, Judge. Calls for speculation.
6 THE COURT: Sustained.
7 BY MS. PALM::
8 Q Okay, were you startled by her waking you by
9 screaming and jabbing a knife at you?
10 A Yes.
11 Q And were you able to calm her down?
12 A Well, yes, I was -- I wasn't -- because I wasn't
13 drinking, I was able to diffuse the situation. I was able to
14 calm her down and --
15 Q And how did you do that?
16 A By talking with her and asking her what's going on
17 calmly. Basically, look, get ahold of yourself. You know
18 what, you want me to get up, I -- you know, she started to back
19 up. She came to her senses. You know, whatever you want. You
20 know, I'll get off the couch. I won't watch TV, whatever, and,
21 you know.
22 Q Okay. So three days after that on November 5th,
23 2008, until that day did you maintain your sobriety?
24 A Yes.
25 Q Okay. And did you fall off the wagon on that date?

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1 Berger being one of them. Another several foremen I worked
2 with. I was kind of -- you know, the money situation and
3 trying to keep myself busy. We had just --
4 Q Okay, let's just do a little bit at a time, okay.
5 A Yes, ma'am.
6 Q So when you say 30 phone calls, you don't know the
7 exact number of phone calls, do you?
8 A No, there was multiple calls.
9 Q Okay. And one of those calls was the call to Tracy
10 Berger that he testified about in court?
11 A Yes, ma'am.
12 Q And did that call give you hope that you'd be going
13 back to work soon?
14 A Yes, it did. Absolutely.
15 Q And had Victoria left the house prior to that?
16 A Yes.
17 MR. SMITH: Objection, Judge. Non-responsive. The
18 answer is yes.
19 THE COURT: Sustained.
20 BY MS. PALM::
21 Q Where did she go?
22 A She went to Von's to get some food and some wine.
23 Q Okay. And did she come back with food and wine?
24 A Yes, she did, and I continued making phone calls.
25 Q Okay. At what point did you decide that you were

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1 going to go out and drink again?
2 A I know I shouldn't of, but after talking to Tracy,
3 prospective employment for the long time, all my burdens were
4 relieved, and I'm talking very good money in a matter of weeks.
5 I could have got everything, and I wanted to refinance the car
6 and whatever, but I -- her birthday and one for want to reward
7 myself for sobriety. I did it. I'm not going to lie, folks, I
8 wanted to drink any excuse, but I said let's go out. Come on,
9 let's go celebrate it. And I even had a -- two --
10 Q Okay.
11 A -- glasses of wine.
12 Q Okay. So you were finding an excuse to drink? You
13 admit that?
14 A I -- I'm an alcoholic.
15 Q And do you struggle with that alcoholism everyday of
16 your life?
17 A That's why they say one day at a time. One's too
18 many and a million's not enough.
19 Q So at some point the two of you decide to go out.
20 Did you do any errands after you left the house?
21 A Yeah, I had just purchased a sweeper the week before,
22 and I was cleaning up my spare bedroom with all the tools,
23 arranging my hardhats, and I spilled some screws, and I swept
24 over them and they got caught in the belt, and it broke the
25 belt. So I said well, the first thing we need to do, let's

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1 Q Okay.
2 MR. SMITH: Objection, Judge, and move to strike.
3 He's talking about facts not in evidence.
4 THE COURT: I sustain that. The jury's instructed to
5 disregard the last statement from the defendant.
6 BY MS. PALM::
7 Q So you believe that you went to Paris about 6:00,
8 6:30 p.m.?
9 A That is correct.
10 Q At this point you had had two glasses of wine. How
11 much had Victoria had?
12 A A bottle and a -- a bottle.
13 Q And what did you do at the Paris?
14 A We valeted the car. We walked over briefly to see
15 the times on the lights. We'd always go down there. But we
16 went back to Paris and we want to the roulette tables.
17 Q Were you gambling that night?
18 A Yes, I was.
19 Q And did that gambling allow you the ability to get
20 free drinks?
21 A Yes.
22 Q And were both you and Victoria drinking at the Paris?
23 A Yes.
24 Q What were you drinking?
25 A I was drinking double -- double shots of Absolute

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ROUGH DRAFT TRANSCRIPT

1 drop the sweeper off right around the corner, and then we'll
2 head down to Paris Hotel. I did that and got to the sweeper
3 shop. She waited in the car. I took it in.
4 The guy told me it would take five minutes. Went in
5 the back.
6 Q Okay. Let's move on. So you do the sweeper errand
7 and then you go to Paris? Yes?
8 A That is correct.
9 Q Okay. Do you have a good fix looking back on the
10 times that all of that was occurring?
11 A Yes.
12 Q Okay. What time do you think you went to Paris?
13 A It was -- we valeted about -- it was around 6:30.
14 Q Okay. And prior to 6:30, had you been drinking?
15 A I had two glasses of wine.
16 Q Okay.
17 MR. SMITH: And I'm sorry, Judge, just so there's
18 clarity, are we talk being 6:30 a.m. or p.m.?
19 MS. PALM: 6:00 --
20 BY MS. PALM::
21 Q Is it a.m. or p.m.?
22 A It was 6:30 p.m.
23 Q And that's on November 5th?
24 A On November 5th. The receipt that I received from
25 the sweeper shot shows 5:59 p.m. that we were there.

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ROUGH DRAFT TRANSCRIPT

1 straight up.
2 Q Okay.
3 A I had one also white Russian which that's what
4 Victoria was drinking.
5 Q Okay. So Victoria's drinking White Russians while
6 she's there?
7 A That is correct.
8 Q Do you know how much she had?
9 A At least three, maybe four.
10 Q Are things going well? Are you getting along while
11 you're at the Paris?
12 A We're having a great time. Everything's okay. She's
13 feeling good at that point. She started a little bit earlier
14 than me, and I was kind of like catching up, but she was ahead,
15 but she was fine, and she was --
16 Q Okay. So you're enjoying your time at the Paris?
17 A Very much so. I was winning.
18 Q Okay. Were you also losing?
19 A I end up losing a hundred so back of that winning,
20 which she wasn't happy with.
21 Q Okay. Do you recall leaving the Paris?
22 A Not really. Somewhat.
23 Q Do you know what time you left the Paris?
24 A No, I didn't have a watch.
25 Q No?

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ROUGH DRAFT TRANSCRIPT

000555

1 A No.
2 Q Okay. Do you have any memory of getting in the car?
3 A Somewhat. No.
4 Q No? It's not a clear memory?
5 A It's not clear. It's not.
6 Q Okay. Have you had problems because of your
7 alcoholism with having blackouts in the past?
8 A Yes.
9 Q So were you -- looking back, do you think you
10 experienced a blackout?
11 A Yes.
12 Q Do you remember the drive home from the Paris?
13 A No.
14 Q Do you remember being back at the apartment complex,
15 at your apartment complex in the parking lot?
16 A Yes, I do.
17 Q Okay. When at the point that you can remember again,
18 tell me where you are and where she is?
19 A We pulled into the parking spot, and she's like we're
20 here. She was a little agitated. Well, she was a little more
21 than agitated. She was starving, but she thought we're here,
22 get up, get up, and I --
23 Q Okay. Let me stop you there. Why is she telling you
24 to get up?
25 A She was saying she was here. She didn't care. We're

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. Was she upset with you about anything?
2 MR. SMITH: Objection, Judge, to the form of the
3 question. Unless she can lay a foundation.
4 BY MS. PALM::
5 Q Were you aware --
6 THE COURT: Sustain the objection.
7 MS. PALM: Okay.
8 BY MS. PALM::
9 Q Were you aware when she went upstairs whether she was
10 angry with you or not?
11 A Yes.
12 Q And what was what over?
13 A Cumulative things. A couple of things. I had made a
14 last minute bet for 25 cash. We went to cash the chips out,
15 she counted how much we had, I made one more bet. No, no, no.
16 I lost 25. She wanted to go eat. She was ready to eat. But
17 once I got start the to drinking, I wanted to drink. You know,
18 you're -- you started hours before me. Let me -- so, you know,
19 she wanted to eat. She didn't want to have to go home and
20 cook.
21 Q Okay. So at some point do you get out of the car and
22 go up to your apartment?
23 A Yes, I do.
24 Q Do you remember going up the stairs to your
25 apartment?

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ROUGH DRAFT TRANSCRIPT

1 here, we're home.
2 Q Okay. What were you doing?
3 A I was laying back in the seat sleeping.
4 Q Had she been the driver?
5 A Yes.
6 Q Okay. And were you reclining in the passenger seat?
7 A In the front passenger seat, yes.
8 Q Were you -- so she wants you to wake up and you're
9 reclining, and then what happens?
10 A I don't think she cared whether I got up or not. She
11 was just --
12 MR. SMITH: Objection, Judge. Calls for speculation.
13 THE COURT: Sustained.
14 BY MS. PALM::
15 Q Okay. What happened? Not what she's thinking, what
16 happened?
17 A She got up and went up to the apartment.
18 Q Okay. Did you stay down stairs?
19 A Yes.
20 Q Inside the car?
21 A Yes.
22 Q Were you still reclining?
23 A Yes.
24 Q Okay. Did you know what time it was?
25 A I had no idea. I had no idea.

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ROUGH DRAFT TRANSCRIPT

1 A Yes, somewhat.
2 Q What do you remember about it?
3 A Staggering up. Bounced off the well. That's when
4 Jimmy came out, the next door neighbor, heard me.
5 Q Okay. Would that be Jimmy Hatchcos?
6 A Yes, 35. Came out and he looked at me. I was
7 standing out there finishing the cigarette, looked --
8 Q Okay. Did Jimmy stay outside or did he go back in?
9 A It was -- he just -- I heard the door open, and I
10 just -- we just looked at each other, and he seen me. He
11 basically just went back in, and I went into my place, opened
12 up the door.
13 Q Okay. When you got upstairs, had the door been
14 closed or was it open?
15 A It was closed at that time.
16 Q Okay. So you enter into the apartment?
17 A Yeah, I had to pee bad.
18 Q Okay. When you get in there, were the lights on in
19 the living room?
20 A There -- there was the one light by the couch.
21 Q Is that a table lamp?
22 A Not where the roses were. The light on the other end
23 of the couch.
24 Q Okay.
25 A The three pronged. The middle light was on.

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ROUGH DRAFT TRANSCRIPT

000556

1 Q Okay.
2 A And we have little night lights in, and there was a
3 light that I could see coming from the bedroom. The bathroom
4 light was on.
5 Q What did you do next in?
6 A I walked into the spare bathroom which I utilize a
7 lot, and used the bathroom. Came out, got a cigarette, went
8 outside, opened the door wide open, which I normally always
9 did. Everyone's always seen me. I don't smoke in the
10 apartment. I went out and smoked some cigarettes.
11 Q Okay. Did you know what Victoria was doing when you
12 came in or went back out?
13 A She was in the bathroom changing clothes, thumping
14 around. I heard some noise. There was no conversation. She
15 was in there thumping around. I heard thumping, and I didn't
16 really -- she was in the bathroom. I wasn't going to go in
17 there -- okay.
18 Q So do you know how long you were outside on the
19 terrace smoking cigarettes?
20 A I have no idea. I was out there until I came back
21 in.
22 Q Okay. Do you know how many cigarettes you smoked?
23 A Two or three. I had got some off the counter.
24 Q Okay. Were you still drinking at that point?
25 A I don't remember. I don't remember.

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ROUGH DRAFT TRANSCRIPT

1 Q So was some light coming out of the bedroom?
2 A Well, yeah, absolutely.
3 Q And so you've taken your coat off. What are you
4 going to do?
5 A I'm going to walk toward the closet and hang it up.
6 Q Okay. And did something happen?
7 A Victoria came out of the bathroom, and she had a
8 knife in her hand.
9 Q Okay. How was she holding the knife?
10 A In her right hand coming at me.
11 Q And how did you learn that she was coming at you with
12 a knife?
13 A I had my back to her. I'm walking to the closet.
14 She comes out behind the bathroom, heard me walking, and I turn
15 around and see it.
16 Q Okay. And were you startled?
17 A Startled was beyond -- I was surprised. I had -- it
18 was like coming at me.
19 Q Okay. And how did you respond?
20 A I swung my jacket at her. Told her to get back. I
21 asked her -- so many -- it was so fast, folks. It was --
22 Q Okay. Try and describe to the jury what happened
23 that -- from the point you throw your jacket in steps. What
24 happened next?
25 A I turned around, she came out. The light -- when she

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ROUGH DRAFT TRANSCRIPT

1 Q Do you remember going back into the apartment?
2 A Yes. I had a lot to drink, and I was sweating, and I
3 was hot. I was -- and I had my -- I had just got my brand new
4 union jacket, the big winter jacket, and I was hot from all the
5 alcohol. And it was a nice night out. I took my jacket off,
6 and I went into the bedroom to hang up my jacket.
7 Q Okay. When you went into the bedroom, were the
8 lights on in the bedroom?
9 A No.
10 Q Okay. What kind of lighting is in that bedroom?
11 A There's -- when you walk in, there's a switch that
12 controls -- and there's the bed. On the other side of the bed,
13 there's a little table and one little lamp. There was also a
14 radio there. When you walk around the bed, there's one of
15 those little night lights. I always kept it plugged in.
16 Minimal light, just so you can see where you're walking.
17 There's no overhead light at all. The bathroom,
18 though, has four pretty big lights up above the vanity on the
19 top. And when you turn that light on and open the door, the
20 light really, it shines in.
21 Q Okay. So when you walked in the bedroom, none of the
22 bedroom lights themselves were on other than the night light?
23 A The little night light, correct.
24 Q Okay. Was the bathroom door open or closed?
25 A Partially.

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ROUGH DRAFT TRANSCRIPT

1 came out of the bathroom, the door opened up extremely and the
2 really light comes in, and I turned and looked and seen her
3 coming at me with the knife. And I'm like -- I start backing
4 up, and I back into the door. I'm plastered. I'm swinging
5 what are you doing now?
6 I knew she was mad about not -- she was mad about a
7 lot of things. I --
8 Q Okay.
9 A -- swing my jacket at her, tell her to get back with
10 the knife. He swing my jacket and I just throw it and it hits
11 the blinds. She's coming at me with the knife, and I grab the
12 knife. And she yanks the knife. I didn't have a good enough
13 hold on it, and she yanks it out of my hand. It cuts me.
14 She's coming at me some more, and I grab her wrist,
15 and she's got the knife in her hand. I can't get by her
16 because she's got me backed into the room. There's only the
17 walkway. She's in that walkway coming out of the bathroom door
18 backing me up. I start pushing her back. I mean, I had ahold
19 of her, and I'm trying to get her back.
20 Q Okay, Brian, how long does the struggle go on? Do
21 you have both of her wrists at that point?
22 A No, I don't think -- I know I had her left.
23 Q And --
24 A At one point I think I had her right hand, too, and I
25 was pushing her back.

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ROUGH DRAFT TRANSCRIPT

000557

1 Q Okay. Did you have her hand that was holding the
2 knife?
3 A Yes.
4 Q Okay.
5 A My left hand was around. She had on her hand holding
6 her because when I went to grab the blade, she yanked -- pulled
7 it out, and it -- I didn't grab it hard enough and I was --
8 Q Okay. I'm not understanding something.
9 MS. PALM: May I approach --
10 THE COURT: Yes.
11 MS. PALM: -- your Honor?
12 BY MS. PALM::
13 Q Okay, if you could just show me. She has the knife
14 in her right hand or her left hand?
15 MR. SMITH: Can I approach, Judge, so I can see?
16 THE WITNESS: Yes.
17 THE COURT: Yes.
18 BY MS. PALM::
19 Q She has the right in her right or her left?
20 A She has it in her right hand.
21 Q Okay. And how do you grab her hands?
22 A I grab her hand like this.
23 Q Okay. And you're holding that hand?
24 A I'm holding her hand.
25 Q During -- and this hand --

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ROUGH DRAFT TRANSCRIPT

1 A I --
2 Q Do you fall on top of her?
3 A I fall on top of her, the weight.
4 Q Okay. And what happened next? And not to speculate.
5 I want you to tell me what you remember happened --
6 A It happened --
7 Q -- next.
8 A -- so fast. It was -- I fell down on her. When I
9 completely down on her, I'm trying to push the knife away. Her
10 head hits the back of the head board. My head hits the front
11 of her head. I don't know what -- I didn't even know she was
12 punctured. I didn't know --
13 Q I'm asking you what you did know, all right. So at
14 some point does something change with Victoria?
15 A She relaxed.
16 Q After this fall?
17 A She relaxes.
18 Q Relaxed?
19 A She relaxes.
20 Q And how do you respond to that?
21 A Not sure. Shocked. I don't know. I'm like --
22 Q Do you know that she's bleeding at that point?
23 A I did not even know.
24 Q Okay. Do you get back up?
25 A Yes.

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ROUGH DRAFT TRANSCRIPT

1 A This hand I'm shaking.
2 Q Okay.
3 A And at some point I think I do grab her and I'm
4 pushing back, you crazy -- what --
5 Q Okay.
6 A Pushing her back the whole -- trying to get her back.
7 We go down onto the bed.
8 Q Okay. When you go down onto the bed, is she still
9 holding the knife in her right hand?
10 A Yes.
11 Q And did you still have a hold of her hand?
12 A I had ahold of her left hand. I know that.
13 Q The knife hand or the other hand?
14 A The knife -- the hand with the knife in it, I had it.
15 Q Okay, so you're saying with your left hand, you had
16 ahold of the --
17 A My left hand --
18 Q -- right hand?
19 A Yes.
20 Q Okay.
21 A The right hand.
22 Q So when you go onto the bed, does she fall on her
23 back or how does she fall?
24 A She goes on her back.
25 Q Okay.

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ROUGH DRAFT TRANSCRIPT

1 Q When do you realize Victoria is bleeding?
2 A When she doesn't respond to me. She's like not
3 looking at me. I mean --
4 Q Does some time go by or do you notice that there's
5 blood on the bed around Victoria?
6 A I'm sitting on the edge of the bed and it's dark, and
7 I feel something starts getting wet, and I don't know what it
8 is. And I started realizing it's blood.
9 Q And what is your mental state regarding -- as far as
10 the intoxication goes at this time?
11 A I was frickin' drunk.
12 Q Okay. You realized there's something wet, and are
13 you trying to make sense of what it is? Are you trying to
14 figure out what it is?
15 A I'm trying to figure out what happened.
16 Q Okay. Do you look for the knife?
17 A I start -- I don't know.
18 Q What do you remember doing?
19 A I remember pulling her down, and I'm seeing the
20 blood. The blood was -- I could start seeing a brown spot on
21 the bed.
22 Q Did you move her to a different --
23 A I pull her down some, and I lift the pillowcase cover
24 off and I'm trying to push it against, and all I know I
25 remember is I picked her because (indiscernible) from --

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ROUGH DRAFT TRANSCRIPT

000558

1 Q Let's do this a little bit at a time, okay. Do you
2 remember Victoria's pants coming off?
3 A Yeah.
4 Q And do you remember thinking about that?
5 A I just thinking I got to -- what am I going to do? I
6 picked her up. I got her. I fell on the floor. Dropped her
7 on the floor. There was a --
8 Q Okay. At what point did her pants come off?
9 A At that time. There was blood -- there was -- it was
10 getting so red, and I didn't know if she had any other cuts or
11 anything.
12 Q Okay. So you're looking for cuts on her body?
13 A Yes.
14 Q Okay. And at that time were her pants bloody?
15 A They were saturated.
16 Q Okay. So at what point, if you did, find a stab
17 wound?
18 A I don't know. It was so fast. It was automatic
19 responses.
20 Q Okay.
21 A I needed something else. I checked and I -- there
22 was a rag in the bathroom. There was a scarf. I go over and I
23 grab it, and I roll it, and I'm trying to -- and I don't know
24 if I got to give her CPR, and I'm laying beside her saying V.
25 I don't -- it was automatic responses. I would in the leave my

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ROUGH DRAFT TRANSCRIPT

1 yourself because you got a little ahead of me. Are you ready?
2 A I'm sorry.
3 Q Okay. Brian, do you remember your neighbors coming
4 in? Do you remember the first time Cookie (phonetic) said he
5 came in?
6 A Yes, I -- yeah. Cookie said he heard a -- what's
7 going up here, and I'm saying Cookie came in here. Help me.
8 Help me with her. Call. I think she's dying. I think she's
9 that. I don't know what I said. Help me. Call some -- call.
10 And all I remember is he ran in, and he -- he lost
11 it. He run around. What -- he just took off. Call. And I'm
12 trying to hold her. I'm over her. I'm saying somebody help
13 me. Somebody --
14 Q Were you --
15 A -- come and help me.
16 Q Were you still talking to Victoria --
17 A Yes.
18 Q -- at that time?
19 A I wasn't talking then. I was concentrating. I was
20 talking to V.
21 Q Do you remember Cookie coming back in with Tom
22 Armbruster?
23 A I -- yeah. I thought wow, someone's -- someone heard
24 that I -- I didn't --
25 Q Okay.

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ROUGH DRAFT TRANSCRIPT

1 partner. I --
2 Q Okay. You're trying to figure out what happened.
3 You're trying to stop the bleeding you know about; is that
4 true?
5 A Yes.
6 Q Okay. And at that point do you know whether she's
7 alive or dead?
8 A I don't know. I'm not sure. I was trying to listen.
9 I kept thinking she's breathing. I'm -- you're alive, you're
10 dead. I'm -- it was so fast, folks. You don't -- you could
11 see her ask me for hours what next, what next, what -- in a
12 real time situation this happened so fast. I was panicked.
13 I'm so frickin' drunk.
14 Q Okay.
15 A You can't sit here and say I did this and then I put
16 this right here and I remember exactly I did that --
17 Q Okay, Brian --
18 A -- and this.
19 MR. SMITH: Objection, Judge.
20 BY MS. PALM::
21 Q -- let me stop you.
22 MR. SMITH: This is completely non-responsive.
23 THE COURT: Okay. Sustained.
24 BY MS. PALM::
25 Q I'm just going to give you a second to collect

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ROUGH DRAFT TRANSCRIPT

1 A -- know who was -- who --
2 Q Let me ask you this. You heard the testimony that
3 you got up and took kind of a stumbling swing at Todd. Do you
4 remember doing that?
5 A I -- I don't know. I may have. I don't know. I --
6 I think I was agitated because all it was like everyone want to
7 run up and see the dead -- like, why don't you fucking people
8 go call someone instead --
9 Q Okay.
10 A -- of everyone wanting to come up and think they got
11 her. Hey, yeah.
12 Q Brian. Can you please take a second and just take a
13 couple deep breath, because you have to answer my questions
14 directly, okay. Yes or no, do you remember not wanting Cookie
15 and Todd in the room?
16 A Yes.
17 Q Okay. Do you remember what you were thinking about
18 that?
19 A Where are the paramedics. Why are you here? I
20 didn't have much time to concentrate on that. I was trying to
21 deal with her.
22 Q Okay.
23 A I --
24 Q All right, stop, please. I don't know if you were
25 watching when the photographs came in, but we've shown you some

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ROUGH DRAFT TRANSCRIPT

000559

1 of the photographs in this case, and Victoria had some bruises.
 2 Do you agree with that?
 3 A Yes, I -- they're there, yes.
 4 Q Do you know how Victoria got those bruises?
 5 A Which bruises?
 6 Q Do you remember how she got any of the bruises that
 7 they were talking about?
 8 A The pink ones or fresh -- I didn't see them all.
 9 Q Okay.
 10 A I started to look and then I couldn't. I -- I'm sure
 11 I had her -- I'm sure I picked her up. I mean, dead weight is
 12 dead weight.
 13 Q Okay.
 14 A And I'm yanking her up. I just picked -- I --
 15 Q Brian, did you hit Victoria that evening?
 16 A No, I did not.
 17 Q Did you slam her into anything?
 18 A No. The only thing was we fell back on the bed and
 19 her head hit the head board. My head went on her.
 20 Q Okay. Do you know how your back got scratched?
 21 A I think that was from the police.
 22 Q Okay. Do you know how the bruise got there on the
 23 your shoulder blade?
 24 A I -- no.
 25 Q Do you know how the bruises got on your bicep?

