

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 **BRIAN KERRY O'KEEFE,**)

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Supreme Court No. **Electronically Filed**
Apr 08 2011 09:08 a.m.
District Court Case No. C250630
Tracie K. Lindeman

EIGHTH JUDICIAL DISTRICT
COURT; THE HONORABLE
MICHAEL P. VILLANI,
DISTRICT COURT JUDGE,

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

APPENDIX

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

VOLUME 7

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

Christine L. Lalli
CLERK OF THE COURT

THE STATE OF NEVADA,	.	CASE NO. C-250630
Plaintiff,	.	
vs.	.	DEPT. NO. 17
BRIAN KERRY O'KEEFE,	.	
Defendant.	.	Transcript of
.....	.	Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
MOTIONS HEARING

THURSDAY, AUGUST 19, 2010

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTOPHER LALLI, ESQ. Assistant District Attorney
FOR THE DEFENDANT:	PATRICIA PALM, ESQ. Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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1 LAS VEGAS, NEVADA, THURSDAY, AUGUST 19, 2010, 8:50 A.M.

2 THE COURT: Can we take care of O'Keefe? Page 11.

3 Can I have counsel approach, please.

4 (Off-record bench conference).

5 THE COURT: The first motion we're going to handle
6 this morning, the defendant's motion to preclude the state from
7 introducing at trial other act or character evidence and other
8 evidence which is unfairly prejudicial or would violate his
9 constitutional rights.

10 Specifically, in item one, Ms. Palm, is a statement
11 he made to one of the witnesses stating, sort of paraphrasing,
12 that he could kill anyone with a knife. Anything additional to
13 add to your motion?

14 MS. PALM: No, your Honor. I think I'll just submit
15 on my argument there.

16 THE COURT: All right, Mr. Lalli, anything to add?

17 MR. LALLI: No, your Honor.

18 THE COURT: All right. I think I had previously
19 ruled that that was admissible, and I still believe it is
20 relevant in this particular case. We have a situation of
21 someone either by accident or in self-defense being stabbed,
22 and so I'm going to deny the motion to that extent.

23 The second part is redaction from the JOC regarding
24 concurrent sentencing. The think the State agrees with your
25 motion, so it's granted in that respect. Ms. Palm, I'm going

1 to ask you to prepare the order on this motion here.

2 The item three is the evidence, was it sexual
3 assault; is that what it was?

4 MR. LALLI: Yes, your Honor.

5 THE COURT: I'm trying to read my own sloppy writing.

6 MS. PALM: A prior case allegation.

7 MR. LALLI: Right. We don't intend to admit that
8 unless when the defendant's testifying, if he chooses to
9 testify again, if he somehow opens the door to that or if in
10 the defense case or through cross-examination they open the
11 door to it. Barring that, we don't intend to elicit that in
12 our case in chief.

13 THE COURT: So I'm going to grant the defendant's
14 motion with the understanding that if somehow the defense side
15 opens the door that that could become relevant, then we'll deal
16 with it on a case-by-case basis.

17 MS. PALM: And your Honor, he was acquitted of that,
18 just so the record's clear.

19 THE COURT: Okay. Like I said, it's granted, but I
20 don't know how -- how else it could come up. But if somehow it
21 comes up and becomes relevant, then we'll deal with it at that
22 time. But right now you're motion is granted in --

23 MR. LALLI: Thank you.

24 THE COURT: -- that respect. The second item is a
25 sexual assault kit. Mr. Lalli, I have a -- my understanding is

1 that they did a sexual assault kit on the victim here and it
2 came up negative; is that correct? There's no findings
3 consistent with the sexual -- actually zero findings; is that
4 correct?

5 MR. LALLI: Well, not -- not -- and I -- I wish I had
6 all those notes with me. There's a lot of information that is
7 received in the sexual assault kit. For example, the -- the
8 DNA standards for our descendant came from the sexual assault
9 kit. Her fingernails, fingernail clippings, things of that
10 nature, they're all collected in the sexual assault kit.

11 The problem is sexual assault kit is a term of art.
12 On the impound sheet, if memory serves, it's listed as sexual
13 assault kit. The -- the DNA experts, when they examine them,
14 they say yes, I went into the sexual assault kit.

15 It will be perfectly clear that the defendant has
16 never -- is not being charged with sexual assault. Certainly,
17 something aberrant occurred here because our descendant's found
18 completely naked from the waist down.

19 But barring introducing and -- and that being kind of
20 res gestae evidence, I mean, we don't intend to suggest there
21 was a sexual assault here. But to -- to somehow say that wow,
22 a jury's going to convict him because there's a little evidence
23 collection kit that everybody calls a sexual assault kit is
24 kind of silly.