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ROUGH DRAFT TRANSCRIPT

1 A I think the police. I don't --
 2 Q Are you not sure?
 3 A I'm not sure.
 4 Q Okay.
 5 A I don't know.
 6 Q If you're not sure, don't speculate.
 7 A Okay, I don't --
 8 Q I'm not sure.
 9 A If I don't know, I don't know.
 10 Q Okay. The crime scene photographs showed that the
 11 closet doors were off track. Do you know how the closet door
 12 got off track? The one closet door was off track.
 13 A She backed me into it.
 14 Q Okay.
 15 A I do -- yeah, that's exactly the area I was at.
 16 Q Do you know why there's blood on the light switch?
 17 A I don't know if subconsciously I went to turn that
 18 on, and I -- the light switch was to the radio. It didn't
 19 power the light. She would put the switch up, and her radio
 20 was programmed. She couldn't see close -- it was easier for
 21 Victoria to flip --
 22 Q Okay.
 23 A I wasn't thinking of that. I'm running around. I'm
 24 like --
 25 Q Okay. My question is you think that the blood might

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ROUGH DRAFT TRANSCRIPT

1 have gotten on there because you might have been trying to turn
 2 on the light?
 3 A Needed light. Needed more light.
 4 Q Is the office that Todd Armbruster and Robin Colaxe
 5 (phonetic) lived in, was that across the courtyard
 6 from your apartment?
 7 A Yes.
 8 Q How long would it have taken a person in your
 9 experience to walk from your apartment to that office?
 10 A 15 seconds.
 11 Q Want to talk about Ms. Morris' jail visit with you in
 12 December of 2008 after you were arrested. Do you remember her
 13 visiting you?
 14 A Cheryl, yes.
 15 Q You heard the story that she testified to in court
 16 regarding what she says you said to her. Do you remember that?
 17 About what happened to Victoria.
 18 A What she said happened?
 19 Q What she said you -- what Cheryl Morris testified you
 20 told her at the jail visit. Do you remember that?
 21 A Yes.
 22 Q Okay. When Cheryl Morris visited you in jail, what
 23 did she want?
 24 A Money. My accounts.
 25 Q And did you ever talk to Cheryl Morris about what

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ROUGH DRAFT TRANSCRIPT

1 happened that evening?
 2 A I might have said something. She -- yeah -- yes.
 3 Q Okay. Did you say what she said you said?
 4 A No, I did not.
 5 Q Okay. What do you think you told her?
 6 A That she came at me with a knife, and she told me the
 7 neighbors said she was stabbed --
 8 MR. SMITH: Objection.
 9 BY MS. PALM::
 10 Q Okay.
 11 A -- 16 times.
 12 MR. SMITH: Objection, Judge.
 13 THE COURT: Sustained.
 14 BY MS. PALM::
 15 Q Brian, prior to the police coming there, coming to
 16 the apartment, did you ever attempt to leave the scene?
 17 A I wouldn't leave Victoria. No one would come in. I
 18 was -- I wasn't going to leave her. I'm --
 19 Q So you had no plan to leave?
 20 A No way.
 21 Q Do you recall the officers and the fact that you
 22 would not respond to their commands to come out of the
 23 apartment -- or to come out of the bedroom? Just do you recall
 24 it?
 25 A I wasn't sure who was who or what after --

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ROUGH DRAFT TRANSCRIPT

1 Q I'm not asking you what you were thinking. I'm just
2 asking do you recall what they testified to?
3 A Some.
4 Q Okay. Hearing their testimony in court, how do you
5 feel about your behavior --
6 MR. SMITH: Objection.
7 BY MS. PALM::
8 Q -- and your thoughts to the officers?
9 MR. SMITH: Objection, Judge.
10 THE COURT: Sustained.
11 MR. SMITH: To relevance.
12 BY MS. PALM::
13 Q Are you angry with the officers?
14 MR. SMITH: Objection, Judge. Relevance. What does
15 it matter if he's angry at the officers today?
16 THE COURT: Sustained. Sustained.
17 BY MS. PALM::
18 Q Do you recall watching the videotape of your
19 statement to detectives?
20 A Yes.
21 Q Did you remember the details of what was shown on the
22 video before you watched it?
23 A No.
24 Q Why didn't you give the officers a clear account of
25 what happened?

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ROUGH DRAFT TRANSCRIPT

1 MS. PALM: Thank you.
2 BY MS. PALM::
3 Q Okay, Brian, please try and listen really carefully
4 to my questions before you respond, and don't add anything to
5 them, okay. Do you remember being evaluated by medical
6 personnel at the jail following your interview and arrest?
7 A I remember talking to some people. I don't know who
8 was who or what, really.
9 Q Okay. If they stated that you appeared to be
10 disheveled, would you agree with that?
11 A Define, please. I'm sorry.
12 Q Disheveled, messed up.
13 A Yes.
14 Q If they stated that your behavior was incoherent,
15 would you dispute that? Just yes or no?
16 A Yes. Yes.
17 Q You would dispute that or you would agree with it?
18 A I would agree with it. I lost control of the
19 situation. I couldn't control --
20 Q Okay, just limit yourself to responding to the direct
21 question, okay. If they said that your affect was tearful,
22 would you agree with that?
23 A Yes.
24 Q If they said that you appeared to be in shock, would
25 you agree with that? I'm sorry?

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ROUGH DRAFT TRANSCRIPT

1 A I couldn't process the data. I couldn't -- I wasn't
2 really sure what had happened.
3 Q What was your mental state as far as intoxication at
4 the time of that interview?
5 A I was too intoxicated to (indiscernible).
6 Q Do you remember falling asleep in the police vehicle
7 prior to that?
8 A No.
9 Q Do you remember trying to tell the officers what
10 happened?
11 A Some of it. I remember some of the things.
12 Q Do you recall making a statement referring to ten
13 years?
14 A No.
15 Q Do you recall being examined by medical personnel at
16 the jail?
17 A No.
18 Q Do you remember being placed in the special housing
19 at the jail?
20 A Yes.
21 Q What kind of housing was that?
22 MR. SMITH: Objection, Judge. Relevance.
23 THE COURT: Counsel approach, please.
24 (Off-record bench conference).
25 THE COURT: Go ahead, Ms. Palm.

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 MS. PALM: Your Honor, I would move to admit
3 Defendant's Proposed Exhibit LLLL, and that is records from the
4 (indiscernible).
5 MR. SMITH: Subject to the objection that we placed
6 on the record, Judge, the State has no objection.
7 THE COURT: And the redaction.
8 MR. SMITH: Oh, with the exception of that.
9 MS. PALM: Subject to the redaction.
10 MR. SMITH: (Indiscernible), right?
11 MR. PIKE: There's HIPAA requirements that require
12 that some items not be --
13 THE COURT: Right.
14 MR. PIKE: -- provided, and so we'd ask that we
15 follow the federal ruling on that. Thank you.
16 THE COURT: It will be admitted with the redaction as
17 discussed.
18 BY MS. PALM::
19 Q Brian, did you intentionally kill Victoria?
20 A No, I did not.
21 Q Do you take any responsibility for her death?
22 A I took all the responsibility because I shouldn't of
23 drank, and I couldn't control -- and I couldn't control myself.
24 I lost control of the situation. My (indiscernible) ruined my
25 life. I'm sick. She's sick.

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ROUGH DRAFT TRANSCRIPT

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1 Q Okay. Brian --
2 A I'm helpless.
3 Q Brian, I'm going to pass you as a witness. That
4 means that the district attorney now gets to cross-examine you,
5 okay.
6 CROSS-EXAMINATION
7 BY MR. SMITH::
8 Q Mr. O'Keefe, have you ever heard of the term called
9 selective recall?
10 A No.
11 Q Okay. It seems that here you're able to remember
12 certain things that are helpful to you, but you can't remember
13 other things; is that correct?
14 MS. PALM: Objection, your Honor. That's
15 argumentative.
16 MR. SMITH: I'll pose another question.
17 THE COURT: Sustained. Sustained.
18 MR. SMITH: I'll pose a question.
19 BY MR. SMITH::
20 Q You're able to remember that on the night and time in
21 question you smoked three cigarettes on the porch; is that
22 correct?
23 A I really don't know how many, sir. I thought I said
24 two or three. I don't know.
25 Q Okay. But you remembered where you got the pack of

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ROUGH DRAFT TRANSCRIPT

1 evidence from your own mouth that you were plastered that
2 night, right?
3 A Yeah.
4 Q Yes?
5 A Yes. Yes.
6 Q Okay. And so you couldn't remember what happened
7 when you were plastered, but now today, some six months later,
8 you can remember it pretty much to a t?
9 A I don't recall it that way, Mr. Smith. Not at all.
10 Q Okay. Let's talk about this alleged altercation that
11 took place between you and Mrs. Witmarsh on her birthday. Do
12 you remember talking about that?
13 A Yes, sir.
14 Q When she allegedly tried to stab you with the knife.
15 A Yes.
16 Q Okay. Why don't you tell me about that again?
17 Actually, let me ask you some specific questions. Now, you
18 testified that November 2nd, 2008, three days before the night
19 in question, that was her birthday.
20 A Yes.
21 Q And you guys -- actually, you said she had two
22 glasses of wine, right?
23 A No.
24 Q You didn't just testify on direct examination that
25 she had two glasses of wine?

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ROUGH DRAFT TRANSCRIPT

1 cigarettes from, correct?
2 A I ran out, sir, yes.
3 Q Okay. But you can't remember how the knife got
4 inside Ms. Witmarsh?
5 A No, sir.
6 Q Okay. Would you agree that those seconds were
7 probably the most important seconds of your life?
8 A Absolutely.
9 Q At the time that Mrs. Witmarsh's life ended?
10 A No denying that, absolutely.
11 Q And you'd agree that under most circumstances a
12 person could remember crucial seconds like that, correct?
13 MS. PALM: Objection, your Honor.
14 THE COURT: Sustained.
15 BY MR. SMITH::
16 Q On direct examination you testified that back when
17 the police detective, Detective Wildemann, asked you what
18 happened, you said that the reason why you couldn't provide any
19 information was because you weren't really sure what happened;
20 is that correct, at that time?
21 A Yes.
22 Q Okay.
23 A That's what I said, yes. I didn't know. Didn't
24 quite exactly know. I --
25 Q Okay. And we've heard a tremendous amount of

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ROUGH DRAFT TRANSCRIPT

1 A She was drinking wine that night, Mr. Smith.
2 Q Okay.
3 A But I don't know remember saying exactly two.
4 Q Okay. How much wine had she had?
5 A That night?
6 Q Yes.
7 A She had a bottle, but how much of it she drank, I
8 don't know, Mr. Smith.
9 Q Okay. So she drank some wine.
10 A Yes.
11 Q And then at some point she gets violent with you.
12 A Yes.
13 Q And why don't you tell us again what she does with
14 the knife.
15 A She comes at me, and she's saying get up.
16 Q Okay. And where are you at?
17 A I'm laying on the couch.
18 Q You awake or asleep?
19 A I was asleep at first, Mr. Smith.
20 Q Okay. How long had you guys been they house before
21 this happened?
22 A We were there practically all day.
23 Q Okay. Where did she get the wine from?
24 A Von's. We always went to Von's.
25 Q Okay. You guys got -- had she gotten wine before

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ROUGH DRAFT TRANSCRIPT

1 like say November 1st, 2008?
2 A Yes. She's always --
3 Q Okay. I understand. But she didn't try and stab you
4 that day, right?
5 A Which day, Mr. Smith?
6 Q November 1st, 2008.
7 A Not November 1st, no.
8 Q Okay. But on November 2nd, 2008, she tried to stab
9 you because she was angry about what?
10 A She had mood swings. She -- I never remember saying
11 exactly what. That was part of the problem. I wasn't quite
12 sure.
13 Q Okay.
14 A Her mood swings, her medicine, the mixture, I don't
15 know. I would think that I do remember she was like get up off
16 the couch, you know, the TV.
17 Q Okay. And you suspected that the wine contributed to
18 that, right?
19 A I know it did.
20 Q Okay. So now let's fast forward to November 5th,
21 2008. We've heard your statement from the detective where
22 Victoria said I wanted to go get some wine, and you said sure,
23 honey, go right ahead and go get it. Do you remember that?
24 A I absolutely did, yes.
25 Q Okay. So despite the fact that according to you on

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ROUGH DRAFT TRANSCRIPT

1 Q Okay.
2 A I'm like what are you doing?
3 Q Did the blade touch you?
4 A She might have poked me, yeah.
5 Q Okay.
6 A But, I mean, she didn't stab me and she didn't -- she
7 wasn't trying to actually kill me, but she was not herself.
8 Q She wasn't trying to kill you; is that what you just
9 said?
10 A She wasn't trying to put it in my body, but she was
11 coming at me with the knife tapping. It's like hey. That's
12 not normal behavior, Mr. Smith.
13 Q Okay.
14 MR. SMITH: Judge, objection to -- I move to strike
15 the part after it's normal behavior.
16 THE COURT: Sustained. The jury's expect to
17 disregard the last statement of the defendant.
18 BY MR. SMITH::
19 Q How many times did she jab the knife at you?
20 A I don't know, Mr. Smith, exactly.
21 Q Okay. So --
22 A I was just waking up, sir.
23 Q Okay. So you talked her out of it?
24 A Yeah, I started talking to her, yes.
25 Q How long did it take you to diffuse the situation?

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ROUGH DRAFT TRANSCRIPT

1 November 2nd, 2008, her birthday while she's drinking wine she
2 tries to stab you and/or kill you, couple days later you
3 nevertheless tell her to go get some more wine?
4 A Yeah.
5 Q Okay. You also said that on November 2nd, 2008,
6 Victoria was agitated because her unemployment insurance was
7 running out. Do you recall that?
8 A Yes.
9 Q Okay. Did you think that simply because her
10 unemployment insurance was running out that increased her
11 agitation on that day?
12 A Yes.
13 Q Okay. Now, when she tried to stab you with the knife
14 on November 2nd, how did you diffuse the situation again?
15 A By talking to her.
16 Q Okay. What --
17 A She was pointing the knife, Mr. Smith --
18 Q Okay.
19 A Give me -- at me saying hey, get up.
20 Q Okay.
21 A But it's a little bit more, sir, than just a
22 nonchalant --
23 Q Well, show us.
24 A It's she's get up, kind of like I was on -- get up,
25 hey.

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ROUGH DRAFT TRANSCRIPT

1 A I would say probable three or four minutes.
2 Q Okay. And then what happened with the knife?
3 A She goes back in the kitchen. She was cooking.
4 Q Okay. So for some reason you're asleep on the couch
5 --
6 A Yes.
7 Q -- and, in fact, I think you said that she was in the
8 kitchen cooking at first before any of this happened, correct?
9 A Yes.
10 Q And then she just decides that she's going to come
11 and grab a knife and then poke it at you to wake you up.
12 A Yes.
13 Q But you didn't think she was going to kill you with
14 it?
15 A I wasn't sure what she was going to do, Mr. Smith.
16 Q Okay. And you talk her out of it for three or four
17 minutes, right?
18 A Yes.
19 Q And then she walks right back in the kitchen and
20 keeps on cooking?
21 A Basically.
22 Q Okay. But you didn't call the police or anything,
23 though, right?
24 A No.
25 Q To report that she had just came at you with a knife?

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ROUGH DRAFT TRANSCRIPT

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1 A No, I did not.
2 Q Okay. Now we hear about November 5th, 2008 where you
3 just said that you fell off the wagon. Is that what you just
4 said?
5 A Yes, I did, sir.
6 Q Okay. And so let's talk about after you guys leave
7 the Paris, because we know what happened at the Paris, right?
8 A Yes, sir.
9 Q Victoria drank, you drank.
10 A Yes, sir.
11 Q Okay. But you don't know -- actually strike that.
12 Who drove you guys home?
13 A She did.
14 Q Okay. What condition were you in upon leaving the
15 Paris?
16 A Pretty plastered.
17 Q Okay. So you let her drive.
18 A Um-h'm. She was mad about that.
19 Q Okay. You guys -- you make it home okay?
20 A Yes.
21 Q Victoria goes upstairs.
22 A Yeah.
23 Q All right. At this point Victoria's pretty drunk,
24 right?
25 A Yeah.

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ROUGH DRAFT TRANSCRIPT

1 stepped out of his apartment.
2 A Yes, sir.
3 Q But at some point Jimmy pokes his head back into his
4 apartment, and he closes his door, right?
5 A Yeah, no words were exchanged.
6 Q Okay.
7 A He just shut the door, and --
8 Q And he saw that look on your face that we heard
9 about.
10 A That's what he said. I --
11 Q Okay. And then you open your door and then go
12 inside?
13 A Yes.
14 Q Okay. So would you disagree, then, with Jimmy's
15 testimony that when he walked outside or when he poked his
16 outside that your door was open?
17 A The door was shut at that time, I do believe.
18 Q Okay.
19 A The door was shut.
20 Q Okay. So according to you, the door's shut. You go
21 inside?
22 A Yes, I open the door and go in.
23 Q And then Victoria's in the bathroom?
24 A Victoria's in the master bedroom in the bathroom.
25 Q And what's she doing?

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. So she goes upstairs and you stay in the car
2 for how long?
3 A Oh, I don't even know, Mr. Smith.
4 Q You don't remember that detail?
5 A All I remember is going up. When I went up it was
6 when Jimmy came out of the -- his apartment, sir.
7 Q Okay.
8 A So --
9 Q And we've heard Jimmy testify that he came out of his
10 apartment because he heard some kind of commotion, like a
11 noise.
12 A Yes, on the rail.
13 Q Okay. And that was you, what, falling over the rail?
14 A I kicked the rail. Was on the rail right outside the
15 doors.
16 Q Okay. And then Jimmy goes back in his apartment.
17 A No, Jimmy was in his apartment, sir. I was hanging
18 over the rail.
19 Q Okay. Well, how did Jimmy see you, then?
20 A Jimmy said he heard me outside, and he said he popped
21 open his door and looked and seen me out there.
22 Q Okay, so --
23 A And I kind of looked at him and --
24 Q Okay, so I think you're a little confused. I didn't
25 mean that Jimmy -- I didn't mean to imply that Jimmy actually

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ROUGH DRAFT TRANSCRIPT

1 A I have no idea. She's a little bit of upset,
2 thumping around, stomping around. What she was doing, changing
3 clothes, you know, I don't know.
4 Q How long is she thumping around?
5 A I had just come up, Mr. Smith. I was asleep in the
6 car. I got up. She was in there from the time she went up.
7 Q How long were you asleep in the car?
8 A I don't know. It had to be an hour, hour and a half.
9 Q Okay.
10 A I have no idea. You can't -- I don't know. I told
11 you I don't know at the time. Whatever time Jimmy, sir, came
12 out was the first time I went up to the apartment.
13 Q So Victoria now is in the house thumping around by
14 herself?
15 A I don't know what she's doing. I wasn't there, sir.
16 Q Okay. But at the time you get up there, according to
17 you, she's now in the apartment and she's thumping around?
18 A She's thumping around. She heard me come in, I'm
19 sure. She's in the bathroom thumping around, bedroom, her
20 bathroom. I go to my bathroom.
21 Q Okay.
22 A I urinate, sir.
23 Q Okay.
24 A I go in the kitchen to get some cigarettes. As
25 actuality, the last cigarette that I had was the one that I

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ROUGH DRAFT TRANSCRIPT

1 smoked going up.
2 Q Okay. Why didn't you go see what was wrong with her
3 if you heard her thumping around?
4 A Because she was in the bathroom.
5 Q Again, why didn't you go and see why she was thumping
6 around?
7 MS. PALM: Asked and answered, your Honor.
8 MR. SMITH: Okay, fair enough. I'll withdraw the
9 question am.
10 THE COURT: Sustained.
11 BY MR. SMITH::
12 Q Because she was in the bathroom; that's your answer?
13 A Yes.
14 Q Okay. So then you go back outside to smoke some more
15 cigarettes?
16 A Yeah, I went outside. I took -- yeah, I went outside
17 and opened the door. The door -- that's what we would always
18 do.
19 Q Okay.
20 A Open the door. It's wide open the entire time.
21 Q Okay.
22 A There's no voices, no conversation, no -- the TV
23 wasn't even on, the radio wasn't even on.
24 Q I get you, sir. So when you come back inside, what
25 happens next?

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ROUGH DRAFT TRANSCRIPT

1 A Yes, sir.
2 Q Where is 5001 El Parque? What are the nearest cross
3 streets?
4 A Oakey and Decatur.
5 Q Decatur and Oakey.
6 A Yes.
7 Q So it's pretty late at this point, right?
8 A Yeah.
9 Q And you're going to go where at this point? Are you
10 getting ready to retire for the night?
11 A No.
12 Q What are you planning on doing now?
13 A Hang up my jacket and go outside. I have a -- an
14 ashtray out there. I don't smoke. I was going to go outside
15 on the patio.
16 Q Okay. So this -- would this have been the third time
17 you were planning on smoking or the third -- because remember,
18 you testified that when you first arrive you walked upstairs --
19 A And I got a cigarette.
20 Q You got a cigarette, right?
21 A And I'm out on the rail.
22 Q Right. And then at some point --
23 A Exactly --
24 Q -- Jimmy Hatchcos peeks his head out and sees you.
25 A Hears me on the rail, sees me, throw my cigarette,

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ROUGH DRAFT TRANSCRIPT

1 A I'm starting to get a little sweaty, hot, getting my
2 body moving again, the alcohol. I go into to hang up my jacket
3 in the master -- in the bedroom.
4 Q Okay. And --
5 A She's --
6 Q And you're sweating, you said?
7 A Yeah, yeah, I was warm. I had a lot of alcohol in
8 me, yes.
9 Q Okay. Is Victoria still thumping around?
10 A She's in the bathroom at that time.
11 Q She's still in the bathroom?
12 A She's still in the bathroom.
13 Q Then where do you walk once you come back in the
14 apartment?
15 A I go -- I come into the apartment, the door's still
16 wide open.
17 Q The door to the bathroom or the front door?
18 A The front door was wide open, Mr. Smith.
19 Q Okay.
20 A I walk in. It's wide open. I walk in to take my
21 jacket off. I walk into the master bath -- bedroom, sir.
22 Q Okay. So at this point it's about 10:00 o'clock at
23 night, right?
24 A No, at this time it's -- it's almost 11:00 o'clock.
25 Q It's later?

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ROUGH DRAFT TRANSCRIPT

1 yep, he goes in.
2 Q And then you go in and get some more cigarettes from
3 the pack?
4 A I go in -- Mr. Smith, I testified I go in to use the
5 bathroom.
6 Q Okay. When do you get those other cigarettes?
7 A When I came out of the bathroom, I went to the
8 kitchen. We have a drawer there filled with everything.
9 Q Okay. And then you come back out?
10 A Yeah.
11 Q Okay. And then you smoke some more cigarettes?
12 A Yes.
13 Q Yes? And then at this point you realize that you're
14 hot and sweaty?
15 A Yeah. The jacket bulky big (indiscernible).
16 Q Okay. So then you go inside, as you just testified
17 to, with the intention of hanging up your jacket?
18 A Right, I go in. The door was wide open.
19 Q Okay. You go in with the intention to hang up your
20 jacket..
21 A That is correct.
22 Q And then you come back out -- you're getting --
23 A No.
24 Q -- you're getting ready -- you want to come back
25 outside to smoke some more cigarettes?

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ROUGH DRAFT TRANSCRIPT

1 A No, that's not what I said.
2 Q Okay. What was your intention once you hung up your
3 jacket?
4 A I didn't get to hang up my jacket, Mr. Smith.
5 Q That's not my question, sir. When you walked in
6 there to hang up your jacket, you had a plan in your mind,
7 right?
8 A Probably get a drink, go out and smoke.
9 Q Okay.
10 A I don't know, Mr. Smith.
11 Q Okay, that was my question. You were planning on
12 hanging up your jacket to do what next. Regard of what -- we
13 know what actually happened. Regardless of that, what were you
14 intending on doing?
15 A Going back outside because I left my door wide open,
16 Mr. Smith.
17 Q Okay. But you weren't able to do that?
18 A No, sir.
19 Q Okay. So you're going to hang up your jacket and
20 Victoria is still in the bathroom?
21 A When I walk in to hang up my jacket, she hears me,
22 she darts out of the bathroom, sir.
23 Q Okay. So she's waiting for you?
24 A I guess if you want to call it that.
25 Q Okay. So she darts out of the bathroom, right?

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ROUGH DRAFT TRANSCRIPT

1 driver's license. She's five, four, a buck, right? A hundred
2 pounds?
3 A 110, yeah.
4 Q Okay. And you're what, five, ten?
5 A Five, nine, five, ten.
6 Q Back then -- we've seen pictures of you -- what were
7 you about a buck ninety?
8 A 180, 185, I don't know.
9 Q Okay. So you had about 80 pounds on this woman and
10 six inches, correct?
11 A Yes.
12 Q And at this point in time she has close to a.24
13 because that's what she had at the time of her death, correct?
14 A That's what it states.
15 Q Okay. So this little bitty thing that we've just
16 heard about that weighs five, four and a hundred pounds and
17 you, combat trained veteran who's won a bronze star, tell me
18 how this -- tell me how this transpires again. She comes at
19 you with the knife and you do what?
20 A I have my jacket. I swing my jacket at her.
21 Q And that didn't work?
22 A No, I -- no, it did not.
23 Q Okay. So what's your next attack?
24 A I didn't attack.
25 Q Okay, fair enough. What's the next thing you do?

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ROUGH DRAFT TRANSCRIPT

1 A With the knife in her hand.
2 Q Okay in the left hand?
3 A In her right hand, sir.
4 Q Now, on direct examination first you said that it was
5 in her right hand, but then later on you said it was in her
6 left hand?
7 A No, I said the --
8 MS. PALM: Objection. Misstates his testimony.
9 MR. SMITH: That does not misstate his testimony at
10 all.
11 THE COURT: Well, I think there may have been some
12 confusion. I'm not sure but I'm going to sustain the
13 objection.
14 BY MR. SMITH::
15 Q So it's your testimony that the knife is in her right
16 hand?
17 A Yes.
18 Q And how is she holding it? Like how you'd normally
19 would hold a knife like that?
20 A Yes, Mr. Smith.
21 Q Okay.
22 A That's absolutely correct.
23 Q But not like that?
24 A Not like this. Like this.
25 Q Okay. And she's -- I mean her -- we've seen her

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ROUGH DRAFT TRANSCRIPT

1 A I'm talking to her, swinging the jacket asking her
2 what -- what are you doing?
3 Q Okay. And what is she doing while you're talking to
4 her?
5 A She's coming at me with the knife. She's very angry.
6 Q But your door's wide open. Why not just run outside?
7 A Because she has me blocked in, Mr. Smith.
8 Q The five, four inch, 105 pound woman has you blocked
9 in?
10 MS. PALM: Argumentative, your Honor?
11 THE COURT: Sustained.
12 BY MR. SMITH::
13 Q Okay. She has you blocked in?
14 A Yes.
15 Q You can't get by her?
16 A No.
17 Q Why not?
18 A I'm pretty intoxicated. I was surprised.
19 Q Okay. So what do you do?
20 A I finally end up grabbed the knife, Mr. Smith.
21 Q Right. And you testified that she yanked it out of
22 your hand.
23 A I grabbed the knife, I didn't have a firm hold on it.
24 Q Right, and that's why she was able to yank it want?
25 A She yanked it out, and it cut me.

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. But it didn't cut you on your palms where you
2 would expect it would if the blade is facing --
3 MS. PALM: Objection, your Honor.
4 BY MR. SMITH::
5 Q -- down; is that correct?
6 THE COURT: Sustained. Sustained.
7 MR. SMITH: All right.
8 BY MR. SMITH::
9 Q Let me ask the question, did your palms get cut? Is
10 that a yes or no?
11 A No.
12 Q Okay. So when she yanks that blade, what do you do?
13 A I shake my hand. I'm looking at my hand.
14 Q Okay.
15 A Well, what do you -- natural response. Scared. I'm
16 like -- I'm pretty intoxicated, and it's in a dark room, Mr.
17 Smith.
18 Q Okay.
19 A I was -- element of surprise was very much there.
20 Q But again, you are trained combat veteran, correct?
21 A Yes.
22 Q Okay. She has the element of surprise, the blade is
23 being yanked out --
24 A Was.
25 Q -- and you still -- does she have you cornered?

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ROUGH DRAFT TRANSCRIPT

1 Q Okay.
2 A My hand was cut, sir. Instantly I don't know.
3 Again, it's not why didn't I do this, why didn't I do three,
4 why didn't I do four, a, b, c.
5 Q Okay.
6 A I thought, okay, get ahold of her hand, grab the
7 knife.
8 Q Okay, and that didn't work?
9 A Try to get -- to get ahold of her hand.
10 Q And that didn't work, right?
11 A I tried to grab her wrist several times. I don't --
12 Q Well, I thought you just said she yanked the knife,
13 and then you said ouch --
14 A Right -- and --
15 Q -- or actually --
16 A -- I'm shaking my right hand.
17 Q -- you shake your right hand.
18 A And she's --
19 Q And then --
20 A -- coming at me again, and I grab her wrist.
21 Q Okay, wait a minute.
22 A I grab her hand, her hand. The knife's still in her
23 hand.
24 Q Okay. I'm trying to figure out when you did this and
25 backed up because you just said -- let me finish my question,

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ROUGH DRAFT TRANSCRIPT

1 A She -- I was backing up -- I was backing away from
2 her backing up into the sliding doors, Mr. Smith.
3 Q Okay. Why not just kick her out of the way?
4 A Why not do a lot of things, Mr. Smith?
5 Q Well that --
6 MR. SMITH: Objection, Judge. Non-responsive.
7 THE COURT: Sir, he asked the question like your
8 attorney does. You answer the questions.
9 BY MR. SMITH::
10 Q Why didn't you just kick her out of the way?
11 A It didn't seem the appropriate action.
12 Q But at this point, according to you, you're afraid
13 now, right?
14 A Yes. When she yanked the knife away from me and it
15 cut me.
16 Q So your testimony is that the appropriate action is
17 to leave yourself defenseless and back up instead of taking an
18 offensive maneuver like kicking her out of the way?
19 MS. PALM: Objection, your Honor. Argumentative.
20 MR. SMITH: It's not argumentative. It's a question.
21 THE COURT: No, overruled. Overruled.
22 THE WITNESS: I'm trying to grab the knife. I want
23 to get control of the knife, but I could not. I failed the
24 first time, Mr. Smith.
25 BY MR. SMITH::

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1 sir.
2 A Okay, sir.
3 Q You just said that you tried to grab the knife. You
4 didn't get a good hold of it. She snatches the knife and then
5 you start backing up, and she's still coming at you. That's
6 what you just said initially.
7 A And there's not far to back up. A step may be.
8 Q Okay, so --
9 A You're against the back already. It's a small room.
10 Q Sir, I'm not trying to confuse you. I'm just trying
11 to make sure I understand --
12 A Oh, sure, sir.
13 Q -- the sequence of events.
14 A Okay.
15 Q Because you'd agree that's important here, correct?
16 A Absolutely.
17 Q Okay. So this didn't work. You back up, she's still
18 coming at you.
19 A Yes, thank you.
20 Q At this point in time, you do not try and kick her or
21 do anything to get her out of the way; is that correct?
22 A No.
23 Q Okay. So instead, you do this, correct?
24 A No, I didn't raise my hands.
25 Q Well, that's the motion you just did on the stand.

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ROUGH DRAFT TRANSCRIPT

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1 A I mean, I'm shaking my hand. I didn't -- I'm shaking
2 my hand backing up.
3 Q Okay.
4 A And --
5 Q So now --
6 A -- then when she comes at me again, basically I grab
7 for her hand that has the knife in it.
8 Q Okay. So now you're shaking your hand doing this and
9 you're not doing this?
10 A I'm not doing them simultaneously.
11 Q Okay.
12 A I mean --
13 Q But if have her hand and you're shaking this hand,
14 then how is she coming at you more repeatedly?
15 A She had already come at me repeatedly --
16 Q Okay.
17 A -- by the time I got ahold of her hand.
18 Q So you grabbed the knife hand at this point, right?
19 Let's fast forward to the point where you testify that you have
20 control of the weapon.
21 A I have her hand. Have her -- which she has the knife
22 in it.
23 Q Right.
24 A And I'm trying to push her back. I'm pushing her
25 back, let me get by.

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ROUGH DRAFT TRANSCRIPT

1 A Yes.
2 Q Okay.
3 A That --
4 Q Okay. So you got one hand on her knife wielding
5 hand, and your other hand is hurt. So what happens next?
6 A I'm pushing her back. Eventually I do. My right
7 hand does come up. I never released this hand with the knife
8 in it. I never release it. There's a very small where you
9 walk in -- you've seen in the diagram of the room. I'm trying
10 to push her back toward the doorway. I'm trying to get her on
11 the bed, but when I push, I go down with her. I'm trying to
12 just back her up and get her away and get out. I just want to
13 get away from the situation.
14 Q Okay. So when you push, and you end up on the bed
15 with her, then what happens?
16 A We go down on the back of the bed. Lost my -- went
17 down. We went down pretty hard. My head hits her head. Her
18 head hits the back of the head board. She goes limp. I'm --
19 it was so fast.
20 Q How did she land on the bed, Mr. O'Keefe?
21 A I'm pushing her back. Her back -- it's a small
22 walkway. The bed's up to here. When I'm pushing her back, the
23 back of her feet hit the side of the mattress --
24 Q Okay.
25 A -- which she tends to go over and I still have ahold

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. But you didn't just grab the knife and take it
2 out of that hand?
3 A No, because this hand was on her hand and this hand
4 was cut.
5 Q So because this hand was cut -- and let's look at
6 that cut. That's Defense quadruple J. That's the cut we're
7 talking about, right?
8 A Yes, there's --
9 Q Okay.
10 A There's one underneath here.
11 Q Okay.
12 A Underneath and this.
13 Q Okay. So those small cuts prevented you from
14 grabbing the knife a second time?
15 MS. PALM: Objection, your Honor. Nobody
16 characterized the length or --
17 THE COURT: Just say those cuts.
18 MR. SMITH: Okay.
19 BY MR. SMITH::
20 Q Those cuts prevented you from trying to grab the
21 knife a second time?
22 A Yes. I wasn't going to try to grab the blade again.
23 Again --
24 Q Despite the fact that this is now apparently a life
25 or death struggle?

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ROUGH DRAFT TRANSCRIPT

1 of her, and we both go down.
2 Q Okay. And do you land directly on top of her?
3 A Pretty much.
4 Q And does she --
5 A Like --
6 Q And does she land back like this?
7 A She lands back.
8 Q Okay.
9 A And I --
10 Q I would --
11 A My hand and all my weight --
12 Q Okay.
13 A -- goes down.
14 Q Okay.
15 A There were just --
16 Q Okay. So let me get it straight. You go forward and
17 she goes back, yes?
18 A Yes, she's falling back, and I'm pushing her. I'm
19 going -- I end up going with her.
20 Q Okay.
21 A On top of her.
22 Q Okay. And then what happens?
23 A She goes limp.
24 Q And what do you do?
25 A You know what happened.

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ROUGH DRAFT TRANSCRIPT

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1 Q I know, but just like your attorney got to ask you to
2 explain it --
3 A Yes, sir.
4 Q -- I get to ask you, too.
5 A Yes, sir.
6 Q Okay. She goes limp, yes?
7 A Yes.
8 Q But at this point you don't know that anything's
9 wrong, right?
10 A No, I don't. I don't know. I did not even know the
11 knife punctured her. I didn't know.
12 Q Okay. So she didn't make a sound?
13 A No, there was no sound.
14 Q You'd agree that people usually make sounds when they
15 get punctured with a knife four inches, correct?
16 A I don't know what they do when they get punctured.
17 Q Well, your common sense.
18 MS. PALM: Objection, your Honor. He's asking him
19 common sense about other people and whether they make noises
20 when they get stabbed.
21 MR. SMITH: All right.
22 THE COURT: Sustained.
23 BY MR. SMITH::
24 Q So I'll just make sure it's clear. In your -- you
25 don't know -- you have no idea whether people make noises when

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ROUGH DRAFT TRANSCRIPT

1 seconds? Excuse me, 180, I apologize.
2 A Repeat the question, Mr. Smith.
3 Q You just said that it was two to three minutes before
4 you realized something was wrong. Let me -- I'm going to
5 repeat the question. You testified that once you guys fell,
6 she didn't make a sound and didn't move. So from the time that
7 you guys fell to the time you realized that something was going
8 on was either 120 or 180 seconds. What were you doing?
9 A Looking at her. I -- it was so fast I don't --
10 Q Okay. And blood wasn't spurting out of her side?
11 A No.
12 Q Okay.
13 A She had the two shirts or whatever. That's what was
14 -- it -- whatever she had on. No, there wasn't no blood
15 squirting out.
16 Q Showing you Defense 5. So how long -- at what point
17 -- at what point do you realize that the scene looks like
18 this?
19 A I have no idea.
20 Q You don't recall that?
21 A No, I don't -- I had moved her to the floor.
22 Q Okay.
23 A I don't know, sir.
24 Q Okay.
25 A Please, I don't know.

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ROUGH DRAFT TRANSCRIPT

1 a blade punctures them four inches?
2 MS. PALM: Same objection, your Honor.
3 MR. SMITH: I just want to make sure it's clear.
4 MS. PALM: Now he's asking in the reverse. It's not
5 relevant --
6 THE COURT: Sustained the objection.
7 MS. PALM: -- what other people do.
8 BY MR. SMITH::
9 Q Suffice it to say, they makes no sound, correct?
10 A Yes.
11 Q Okay. And sow still don't know what's going on?
12 A (Indiscernible).
13 Q How long does it take before you realize what's going
14 on?
15 A Mr. Smith, I -- it's a couple minutes, two, three,
16 four minutes, I don't know. Don't ask me to say a time. I
17 don't know. It was -- I don't know.
18 Q What was going on in those two to three minutes?
19 A I get up, I'm sitting on the edge of the bed.
20 Q She hasn't moved yet, right?
21 A No, not -- no, not really.
22 Q And you're still not concerned that something's going
23 in that --
24 A I don't know --
25 Q Let me finish my question. In that 120 to 150

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ROUGH DRAFT TRANSCRIPT

1 Q Okay. So after the two to three minutes past and you
2 do finally realize that something is terribly, terribly wrong,
3 what do you do?
4 A I -- when she's on the bed, on the floor or when,
5 sir?
6 Q At what point did you realize that something was
7 wrong, Mr. O'Keefe?
8 A After a few minutes it started getting wet.
9 Q Okay.
10 A It started getting wet, sir.
11 Q What did you think that wetness was?
12 A I wasn't sure. I was not sure.
13 Q Was it a lot of wetness?
14 A Define a lot.
15 Q Okay. Once you realized that something's wrong,
16 before you move her to the ground, what do you do?
17 A I -- I think I grabbed a pillow, and I immediately
18 took the pillowcase off, and I balled it up or I squeezed it --
19 I don't -- and I'm putting it on her side. I'm holding it
20 because I realized it's blood.
21 Q Okay.
22 A And I'm moving her around, and I'm on the bed, too,
23 and the bed's going -- and I -- I'm trying to pull her down,
24 and I -- I got to get her on the flat floor. I got to -- and
25 I'm trying, and I pick her up and --

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ROUGH DRAFT TRANSCRIPT

1 Q Okay, let me stop you right there. What's the
2 purpose of getting her to a flat floor -- to the flat floor?
3 A If I had to try to give her CPR or whatever. I don't
4 know, my -- it was muscled memory. Just reaction.
5 Q Right. And, in fact, you said these are automatic
6 responses, right?
7 A Some of them was --
8 Q Okay. But it wasn't an automatic response for you to
9 take one of the three cell phones in your apartment and call
10 911?
11 A I -- that's --
12 Q That wasn't an automatic response?
13 A No, I was too involved with her. And I thought when
14 I told Cookie, when he ran out, I says call, please come help
15 me.
16 Q Okay.
17 A I was very --
18 Q Okay. Let me back up because I'm talking about when
19 you first realized that something was wrong. Not when Cookie
20 comes upstairs after he hears everything, because you're the
21 first person that realizes that something is wrong, correct?
22 A That is correct, Mr. Smith.
23 Q Not Charles Toliver, right?
24 A I realized, yes, I am --
25 Q Let me finish. Not Joyce Toliver, right?

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ROUGH DRAFT TRANSCRIPT

1 medical aid to this woman, right?
2 A I'm trying to do everything I can, yes.
3 Q But that doesn't really answer my question. You
4 moved her to the ground because you wanted to give her medical
5 assistance, correct?
6 A That is correct.
7 Q Each though you're plastered, correct?
8 A That is correct.
9 Q Okay. So at some point you realize that your efforts
10 aren't going to work, right?
11 A That's correct.
12 Q Okay. And then at some point after that, you got
13 four people coming upstairs -- or actually strike that. You
14 got two people, Charles Toliver and Todd Armbruster coming
15 upstairs to see what's going on, right?
16 A Yes.
17 Q And, in fact, when Todd comes in to try and see
18 what's going on, you take a swing at him, right?
19 A He states.
20 Q You don't remember that?
21 A I really don't remember that. I don't know, Mr.
22 Smith. I don't know.
23 Q Okay. And you testified that you actually told Todd,
24 for him to call 911, right?
25 A I cannot explain again that in real time it happened

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ROUGH DRAFT TRANSCRIPT

1 A No, sir.
2 Q Not Jimmy Hatchcos, right?
3 A That is correct.
4 Q And not Todd Amburster, right?
5 A That's correct.
6 Q It was you, right?
7 A That's correct.
8 Q Okay. You did not pick up any one of those phone
9 calls -- those phones to call 911, right?
10 A I did not.
11 Q And that's usually an automatic response in a
12 situation like this, right?
13 A That's -- you're absolutely correct. I --
14 Q Unless you want the person to die, right?
15 MS. PALM: Objection, your Honor. Argumentative.
16 MR. SMITH: It's not argumentative. It's a yes or no
17 question.
18 THE COURT: Well, I'm going to overrule that.
19 BY MR. SMITH::
20 Q Unless you want to make sure they're dead, right?
21 A I don't want her dead, Mr. Smith.
22 Q Okay. So now we know you didn't call 911. And then
23 at some point you move her to the ground, right?
24 A Yes.
25 Q And it's your testimony because you want to render

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ROUGH DRAFT TRANSCRIPT

1 so fast, Mr. Smith.
2 Q Okay.
3 A And all I meant was for someone to help me, and I
4 swear I told -- I told Cookie, the first person, help me with
5 her, call, and he runs out, and I just assumed if he seen it --
6 yes, I made a mistake when I --
7 Q Well --
8 A -- did not call.
9 Q Okay.
10 A I did not call. It was my fault. Is that what you
11 want to hear? It's my fault for getting drunk. I didn't want
12 to leave her. I did not. I would not leave her.
13 Q Okay. So according to you, you're concerned about
14 this woman's welfare, right?
15 A Yes.
16 Q Let's jump forward a little bit to when the police
17 arrive. Do you remember that?
18 A Not really.
19 Q Now you don't remember --
20 A Some of it.
21 Q -- when the police arrived?
22 A I hear voices.
23 Q Voices telling you hey, get out of here. We need to
24 get her help, police. Metropolitan Police. Are those the
25 voices that you heard? Do you remember hearing that, Mr.

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ROUGH DRAFT TRANSCRIPT

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1 O'Keefe?
2 A Sometimes.
3 MS. PALM: Your Honor, I'd ask Mr. Smith not to yell
4 at my client.
5 MR. SMITH: I'm trying to recreate the situation.
6 MS. PALM: Well, he's yelling his questions now.
7 THE COURT: Well, I'm going to sustain the objection.
8 BY MR. SMITH::
9 Q The police are telling you to come out there in a
10 loud voice, right?
11 A And I'm telling them to get in here and help me.
12 Q Or our saying getting in here and help me and not
13 fuck you, get in here?
14 A I'm even after at first I'm saying please -- yes, I'm
15 saying get the fuck in here. Help me, get in here. Help me.
16 Q Okay. Okay. So we've heard testimony from Officer
17 Conn and the other officers who were there that Officer Conn is
18 telling you come out here, we need to get her some help. We're
19 trying to get some help. Come out here. Show us your hands.
20 And what do you do?
21 A I did not do that.
22 Q Okay. But you want to make sure that she gets
23 helped, right?
24 A In my mind I did not do anything wrong, Mr. Smith,
25 and I was -- I did not understand the concept because I did not

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ROUGH DRAFT TRANSCRIPT

1 bruises. You testified that you think she got them when you
2 were trying to render aid to her, correct?
3 A That's correct.
4 Q And how exactly did you try and render aid to her,
5 Mr. O'Keefe?
6 A By trying to put a cold compress on her, by trying to
7 get her on the floor, so --
8 MS. PALM: Okay. And your Honor, I'd like him to clarify
9 which bruises because Mr. O'Keefe --
10 MR. SMITH: I'm going to -- I'm going to get there,
11 I'm sorry.
12 THE COURT: Okay.
13 MR. SMITH: I just want to look at the photographs.
14 BY MR. SMITH::
15 Q So how do you get her off the bed?
16 A I don't exactly know, Mr. Smith. I'm pulling her up.
17 I'm pulling at her. I'm pulling on her.
18 Q Okay. Let me ask you this, is her body lifeless at
19 this point, as far as you know? I mean, she's not moving,
20 right?
21 A I didn't know.
22 Q Well, you said she was dead weight at this point.
23 A She felt like it. She was pretty --
24 Q Well, okay. So somehow you get her on the ground.
25 A That's correct.

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ROUGH DRAFT TRANSCRIPT

1 do anything wrong.
2 Q Well, if you didn't do anything --
3 A I was saying get in and help.
4 Q Okay. Well, if you --
5 A But there was no guilt in my mind of anything.
6 Q Let's talk --
7 A Come in and help me.
8 THE COURT: Sir, wait for the next question.
9 BY MR. SMITH::
10 Q Let's talk about guilt in your mind. You said you
11 didn't do anything wrong and there was no guilt in your mind,
12 right? So why make the statement let's go, let's do the ten
13 years?
14 A That -- I never made that statement to a cop.
15 Q You didn't say that? Did you make it at all?
16 A I don't remember. They say I mumbled it. I was
17 talking about it.
18 Q So you don't deny that you didn't say it. It's just
19 your contention that nobody else would have been able to hear
20 it?
21 A Mr. Smith, I'm not saying that I didn't say it. I'm
22 not saying that I did.
23 Q Could have you said it, sir?
24 A Absolutely.
25 Q Okay. Now, let's talk a little bit about these

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ROUGH DRAFT TRANSCRIPT

1 Q And she ends up kind of how like we see in this
2 photograph right here, kind of off to the side; is that
3 correct?
4 A That is correct, sir.
5 Q Okay. And then she rests like that, yes?
6 A She what, sir?
7 Q I mean, she obviously never moves again from that
8 position, right?
9 A I don't know, sir.
10 Q Okay?
11 A I don't know, honestly.
12 Q So you don't know if she ever moved once she ended up
13 on -- once you got her off the bed to the ground like that?
14 A I was laying beside her, Mr. Smith. I -- at that
15 point when they --
16 Q Do you remember if she ever moved?
17 A I don't remember.
18 Q Okay.
19 A I don't, sir.
20 Q Okay. Well, we heard testimony from the medical
21 examiner that Ms. Witmarsh had an injury that was actually
22 underneath the back of her -- in fact, she pointed. She said
23 it was right back here. You heard that testimony, right?
24 A Something to that, yes.
25 Q So she had an injury to the back of her head, and we

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ROUGH DRAFT TRANSCRIPT

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1 also know that she had this injury on the front of her head.
2 Now, can you explain how that happened?
3 A I don't know what I'm looking at, sir.
4 Q Okay, I'm zoom it out. How about now, can you tell
5 what you're looking at now?
6 A Oh, yeah. We hit heads.
7 Q Oh, that's when you hit heads?
8 A Yeah.
9 Q Okay.
10 A Yeah.
11 Q She ended up with that? Yes?
12 A Apparently.
13 Q Okay.
14 A It's there, sir.
15 Q Okay. And it's your testimony that she got the rest
16 of the bruises that we saw while you were trying to help her?
17 A I didn't see all the bruises you're speaking of, Mr.
18 Smith.
19 Q Okay. Here, I'll show them to you. There's State's
20 33.
21 A Absolutely.
22 Q Wait, hold on, I'm going to show them all to you.
23 There's State's 34. There's State's 37. There's three
24 different ones. So that's six by my count. There's State's
25 40, which is on her kneecap. You'd agree she's not laying on

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ROUGH DRAFT TRANSCRIPT

1 trying to get her up.
2 Q You were yanking her up on the bed?
3 A I mean, I'm grabbing her arms pulling her up.
4 Q Okay.
5 A Lift -- pulling her up trying to -- I mean --
6 Q So this actually all coming to you as you're talking
7 about it?
8 A I'm sorry?
9 Q Because it seems like now you're remembering even
10 more.
11 A No, I said that earlier. I pulled her up.
12 Q Okay.
13 A I mean, when I realized when I put the -- when
14 finally decided to get her on the floor, I'm trying -- I got to
15 pull her up sometimes, Mr. Smith --
16 Q Okay.
17 A -- so I can get her up onto the floor. She didn't
18 get there by herself, sir.
19 Q Well, she didn't get stabbed by her either, did she?
20 A Who said she was stabbed, sir?
21 MS. PALM: Objection. Argumentative.
22 THE COURT: Sustained.
23 BY MR. SMITH::
24 Q Now, in direct examination you were asked some
25 questions about your military service, right? When did you get

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ROUGH DRAFT TRANSCRIPT

1 her knee, right? So that's seven. Here's some more on her
2 feet. There's some more over here. There's one on the palm of
3 her feet. I actually, I'm not going to count anymore. Let's
4 just go through these and make sure that you're testifying that
5 she got all those by you trying to help her.
6 I think there's some more on her stomach. There's
7 one right there. There's two more right there. There's
8 another one right there. Actually, I'm going to -- I could go
9 on, but the point is that you're testifying that she got all
10 those by you trying to help her.
11 MS. PALM: I don't think that was his testimony. He
12 hadn't seen the pictures already.
13 MR. SMITH: They --
14 MS. PALM: He did not --
15 THE COURT: I'm overruling the objection. You can
16 clarify that in redirect.
17 BY MR. SMITH::
18 Q She got those by you trying to help her?
19 A I believe so, yes.
20 Q Okay. But you don't -- you say you believe so. You
21 don't remember?
22 A I don't remember.
23 Q Okay.
24 A I know I picked her up multiple times and was holding
25 her. People testified. I know I was yanking her up on the bed

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ROUGH DRAFT TRANSCRIPT

1 out of the military?
2 A Which part, sir?
3 Q Well, let's go active duty. When did you get out for
4 active duty?
5 A '85.
6 Q What's that, about 24 years ago?
7 A That's correct.
8 Q And then after you got out the active duty, did you
9 go to the reserves? I think that's what you said during direct
10 examination.
11 A Yes, for --
12 Q Yes?
13 A Yes.
14 Q You actually got kicked out of reserves, correct?
15 A I no longer had to go. It was voluntary deal.
16 Q It was voluntary?
17 A Yeah, I didn't show up. I didn't go. I didn't have
18 to.
19 Q So isn't the reason why you got kicked out of the
20 reserves was because you didn't show up?
21 A Yes.
22 Q Okay.
23 A I didn't go.
24 Q All right. Then we've heard testimony about your
25 prior family life, that you were married twice before?