25 More importantly, you're setting the State up for

1 failure, because it's parlance. It's how we refer to that
2 item. So to tell a crime scene analyst who for 20 years has
3 referred to that as a sexual assault kit that hey, for the
4 purposes of your trial don't call it that, and if there's a
5 slip, now we have all of a sudden mistrial motions and things
6 of that nature. I just don't think it's necessary.

7 THE COURT: Ms. Palm.

8 MS. PALM: And your Honor, last time it was
9 absolutely no problem. I think we agreed to call it a DNA
10 collection kit. Nobody had a problem with that. No mistakes
11 were made because the term sexual assault is negative and
12 prejudicial, and there's no reason to call it a sexual assault
13 kit if we don't have to.

14 It just wasn't a problem last time. And with respect
15 to his certainly something aberrant occurred here, that's just
16 not the case. Mr. O'Keefe explained he was looking for a knife
17 wound. So that's the reason the pants were off. So there's no
18 certainty about it.

19 THE COURT: So are you saying -- I don't recall -- I
20 mean, I recall the case. I don't recall obviously all the
21 rulings. Are you saying in the previous case the State
22 referred to it as the DNA kit or --

23 MS. PALM: Yes, and we stipulated to it. And they
24 agreed to that it was overly prejudicial and will stipulate to
25 call it a DNA collection kit.

1 THE COURT: All right, I -- Mr. Lalli, I'm going to
2 grant the motion to the extent that the State's witness is
3 going to call it a DNA collection kit. If there is a slip, I
4 don't know if it necessarily is going to be a motion -- you
5 know, a mistrial will be granted. I'm going to give the
6 defense some leeway, so it's absolutely crystal clear to the
7 jury that he was never charged with a sexual assault. There's
8 no allegation of sexual assault, and it's just another name for
9 the kit, but if it comes out.

10 MR. LALLI: Very good. Well, I'll admonish our
11 witnesses. I'll do my best to keep them so that they abide by
12 the Court's ruling.

13 THE COURT: Okay. Next item is photos of the
14 bruising. Ms. Palm, I'm going to deny that motion. The doctor
15 had testified that there was some blunt force trauma and it's
16 consistent with either a self-defense or an attack by your
17 client.

18 The racial slurs is irrelevant. So I'm granting your
19 motion in that regard. The next item is Mr. Toliver, who is
20 the downstairs neighbor. If I recall, he went upstairs, I
21 don't know if he actually looked into the room. The defendant
22 may have made some comment to him, and Mr. Toliver went
23 downstairs and told his wife, apparently he done killed that
24 girl or something along those lines.

25 Mr. Lalli, how -- why is that coming in or why should

1 that come in?

2 MR. LALLI: Well, it's an ex sited utterance. It is
3 certainly a statement of (indiscernible), and it's based upon
4 things that the defendant said to him. Based upon what the
5 defendant said to him and based upon what he saw.

6 It's certainly, probative. I mean, it's certainly
7 relevant of identity, especially when now there seems to be
8 some claim that maybe this woman stabbed herself or fell down
9 on the knife or something ludicrous like that. In light of
10 that sort of a defense being injected in the case, it's
11 certainly highly probative and relevant.

12 THE COURT: Well, it's not something that Mr. Toliver
13 actually saw. It wasn't -- that's his interpretation that --

14 MR. LALLI: Well, it's based upon what he saw and
15 it's based upon things that the defendant said to him.

16 THE COURT: What specifically did he -- I mean,
17 refresh my memory. What specifically did the defendant say to
18 him which would justify that statement?

19 MR. LALLI: I'm paraphrasing, but as -- as Mr.
20 Toliver -- he actually walks into the apartment and he's -- the
21 defendant is engaging him in conversation, words to the effect
22 of, you need to help me out, or you need to help me, or you
23 need to see this or you need to -- things of that nature. And
24 he goes in and he sees the descendant laying there on the
25 ground and the defendant in close proximity to her, and he runs

1 out and -- and says these things.

2 THE COURT: I think this relates to speculation on
3 his part and so I'm going to grant the motion that -- that
4 statement -- I think it was, baby, he done killed that girl,
5 should be excluded. And Mr. Lalli if you would advise your
6 witness, both -- both the Tolivers not to --

7 MR. LALLI: Very well.

8 THE COURT: -- make that statement. The next motion
9 is on Detective Wildemann testifying, giving as defense states,
10 an expert opinion regarding the cuts on his own hand.

11 MR. LALLI: Your Honor, in a related motion to this,
12 it's the defense motion to strike the notice of expert
13 (indiscernible) with regard to Detective Wildemann.

14 THE COURT: Yes.

15 MR. LALLI: I don't know if the Court has had the
16 opportunity to review that, but I -- I -- if not, I'll argue
17 some of the law that's contained in it. But I wanted to
18 incorporate some of -- particularly a case that I cited in
19 that --

20 THE COURT: And you're referring to --

21 MR. LALLI: -- opposition.

22 THE COURT: -- the --

23 MR. LALLI: It's the Meadow (phonetic) versus Civil
24 Service Board (phonetic) case. It's on Page 3 of that motion.

25 THE COURT: And that's where the officer testified

1 that it sounded like someone was getting their butt whipped?