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ROUGH DRAFT TRANSCRIPT

000572

1 A That is correct.
2 Q Both of those marriages ended because you say due to
3 alcoholism?
4 A Yes.
5 Q Okay. You meet Victoria sometime in October, 2001,
6 right?
7 A Yes.
8 Q And that in April '07, that's when you testified that
9 you were released from prison from the battery constituting
10 domestic violence charge.
11 A Yes.
12 Q And it is, in fact, true that you served about three
13 years in custody over that charge; isn't that correct?
14 A No, sir.
15 Q You didn't serve three years in custody?
16 A It was a two to five, sir. You're a prosecutor, you
17 know better than that.
18 THE COURT: Sir, answer the question yes or no.
19 THE WITNESS: On that, no, I did not, sir.
20 BY MR. SMITH::
21 Q How much of that two to five did you serve?
22 A Two.
23 Q So you're saying you served two years in custody?
24 A On that charge, yes, sir.
25 Q Okay. And you also admitted that you weren't honest

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ROUGH DRAFT TRANSCRIPT

1 Q For felony criminal non-support of dependents, and
2 that's actually two counts, correct?
3 A Two children, yes, sir.
4 Q So in total you have four felony convictions,
5 correct?
6 MS. PALM: Objection, your Honor. I don't think
7 that's correct.
8 MR. SMITH: If it's two counts, it --
9 THE COURT: It's three separate cases.
10 MR. SMITH: Three separate cases, but four felony
11 convictions.
12 BY MR. SMITH::
13 Q Is that correct?
14 A There is the case in Ohio. I guess, if that's the
15 way it would be classified, a count for each child. I'm --
16 Q I'm just make sure it's clear. Three separate cases,
17 but four felony convictions.
18 A I think they charged me for each child, yeah, it was
19 one case, Mr. Smith.
20 Q Okay.
21 MR. SMITH: Judge, I'm pass the witness.
22 THE COURT: All right. Any redirect?
23 MS. PALM: No, your Honor.
24 THE COURT: All right. Thank you, sir.
25 THE WITNESS: Thank you.

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ROUGH DRAFT TRANSCRIPT

1 with Cheryl about your ongoing relationship with Victoria
2 Witmarsh; is that correct?
3 A That is correct, sir.
4 MR. SMITH: Court's indulgence. Judge, I'm pass the
5 witness. Thanks.
6 THE COURT: All right. If I --
7 MR. SMITH: Actually, I'm sorry.
8 THE COURT: All right.
9 MR. SMITH: I'm sorry.
10 BY MR. SMITH::
11 Q I just want to clarify one other thing. Regarding
12 your prior experience, you get out of the military, and we
13 obviously know that you've kind of come into some trouble with
14 the law by way of these felony convictions since you've gotten
15 out of the military; is that correct?
16 A That's correct, Mr. Smith.
17 Q And we've hear that you're a convicted felon for
18 burglary, right?
19 A That's correct, Mr. Smith.
20 Q And also that you're a convicted felon for battery
21 constituting domestic violence, right?
22 A That is correct, Mr. Smith.
23 Q And I want to make sure I get it right. And you're
24 also convicted out of Ohio -- is it Ohio? Yes, Ohio.
25 A Yes, sir.

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Go down with your -- any other -- oh, I'm
2 sorry. I'm sorry. I apologize. We have some questions from
3 the jurors. If you could hand those to the marshal, please.
4 Counsel approach, please.
5 (Off-record bench conference).
6 THE COURT: Mr. O'Keefe, we have, as you know, we
7 allow questions from the jurors, and we have some questions for
8 you, all right.
9 THE WITNESS: Yes, Judge.
10 THE COURT: One of the jurors, it says when you got
11 out of the car, did you know Victoria was angry at you?
12 THE WITNESS: Does that have to be a yes or no,
13 Judge.
14 THE COURT: I think at this point it does, and your
15 attorney or Mr. Smith can follow up.
16 THE WITNESS: That would have to be --
17 THE COURT: It says did you -- I'll read it again to
18 you, sir. When you got out of the car, did you know Victoria
19 was angry at you?
20 THE WITNESS: Yes.
21 THE COURT: And were you in turn angry at her?
22 THE WITNESS: No, I was happy.
23 THE COURT: All right. Next question, where was the
24 knife when you were wadding up the pillowcase?
25 THE WITNESS: On the bed somewhere. I don't -- on

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000573

1 the bed.
2 THE COURT: Okay. What direction on the bed did
3 Victoria land? I mean, did she sort of fall side to side or
4 top to bottom?
5 THE WITNESS: Is there the diagram that they could
6 show of the room? Is that okay?
7 THE COURT: Do we have one?
8 THE WITNESS: For the -- to show the juror?
9 MR. SMITH: No, Judge, that's not okay.
10 THE COURT: All right. Okay. At this point there --
11 THE WITNESS: She fell on her -- okay, when you walk
12 in the bedroom door, there's a little just walkway about like
13 that, and the bed's right to the left. When I was pushing back
14 backing her up going through, we went side ways. We were right
15 like in the middle of the bed sideways, and I pushed back, and
16 she went on her back and the head board was there. Head hit
17 the head board, and I was on top of her. If --
18 THE COURT: Okay.
19 THE WITNESS: That's --
20 THE COURT: I think there was a question here about
21 the jacket we were just going to exhibit the photograph again;
22 is that correct?
23 MR. PIKE: That's correct, your Honor.
24 THE COURT: All right. We'll just put it on the
25 Elmo. There's a question of where was his jacket that was

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1 she will be here at 1:00 o'clock.
2 THE COURT: Okay. Ladies and gentlemen, I've been
3 advised that the testimony of that witness will be relatively
4 short. And after her testimony, then we will go straight into
5 jury instructions and closing argument, okay. So make sure you
6 take all the breaks you need to take before we take the -- you
7 know, go back in the courtroom at 1:00 o'clock. All right, so
8 it's about 11:25 now here so you have a little extra lunchtime,
9 and we'll see you back at 1:00 o'clock.
10 And during this lunch recess it is your duty not to
11 converse among yourselves or with anyone else on any subject
12 connected with this trial or to read, watch or listen to any
13 report over commentary on the trial by person connected with
14 the trial or by any medium of information, including without
15 limitation, newspaper, television, radio or the Internet.
16 You're not to form or express an opinion on in my
17 opinion subject connected with this case until this matter is
18 finally submitted to you. Actually, if you can hang on, I
19 think the that Marshal Cliff was going to perhaps do something,
20 here. Just hang on one second, please.
21 Ladies and gentlemen, my court recorder or maybe
22 that's perhaps the marshal. Open the door. Okay, the marshal
23 will escort you out of the courtroom, okay, and we will see you
24 back at 1:00 o'clock. He should be meeting you at that door in
25 just a second here. And ladies and gentlemen, just so you're

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1 thrown at Victoria.
2 MR. PIKE: Defendant's Exhibit W.
3 THE COURT: All right. Those are all the questions,
4 correct, that we were going to ask?
5 MS. PALM: Yes.
6 THE COURT: All right. And any follow-up, Ms. Palm?
7 MS. PALM: No, thank you.
8 THE COURT: All right.
9 MR. SMITH: Just briefly.
10 BY MR. SMITH:
11 Q So she fell back?
12 A Yes, she --
13 MR. SMITH: No further questions.
14 THE COURT: All right. Any other questions by the
15 jurors? All right, thank you, sir. Any other witnesses for
16 the defense?
17 MR. PIKE: No, your Honor. At this time the defense
18 rests.
19 THE COURT: Okay. Any rebuttal -- you have a
20 rebuttal witness at 1:00 p.m.; is that correct?
21 MR. SMITH: We do have a rebuttal witness at 1:00
22 o'clock p.m., and for the record, it is the medical examiner.
23 We anticipate that her testimony will be very short and
24 limited. Unfortunately, she is conducting an autopsy as we
25 speak. That's why she can't be here this morning this. But

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1 clear, he's going to escort you to the jury deliberation room,
2 but you are not to deliberate until this case -- you know,
3 after the closing arguments. You're there -- okay.
4 As soon as the jury gets into the room there, I want
5 counsel to come back so we can finish the jury instructions.
6 (Court recessed at 11:26:33 p.m. until 13:01:24 p.m.)
7 (Outside the presence of the jury)
8 THE MARSHAL: You may be seated ladies and gentlemen.
9 Let's check and make sure our cell phones are turned off,
10 please. All cell phones are turned off.
11 Please remain seated and come to order. Department
12 17 of the Eighth Judicial District is again in session.
13 Honorable Judge Michael P. Villani presiding. Let's make sure
14 your cell phones are turned off, please.
15 THE COURT: Good afternoon, ladies and gentlemen.
16 Okay, just for our schedule today we're going to have the --
17 just one witness for the State. It should be relatively short.
18 And then we'll have the jury instruction and arguments.
19 Arguments with the jury instruction may take up approximately,
20 I don't know, two hours or so. I don't rush the counsel who
21 are presenting their cases.
22 And so because of that, we're going to -- after the
23 last witness here, we'll probably take a ten minute break. And
24 I know you've been from lunch hour, but you need to take a ten
25 minute break, get all the evidence ready to go back to the

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1 deliberation room, and then have you come in and then we'll do
2 the jury instructions, okay.
3 Mr. Smith, call your next witness or call your
4 rebuttal witness.
5 MR. SMITH: Judge, the State calls Dr. Jacqueline
6 Benjamin.
7 THE MARSHAL: Dr. Benjamin, if you'll raise your
8 right hand, please, and face the clerk.
9 DR. JACQUELINE BENJAMIN, PLAINTIFF'S WITNESS, SWORN
10 THE CLERK: Please be seated. Will you please state
11 your name and spell it for the record.
12 THE WITNESS: Jacqueline Benjamin,
13 J-a-c-q-u-e-l-i-n-e, B-e-n-j-a-m-i-n.
14 THE COURT: Go ahead, Counsel.
15 MR. SMITH: Thank you, Judge.
16 REBUTTAL DIRECT EXAMINATION
17 BY MR. SMITH:
18 Q Doctor, Benjamin, we've heard testimony from a Dr.
19 Tawni Christensen, an emergency room doctor, wherein she
20 indicated that it was her opinion that the amount of
21 venlafaxine in her system as reported in the Quest report was
22 of an overdosage level. Do you have any opinion as to that?
23 A I certainly do. As I had mentioned previously, the
24 level was actually, in fact, therapeutic, and that's based on
25 two different sources that we use in forensic practice.

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1 report.
2 Q And is that report is one that's prepared by Quest
3 Diagnostics; is that correct?
4 A The actual -- our toxic lab is Quest Diagnostics, but
5 the test on the venlafaxine was sent to NMS.
6 Q Okay. We heard testimony from Dr. Christensen in
7 that -- pardon me. She review the Quest Diagnostic and she
8 saw, which is now clearly in evidence, that the venlafaxine in
9 Mrs. Witmarsh's system was 990 nanograms per milliliter.
10 Would you agree that that's on accurate statement of the
11 report?
12 A Yes, that's an accurate statement.
13 Q Ms. Christensen offered opinion that it was, in fact,
14 an overdosage amount based on indication in a separate part of
15 the Quest report stating that you would expect it to be 93 to
16 334 nanograms per milliliter if it was 150 milligrams per day.
17 Are you familiar with that part of the report?
18 A Yes, I am.
19 Q Is that an accurate baseline to do such a comparison?
20 A The -- what that physician was looking at is NMS is
21 giving you reference ranges for both steady state and steady
22 state peak concentrations of the drugs after, I believe it's
23 two hours here, and also the trough, meaning the lowest drug
24 concentration in the system.
25 If you were to use 150 milligrams a day or 225 or 450

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1 Q And why don't you tell us what those sources are.
2 A Yes, I have both the sources here with me. One is
3 Winicks Drug and Chemicals Blood Level Data (phonetic) from
4 2001. And the other is Disposition of Toxic Drugs and
5 Chemicals in Man, 8th edition, published in 2008.
6 Q How often would you say in your practice do you have
7 to interpret the toxicity level of a prescription drug in a
8 person's system?
9 A On a regular basis.
10 MR. PIKE: Objection, your Honor. Irrelevant. The
11 toxicity wasn't the issue. The overdose is beyond the
12 prescribed amount.
13 MR. SMITH: Okay, then I'll restate my question.
14 THE COURT: It's sustained. Okay want.
15 BY MR. SMITH:
16 Q How often would you, in your practice, have to assess
17 the dosage level in a person's system?
18 A As a forensic pathologist I look at the level of the
19 drugs in a person's system to determine whether that drug level
20 is, in fact, therapeutic or it's in toxic or lethal
21 concentrations.
22 Q And so is it your testimony that you, in fact, have
23 to do that pretty much in every case that you handle?
24 A Yes, we draw toxicology in all descendants and those
25 results are reviewed and incorporated into the final autopsy

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1 milligrams a day. What she probably wasn't aware of is that
2 these values for normal individuals who have normal function.
3 This drug is metabolized in the liver predominantly.
4 Q Okay. So do you have an opinion as to whether or not
5 the values give on the Quest Diagnostics form would be reliable
6 on the facts and circumstances of this case?
7 A The information given is reliable. However, it
8 cannot -- you cannot use these to say this is an overdose. All
9 they are telling you is that in an average person who takes 150
10 milligrams a day, your steady state peak concentration should
11 be between 93 and 334. It says nothing about overdose. It --
12 this is not giving you the values for an overdose.
13 Q So is it your testimony, then, that a person who had
14 liver problems, such as say if they suffer from cirrhosis
15 and/or Hepatitis C, would that impact their ability to
16 metabolize venlafaxine?
17 A Yes, definitely.
18 Q Would that contribute to the information that is
19 reported in terms of the amount that was in her system at the
20 time?
21 A That information cannot be incorporated into a
22 standard toxicology report because the values for someone with
23 liver disease are not tested. The data that we look at that
24 the NMS Laboratory's looking at and that this textbook looks at
25 is in normal individuals. So I don't have data ranges for

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1 someone with cirrhosis.
 2 Q Okay. So you can't tell us what you would expect the
 3 nanograms per milliliter to be in a person taking 150
 4 milligrams per day of venlafaxine if she suffer from cirrhosis
 5 and or Hepatitis C?
 6 A I don't have those data ranges, no. And I'm not -- I
 7 don't know if those are published.
 8 Q Okay. Now, we also heard testimony from Ms.
 9 Christensen that --
 10 MR. PIKE: Dr. Christensen, your Honor.
 11 MR. SMITH: Dr. Christensen, I'm sorry.
 12 MR. PIKE: Thank you.
 13 MR. SMITH: I mean no disrespect.
 14 MR. PIKE: Then -- I'm sorry. Inappropriate comment.
 15 I'll withdraw and apologize.
 16 BY MR. SMITH:
 17 Q We also heard testimony from Dr. Christensen that the
 18 combination of alcohol and venlafaxine has a potential side
 19 effect of aggression. Do you have any opinion as to that?
 20 A I'm actually not aware of aggression as a side
 21 effect, not on review of the Physician's Desk Reference or that
 22 Basalt textbook.
 23 Q And can you explain to the jury what the Physician's
 24 Desk Reference is.
 25 A Yes, it lists the drugs -- all various pharmaceutical

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1 MR. SMITH: Judge, thank you. I'll pass the witness.
 2 THE COURT: Mr. Pike.
 3 MR. PIKE: Thank you.
 4 CROSS-EXAMINATION
 5 BY MR. PIKE:
 6 Q Thank you for coming back, Dr. Benjamin.
 7 A Not a problem.
 8 Q I understand you were busy this morning.
 9 A Quite.
 10 Q In going through and making a determination in
 11 reference to this, you've -- you consulted a couple of
 12 different resources that were available to you, texts or
 13 alternate sources; is that correct?
 14 A That's correct.
 15 Q And it would be an accurate or safe statement to say
 16 that there are a large number of resources that you may look at
 17 some, another doctor may look at another, and it's not uncommon
 18 for doctors to arrive at different opinions?
 19 A In respect to?
 20 Q In respect to the proper amount of medication for one
 21 person or another.
 22 A I would imagine there are different resources, but I
 23 don't treat patients, so I wouldn't know the proper amount of
 24 medication to prescribe to a particular patient.
 25 Q Okay. And so you wouldn't know, in this case, if 150

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1 drugs, the side effect of those drugs, how those drugs are
 2 metabolized.
 3 Q And that's a publication that -- actually strike
 4 that. Is that a publication that would be available to pretty
 5 much anyone in the medical industry?
 6 A Yes.
 7 Q And it's your testimony that consulting that
 8 Physician's Desk Reference, it does not indicate that combining
 9 alcohol and venlafaxine can lead to aggression?
 10 A Correct.
 11 Q Now, suffice it to say, doctor, does it, in fact,
 12 list some potential side effects of the drug?
 13 A Yes, it lists the side effect of the drugs in the
 14 clinical trials that were performed before the drug went to
 15 market.
 16 Q Now, does that mean that the potential side effects
 17 would necessarily affect a specific person?
 18 A No. Again, it's the side effects that was brought
 19 out in clinical trials. Some people experience some side
 20 effects, while others experienced other side effects, and not
 21 everyone experienced all of the listed side effects.
 22 Q So, in fact, is there any way that we can know what
 23 side effects Victoria Witmarsh suffered, if any?
 24 A I would have no way of knowing that having only --
 25 the only experience I had with her was performing her autopsy.

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1 milligrams a day was a proper prescriptive amount for Mrs.
 2 Witmarsh?
 3 A I would not. I'm not a treating physician.
 4 Q Now, the -- and forgive me, you indicated that there
 5 -- this drug from your research is something that is processed
 6 within the liver, and the liver, if it's affected, it can
 7 maintain too much of it?
 8 A Well, what happens is it is metabolized, meaning that
 9 the chemical is converted in the liver, and so if the liver is
 10 not functional because of something like cirrhosis, where most
 11 of the liver cells are converted to fibrous tissue, then you
 12 have less conversion of the drug and more of the parent drug in
 13 your bloodstream.
 14 Q Okay. So you have the apparent drug which would show
 15 up as the actual drug itself.
 16 A Correct.
 17 Q And then the trace amounts of what that which would
 18 have been processed would be the metabolites?
 19 A The metabolites.
 20 Q And what was the level of the metabolites in this
 21 case?
 22 A The metabolite oldismethyl (phonetic) venlafaxine was
 23 870 nanograms per mill.
 24 Q Okay. Now, the --
 25 MR. PIKE: May I approach the witness, your Honor?

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1 THE COURT: Yes.
2 MR. PIKE: I'm going to refer to the Quest
3 Diagnostics. Okay, great.
4 BY MR. PIKE::
5 Q The document that you received from Quest Diagnostics
6 was a -- it basically, from what you've described, and correct
7 me if I'm wrong, it was that doctor's or that company's
8 interpretation of how much the regimen that they would believe
9 that you see in the blood system of a normal person that was
10 doing the prescription at 150 milligrams per day.
11 A There were various levels. 150 was one of the level.
12 Q Right. And they actually gave you a range. This is
13 how much you'd find at 75 milligrams per day, 225 milligrams a
14 day or 450 milligrams a day.
15 A Correct.
16 Q Okay. And even at 450 milligrams per day, which is
17 approximately three times that dose, still for a normal person
18 they expect the range would not exceed 600 nanograms per
19 milliliter.
20 A 597.
21 Q Okay. So both the metabolites, the amount that had
22 already processed into the system, as well as the amount that
23 had yet to be processed into the system, both of those exceeded
24 even the highest level that was provided to you in the Quest
25 Diagnostics documents that you rely upon as part of your duties

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1 documents provided by the company that makes the drug.
2 A No.
3 Q You didn't, okay.
4 A No.
5 Q It would be safe to say that there are some drugs
6 that are introduced into the system. They may be approved for
7 doctors to prescribe, that go through the testing process. And
8 it's not until they're actually introduced into the public that
9 difficulties are found with that.
10 A That is true, because clinical trials only use a
11 certain amount of individuals, and when it's -- the drug is put
12 on the market, you have a much larger sample size.
13 Q And that would be like the Fen Phen, you know, the
14 diet drug, and that affected people's livers.
15 A Correct.
16 Q And one of the worst cases, I guess, would be
17 phlodamayan (phonetic), right?
18 A Phlodamayan, right.
19 Q Okay, and that was prescribed for pregnant women and
20 it resulted in a large number of birth defects.
21 A Correct.
22 Q And yet, that had been introduced and was sold over
23 the counter.
24 A Correct. I'm not sure it was sold over the counter,
25 but that was --

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1 as a coroner.
2 A Those levels are increased as compared to this. But,
3 again, I just don't look at the levels in isolation. I have to
4 look at what the therapeutic ranges are and what the toxic
5 ranges are.
6 Q Okay. And certainly, we're not saying this is a
7 toxic range.
8 A Not at all.
9 Q Okay. But we're talking about a range for a normal
10 person, and in the amount that's involved with Mrs. Witmarsh,
11 Mrs. Witmarsh was only weighed about a hundred pounds, 110
12 pounds.
13 A I believe it was 108 --
14 Q Okay --
15 A -- if I'm not mistaken.
16 Q -- it's right around there. And so you'd expect that
17 a smaller person like that you would have a representatively
18 smaller amount of dosage in that individual.
19 A That's not really a fair statement. It depends on
20 how much that individual took of the parent drug initially, and
21 also in this case the toxicology is performed on heart blood
22 and not peripheral blood which was not available. So that
23 makes the value a little higher than it should be anyway.
24 Q Okay. And one of the documents that you relied upon,
25 I think you said you relied upon the pre-marketing tests or the

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1 Q No, I meant --
2 A Yeah.
3 Q I'm sorry, thank you. By prescription. When I meant
4 over the counter, I meant by -- prescribed by doctors and they
5 were following the protocols, and it was found to have that
6 type of an effect.
7 A Correct. Thank you for your time today, Dr.
8 Benjamin. Appreciate you being here.
9 THE COURT: Any redirect?
10 MR. SMITH: No, Judge.
11 THE COURT: All right, thank you, doctor, for your
12 testimony. Any other rebuttal witnesses? I'm sorry, was there
13 a question? I thought I saw someone's head go up. No. Okay.
14 Thank you for your testimony, doctor.
15 THE WITNESS: Sure.
16 THE COURT: Any other rebuttal witnesses for the
17 State?
18 MR. SMITH: No, Judge.
19 THE COURT: Any surrebuttal for the defense?
20 MR. PIKE: No, your Honor.
21 THE COURT: Okay. And at this point defense has
22 rested, correct?
23 MR. PIKE: Yes.
24 THE COURT: State has rested?
25 MR. SMITH: Yes, Judge.

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1 THE COURT: Okay. Ladies and gentlemen, we've
2 completed the portion of trial of the evidentiary portion of
3 the trial. As I said, we just need to take about a ten men
4 break and then we'll go through the instructions and closing
5 argument and then deliberations. All right.
6 So during this recess it is your duty not to converse
7 among yourselves or with anyone else on any subject connected
8 with the trial, to read, watch or listen to any report over
9 commentary on the trial by my person connected with the trial
10 or by any medium of information, including without limitation,
11 newspaper, television, radio or the Internet.
12 You're not to form or express an opinion on any
13 subject connected with this case until this matter is finally
14 submitted to you. We'll see you back just a few minutes.
15 Marshal will escort you out.
16 (Off-record bench conference).
17 (Outside the presence of the jury)
18 THE COURT: My JEA was just retyping, making some of
19 the corrections. I'll see if she's completed those, and we'll
20 bring out the stack.
21 MS. PALM: Okay.
22 (Court recessed at 1:21:59 p.m. until 13:29:54 p.m.).
23 (Outside the presence of the jury)
24 THE COURT: Okay. Defendant's present. We're
25 outside the presence of the jury. The jury instructions that

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1 feel it accurately established -- was established under Nevada
2 law.
3 MR. SMITH: Right. And it was the State's objection
4 that it came too close to impinging upon the reasonable doubt
5 instruction because it made it sound as if the State must show
6 that only one thing happened here and only one thing could have
7 happened.
8 THE COURT: All right. And I think the -- it does go
9 to the reasonable doubt instruction. I think that covers this
10 particular issue as well as I think it might be misleading to
11 the jury, so that's why I declined to give that, and why don't
12 we have that marks next in line as the State -- as the Court's
13 exhibit.
14 MR. PIKE: Okay. Actually, I have them as a packet.
15 THE COURT: Okay.
16 MR. PIKE: And I'll submit the packet, but --
17 THE COURT: All right.
18 MR. PIKE: -- the next instruction in that packet is
19 if the evidence in the case is subject to two constructions or
20 interpretation, each of which of you appear to be reasonable.
21 I indicated that I felt that that was appropriate based in
22 Krane versus State (phonetic). In a case in -- that it was
23 appropriate to give that in a case in which the evidence was
24 circumstantial. After argument by Counsel, I believe the Court
25 found that because there was circumstantial as well as direct

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1 the Court's going to give are being copied as we speak, and
2 they'll be numbered in just a minute. However, there were
3 certain instructions requested by both sides which the Court is
4 declining to offer or to provide to the jury. And so, Mr.
5 Pike, why don't you go first.
6 MR. PIKE: Thank you, your Honor.
7 THE COURT: And then Mr. Smith, if you can respond.
8 MR. PIKE: We were able to arrive at resolutions
9 regarding a number of the instructions and have been able to
10 have a complete set that -- to go before the jury. I had
11 submitted a proposed instructions regarding a finding of guilt
12 as to a crime may not be based on circumstantial evidence
13 unless it's consistent with the theory of the State. I cited
14 Kaljick, 201 as the authority for there. There was not a
15 Nevada case on point, but California law suggesting that, and
16 that was an offered, and the Court after argument rejected
17 that.
18 THE COURT: All right, Mr. Smith. Do you mind if Mr.
19 Smith just stands next to you.
20 MR. PIKE: Oh, yeah, yeah.
21 MR. SMITH: Okay, which one was it?
22 MR. PIKE: This -- as I indicated the Court's ruling
23 was based upon the fact of the circumstantial instruction that
24 there was not Nevada law on point, and that the citation to the
25 California instruction was insufficient, and the Court didn't

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1 evidence in the case, that this was not an appropriate
2 instruction for this case.
3 THE COURT: Mr. Smith.
4 MR. SMITH: And the State's objection to that
5 instruction was to the exact same as to the previous one.
6 THE COURT: And that's why Court declined to give
7 that instruction.
8 MR. PIKE: I asked for a corrective instruction
9 indicating that -- to instruct the jury that test the events
10 contained in this case, that the defendant was irrebuttably
11 presumed to have been intoxicated. I based that upon the
12 authority of Sandborn versus State in which the Nevada Supreme
13 Court found a corrective instruction to be appropriate where
14 there was evidence it was within the direct control of the
15 police and it was destroyed and or lost and it's a spoilage
16 instruction borrowed from -- borrowed criminally from civil
17 case.
18 And this case we brought in evidence that Mr. O'Keefe
19 appeared to be gross -- or very intoxicated, and yet, during
20 the entire time that he was held during the interview, the
21 alcohol rate or proof there of was dissipating, and we should
22 be entitled to that instruction.
23 MR. SMITH: And Judge, we actually litigated that
24 very issue during pretrial motion, and it was the State's
25 objection that there was nothing to warrant that instruction be

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1 given under the circumstances of this case. Specifically that
2 there was never any showing of spoilage or malicious intent or
3 anything on the behalf of the detectives who were involved in
4 this case. And that it was not a duty imposed upon the State
5 to take a blood alcohol test under these circumstances.

6 THE COURT: Also, I think it's factually dissimilar
7 to Sandborn, so the Court was not going to give that
8 instruction.

9 MR. PIKE: Thank you very much. And the next one
10 it's a non-flight after crime instruction. I borrowed the
11 instruction from State indicating that you can consider a
12 defendant's flight after a -- or from the scene of a crime as
13 evidence of guilt and twisted that to indicate that if the
14 non-flight of a person from the location immediately attended
15 to a crime indicates that lack of a consciousness of guilt, and
16 the Court has indicated it's disinclined to give that
17 instruction.

18 MR. SMITH: And it was merely the State's contention
19 that instruction was not supported in law.

20 MR. PIKE: Okay.

21 THE COURT: Again, that's why the Court did not give
22 that instruction. Mr. Pike, can you hold on one minute,
23 please.

24 MR. PIKE: Okay, let's see. I offered the malice
25 aforethought instruction.

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1 of the Runion, there is a portion of that indicating that the
2 killing of another in self-defense. One of the portions of
3 that is that it is absolutely necessary under the
4 circumstances. We object to absolutely necessary language that
5 was use in that and believe that that changes the burden of
6 proof from a reasonable standard to a burden that the -- is
7 beyond a reasonable doubt as far as the defense. It improperly
8 changes the burden of proof, and we'd object to that on
9 constitutional grounds.

10 MR. SMITH: I understand their objection of
11 constitutional grounds. It was the State's position that that
12 language quoted specifically language approved by the Nevada
13 Supreme Court in Runion v. State.

14 MR. PIKE: And it does.

15 THE COURT: All right, and that's correct. We are
16 giving an instruction that was contained in that case.
17 (Off the record colloquy).

18 THE COURT: All right.

19 MR. SMITH: And I'll spell Runion for the record.
20 R-u-n-i-o-n.

21 THE COURT: Any others, Mr. Pike?

22 MR. PIKE: I had submitted a benefit of doubt
23 instruction indicating that the jury was satisfied beyond a
24 reasonable doubt that the calling was unlawful, but you have a
25 reasonable doubt whether the crime is murder or manslaughter,

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1 THE COURT: All right, next. Sorry, Mr. Pike.

2 MR. PIKE: In relation to the malice aforethought
3 instruction that's being given by the Court, we felt that that
4 inadequately and improperly stated the laws of the state of
5 Nevada and we offered a much shorter one, and the Court
6 declined to allow our instruction, feeling that the one offered
7 by the State was -- contained, although items we objected to,
8 that it sufficiently stated the law and the Court approved
9 their instruction over ours.

10 MR. SMITH: Was that the one that talked about -- oh,
11 right, it was the State's position that the instruction we
12 tendered was one that is an instruction that ass been given
13 many, many, many times and is supported in the case law.

14 THE COURT: That's correct, and this is why the
15 Court's not -- that's why the Court's giving the instruction
16 that it is. I think we can put on the record that there were
17 certain instructions that the Court is giving that are not in
18 dispute, but some of the instructions were, I guess, joint
19 instructions as far as each changes we made to various -- but
20 sometimes we call stock instructions, but the parties did come
21 to agreement on making various modifications to those
22 instructions which the Court is giving, and we'll go over those
23 in just a minute.

24 MR. PIKE: Yes. And in relationship to the
25 self-defense issues and the instructions that were pulled out

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1 that you must give the defendant the benefit of such doubt.
2 The instructions in the manner in which this has -- it has
3 previously been directed to juries to start at the top and work
4 down. I don't feel that adequately expresses to the jury the
5 concept of reasonable doubt, and although that has been
6 approved, I think that this is a necessary addition to that in
7 order to allow the jury to understand the constitutional
8 protections that are involved.

9 MR. SMITH: And it was the State's position that
10 intent -- the idea that it's attempted to be conveyed in that
11 instruction is conveyed in the other instructions, including
12 the reasonable doubt instructions. Because of the potential
13 for confusion, the State objected to it.

14 THE COURT: The Court did find that the other
15 instruction appropriately define the law in question, and
16 that's why I did not give the defense requested instruction.

17 MR. PIKE: Thank you. The defense also tendered an
18 instruction indicating murder and voluntary manslaughter to be
19 distinguished, one between the other, and in that we -- in that
20 instruction the language that we sought regarding the burden on
21 the State to prove beyond a reasonable doubt each of the
22 elements of murder and that the death was caused or not was not
23 done in the heat of passion want.

24 It's similar to once we've established prima facie
25 defense, then the burden of proof shifts back to the State. I

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1 cited Robert for State versus that (sic). The Court found that
2 the concepts and defenses associated with that were adequately
3 contained in other instructions and denied that motion or that
4 instruction.

5 MR. SMITH: And it was the State's position that this
6 instruction was covered by the instructions already offered.

7 MR. PIKE: And similarly, there was a lesser included
8 benefit of the doubt instruction regarding manslaughter which
9 cites the Lizbi versus State (phonetic). That was a potential
10 alternate to the benefit -- the shorter benefit of the doubt
11 instruction that we previously argued, and the Court issued the
12 same ruling on that.

13 The -- I tendered an instruction indicating that a
14 person is entitled to use self-defense even though the danger
15 to life or personal security may not have been real if from the
16 circumstances in the viewpoint of the defendant it would -- it
17 would have reasonably believe that he was in eminent danger of
18 death or great bodily harm citing to Paneda (phonetic) versus
19 State, and the Court declined that instruction.

20 MR. SMITH: And the State's objection to that was
21 that it's covered in the Runion instruction.

22 MR. PIKE: Okay.

23 THE COURT: That's correct. Go ahead, Mr. Pike.

24 MR. PIKE: We offered an instruction that good
25 character when considered in connection with the other evidence

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1 Court's ruling.

2 THE COURT: All right, the last part of the
3 instruction says you must consider the actions of the State and
4 police officer withholding this evidence in determining the
5 State has met its burden of proof meaning the charge against
6 the defendant.

7 MR. PIKE: Thank you, your Honor.

8 THE COURT: I think it's incorrect statement of a --
9 you know, there's no requirement much that, and I don't think
10 there's any testimony that it was improperly withheld. It was
11 -- the testimony stands in that regard, so --

12 MR. PIKE: Thank you. And for the record, those
13 proposed jury instructions that have been placed with a cover
14 sheet on them indicating the defendant's replaced jury
15 instructions. I'd ask they be filed as a court exhibit for the
16 record.

17 THE COURT: Will be. And Mr. Smith, you had two
18 instructions?

19 MR. SMITH: We had proffered an instruction, and I
20 believe it's from the Tomarchie case. I believe the spelling,
21 for the record, is T-o-m-a-r-c-h-i-e. It's commonly known as
22 the bad act instruction. And since the State has introduced
23 evidence in this case to a prior bad act of the defendant, we
24 proffered that instruction as has been ordered for the State to
25 do by the supreme court.

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1 may generate a reasonable doubt alone. This is in reference to
2 the past service that Mr. O'Keefe provided to the country. The
3 State objected to that. The Court found that it was adequately
4 covered in other instructions.

5 MR. SMITH: Well, and then just to supplement. I
6 believe what happened is the State proffered an alternate
7 instruction, and the parties agreed they would (indiscernible).
8 We kind of agreed that they didn't like our instruction and we
9 didn't like theirs, so we just decided to fore go it.

10 THE COURT: I think that's correct, isn't it, Mr.
11 Pike?

12 MR. PIKE: That actually is. If one was not going to
13 be given separately, they were both going to be given, and so
14 the defense did concede that --

15 THE COURT: All right..

16 MR. PIKE: -- in settlement of instructions. A final
17 instruction offered by the defense was that it was a form -- in
18 the form of a corrective instruction regarding the officer's
19 providing the use of force report. The Court found that we
20 have established such evidence to argue any of those questions
21 before the jury, and did -- and felt that this instruction
22 would improperly bring that single issue before the Court.

23 THE COURT: Let me see that instruction again, Mr.
24 Pike.

25 MR. PIKE: Okay. I hope I'm correctly stating the

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1 It's the defense's decision to request that
2 instruction. Not to give it, but in this case they actually
3 did or they agreed with the giving of that instruction. I
4 think we also proffered an adoptive admission instruction, and
5 the Court declined to give that, and I think that was it.

6 THE COURT: I didn't think there was such evidence of
7 the adoptive admission, so that's why the Court didn't give it.
8 And also it was objected to by the defense, correct?

9 MR. PIKE: That's correct, your Honor.

10 THE COURT: All right.

11 MR. PIKE: Thank you. You should have the packet of
12 instructions in front of you. They've been handed out or we
13 have them here.

14 THE CLERK: (Indiscernible).

15 THE COURT: They've been numbered. They're not
16 numbered on your stack there, but they're instructions --
17 they're jury instructions I through 11 instructions.

18 MS. PALM: They -- we should number them ourselves?
19 They are numbered?

20 THE COURT: Right. We just didn't number those yet,
21 but they are -- it's I through 44.

22 MS. PALM: Okay.

23 THE COURT: And we went over these instructions.
24 Besides the objections, Mr. Pike, of what you just stated on
25 the record, as far as the instructions I was giving the State

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1 presented, do you have any other objections to instructions 1
2 through 44?
3 MR. PIKE: The only -- I have just a few brief ones.
4 The instruction that indicates that -- regarding voluntary
5 intoxication is an instruction that was adapted from State
6 versus Jukich, J-u-k-i-c-h, 29 Nevada 217. I believe that's
7 contrary to the Biford (phonetic) instructions and the
8 statement of the law within that case.
9 MR. SMITH: Which instruction are you talking about
10 right now, I'll sorry?
11 MR. PIKE: The volunteer intoxication case or
12 instruction.
13 MR. SMITH: And it was the State's position that that
14 is an accurate statement of the law.
15 THE COURT: Anything else, Mr. Pike?
16 MR. PIKE: The -- I believe that in the heat of
17 passion instruction, that as I've indicated, that improperly or
18 impermissibly shifts the burden from a subjective standard to
19 an objective standard regarding the mens rea elements of
20 murder.
21 THE COURT: Mr. Smith.
22 MR. SMITH: I'm sorry, Judge. They had an objection
23 to this one, and I believe our contention was that this is, in
24 fact, an accurate statement of the law with regards to what the
25 heat of passion must be in order to reduce a murder it a

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1 THE COURT: Okay. And besides the two instructions
2 you had requested, any other instructions you request be given
3 by the Court you?
4 MR. SMITH: No, Judge.
5 THE COURT: And besides the ones you had requested,
6 Mr. Pike, any other instructions?
7 MR. PIKE: No.
8 THE COURT: All right. Let's call the jury in.
9 Questions?
10 MS. GRAHAM: Oh, no. I was just going to ask for a
11 quick bathroom break, but --
12 THE COURT: Can you hold that? Are you okay? I
13 don't want you to have --
14 MR. PIKE: That's just fine.
15 MS. GRAHAM: Can I just set this up --
16 THE COURT: Yes.
17 MS. GRAHAM: -- and make sure it's going to go on
18 there correctly so I don't have to do it in front of the jury,
19 Judge?
20 THE COURT: Yes.
21 MS. GRAHAM: Okay.
22 (Off the record colloquy).
23 MS. PALM: Judge, instruction 23 and 29 are the same,
24 and I don't want to undo emphasis. So can we take out 29?
25 MR. SMITH: Oh, yeah.

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1 voluntary manslaughter.
2 THE COURT: That's what the Court found. Any others,
3 Mr. Pike?
4 MR. PIKE: The only other instruction that I find
5 objectionable is -- well, actually, I will indicate for the
6 Court for the record in this that the defendant did make a
7 number of objections in relationship to language. Kind of
8 Archean language about (indiscernible) depraved in a needless
9 spirit, and the parties were able to find more appropriate,
10 more current instructions that didn't strike on the religious.
11 And so there was a great deal of effort that went into
12 correcting some of the Archean language that appears.
13 MR. SMITH: That's correct, Judge, we were able to
14 come to an agreement.
15 THE COURT: Okay. And you're familiar with the
16 verdict form, Mr. Pike?
17 MR. PIKE: I am. We have no objection to that.
18 THE COURT: Okay. Mr. Smith, you're familiar with
19 instruction 1 through 44?
20 MR. SMITH: Yes, I am, Judge.
21 THE COURT: Any objection to those instructions?
22 MR. SMITH: Not as give.
23 THE COURT: All right. Any objection to the verdict
24 form?
25 MR. SMITH: Oh, I'm sorry, no, Judge. No objection.

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1 MS. PALM: At least in our packet it's in there
2 twice.
3 THE COURT: Yep, so it will be instruction 1 through
4 43. I'm have to renumber those, but --
5 MS. PALM: Okay.
6 MR. SMITH: So we're taking out what? Which one?
7 MS. PALM: We're taking out 29.
8 THE COURT: 29.
9 MR. SMITH: Okay. I think we're ready, Judge, I'm
10 sorry.
11 (In the presence of the jury)
12 THE MARSHAL: Officers and members of the court,
13 Department 17 jurors. You may be seated, ladies and gentlemen.
14 Let's make sure all cell phones are turned off, please.
15 THE COURT: Let the record reflect we're back in the
16 presence of the jury panel. Party's ready to proceed with the
17 closing?
18 MS. PALM: Yes, your Honor.
19 MR. SMITH: Yes, your Honor.
20 MS. GRAHAM: Yes, your Honor.
21 THE COURT: Ladies and gentlemen, it is now my duty
22 as judge to instruct you on the law that applies to this case.
23 (Thereupon, the jury instructions were given but not
24 transcribed).
25 THE COURT: Counsel approach, please.

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1 (Off-record bench conference).
2 THE COURT: I'm sorry, ladies and gentlemen.
3 (Reading of the jury instructions resumed but not
4 transcribed).
5 THE COURT: Counsel.
6 MS. GRAHAM: Yes, Judge. Court's indulgence. I'm
7 not a technical person. I apologize. So Mr. Smith is helping
8 me out setting this up. And while we're waiting to do that, I
9 just -- it's been a long week, I think you'd all agree. It's
10 been a long week. A lot to take in. This is a really serious
11 case. Somebody's dead. It's the State's position that she was
12 murdered, and it's also I'm going to tell you right off the
13 bat, it's the State's position that defendant committed first
14 degree murder with a deadly weapon.
15 You're going to have a verdict form here that gives
16 lots of options for you to consider. First degree murder with
17 use of a deadly weapon, first degree murder, second degree
18 murder with use of a deadly weapon, second degree murder,
19 voluntary manslaughter with use of a dead weapon, voluntary
20 manslaughter, involuntary manslaughter with use of a deadly,
21 involuntary manslaughter, and obviously not guilty.
22 The State's position is that this is first degree
23 murder with use of a deadly weapon. You're going to have
24 copies of the jury instructions. I think the judge informed
25 you of that. So I know that that was a lot of stuff to hear

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1 Direct evidence. We heard direct evidence in this case.
2 Direct evidence is evidence from witnesses, okay. You were
3 able to observe them while they testified, to hear the content
4 of their testimony, to judge their credibility by their actions
5 on the stand, their eye contact, their mannerisms. That's
6 really important. And you all have life experience. I mean,
7 you can judge somebody's credibility.
8 So and credibility's another one of the instructions.
9 But the witnesses, that's direct evidence okay. Their
10 testimony is direct evidence. The weight of that evidence is
11 going to be determined by you. And I just gave an example.
12 Circumstantial evidence is a chain of facts. And
13 this is real important, okay. Circumstantial evidence is a
14 chain of facts that draws an inference that you can give weight
15 to. And you're to give the same weight to direct evidence,
16 evidence that you've actually heard, as things that can be
17 inferred, and I'll give you an example of that. And I think,
18 you know, the judge gave you an example of that at the
19 beginning of this case.
20 I guess the best example that comes to my mind is
21 because I'm from the midwest, and it snows there a lot. You
22 are home, you're awake, you lookout the window, you see the
23 snow falling on the ground, you see the snow. That's the
24 direct evidence. The difference between that, circumstantial,
25 is I go to bed that night, I wake up the next morning, I

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1 and read. You're not going to have to try to remember it.
2 You're getting copies of all of that to take back with you.
3 My job now is to try to help explain all of those
4 things that the judge said and how that would apply to this
5 case. And how the evidence in this case proves that he
6 committed first degree murder with use of a deadly weapon, a
7 knife.
8 Now let's see if this works for me. Your job is very
9 important, as the judge told you when you first got here and
10 through voir dire, and that's why we took a lot of time. The
11 system wouldn't work without you guys because, you know, we
12 want everybody of different backgrounds and different
13 experiences on our jury. Your sole duty when you go back in
14 that deliberation room right now is to determine what crime was
15 committed by the defendant.
16 Jury instructions, those are the law. That's the law
17 in Nevada per the judge and actually per our legislatures.
18 Whether you agree with the law or not, it's the law, and you
19 all took an oath to follow the law. And what the judge
20 described to you and what my attempts to explain to you the law
21 in the state and of course, defense will explain to you law of
22 the state, that's the law, folks. And that's what you have to
23 apply to the evidence in this case. But, again, you're going
24 to have copies.
25 Two types of evidence. Direct and circumstantial.

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1 lookout the window, there's snow all over the ground. I can
2 infer that it snowed last night, right. I mean, that's an
3 inference I can draw because when I went to bed, it -- there
4 was no snow on the ground, I didn't see it snow. I didn't see
5 it snow, but when I woke up, there's snow on the ground, so
6 wouldn't that be a reasonable inference? Yes, that would be a
7 reasonable inference.
8 And you're to give the same weight to circumstantial
9 evidence as you are to direct evidence. So you can infer. You
10 need to use your common sense. Credibility of the witnesses,
11 live testimony. Like I said, he discussed that. That's so
12 important. You know, we've had so many people testify. We've
13 had officers testify today. We've had the defendant testify.
14 We've had lay witnesses, neighbors testify, medical examiners
15 testify, doctors testify. That live testimony, you can judge
16 the credibility of those witnesses because you were here, you
17 watched, you observed. Europe the ones that are supposed to
18 judge the credibility and their motives to lie.
19 You can disregard the entire testimony of a witness
20 if you don't find them credible. That's important. If you
21 find any one of our witnesses not credible, you're free under
22 the law to disregard that entire testimony. So remember that.
23 Don't get caught up in trying to figure things out. Common
24 sense. That's a beg one want you don't leave it at the door.
25 There's a jury instruction -- I think there a jury

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1 instruction that says you bring your common sense and life
2 experience in. You don't leave it at the door. That's why
3 there's so many -- you know, on each side of you, you're all
4 different. You all have different life experience. You're to
5 bring that life experience and your common sense into that
6 deliberation room. Don't forget it, okay.

7 Punishment. Your duty at this point right now when
8 you go back in the deliberation room is confine to the guilt of
9 the defendant. Whether or not he's guilty and what he's guilty
10 of. You were not to discuss punishment. The judge instructed
11 you on that. Or consider the subject of punishment during your
12 deliberations as to his guilt. That cannot be a factor in your
13 determination of what he's guilty for. The judge has
14 instructed you on that, and that is the law in Nevada. You
15 need to put that aside.

16 What is murder? I'm going to try to break it down.
17 I mean, it's so complicated. There's just -- you know, you --
18 I was watching some of you. It's like well, what does all that
19 mean? Well, murder is the unlawful killing of a human being
20 with malice aforethought. Malice aforethought can be expressed
21 or implied. What is malice aforethought? We know what killing
22 another human being is, right? Okay. But what's malice
23 aforethought? Intentional killing without legal cause or
24 excuse or what the law would consider adequate provocation.