2 MR. LALLI: Right.

3 THE COURT: Well, in that case, I mean, isn't -- to
4 me it seems like it's consistent with anyone. Any lay person
5 can say, look, sounds like someone's getting beat up versus --
6 I mean, that's just what I would say almost a common
7 observational lay observation. But the concern I have is that
8 a lay observation, that if you are the attacker in a knife
9 situation, that it's not uncommon to see receive knife wounds
10 to our own hand.

11 MR. LALLI: What's different about that case, your
12 Honor, is specifically the facts that the Supreme Court relied
13 on. And they paid particular attention to the level of
14 experience that this police officer had. In that case they
15 noted that Officer Burney (phonetic) at the time had over 14
16 years of experience.

17 And in rendering their opinion, their -- their
18 holding in the case, and I put it in quotes, it's quote, "Given
19 Officer Burney's experience, his testimony was rationally based
20 upon his perception at the time."

21 So it -- it is -- it is -- it is specifically the
22 situation that we have with Detective Wildemann. This is not
23 -- this is not just some person off the street coming in. It's
24 as though the -- the Supreme Court looks at the statute as
25 there some fluidity to it in terms of the lay witness opinion

1 of the police officer versus the lay witness of Joe off the
2 street.

3 And I think it's quite telling that take the time in
4 this opinion, which is certainly still good law today, to note
5 Officer Burney's 14 years of experience and given this
6 experience, he can testify that what he heard was consistent
7 with a beating.

8 So I would respectfully suggest to the Court they are
9 very concerned and very interested in the level of experience
10 of police -- this is classically the situation. The other
11 thing that's quite telling here is this is not Detective
12 Wildemann coming up with an opinion based upon books these read
13 or studies that he's read. He's actually seen these things.

14 And the statute is specific to that. The statute
15 says rationally based upon the perception of the witness, the
16 perception. I read that to mean I saw it, I heard it, I felt
17 it, whatever it is. I -- I experienced it in a sensory manner.

18 And in -- in this case when you have a homicide
19 detective who's investigated stabbing cases, he has a wealth of
20 experience. He has seen those. He's investigated those. This
21 is the essence of being rationally based upon his perception,
22 and he can, based upon that, give an opinion as a lay witness.

23 So I think that he certainly is able to do that.
24 Moreover, the Court allowed that. The Court's already passed
25 upon this issue and allow it had in a previous trial. And it

1 was absolutely the correct ruling. So I'd ask the Court not to
2 change courses on that.

3 MS. PALM: May I respond?

4 THE COURT: Ms. Palm.

5 MS. PALM: It did happen in the last case the
6 detective testified that it has frequently been his experience
7 that stabbing a suspect has cuts on the fingers in the same
8 area that O'Keefe did. We objected to that and we raised that
9 as an issue on appeal. The Court on appeal did not deal with
10 the issue because they remanded on another issue.

11 So there's been no ruling that that's the correct
12 ruling. As well as the case cited in my motion to preclude him
13 from testifying, Lord versus State (phonetic), the Supreme
14 Court dealt with the issue and ruled that a detective's
15 opinion, based on his experience as to the significance and
16 cause of injuries on the defendant was improper. He was not
17 qualified to give an expert opinion and a lay person is not the
18 appropriate -- a lay person opinion is not the appropriate
19 vehicle for this. That's Lord versus State.

20 So they've addressed it. That's the law. A
21 detective -- a detective's opinion is not proper whether it's
22 lay or expert.

23 THE COURT: Mr. Lalli, have you reviewed Lord v.
24 State?

25 MR. LALLI: I have, your Honor, and I -- and I think

1 it's a different situation. I think that the -- the -- not the
2 Mitchell (phonetic) case, the -- the Meadow case is -- is the
3 -- is the controlling one.

4 THE COURT: What I'm going to do is I'll continue
5 this -- I want to review Lord v. State and Meadows (phonetic)
6 again. And I'll continue this until tomorrow. Did we decide
7 on 9:30 or 8:15 on this?

8 MR. LALLI: Whatever the Court's pleasure. My -- I
9 would -- I would -- probably 9:15 would probably be better for
10 me. But I'll certainly -- I think that was what the Court
11 originally recommended, but I'll certainly be here when the
12 Court tells me to.