25 Okay, so it's intentional. An intentional killing

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1 without legal cause or excuse. Anger, hatred, revenge, ill
2 will or spite is not required for malice, okay. That's in your
3 injury instructions, so don't feel like you're going to have to
4 remember everything that I tell you. Expressed malice is the
5 deliberate intention to take away the life of another.

6 Deliberately do it. Implied malice. Malice can be implied
7 just kind of like the circumstantial evidence kind of thing.

8 You know, you can imply malice when no considerable
9 provocation appears or when all of the circumstance of a
10 killing show an abandoned or malignant heart. So there's
11 implied malice as well as expressed. It can be deliberate or
12 you can imply it. And you can imply it with no provocation
13 appears and when all of the circumstances showing a killing of
14 an abandoned or malignant heart.

15 Simply put, malice aforethought means it wasn't an
16 accident, okay. Malice aforethought simply put, not an
17 accident. What is first degree murder? The killing was
18 willful, deliberate, premeditated. All of those have
19 definitions, too, believe it or not. Of course, they do.
20 Okay. And each one is different.

21 What is willfulness? The intent to kill. The intent
22 to kill -- you intended it kill. That's willful. You know, we
23 kind of all know we what -- we willfully do things everyday.
24 You know, we willfully get in our car and come to the -- start
25 it and drive down to the court house to sit for jury duty.

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1 What happened to my Power Point?

2 The intent to kill, though, can be a certain or
3 deduced from the facts and circumstances of the killing. So
4 the intention of the person that killed, you can deduce that
5 from all of the facts and circumstance of the evidence that we
6 presented to you today or throughout the week. Most
7 importantly, such as the use of a weapon that's calculated a
8 deduced detective in the manner that it was used and the
9 circumstances surrounding that act. That can be inferred.

10 Deduced. There doesn't have to be an amount of time,
11 a (indiscernible) amount of time needed between the formation
12 of the intent to kill and the act of killing itself, okay.

13 What is deliberation? You think about it first, you weigh the
14 options, consider the consequences, you make a decision. That
15 decision, folks, can be made very, very quickly by
16 premeditation, decision to kill, formed in the mind of the
17 killer, before the killing. It can be as instantaneous as
18 successive thoughts of the mind. Less than a minute.

19 The law doesn't measure the length of time of
20 premeditation, okay. It doesn't require how long that thought
21 must be pondered in the mind before it's premeditated. That's
22 really important for you to understand. Time can be varied
23 based on the individual and the circumstances of the evidence
24 that is presented to you. Instantaneous just is successive
25 thought in the mind. The law doesn't look at the duration of

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1 time for premeditation.

2 If you believe the evidence -- from the evidence that
3 the act constituting the killing has opinion preceded by and
4 has been the result of premeditation, no matter how rapidly,
5 the killing's premeditated.

6 What is second degree murder? The killing was not
7 deliberate, not premeditated. Just intentional. Voluntary
8 manslaughter. Killing without malice aforethought,
9 deliberation or premeditation with provocation. An example
10 would be a serious injury. Self-defense, maybe. Or somebody
11 is trying to hurt you. With no time to think. An irresistible
12 impulse in the heat of passion.

13 And the objective standard, though, for that heat of
14 passion is an ordinary person would have killed without
15 thinking. I mean, it's just innate, okay. You're in a
16 circumstance where, you know, let's say that you're at the zoo
17 and a tiger comes out of the cage and he's loose, I mean, it
18 would be -- you wouldn't even think to try to save your
19 daughter or, you know, that's instantaneous. That's an
20 instantaneous -- that's what an ordinary person would do. You
21 know, a situation where an ordinary person would kill.

22 Involuntary manslaughter, killing without any intent
23 during the commission of an unlawful act or a lawful act which
24 probably might produce such a consequence in an unlawful
25 manner. But where the involuntary killing occurs in the

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1 commission of an unlawful act which in its consequences
2 naturally tends to destroy the life of a human being the
3 offense is murder.

4 What's a deadly weapon? Well, it's complicated,
5 according to the law. Any instrument if used in the ordinary
6 manner contemplated by its design and construction will or is
7 likely to cause substantial bodily harm or death. Or any
8 weapon, device, any instrument, under the circumstances it was
9 used or attempt to be used or threaten to be used that's
10 readily capable of causing substantial bodily harm or death is
11 a deadly weapon. And of course, our contention is that a knife
12 was the deadly weapon.

13 Substantial, what's substantial bodily harm?
14 Substantial bodily harm means that it's bodily injury which
15 creates a substantial risk of death or causes serious
16 impairment, disfigurement or prolonged physical pain. All
17 right, what's self-defense. We use the reasonable person
18 standard. Honest but unreasonable does not negate malice and
19 does not reduce the offense from murder to manslaughter.

20 It has to be reasonable under the reason person
21 standard. There has to be the threat of eminent death.
22 Eminent means quicker than immediate. Or substantial bodily
23 harm. So there has to be a risk of eminent death or
24 substantial bodily harm, which, again, was, you know, the
25 threat of serious bodily injury.

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1 instantaneous? How do we know all this? Well, I'm going to
2 get to that want it was deliberate. And there was definitely
3 malice aforethought, either express, definitely implied. Okay.

4 MR. PIKE: Objection, your Honor. May we approach
5 the bench, I'm sorry.

6 THE COURT: All right.

7 MR. PIKE: I hate to interrupt Counsel's argument.
8 (Off-record bench conference).

9 MS. GRAHAM: Okay. So we look at the evidence before
10 the murder, during the murder and after the murder. What did
11 he say, the defendant? What did he do before the murder? He
12 said I want to kill the bitch. He told Cheryl Morris that. I
13 want to kill the bitch, she's poison. Why? He told her why.
14 She took three years of his life.

15 You can judge the credibility of Cheryl Morris
16 herself. He even told her how he could kill somebody with a
17 knife. He demonstrated to Cheryl that he can kill somebody
18 with a knife. He talked about his proficiency in the services
19 with a knife. His training. Before the murder he said all
20 that.

21 What about during the murder? Well, that's a little
22 tougher because we don't really know what was said or exactly
23 in what order that transpired. We know that the Tolivers, who
24 live directly under the defendant and Victoria that night,
25 directly under, were in their bedroom where the murder occurred

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1 The killing was absolutely necessary to avoid your
2 death or substantial bodily harm in this case, as it applies in
3 this case. The reasonable person standard. Fear alone is not
4 enough. And you cannot use more force than was necessary under
5 the law. And it doesn't apply to initial aggressors.

6 Intoxication. We've heard about intoxication. If an
7 intoxicated person has the capacity to form the intent to take
8 a life and he concedes and executes that intent, that's no
9 grounds for reducing the degree of this crime. There are other
10 instructions that are the packet. Those are pretty much
11 self-explanatory.

12 How do we know defendant killed Victoria? Well, for
13 one thing, there's been absolutely no evidence that anybody was
14 in the room but the defendant and Victoria. I don't think
15 identity's an issue in this case. All right, this is how we
16 know it's first degree murder. It wasn't an accident. It was
17 willful. I don't think I have to go through all the facts.

18 You guys, there's been so much testimony here. Use your common
19 sense. Use all the evidence. You can infer that there was no
20 accident here. The medical examiner testified that the
21 location of the wound -- you can view the photos yourself and
22 determine that this was no accident. It was willful. The act
23 of stabbing Victoria was willful.

24 It was premeditated. He had time to think about it
25 and thought about it. Remember, premeditation can be quick

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1 directly under. And Joyce told you as she was laying in bed,
2 she heard lots of thumping, lots of noises, a woman crying.
3 She kept turning up the volume. It got louder. It won't on
4 for about an hour. She heard thumps, she heard crying. And
5 then at one point it got so loud, it woke Cookie (phonetic) up.
6 You remember, he jumps up, what the hell? Stick the broom up
7 -- you know, the old broom trick on the ceiling, you know, to
8 try to quiet it down. It didn't quiet it down. It got louder.

9 And then Cookie was so frickin' irritated because he
10 was awoken. He went up there to tell them to quiet down, and
11 what did he see? Well, he saw Victoria laying there in a pool
12 of blood. And Cookie's reaction is what the hell did you do?
13 He ran down stairs, started calling for people to call 911.
14 Defendant never asked him to call 911. He saw Cookie. Told
15 him to get out. Most importantly, one of the things that we
16 can infer that during the murder, since we don't know exactly
17 how everything transpired, we have photos.

18 The photos, and you know the saying? A picture is
19 worth a thousand words. These are all going to be back in the
20 jury room, State's Exhibit 55, State's Exhibit 36, State's
21 Exhibit 59, State's Exhibit 46, State's Exhibit 39, State's
22 Exhibit 58, 57. There's more, folks. I'm not going to show
23 you all of them. How about this one, 8? State's Exhibit 60.
24 How about this one, Defendant's Exhibit UU? That says it all,
25 really. Picture's worth a thousand words.

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1 After, well after -- after, we have Todd coming in
2 the room. Todd Armbruster, remember the neighbor or the
3 maintenance guy that worked on the property? He came in the
4 room because Cookie's like dude, you know, call 911. He's done
5 killed that little girl. Todd goes up there. He goes into the
6 room. He sees Victoria laying on the pool of blood. And what
7 does the defendant do? He says get the fuck out, and he takes
8 a swing at him, right? That's what Todd testified to. You can
9 believe Todd if you want to, but --

10 So he takes a swing at Todd. Todd calls 911. They
11 leave. Cookie says he sees this face. They all -- Todd,
12 Cookie, and even the neighbor next door, Doomy (phonetic), who
13 saw the defendant that night -- described this face, this scary
14 face that the defendant had. It scared Cookie. You remember
15 he wanted to get the hell out of there. He wanted to get the
16 hell out of there because he said he didn't know what would
17 happen to him.

18 So defendant didn't call 911. We know that because
19 Detective Wildemann told you that he checked the cell phones,
20 and there was absolutely no entry of 911. I think there were
21 three cell phones, maybe four recovered from that apartment.
22 He didn't call 911. He didn't call for help. If this was an
23 accident, if this was self-defense, if she stabbed herself,
24 you'd call 911 for help.

25 And when they came, because other people had to call,

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1 blood on the floor.

2 They cannot send emergency personnel in a situation,
3 a dynamic situation like that. Defendant would allow -- even
4 if she was alive at that point, he wouldn't allow her to be
5 treated. He would not allow them to enter the room to help
6 her. They had to taze him twice and drag him out of the room.
7 Well, he says he doesn't want to leave her body.

8 He testified -- I mean -- let's see, what else
9 happened after? Okay, he told Hutcherson, you know, once he
10 was in custody he was put in the back of a patrol car -- a
11 patrol car. He says sorry, V, I didn't mean to hurt you, let's
12 go, let's go, let's do the ten years. Sorry V doesn't cut it.
13 Sorry V.

14 The fact that you have remorse after you kill someone
15 does not negate the intent to kill at the time. Sorry V, that
16 doesn't cut it. He made so many statements. You know what, I
17 can't -- I'm not even going to go into them because we would be
18 here all week.

19 You saw the defendant testify in his taped statement.
20 Well, you saw the taped statement that Detective Wildemann --
21 it was Detective Wildemann and Detective Krieger (phonetic), I
22 believe -- Kieger. You guys saw that. You know how many
23 different statements he made and things he said. You were able
24 to watch his demeanor, and you were able, you know, to observe
25 Detective Wildemann and Detective Kieger with him. You can

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1 you wouldn't have a stand off in the bedroom with them. You
2 would let them attend to a woman that you supposedly love
3 bleeding all over the floor. But that didn't happen. Instead
4 when they got there, you heard from Officer Conn, Santarossa,
5 Ballejos, Taylor, Hutcherson, they were all on the scene. He
6 wasn't going to let them near him and Victoria. They're
7 shouting to him, you know, is she hurt? What is defendant
8 saying? She's dead, she's alive, get the fuck out, go away,
9 fuck you, fuck -- there's so many inconsistent statements.
10 There's so many things the defendant said.

11 But what we do know is he never would allow -- and
12 the police announce Metro, we need to get her help, is she
13 alive, is she dead? He wouldn't respond want get the fuck out.
14 We need to get medical to her. Get the fuck out. Okay, so
15 what happens, you know? They're worried about this woman
16 laying on the floor. They can't go in there? Why can't they
17 go in there? There's protocol. They don't have him in his
18 line of sight?

19 They see a woman's feet at first. Sergeant Newberry,
20 I believe peeks around the corner, there was testimony of that,
21 and sees and says cover me, you know. They can't go there.
22 They think he's baiting him, you know. They testified to all
23 the things that he was saying and his demeanor, and they think
24 they're baiting him. He -- they can't see. They don't know if
25 there's a weapon. They just see a woman lying in a pool of

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1 judge their credibility and theirs during that interview. And
2 you guys are going to have that, and if you want to, you can
3 watch it again.

4 He testified today, so you can judge that credibility
5 of him on the stand today, you know. You can infer, you can,
6 you know, the demeanor. You know, there's a box of Kleenex
7 right there. I didn't see one Kleenex lifted out of that box
8 while he was up there. You guys saw it. You know when he said
9 I can't go over it, it's -- there's too much.

10 You know what's interesting, in opening statement Mr.
11 Pike gave, you know, a brief opening where he said one stab
12 wound, one stah wound. And I find it really ironic that today
13 on the stand the defendant when referred to alcohol, what did
14 he say? One is too many. One drink is too many. Well, one
15 stah wound is too many.

16 This is much more than second degree murder. Second
17 degree would only apply if defendant acted intentionally but
18 did not have the time to think about what he was doing

19 (indiscernible). No successive thoughts before
20 stabbing Victoria death. He hadn't folks. The facts show he
21 had plenty of time for the weighing of choices and decided to
22 kill despite the possible consequences. There's plenty of
23 time.

24 I mean, co-counsel Smith's -- even if you believe the
25 defendant's version of, you know, the incident between him and

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1 Victoria, he had plenty of time to think about it. The
2 defendant had time to premeditate. Again, remember
3 premeditation. It's not, you know, planning for days or weeks.
4 Prior to the stabbing defendant had successive thoughts about
5 what he was going to do. This is much more than voluntary
6 manslaughter. Again, defendant had plenty of time to think
7 about what he was about to do, to weigh his choices and
8 consider the consequences. Defendant want the Victoria dead.
9 It's not self-defense.

10 We talked about self-defense and what that is by law.
11 It's not self-defense. You know, even if you believe the
12 defendant's version that Victoria had the knife and came at him
13 and was the initial aggressor, you know, he's bigger. What did
14 everybody say, all the neighbors? She's an itty bitty thing.
15 She was a little thing. You know, we have her driver's
16 license. She was what -- well, he even admitted, what, she's
17 five, four, a buck ten, as Mr. Smith said. You know, she's a
18 little bitty thing.

19 And he could have used other means. So self-defense
20 is just absolutely -- it -- it's so far from the realm of
21 self-defense. Deadly weapon. This is a murder with use of a
22 deadly weapon. The knife was the cause of death, okay.
23 According to the law, I at this point that this would qualify,
24 even though Wolfgang Puck probably didn't contemplate his
25 butcher knife being used to stab somebody to death, I think

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1 told you in the -- talked about regarding the jury
2 instructions. When Mr. Pike argued to you, he told you that
3 you should start your deliberations in this case with a second
4 degree murder or in other words, you'll be able to rule out a
5 first degree murder pretty fast, and here's why: Instruction
6 34 tells you how you consider evidence of voluntary
7 intoxication, and you can consider that evidence to reduce the
8 intent -- as far as the intent requirement for a murder.

9 A first degree premeditated murder, as instruction 16
10 will tell you, requires -- oops. It requires deliberation.
11 That's this right here. Deliberation's the process of
12 determining upon a course of action to kill as a result of
13 thought, including weighing the reasons for and against the
14 action and considering the consequences of the action. A
15 deliberate determination may be arrived at in a short period of
16 time, but in all cases the determination must not be formed in
17 passion or if formed in passion, it must be carried out after
18 there's been time for the passion to subside and deliberation
19 to occur. A mere unconsidered and rash impulse is not
20 deliberate, even if it includes the intent to kill.

21 And also, a first degree murder requires that you
22 find premeditation. As far as premeditation is defined, the
23 truth (indiscernible) duration of time, but the extent of the
24 reflection. A cold, calculated, judgment and decision may be
25 arrived in a short period of time, but a mere unconsidered

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1 that this certainly qualifies under the law as a deadly weapon.
2 He talked about his proficiency with a knife.

3 In conclusion, after weighing all of the evidence --
4 and there's a lot, you guys have a task ahead of you -- State
5 is asking you to return a verdict of guilt for first degree
6 murder with use of a deadly weapon. Thank you.

7 THE COURT: Thank you, Ms. Gram. Ms. Palm.

8 MS. PALM: Thank you, Judge. Good afternoon, ladies
9 and gentlemen. This may be your last time that I get to talk
10 to you because as you heard at the beginning of this case, if
11 you come back with anything other than a first degree murder
12 verdict, we're done. If you come back with a first degree
13 murder verdict, then we would be doing another penalty phase
14 after this. So and after my closing today, the State will get
15 another chance. They get that other chance to argue again
16 because they have the burden of proof.

17 MS. GRAHAM: Objection, Judge. You know, the law
18 says --

19 MR. SMITH: Can we approach?

20 MS. GRAHAM: -- that we're not --

21 MR. SMITH: Let's approach.

22 THE COURT: Sustained. No, overruled. Go ahead, Ms.
23 Palm, you're fine. Go ahead.

24 MS. PALM: So they will argue again, and this will be
25 it for us. I just want to address some points that Ms. Graham

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1 and rash impulse, even though it includes an intent to kill, is
2 not a deliberation, and premeditation as will fix the unlawful
3 killing of murder of the first degree.

4 So you can consider Mr. O'Keefe's extreme
5 intoxication when you're considering whether the State has
6 proved to you a first degree murder, and I submit to you they
7 have not. In addition the State has the burden of proving,
8 before you consider any of crimes, they have the burden of
9 proving beyond a reasonable doubt the absence of self-defense
10 and accident. They have not done so.

11 And I also submit that Ms. Graham has spoke a little
12 bit as far as implied malice because implied malice in this
13 case does not apply to a first degree murder theory. If you
14 were going to find guilt under a theory of implied malice, you
15 have to only go to second degree murder.

16 And there's another instruction that might be a
17 little confusing to you, and that is instruction 18. It talks
18 about second degree murder. The only part of this instruction
19 that applies to this case is the first part, murder of the
20 second degree is murder which is an unlawful killing of a human
21 being with malice aforethought, the same thing required for
22 third degree murder, but without the deliberation and
23 premeditation for a first degree murder.

24 MR. SMITH: Judge, may we approach?

25 THE COURT: I think it's okay. It's argument. Go

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1 ahead.

2 MS. PALM: Thank you.

3 THE COURT: Go ahead.

4 MS. PALM: I also want to draw your attention to jury
5 instruction number 17. This jury instruction tells you that if
6 all 12 of you think it's a murder, but not all 12 of you think
7 it's a first degree murder -- some of you think first, some of
8 you think second -- you have to go with second. You can't go
9 with first. It tells you that if you think he's guilty between
10 the two degrees, he must be convicted of the lesser offense.

11 And then if you find that he did not commit a first
12 or second degree murder, then you look at manslaughter.
13 There's voluntary manslaughter and involuntary manslaughter.
14 Ms. Graham talked about the instruction for a voluntary
15 manslaughter. And what I want to draw your attention to in the
16 language in here, this middle paragraph, the provocation
17 required for voluntary manslaughter must either consist of a
18 serious and highly provoking injury inflicted upon the person
19 killing sufficient to excite an irresistible passion in a
20 reasonable person or an attempt by the person killed to commit
21 a serious personal injury on the person killing. That does not
22 require a physical injury. An a voluntary manslaughter can
23 result after a passion from you walk in and you find somebody
24 sleeping with your husband or your wife. That's the kind of
25 passion we're talking about. It's an injury, but it doesn't

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1 as evidence of motive, if you think that there is motive here.

2 Brian has a severe and chronic disease with his
3 alcoholism. You heard that from Mr. Paisano, who does the
4 MINDS counseling. He has suffered for a long time from it.
5 It's influenced his choices, and he's made some bad choices.
6 And he's paid the price for those just like he has paid the
7 price for his prior crimes. He's lost loved ones, he's lost
8 relationships. It's affected his jobs, and now he's in a
9 criminal situation.

10 I'd ask you to they about the whole person that Brian
11 is because there's some good about him, too. As a very young
12 man, 17 years old, he goes into the service. He serves in
13 combat. He's a combat veteran. He was decorated. He did some
14 good things. And then he succumbed to this disease, and he has
15 battled it every day of his life. It's cost him dearly, and
16 it's a struggle that he's succumbed to over and over.

17 But he is entitled to the protection of the
18 Constitution that he fought to defend, and that Constitution
19 requires that if you convict him of a crime, it must be because
20 every element of that crime is proved beyond a reasonable doubt
21 and not because he's done some bad things or you don't like him
22 or you don't like us or -- these require that you hold the
23 State the burden of the proof because that's what our
24 Constitution requires.

25 Brian told you what happened on November 5th. He

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1 mean it has to be a physical injury.

2 And this has been sort of a long trial for a one week
3 trial. And sometimes as trials go, they get a little bit
4 contentious, and I just want to say right now if I or Mr. Pike
5 have done anything to offend any of you, we do not want you to
6 hold that against our client because we are proud to be
7 representing Mr. O'Keefe. And so please forgive us for any of
8 our transgressions.

9 Brian O'Keefe is not proud of the choices in his life
10 and of things that he can't control. You heard about the three
11 prior felony convictions he has, and there are instructions
12 telling you how you can use those, and they're a little bit
13 confusing, so I just want to point those out to you, too.
14 They're jury instructions number 8 and 9.

15 Number 8 tells you that the fact that he's been
16 convicted of a felony may only be considered for the purpose of
17 determining credibility. It does not necessarily destroy or
18 impair his credibility. It's one of the circumstances you can
19 consider. So that is an instruction telling you how to
20 consider the credibility of a witness. Because Mr. O'Keefe
21 testified, you can consider all three of those convictions for
22 that purpose, but it's not evidence of his guilt.

23 Instruction 9 talks about the one conviction that was
24 let in for the purpose of showing motive, and that's the prior
25 domestic battery conviction. That conviction can be considered

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1 didn't have to. He didn't have to take the stand. A criminal
2 defendant is never required to testify, and he got up there and
3 he told you what happened. The State has offered you
4 absolutely no proof that anything else occurred. On that
5 evening he and Victoria were celebrating the prospect of him
6 going back to work, and he admitted to you that he was looking
7 for a reason to drink. He wanted to have something to
8 celebrate. He wanted to drink again.

9 And they went out and they had a good time, and they
10 were acting as a couple, and that evening did not start out
11 with any intent to harm Victoria. They started drinking wine
12 at home, then they went to the Paris and they drank free drink
13 after free drink. That's why they were there. He doesn't
14 remember who drove home, but he remembers parts of it, and he
15 remembers waking up in the passenger seat, and the State's
16 evidence supports that. This is State's Exhibit CC.

17 If you note from that photograph, the passenger seat
18 in the car is reclined. The driver's seat is moved up. There
19 are even glasses in the center console.

20 When he wakes up, they're having a little bit of an
21 argument. She wanted to go out to eat. He wanted to keep
22 drinking because he wanted to catch up with her. She goes
23 upstairs, he stays down stairs, and he sleeps for a little
24 built longer. He remembers going upstairs. He remembers
25 hitting the rail. He remembers Jimmy Hatchcos coming out, and

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1 that is supported by Jimmy Hatchcos's testimony. Jimmy heard a
2 loud noise, came out, and he said Brian's standing out there.

3 He remembers going in the apartment to use the
4 bathroom. Using the bathroom. Victoria's in the master
5 bedroom bathroom making some noises, apparently still angry.
6 He decides he wants to smoke sop more. He goes back outside.
7 He's smoking outside. And then he told you what happened when
8 he went into the bedroom.

9 He goes in the bedroom, was going to hang up his
10 jacket. The lights were off. She comes flying out of the
11 bathroom with the knife, startles him. He uses his jacket to
12 ward off the knife, and that is also supported by the evidence.
13 This is Defense Exhibit W. This is his jacket laying there on
14 the other side of the bed. The blinds are falling down because
15 the jacket hit them.

16 He tells you about the struggle that they had and how
17 she was holding the knife. If you imagine this as the sharp
18 blade of the knife, the edge of this ruler, she's jabbing the
19 knife at him. He grahs it, she grabs it out of his hand and
20 cuts his hands. You would cut your hands where his hands cut
21 where he said he grabbed it, and the evidence supports that.

22 And Dr. Schiro told you that his hand wounds are most
23 likely a defensive injury. From all the options that there
24 are, Dr. Schiro came in here and told you the most likely
25 option is that they are consistent with defensive injury.

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1 given of the issue of self-defense as raised. Brian's defense
2 is not that he intentionally killed her in self-defense, which
3 would be the normal self-defense. Brian's defense is that he
4 acted in self-defense when she's coming at him with a knife,
5 and that she was killed in an accident during that
6 self-defense. So it's not the usual self-defense. So some of
7 those instructions might be a little confusing, but that is the
8 defense that we are putting forth is that this happened during
9 his response to her attack, but the stab itself was an
10 accident.

11 What Brian told you is actually the only thing that
12 makes sense, given all the evidence. It explains the noises
13 heard by the Tolivers. And the Tolivers cannot be right in
14 their descriptions of time if you want to believe the rest of
15 the State's case because Joyce told you she started hearing
16 noises around 9:00, and she knew that because that's when her
17 stories played. And she was annoyed, her stories were playing,
18 and she couldn't hear them because there's noise going on
19 upstairs.

20 Well, she say Cookie woke up at 10:00, went up
21 shortly thereafter. Cookie said he went up about 10:15, and
22 that does not jibe with the 911 calls. Those 911 calls are
23 made at 11:02. So what's happening for 45 minutes? If you
24 believe the State's evidence, apparently a two hour beating.
25 Is that what they're trying to allege because yes, Victoria has

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1 So he's grabbing her wrists and he gets ahold of both
2 wrists, and he's trying to fight with her, and they're moving
3 around that tiny little area by the bed, and you saw the
4 photographs. It's a tiny area. They fall down on the bed, and
5 from the weight of his arms, the knife goes in. And it goes
6 in, and the way it goes in is the same angle as

7 (indiscernible). It goes in like this. Or actually,
8 the sharp part is to the back. So she's holding it, he has her
9 hand, it would go in just like this, sharp part to the back.
10 It makes sense. And the State cannot disprove it, as is their
11 burden. They have to disprove that.

12 He told you that he didn't realize that the knife
13 went in. He didn't realize it went in. He didn't realize it
14 went out. All he understood in his drunken stupor was that she
15 stopped moving and then the bed started getting wet, and he
16 starts looking for an injury, and he doesn't know what's
17 happening. He doesn't understand it. And he's moving her
18 around the bed trying to find out where is the injury. And he
19 takes the pillowcase off, and he's trying to hold that up to
20 the injury that he does find, and her pants are bloody, so he's
21 taking them off looking for is there a different kind of
22 injury. He doesn't know what's happened. And he is drunk out
23 of his mind, and we all know that.

24 There are a lot of instructions on self-defense, and
25 this is not a classic self-defense. But those instructions are

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1 some bruises, but as you hear from Dr. Benjamin, she can't date
2 any of those bruises. They could be up to three weeks old.
3 She doesn't know.

4 And if you look at the bruises and not the multiple
5 pictures of the same bruises. Some look older. Some look
6 newer, and none of them look like a two hour beating. None of
7 them look like a one hour beating. That would have been some
8 serious damage if it's constant beating going on for one hour.
9 And Victoria had cirrhosis and that affects your bruising
10 ability. And she was also in a drunken stupor herself.

11 We don't know that she's not walking into chairs,
12 walking into tables, bumping into things, that she doesn't have
13 a lot of bruises ordinarily on her feet which she -- when she
14 walks into a wall. Cirrhosis affects your bruising, and you
15 would bruise, according to their own expert, upon less than
16 forceful contact and you would bruise easier.

17 Jimmy Hatchcos, who lived right next door to Brian
18 and Victoria didn't hear any noises until 10:00 o'clock, and
19 that a's when he heard a loud noise outside on the rail, and
20 that's when he went out, and that's when Brian was out there.
21 You would think that Jimmy Hatchcos would have hear some kind
22 of moaning going on. And with Victoria's bleeding problem, Dr.
23 Benjamin said she would have bled out quickly, it was probably
24 fast. She wouldn't have been up there moaning for an hour or
25 two hours or any length of time.

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1 There's no physical evidence to support another
2 theory. There's in fingerprints. There's nothing. There's no
3 witnesses. The State has alleged an attempt -- or death by
4 intentional stabbing, and that's what they have to prove, and
5 they have not done it. They want wanted to show you that Brian
6 had a motive to kill Victoria by calling Cheryl Morris to
7 testify. And I want you to consider instruction 7 when you're
8 thinking about Cheryl Morris' testimony.

9 And that tells you that you can weigh her credibility
10 based upon, among other things, her relationship to the
11 parties, her motives, her feelings. And if you think she's
12 lied about anything, then you can throw out her entire
13 testimony. And I submit to you that she had a motive to lie.

14 Cheryl Morris was a woman scorn. Brian hurt her, and
15 she had a right to be angry, and he's not disputing that. He
16 was not a good guy. He cheated on her, he lied to her. He let
17 her put a car in his name. That's a shameful thing, but that
18 does not make him guilty of murder.

19 But Cheryl Morris is unbelievably upset, and after
20 she hears about Victoria's death, she goes to the police. They
21 don't go to her. She goes to them. She calls them. She says
22 I want to talk to you. She testified at the preliminary
23 hearing, and then we hear her testimony yesterday at trial, and
24 she's telling a story about how when she went to visit Brian,
25 he made some statements to her about what occurred, and it's

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1 from Mr. DeSalvio. She bent to his MINDS counseling with him.
2 He took her to see his young daughters. That's not something
3 you do if you're planning to kill somebody or if you want to
4 kill somebody or you hate somebody. These two people loved
5 each other.

6 Even the State's witness, Jimmy Hatcheos, their next
7 door neighbor, said that they were a loving and affectionate
8 couple. That's what he saw the whole time that they were
9 living together for that two months. You saw photographs of
10 their little apartment, Defense Exhibit M. This place was a
11 home. That apartment was nice. It was a home for these two
12 people, and that's where they were planning their future
13 together.

14 And what was Brian saying when Cookie and Todd went
15 in that apartment? He was trying to pick her up. He was
16 saying baby, don't do this to me. Baby, wake up. Wake up. He
17 wasn't responsive to them. He was focused on her. He wants
18 her to get up. He doesn't know what's the matter. He is in a
19 drunken fog.

20 Should he have called for help? Of course. But he
21 told you why he didn't. He didn't tonight leave Victoria. And
22 if this was an intentional thing, don't you think he would have
23 done it in a way to cover it up? That he would have hid some
24 evidence or tried to take off? He wasn't leaving Victoria no
25 matter what because he loved Victoria.

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1 not anything he remembers ever telling her about the case, and
2 I'm not sure why she would say it.

3 I mean, she's saying that Victoria was trying to stab
4 him, and then he didn't remember something. And maybe she
5 thinks that helps him now. Maybe she's feeling guilty about
6 saying the things before that he had said he wanted to kill
7 Victoria. I don't know why she did it, but it doesn't make
8 sense, and Brian never told her those things, and I think that
9 her testimony can be discredited.

10 She also told you that Brian preferred Victoria over
11 her because Victoria was submissive. Well, she also said that
12 Victoria called her five times wanting to talk about how she
13 wants to be with Brian and why does Cheryl want to be Brian or
14 whatever the conversation was. But she's yelling at her. I
15 don't think that's submissive. A woman who is calling the
16 girlfriend of her former boyfriend and yelling at her is not a
17 submissive woman.

18 Brian loved Victoria and Victoria loved Brian. And
19 in their sad world, these two fragile and damaged people found
20 each other, and they loved each other. And when they got back
21 together, they did it -- Brian did it knowing he was risk his
22 health because of her Hepatitis C. She did it wanting to be
23 with him. And they were looking forward to a future together.
24 They made plans for the future. They start the living
25 together. He took her to meet his union friends. You heard

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1 Nothing makes sense about his reaction other than
2 that he was in a drunken stupor, an alcoholic haze and a
3 severely altered state. Nothing makes sense about it. It's
4 not how a normal person acts. And as far as evidence of his
5 drunkenness, we were handicapped in showing you how severe his
6 drunkenness was because detectives --

7 MR. SMITH: Objection, Judge. It's improper -- I
8 think she's going to make an improper argument.

9 MS. PALM: I'm going to say they didn't obtain his
10 blood or breath.

11 THE COURT: All right.

12 MS. PALM: Because they did not obtain his blood or
13 breath sample. They could have. It would have been easy. It
14 was available. They knew how intoxicated he was, and they
15 didn't do it. George Schiro told you that that's a useful and
16 accepted practice in an investigation such as this.

17 Because we don't have it, we can't give you a
18 quantitative analysis. We can't give you a number. We can't
19 ever tell you what his alcohol level was at. But you can see
20 from the video yourself five hours later when they're doing the
21 penis swab, he still can't stand up straight. He's still that
22 intoxicated.

23 We had a lot of the State's witnesses come in here
24 and deny that they noticed any symptoms of intoxication and,
25 you know, maybe one of them smelled a little alcohol, but

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1 nobody was saying yeah, yeah, he was bad off. We didn't have
2 any evidence of that until we got the use of force report. And
3 that use of force report said that Officer Ballejos' impression
4 of Brian at the scene were that he was -- I want to make sure I
5 get the words right. I think it was extremely intoxicated
6 slash mentally ill. That was his impression. We didn't have
7 one document telling us that. There was not one report telling
8 us that until we obtained that use of force report. And then
9 the other officers came to the stand, and when asked about
10 that, they said oh, yeah, we don't disagree with him.

11 Todd Armbruster, luckily we had the State's 911 call
12 when he calls 911. And they ask him is -- they're asking well,
13 is the suspect intoxicated. He says very much so. So we know
14 that he was. And he admitted on cross that he's disoriented
15 and he's stumbling around and unsteady on his feet.

16 What is clear from all of that is that Brian's
17 ability to perceive, to relate and to remember was severely
18 impaired at the time of the incident and later when he's
19 talking about the officers. And I don't know if you noticed,
20 but there were quite a few inconsistencies between the
21 statements of the arresting officers because we had a morning
22 of officers coming, all the ones that entered the apartment,
23 and they're telling you different things about the lies, who
24 went into the room, who carried him out. And I don't fault
25 them for that because when you have that many people telling

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1 MS. PALM: Prescription drugs, I said.
2 THE COURT: All right, prescription drugs.
3 MS. PALM: I think Dr. Christensen testified that it
4 was an overdose.
5 THE COURT: Okay. Go ahead. I'm going to allow --
6 MS. PALM: Thank you.
7 THE COURT: -- your argument.

8 MS. PALM: Her blood alcohol level was a .24. And
9 that is three times the legal limit for driving. She had high
10 levels of Effexor in her blood, and you heard from Dr.
11 Christensen about the risks and side effects of that kind of
12 dosing. It can lead to seizures. It can lead to confusion,
13 anxiety, and agitation. These substances aren't meant to be
14 combined. Alcohol alone has its own toxic effects.

15 Brian told you what affected his ability to give a
16 statement to the detectives when they were questioning him.
17 And you know, Detective Wildemann was extremely patient in that
18 questioning. That was a hard and difficult thing. And Brian
19 is an obnoxious drunk. You watched that video, and you're
20 thinking stop being so obnoxious. But he was also just about
21 drunk, and some people are like that when they're drunk. And
22 he couldn't remember, and he was trying to remember. And you
23 could see parts ever the video where he's trying to remember.
24 He's saying he's trying to think. He's saying just wait, just
25 wait.

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1 the same story, you're going to get inconsistencies.

2 These people were sober. But this was a highly
3 exciting event, and these trained officers still got the
4 details wrong. Well, what is Brian, who is drunk out of his
5 mind supposed to do, and he's being faulted because he doesn't
6 -- didn't have perfect recall when they were questioning him
7 when he was still drunk out of his mind.

8 No one is questioning or faulting the behavior of the
9 arresting officers in this case. Brian was acting nuts, and
10 they had every right to take him, and he knows that. And
11 nobody's saying that they did anything wrong by their actions.
12 Thank God that there's brave men and women who are willing to
13 go into situations that are bloody and they don't know what
14 they're walking into. Thank God for them. We're not saying
15 that they did anything wrong. We're just pointing it out that
16 it was a chaotic situation, and to the extent that anybody had
17 anything to say other than he was extremely intoxicated, it's
18 because there's so many people in the room and so much going
19 on, and it was that way for Brian, too..

20 We also know that Victoria abused both alcohol and
21 prescription drugs that evening. Her blood alcohol level was
22 --

23 MR. SMITH: Objection, Judge. That misstates the
24 evidence. There's no evidence that she abused drugs that
25 evening.

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1 So they can't now come in here and deny that he's
2 confused. When they took advantage, they knew he was confused
3 because they were because they were telling him she's still
4 alive. They had to think he was confused enough to believe
5 that she was still alive because they kept that out through the
6 entire interview until the very end when they told him she's
7 dead, and then he breaks down crying.

8 That's alcohol, ladies and gentlemen. That's not any
9 intent to deceive. And so in summary, I submit to you that the
10 State has not proved their burden of proving beyond a
11 reasonable doubt and overcoming the presumption of innocence
12 that Brian committed any kind of intentional killing whether
13 that's first or second degree murder or voluntary manslaughter.

14 If you think he's negligent in anything he did that
15 morning night, that's involuntary manslaughter. That's not a
16 murder. It's not voluntary manslaughter. Victoria started the
17 actions that led to her death, and this was an accident and a
18 tragic ending and that's all. Thank you.

19 THE COURT: Thank you, Ms. Palm. Mr. Smith.

20 MR. SMITH: Well, we're almost done. I just want to
21 thank all of you guys for your patience, and I know it's been a
22 long week, and we've asked you to consider a lot of evidence.
23 And it's kind of my job to kind of address some of the points
24 that Ms. Palm raised without taking too long and addressing
25 every little point because I'm going to trust that you 12 -- 13

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1 reasonable men and women can figure out some of the things
2 yourself.
3 The important things I do have to address, so please
4 bear with me if I take a little bit longer than you
5 (indiscernible). Folks, one of the things that I
6 first want to talk about is, you know, the State of Nevada
7 doesn't have the luxury of picking who the victims of a crime
8 are. And it's important for you guys to realize that because
9 here we have a woman who has admittedly a .24 blood alcohol
10 level in her system. And as we've heard, that's three times
11 the legal limit.

12 But let me qualify that. That's three times the
13 legal limit if you're driving. If you're sitting in your
14 house, you can have whatever type of liquor that you want or as
15 long as you're not behind the wheel of a car. That brings me
16 to the picture that Ms. Palm just placed to try and get you to
17 believe that Victoria was driving that car simply because one,
18 the seats was laid back. There's no evidence as to who was
19 actually driving that car. Keep that in mind.

20 Pictures do say a thousand words. Sometimes they
21 don't say what the defendant want you to think they say. Now,
22 the only people who have a choice against -- with regards to
23 the people that they commit crimes against are the people that
24 commit the crimes, like this man right here. He had a choice
25 that night.

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1 We've heard she had a .24. We heard she was taking
2 anti-depressants. But, I mean, does that alone that she
3 deserved to have what happened to her on this night? Of
4 course, not. Does that mean that because of that, the
5 defendant is absolved from criminal liability? Of course, not.
6 Now, I'm by no means trying to suggest that we still don't have
7 the burden of proof.

8 But what I want to import upon you is that Victoria
9 Witmarsh's condition is irrelevant so long as we prove that the
10 defendant committed a crime against her. She's still a victim
11 of a crime.

12 Now, got some common sense for you. And I call this
13 things you don't do if you kill someone in self-defense and/or
14 you're in the guilty of murder. And I have a little asterisk.
15 And that asterisk say no matter how much you've had to drink.
16 Just bear with me. It's not long.

17 Number one, say she stabbed herself initially, but
18 then change your name and said well, no she attacked me.
19 Number two, refuse to allow medical assistance to be provide to
20 that person. Number three, resist arrest. Number four, fall
21 asleep after you've just killed them. Number five, decline to
22 call 911, but then lie to the police when they're interviewing
23 you and say well, yeah, I did. The next one, say tack someone
24 who's trying to provide assistance. The next one, say let's
25 go, let's do the ten years. Another one, no way possible she

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1 This case is about choices, folks. He want you to
2 give him a pass because he's an alcoholic. But he's testified
3 that I acknowledge that I fell off the wagon. This case is
4 about choices. It's about the choice that Brian O'Keefe made
5 on November 5th, 2008. He wants you to believe that he was so
6 drunk that night there is no way he could have intentionally
7 taken his life -- or taken Victoria Witmarsh's life. And we'll
8 talk a little bit more about that in a second.

9 But what he wants you to believe is not supported by
10 common sense. And because we don't have a witness who can say
11 I saw Mr. O'Keefe stab Victoria Witmarsh, you have to use a lot
12 of your common sense. And that's no different -- I mean, think
13 about it, folks, in a murder trial it's not really important
14 that we have a witness because a lot of the murders are
15 committed outside the view of another person except the person
16 that's killed. That's why the law allows you to take into
17 consideration circumstantial evidence.

18 And let's talk about common sense. And I apologize,
19 folks. I don't have the Power Point. But it says you must
20 bring to the consideration of the evidence your everyday common
21 sense and judgment as reasonable men and women. Thus, you're
22 not limited to what you see in here, but you can kind of figure
23 things out yourself. The evidence is going to point you in the
24 right direction.

25 And let's talk a little bit about Victoria Witmarsh.

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1 did this to herself. Now, remember, he says that when he
2 police are not inside that room. He's sitting inside that room
3 by himself thinking nobody's paying attention to him. He says
4 there's no way possible she did this to herself. It is at 2:06
5 a.m. on that video.

6 Now, we're asking you to make a really important
7 decision, folks. And I really hope that because this has been
8 a long trial that you don't rush through some of the important
9 decisions that we're asking you to make. That video's going to
10 be available to you. That video also tells you a lot of
11 things. It also speaks a thousand words because it shows the
12 demeanor. And you can see on that video that he might be a
13 little tipsy, but he's not completely drunk that you would
14 forget how you killed somebody.

15 Let me continue. Give the police false information
16 about the victim. Take her pants off while she's bleeding like
17 a stuffed pig. Leave the person looking like this, meaning the
18 pictures that we've shown. And I don't want to belabor the
19 point by keep on showing you guys the photos. You guys can --
20 you guys are going to have that to look back.

21 Tell the police come and get her, she's dead. Tell
22 anybody come and get her she's dead. Wait two to three minutes
23 while they lay there injured and bleeding. These are things
24 that you don't do when you unlawfully take the life of another,
25 no matter how drunk you are.

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1 Now speaking of self-defense, the defendant wants you
2 to believe that this small woman, after they've just been out
3 celebrating, for some reason she decides to wait until they get
4 home, and then she tries to come at him with a knife and tries
5 to stab him repeatedly. But the only thing they has to show
6 for is two, I submit to you, superficial cuts on the sides of
7 his fingers.

8 Now, may I borrow your ruler, Ms. Palm? Now, he said
9 that when she came at him with that knife, he grabbed it but
10 didn't get a good hold of it and she snacked it. Well, the
11 blade is resting -- presumably the blade would be against the
12 fingers, and let me make sure I do it right because she said it
13 was in his right hand, and he grabs it like this. But when
14 they snatches it, you would expect the front cuts along the
15 entirety of his hand, not just right here, right there and
16 right there. You're going to have those pictures, and you're
17 going to see that that's where those cuts are.

18 Now, an alternate theory, obviously, is that when
19 you're holding the knife and you stab somebody, it might get in
20 between there and there. That's certainly an alternate theory,
21 and it's one that's supported by the evidence.

22 Furthermore, he's told you he's a trained combat
23 veteran. He's been in Grenada. He got a bronze star for valor
24 some 20 something years ago. I mean, this is like David versus
25 Goliath here, folks. She's an itty bitty woman. His story

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1 the reasonableness of his story or the fact that it may or may
2 not comport with some of the photographs you've seen.

3 And let's talk about what he told the police during
4 that interview night after this happened. And I don't want to
5 misquote him, so please bear with me while I find it. Here we
6 go. He didn't stab her. She stabbed herself. Back then he
7 had no idea how he got the cuts on his hand.

8 Now, from that statement he said he walked into the
9 bedroom and said what the F are you doing. That's what he
10 said. He said that's what precipitated this argument. Watch
11 that video, it's on there. He walked in the bedroom and said
12 what the F are you doing, and then he grabs knife.

13 But on the stand he says he walks to the bedroom to
14 hang up his coat, and she comes out, surprised attack, I'm
15 going to get you this time. Those are two completely
16 inconsistent stories. Furthermore, people usually, I'm submit
17 to you, folks, don't remember facts better after several months
18 have passed, whether you're drunk or not. That's actually an
19 incident like this, which I submit to you is what's called
20 sobering experience. It's sobering.

21 Meaning when something like this happens, you kind of
22 get your faculties, back. Perfect example, if you go out and
23 have a couple of drinks --

24 MS. PALM: Your Honor, may we approach.

25 MR. SMITH: Is there an objection?

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1 does not make sense. It doesn't add up.

2 Now, Victoria isn't here to tell her side of the
3 story, so it's easy for the defense to get up here and say it's
4 self-defense. She can't tell you that there's no way I tried
5 to stab him with a knife that night or each on the night of her
6 birthday where he tried to tell you where she came at me two
7 days before when she drank some wine.

8 But you heard him say that despite the fact that she
9 allegedly tried to stab him two days before, he lets her go
10 drink some more. Now does that make sense? You're home with
11 your significant other and for some reason they have a couple
12 of bottles to drink. He said she had two bottles. Then they
13 try and kill you or try and stab you. Two days later they say
14 honey, I'm going out to get something to drink. Are you going
15 to say okay? Doesn't add up, folks. Doesn't add up to
16 self-defense drunk or sober.

17 Now, he knows you wouldn't believe that she stabbed
18 herself. So he falls to a plan b, the self-defense plan. He
19 he abandoned that she stabbed herself defense a long time ago.
20 Now, don't forget, folks, he's had some time to think about
21 this. He's been here through the this whole trial, and, in
22 fact, he's the only person who's had the benefit to hear what
23 every other witness had to say. No other witness has been able
24 to do that.

25 So take that into consideration when you think about

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1 THE COURT: Quickly, please. Yes.

2 MS. PALM: Yes, there is.

3 (Off-record bench conference).

4 MR. SMITH: Common sense tells you that something
5 like this would be a sober experience, and you'd be able to
6 remember more when it actually happened. An example being if
7 you go out and have a couple of drinks, you're a little tipsy,
8 you don't think you're drunk, too drunk to drive, but you get
9 in your car anyway, and you start driving home. And the next
10 thing you know, you said red and blue lights behind you.
11 Sobering experience. You're like, I need to get myself
12 together. I need to make sure I'm going to be okay. Sobering
13 experience.

14 Now, if you would agree that that's a sobering
15 experience, wouldn't the night that you killed the woman that
16 you love be a sobering experience? You would expect that you
17 would be able to remember every single detail. Now, you've
18 heard evidence that the defendant suffered from blackouts.
19 That's what he said on the stand. But those medical records
20 that you have in evidence said that he also told people that he
21 was trying to get treatment that he never suffered from
22 blackouts. So if he tells you this now, when it would help
23 him, but he doesn't tell you -- he doesn't tell people that you
24 would think he would be honest with.

25 Ms. Palm wants you to believe that when he's told

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1 that she's dead, Mr. O'Keefe breaks down and cries. The video
2 didn't support that. What it showed was a person who sat there
3 for several seconds and then began to kind of whine. And you
4 heard the testimony from the detective who was actually there,
5 that he saw no tears, he saw no welling up of her eyes, he saw
6 no reaction. That's because he already knew she was dead. He
7 was just kind of playing a game.

8 Now let's talk about credibility. They've already
9 said the credibility instruction, and we're talking about
10 Cheryl Morris. Now, the defense attorney wants you to believe
11 that Cheryl Morris came in here and basically told you a lion
12 the stand because she was a jilted ex-girlfriend. But this is
13 the same ex-girlfriend that the defense attorney called and
14 said hey, you know, we think that Mr. O'Keefe's -- you still
15 have Mr. O'Keefe's glasses, can you bring them. She brought
16 them.

17 Does that sound like the woman who has an ax to
18 grind? She brought the man's glasses. When asked on the stand
19 well, why are you here, because I was subpoenaed. She's
20 subpoenaed, she gets on the stand, she's take an oath where
21 she's asked questions, she tells the -- she provides the
22 answers. She certainly didn't seem like a woman scorn. They
23 want you to believe that this is hell hath no fury like a
24 woman scorned simply because the defendant cheated on her
25 sometime ago.

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1 on direct examination, did you ever demonstrate on her how you
2 could kill somebody with a knife? He said well, no, I didn't
3 demonstrate. Well, certainly that can infer that he admits
4 that he at least told her.

5 Why would she make that up? Because she hates him?
6 I don't think so. And let's talk about the testimony of Joyce
7 and Todd and the timing here. The evidence certainly supports
8 that there was noise coming from that apartment for an
9 extensive period of time. Not five minutes, not ten minutes,
10 but for an extensive period of time. And at some point it got
11 to loud that Mr. Toliver went upstairs to find out what was
12 going on. And we all know what happened after that, the police
13 were called.

14 This brings me to circumstantial evidence. You heard
15 Joyce Toliver talk about how she could hear the woman crying
16 during the time that she heard that noise. Some of you might
17 be thinking well, this whole scenario could have been avoided
18 if Ms. Toliver had called the police. That might be true, but
19 that doesn't change the facts of this case, folks. And it
20 doesn't get the defendant off the hook.

21 You got a woman crying, you got loud noises, you have
22 signs of disturbance inside that apartment, inside that
23 bedroom, and you have a woman looking like the way she looks in
24 those photographs with all those bruises. You have an injury
25 to the front of her head. You have an injury to the back of

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1 But you also heard that Ms. Witmarsh stopped dealing
2 with Mr. O'Keefe in August when she moved out. And now some
3 six or seven months later he want you to believe that she still
4 has this pinned up aggression that she would craft this
5 preposterous story about -- they want you to believe it's
6 preposterous, but that she would make up this story about what
7 the defendant told her about his underlying disdain or enmity
8 towards Victoria Witmarsh because what had happened.

9 Now, some of you may say but yeah, they were together
10 at the time. Sure, but that doesn't mean that he didn't have
11 some deep seeded disdain for what happened during that time she
12 testified against him in front of a jury of people like you.
13 It doesn't change the fact because there could be an alternate
14 scenario as to what happened that night, and I'll get to that
15 in a second.

16 You heard Ms. Witmarsh say that the defendant told
17 her that he wanted to kill the bitch because she took away
18 three years of his life by testifying against him. Take into
19 consideration that her testimony is corroborated by the
20 evidence. The judgment of conviction that's been admitted into
21 evidence, folks, read it.

22 The defendant said that he served about two years,
23 but I'd ask you this, how would Cheryl know this information
24 unless the defendant told her? Cheryl testified that the
25 defendant told her he was proficient with knives. When asked

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1 her head. That's certainly circumstantial evidence of a
2 battery or something that precipitated a stabbing.

3 Now, if he started this, he can't now claim
4 self-defense because the law says the initial aggressor does
5 not have the right to self-defense. That's the law. Ms. Pike
6 -- excuse me, Ms. Palm also said that doubt Cheryl Morris'
7 credibility because she called the police. Well, it's
8 reasonable to infer it's because she learned what had happened
9 in that apartment, and she had some relevant information to
10 provide. That's not unlike something that anyone would do
11 under those circumstances. Not just a person who had an ax to
12 grind.

13 The night in question the defendant never said look,
14 this is where I got injured. But not some several months
15 later, he wants to fall back on that as some evidence
16 corroborating that this little woman trying to kill him that
17 night. Folks, it's unreasonable under these circumstances.

18 Now, with regards to the testimony about the DNA, you
19 can't really conclude anything from that but except that two
20 people came into contact with knife, Victoria Witmarsh and
21 Brian O'Keefe. And the reason why is because the defendant
22 doesn't even know what happened to that knife after she got
23 stabbed, and you can see on the pictures that there's
24 pillowcases laying on top of it. There's an indication that
25 the blade may have been wiped off. I mean, you can't just --

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1 you can't really just trust the testimony of Dr. Schiro and
2 that his interpretation means that these wounds are totally
3 defensive because I've shown how they aren't.
4 Now, briefly allow me to talk about the defendant's
5 testimony on the stand. He tells you about his military
6 service some 25 years ago. We know since then some things have
7 happened in his life. The law says that you can take, for
8 instance, his felony convictions as evidence in assessing his
9 credibility, especially when combined with the fact that he's
10 -- the story's he's given today is inconsistent with the story
11 he told Cheryl Witmarsh (sic), and it's inconsistent with the
12 story he gave on that videotape.

13 Folks, I'm almost done. Ms. Palm wants you to
14 consider the defendant's actions after this happened as
15 evidence that he didn't mean anything to happen on the night in
16 question, but that's not what the law says. The law says you
17 determine a person's intent at the moment they commit the act.
18 And that makes sense because sure, a lot of times people are
19 sorry that they kill somebody after it's happened and/or before
20 they get caught. But it doesn't mean -- it doesn't make the
21 underlying act any less criminal.

22 Now, in talking about reasonable doubt, the
23 instruction tells you exactly what reasonable doubt is. It
24 says doubt to be reasonable must be actual, not mere
25 possibility or speculation. I submit to you the story that the

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1 (Swearing in the marshal)
2 (Outside the presence of the jury)
3 THE COURT: Let the record reflect we're outside the
4 presence of the jury panel. I just want to put on the record
5 when I read the jury instructions, instruction number 3, as was
6 provided to counsel, actually I read it as is, but it was
7 retyped because if you look at line 11, the word instructions
8 was broken up on the line, and that was just retyped. And so
9 the corrected -- or the typed version is provided to the jury.

10 Instruction 42 that was original provided to the
11 attorneys at line 7 and line 8 it says read backs, and I had
12 that -- I read it as play back, but it's originally typed for
13 both counsel and read backs, and so that was fixed.

14 And instruction 43, which you had copies of, was just
15 the instruction that I signed, and the signature line was moved
16 up. So three changes were made and those changes were included
17 in the packet of jury instructions provided to the jury panel.
18 And everyone has provided their cell phone numbers to the
19 clerk, and please within 15, 20 minutes of the court house to
20 be called. It's my understanding is that they wish to
21 deliberate tonight and --

22 MR. PIKE: I plan on staying here --

23 THE COURT: Okay.

24 MR. PIKE: -- until (indiscernible).

25 MS. PALM: Yes, I'll be here, too.

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1 defendant gave does not comport with the evidence, and I'm
2 talking about the story he gave today and yesterday on the
3 stand. He said that she fell backwards, he fell on top of her,
4 and somehow she ends up stabbed.

5 Now, folks, if you land on -- I submit to you that if
6 you land on somebody with all your body weight and you weigh
7 180 something pounds and you land on them and a knife goes into
8 them because your entire body weight is on them and they only
9 weigh a hundred pounds, the blade is going to go in a lot
10 further than four inches. It's going to go all the way in
11 because all your weight is on there.

12 But here, the length of the wound was four inches,
13 which is consistent with an intentional stabbing, but
14 consistent with an accidental stabbing where you fall on top of
15 the person holding the knife. That's another part of common
16 sense. So what we're asking you to do here is to use some
17 common sense, realize that the credibility of the State's
18 witnesses shouldn't be questioned under the circumstances of
19 this case, take into the fact -- take in fact that the State's
20 evidence has corroboration. Go ask me to convict him. We've
21 met our burden. The burden is beyond a reasonable doubt. It
22 says that if you feel an abiding conviction and the truth of
23 the charge, there is no reasonable doubt. Thank you.

24 THE COURT: Thank you, Mr. Smith. The clerk will now
25 swear in the marshal to take charge of the jury panel.

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1 THE COURT: All right.
2 MS. GRAHAM: Judge, (indiscernible).
3 MR. SMITH: I'll be here but no guarantee I'll be
4 sober.

5 THE COURT: Okay.

6 MS. PALM: Yeah, me either.

7 THE COURT: That's off the record, Michelle.
8 (Court recessed at 4:02:58 p.m. until 7:12:55 p.m.)
9 (In the presence of the jury)

10 THE COURT: You may be seated. I understand that we
11 have a verdict, and Mr. Livemash, are you the foreperson?

12 JUROR NO. 6: Yes, sir.

13 THE COURT: Please hand the verdict form to the
14 marshal. The clerk will now read the verdict.

15 THE CLERK: District Court, Clark County, Nevada.

16 State of Nevada, plaintiff versus Brian Kerry O'Keefe,
17 defendant. Case No. C2566 -- 250630, Department No. 17.

18 Verdict. We the jury in the above-entitled case find the
19 defendant, Brian Kerry O'Keefe, as follows: Count one, murder
20 with use of a deadly weapon, open murder, guilty of second
21 degree murder with use of a deadly weapon. Dated this March
22 20th, 2009. Signed by the foreperson, Kirk Livernash. Ladies
23 and gentlemen of the jury, is this your verdict as read? So
24 sea you one, so say you all.

25 THE JURY: Yes.

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1 THE COURT: Either party which to have the jury
2 polled?
3 MR. PIKE: Defense does not, your Honor.
4 THE COURT: Okay. All right, at this time the clerk
5 will record the verdict in the court minutes. The defendant is
6 remanded to custody. We'll refer this matter to Department of
7 Parole and Probation for preparation of pre-sentence
8 investigation report imposition of sentence on the following
9 day:
10 THE CLERK: That will be May 5th at 8:00 a.m.
11 THE COURT: Okay, ladies and gentlemen of the jury,
12 I'd like to thank you for your service, and I -- Nancy Mirolock
13 was our alternate; is that correct.
14 THE CLERK: That's correct.
15 THE COURT: And I'd like to give you an extra special
16 thanks because you were here all week, you paid attention, and
17 I think you asked some questions, and were the jury -- the
18 alternate. I know you were probably as --
19 (Court recessed at 7:15:29 p.m.)
20
21
22
23
24
25

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* * *

EXHIBITS

DESCRIPTION:

ADMITTED

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ACKNOWLEDGEMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

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JULIE LORD, TRANSCRIBER

7-7-09

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FILED IN OPEN COURT

MAR 20 2009

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

Kristen Brown

KRISTEN BROWN

DEPUTY

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,
14 vs.
15 BRIAN O'KEEFE
16 Defendant

CASE NO. C250630
DEPT. NO. XVII

17 DEFENDANT'S BRIEF ON ADMISSIBILITY OF EVIDENCE OF
18 ALLEGED VICTIM'S HISTORY OF SUICIDE ATTEMPTS, ANGER
19 OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION
(WITH KNIVES AND SCISSORS), AND ERRATIC BEHAVIOR

20 DATE: 3/20/2009
21 TIME: 8:00 A.M.

22 COMES NOW, Defendant BRIAN O'KEEFE, by and through his attorneys DAVID M.
23 SCHIECK, SPECIAL PUBLIC DEFENDER, and PATRICIA PALM, Deputy Special Public
24 Defender, and hereby submits this brief in support of a defense request to question O'Keefe,
25 and admit corroborating evidence on the issues of the alleged victim's history of suicide
26 attempts, anger outbursts, anger management therapy, self-mutilation (with knives and
27 scissors), and erratic behavior.
28

SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

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1 This brief is based upon the Fifth, Sixth and Fourteenth Amendments to the United
2 States Constitution, the Constitution of the State of Nevada, article 1, section 8, NRS
3 48.045(1), NRS 48.055(1), NRS 50.095, and NRS 51.069(1), the following Points and
4 Authorities, all papers and pleadings on file herein, and the attached Declaration of Counsel.
5

6 POINTS AND AUTHORITIES
7

8 To show that any act by Brian O'Keefe which may have contributed to the death of
9 Victoria Whitmarsh was made in self-defense, Brian O'Keefe intends to offer opinion and
10 reputation testimony at trial to show that Victoria had a character for aggression, and, as
11 appropriate, evidence to show that she committed specific violent acts when he became
12 intoxicated.
13

14 Brian O'Keefe is expected to continue testifying tomorrow and will state that at the time
15 of the incident in question, he was extremely intoxicated, as was Victoria. He will further testify
16 that Victoria surprised him by coming at him with a knife, as she had done two days earlier.
17 He grabbed the knife blade to prevent her stabbing him and she pulled it away, cutting his
18 hand. He then grabbed her arms in an effort to control her movement so she could not stab
19 him, and because of their drunken states, they fell onto the bed. She accidentally received
20 the stab wound as a result of falling onto the bed.
21

22 Brian will further testify that, as her partner on and off since 2001, he was aware at the
23 time of the incident of her mental health history, which included multiple suicide attempts, both
24 by overdose and cutting herself with knives or scissors. He was aware that she self-mutilated.
25 He was aware that she had uncontrollable anger outbursts, and problems when stressed and
26 when abusing drugs or alcohol and that she was attending anger management counseling.
27 In addition, two nights before the incident for which Brian is now on trial, Victoria came at
28

1 Brian when he was reclining. She was yelling and brandishing a knife at him; however, as he
2 was sober at the time, he was able to calm her down and diffuse the situation.

3 Furthermore, Brian has provided the State with Victoria's medical records, which
4 corroborate his claims as to her aggression and anger problems and her anger management
5 treatment. Those records show as follows:
6

7
8 **October 2001 Admission to Montevista Hospital**

9 Victoria was admitted **October 31, 2001; she cut both wrists with a knife in what**
10 **she reported was her fourth suicide attempt.** She was on the medications Celexa,
11 Xanax and Vistaril. She was diagnosed with Major Depressive Episode, Panic Disorder
12 with Agoraphobia. It was during this hospitalization that she and Brian met.

13
14 **May 2002 Admission to Montevista Hospital**

15 Victoria was admitted on May 21, 2002 because she'd been using Xanax, Lortab,
16 Oxycotin; she was blacking out and unable to function at work; withdrawal was severe;
17 consequences of use included severe dysfunction in her relationship with husband from
18 whom she is separated; psychiatric history: was reported as follows: **severe anxiety and**
19 **depression; she was hospitalized in October 2001 for OD and cutting her wrist; she**
20 **also overdosed in 1983 and was hospitalized; diagnosis was opiate dependence,**
21 **continuous, xanax dependence continuous, major depression, recurrent.**

22
23 **September 2006 Admission Montevista Hospital (this admission was during Brian's**
24 **incarceration)**

25 Victoria was admitted September 26, 2006. She was diagnosed as Bipolar, Dep;
26 Polysub dep; liver cirrhosis w/ascites; Hep C; underweight; gerd; social; marital. The
27 Report of Dr. Allgower states "took lethal dose of Xanax requiring intubation/mechanical
28 ventilation h/o depression, also has self-inflicted wrist lac." Form by Dr. Slagle: Ms
Whitmarsh has made at least 3 suicide attempts. Recent attempt could have been fatal." Report by Dr. Ajayi stated: suicide attempt resulted in admission to ICU. Had been transferred from St. Rose where ICU from 9/24/06 – 9/26/06, OD on Xanax and friend's morphine after argument with estranged husband. Diagnosis at St. Rose was Bipolar Disorder type II, depressed vs recurrent major depression and borderline personality traits. She reported 2 previous suicide attempts (1983 OD on pain meds after fight with husband) and (OD on pills and cutting wrists in 2001). She has been self-mutilating for the pasts 15 years and stated that she cuts herself when she is angry an the last time she cut her left wrist was with a pair of scissors on September

1 22, 2006. She complained of irritability, mood swings, difficulty sleeping at night
2 because of racing thoughts, poor appetite, anxiety, . . . She also reports episodic
3 euphoria, anger outbursts and decreased need for sleep. She reports ongoing
4 conflict with her estranged husband and her sister and her 21 year old daughter.
5 Dr. Slagle documented poor impulse control, and that her 2001 admission to
6 Montevista was because "she was angry, screaming and "went beserk" after an
7 argument with her husband and overdosed on pills and cut her wrist." Drug and
8 alcohol abuse hx: hx of abusing Xanax back to at least 2001; hx of dependence on Lortab,
9 Percocet, and Oxycotin dating back to 2002. Inpatient Detox at Montevista in May 2002
10 followed by inpatient rehab through June 2002. Most recently admitted for detox from
11 Percocet and Lortab at Valley Hospital in August 2006. Her diagnosis was: bipolar
12 disorder, type II, depressed, benzodiazepine dependence, opiate dependence, hx of
13 alcohol dependence in sustained full remission; borderline personality traits.... Hep C, Liver
14 Cirrohsis.... Her treatment plan cont'd: includes anger management.

15 She had racing thoughts and substantial mood swings since 2000; 2 prior suicide
16 attempts in the 1980s both since she married her husband; history of high moods
17 and anger problems; past history of very heavy alcohol use. Hx of pain medication
18 abuse.

19 **Southern Nevada Adult Mental Health October 2007 Admission (This admission was**
20 **after Brian's incarceration but while the couple was separated)**

21 These records show that in October, Victoria took an overdose of pills in an
22 apparent suicide attempt.

23 Brian will seek to admit portions of the records from the 2001, 2002, and 2006
24 hospitalizations as corroborative evidence of his knowledge about Victoria and his state of
25 mind regarding whether she was mentally capable and likely to cause him great bodily harm
26 when she came at him with a knife. Additionally, he was aware of and had the opinion that
27 Victoria could be irrational and had a temper problem that caused her to be aggressive and
28 violent, especially when she was under the influence of alcohol or drugs.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well
as the Nevada Constitution, article 1, section 8, protect a criminal defendant's right to a fair
trial, at which he may confront and cross-examine witnesses and present evidence in his
defense. See Nev. Const., art. 1, sec. 8 (providing that all parties be entitled to appear and

1 defend in person and that "[n]o person shall be deprived of life, liberty, or property, without due
2 process of law"); U.S. Const., amends. V and XIV (providing that a criminal defendant is
3 entitled to due process of law); U.S. Const., amend VI (providing that "[i]n all criminal
4 prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against
5 him"); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965) (recognizing that the right of
6 confrontation requires that a criminal defendant be given an opportunity to cross-examine the
7 witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045
8 (1973) (stating that "the rights to confront and cross-examine witnesses and to call witnesses
9 in one's own behalf have long been recognized as essential to due process").
10

11
12 Further, NRS 48.045(1)(b) provides that "[e]vidence of a person's character or a trait
13 of his character is not admissible for the purpose of proving that he acted in conformity
14 therewith on a particular occasion, except: . . . [e]vidence of the character or a trait of
15 character of the victim of the crime offered by an accused . . . and similar evidence offered by
16 the prosecution to rebut such evidence." Additionally, NRS 48.055(1) states, "In all cases in
17 which evidence of character or a trait of character of a person is admissible, proof may be
18 made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry
19 may be made into specific instances of conduct."
20

21 The Nevada Supreme Court has interpreted these statutes to require that an accused,
22 who claims he acted in self-defense, be permitted to present evidence of the character of an
23 alleged victim *regardless of the accused's knowledge of the victim's character* when it tends
24 to prove the victim was the likely aggressor. Petty v. State, 116 Nev. 321, 326-27, 997 P.2d
25 800, 802-03 (2000). Proof may be established by testimony as to reputation or in the form of
26 an opinion. Id. ***An opinion as to violent character may even be based on knowledge of***
27
28

1 **only one incident of violence.** For instance, in Petty, the Court held that the district court
2 erred by excluding testimony from a probation officer and police officer regarding their opinions
3 as to the violent character of the victim, even though the police officer's opinion was based
4 upon only one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is
5 entitled to present evidence in the form of his opinion or reputation testimony as to Victoria's
6 aggressive character and problems with anger control.
7

8 The defense contends that attempts to commit suicide, especially when those attempts
9 are made with knives or other cutting instruments, and acts of self-mutilation with cutting
10 instruments constitute acts of aggression or violence.
11

12 Furthermore, at the time of the incident in question, Brian O'Keefe was aware of
13 Victoria's prior acts of violence and aggressive character. The Nevada Supreme Court has
14 held that if the accused, who is claiming he acted in self-defense, is aware of specific acts of
15 violence by an alleged victim, then evidence as to those specific acts is admissible to show
16 the accused's state of mind at the time of the alleged crime. Id. at 326-27, 997 P.2d at 803; see
17 also Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986); Sanborn v. State, 107
18 Nev. 399, 812 P.2d 1279 (1991). In Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003), the
19 Nevada Supreme Court explained as follows:
20

21 [A] defendant should be allowed to produce supporting evidence to prove the
22 particular acts of which the accused claims knowledge, thereby proving the
23 reasonableness of the accused's knowledge and apprehension of the victim and
24 the credibility of his assertions about his state of mind. . . . The self-serving
25 nature of an accused's testimony about prior violent acts of the victim makes
26 corroborating evidence of those acts particularly important for an accused's
27 claim of self-defense.

28 Id. at 516, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).

1 The admission of evidence of a victim's specific violent acts, *regardless of its source*,
2 is within the sound and reasonable discretion of the trial court and is limited to the purpose of
3 establishing what the defendant believed about the character of the victim. Daniel, 119 Nev.
4 at 516, 78 P.3d at 32.
5

6 In sum, not only may a defendant present evidence regarding specific acts by victims
7 where the accused is aware of such acts, *but the defendant may also present corroborating*
8 *evidence to prove the particular acts of which the accused claims knowledge.* "[W]hen a
9 defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the
10 acts can be presented through the defendant's own testimony, through cross-examination of
11 a surviving victim, and through extrinsic proof." Id. at 516, 78 P.3d at 32-33. Therefore,
12 because Brian O'Keefe was aware of Victoria's prior acts of violence, he is entitled to present
13 not only his own testimony but any additional corroborating evidence to establish those prior
14 acts. Brian O'Keefe wishes to present the aforementioned medical records and will submit
15 these to the Court as a proposed exhibit.
16
17

18 Additionally, to the extent that the State may seek to admit rebuttal evidence of an
19 alleged victim's character of peacefulness, an accused has a right to confront and cross-
20 examine the State's witnesses as to their knowledge of specific acts of violence by the
21 accused. See State v. Sella, 41 Nev. 113, 168 P. 278 (1917); U.S. Const. Amend VI; Nev.
22 Const. art. 1, sec. 8. Indeed, NRS 48.055(1) specifically provides that when proof by
23 testimony as to reputation or in the form of an opinion has been given, "on cross-examination,
24 inquiry may be made into specific instances of conduct." Therefore, if the State intends to
25 present any evidence to show Victoria's character of peacefulness, Brian O'Keefe is entitled
26 to cross-examine the State's witnesses as to their knowledge of her specific prior acts of
27
28

1 violence or aggression. Also, where relevant to expose a State's witness's incompetence to
2 testify, including defects in memory and perception, extrinsic evidence showing Victoria's prior
3 acts of violence is admissible. See Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004)
4 (holding that impeachment by extrinsic evidence is appropriate where attacking a witness's
5 competence to testify, i.e., attacking defects in perception, memory, communication and ability
6 to understand).

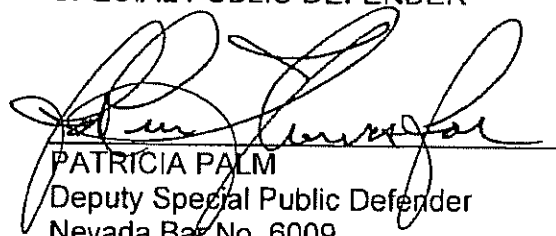
8 CONCLUSION

9 Based upon the foregoing, Defendant Brian O'Keefe respectfully requests that this
10 Honorable Court allow him to present evidence showing his opinion that alleged victim
11 Victoria Whitmarsh had temper problems and could be aggressive or violent, especially when
12 on drugs or alcohol, as well as specific acts of violence known by him, including her
13 brandishing of a knife at him two days earlier, her cutting and self-mutilation and other suicide
14 attempts.

16 Dated 20th day of March, 2009.

18 DAVID M. SCHIECK

19 SPECIAL PUBLIC DEFENDER

21 
22 PATRICIA PALM
23 Deputy Special Public Defender
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25 330 S. Third St., 8th Floor
26 Las Vegas, Nevada 89155
27 Attorneys for Brian O'Keefe

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RECEIPT OF COPY

RECEIPT of a copy of the foregoing DEFENDANT'S BRIEF ON ADMISSIBILITY OF EVIDENCE OF ALLEGED VICTIM'S HISTORY OF SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION (WITH KNIVES AND SCISSORS), AND ERRATIC BEHAVIOR is hereby acknowledged this ____ day of March, 2009.

DISTRICT ATTORNEY'S OFFICE

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