13 THE COURT: Like I said, the problem is I'm doing
14 another calendar and --

15 MS. PALM: (Indiscernible).

16 THE COURT: Yeah, let's -- you know what, Mr. Lalli,
17 if you can make it 8:15, I -- I'm doing 20 things tomorrow
18 morning and --

19 MR. LALLI: Very good. We'll be here at 8:15.

20 THE COURT: And the rest of the motions will be heard
21 tomorrow.

22 MR. LALLI: The other motions?

23 THE COURT: Right.

24 MR. LALLI: Okay. Your Honor --

25 THE COURT: Now, were you able to get the -- the --

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1 the doctor? Wasn't there a question that whether or not the
2 doctor --

3 MR. LALLI: Right.

4 THE COURT: Was it Dr. Benjamin?

5 MR. LALLI: Unfortunately, no. And I -- I wanted to
6 address this now because obviously it -- it has a great impact
7 on -- on our ability to proceed next week. Before I forget, I
8 did want to request leave of Court. I filed this morning a
9 Second Amended Information. It charges murder of the second
10 degree with use of a deadly weapon. There's no additional
11 theories or no changes of theories.

12 As the Court knows, the prior verdict was one of
13 second degree murder. So we are prohibited from proceeding on
14 an open murder theory in this case. So just to -- to make that
15 part of this case right, an amended charging document needed to
16 be filed.

17 THE COURT: You don't have any objection to that, do
18 you, Ms. Palm?

19 MS. PALM: No.

20 THE COURT: All right. So that will be filed in
21 Court.

22 MS. PALM: And your Honor, I filed in Court this
23 morning a motion to preclude their new expert from testifying
24 because we just got the notice after calendar call of the Dr.
25 Dutra (phonetic) expert. So I don't know if the Court's going

1 to deal with this morning or --

2 THE COURT: I didn't get an opposition to that one.

3 MR. LALLI: Well, your Honor, the -- the opposition
4 essentially the -- the Mitchell case that we cited in the
5 motion that the -- the Court had just heard argument on. It --
6 it is a late notice.

7 And the question is, the Court has discretion -- the
8 Mitchel case so holds that the Court has discretion to allow
9 the witness to be called if there's been no bad faith shown on
10 the part of the -- of the state and the defendant's substantive
11 rights are not prejudiced.

12 So I -- I -- I first wanted to kind of bring the
13 Court up to speed on our efforts to procure the attendance of
14 Dr. Benjamin. Dr. Benjamin, she is a forensic pathologist, a
15 doctor, a professional. When we were preparing our subpoenas
16 and getting ready for -- for trial, we decided that we wanted
17 to use her again.

18 And, in fact, I believe it was early last week Ms.
19 Palm came to my office and reviewed my file, and we had some
20 discussions about our inability or our concerns with regard to
21 a forensic pathologist, whether we would be using Dr. Benjamin
22 or whether we would be using somebody assigned to us by the
23 Coroner's Office because I'm not sure that we told we were
24 having difficulty in finding the witness at that point. But we
25 certainly told her there was -- mentioned to her that there was

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1 some issue of this.

2 And if memory serves, and I could be wrong, but I
3 thought our supplemental notice with respect to Dr. Dutra was
4 filed on Friday. But I -- but I could be wrong.

5 MS. PALM: It was actually filed on the 16th and I
6 was served with it yesterday.

7 MR. LALLI: Okay, so it was filed on the 16th.

8 MS. PALM: (Indiscernible).

9 MR. LALLI: Okay. So just to kind of bring the --
10 the Court up to speed on our efforts to get Dr. Benjamin here.
11 A subpoena was issued by deputy district attorney Stephanie
12 Graham for Dr. Felicia Benjamin. The last known address that
13 we had for her was the Coroner's Office here in -- in Clark
14 County.

15 Dr. Benjamin was -- is no longer with that office.
16 On Monday, August 9th, district attorney investigator Don
17 Barlow (phonetic) began to search electronic databases in on
18 effort to locate her, including the CLEAR, C-L-E-A-R, and JL
19 Client, J -- initial J, initial L Client database.

20 Investigator Barlow was able to identify three
21 potential phone numbers for Dr. Benjamin. When called two of
22 the numbers were out of service. The third and the -- the --
23 the third number was called, messages were left and never -- we
24 never received any return phone calls.

25 Through use of those same databases, investigator

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1 Barlow was able to identify two potential addresses for Dr.
2 Benjamin, one of which was 168 North Wilson Avenue, Apartment
3 No. 304 in Pasadena, California. Investigator Barlow drafted
4 letters for both of those addresses that she was able to
5 identify introducing herself and explaining to Dr. Benjamin
6 that she was needed to testify in this case and providing
7 e-mail addresses, phone numbers, things of that nature and
8 these letters still to this date have gone unanswered.

9 In addition to Investigator Barlow, another
10 investigator in our office, Ed Dougherty, D-o-u-g-h-e-r-t-y, my
11 investigator -- so we've had two investigators working on this
12 -- contacted the Office of the Clark County Coroner Medical
13 Examiner to get any sort of contact information we could on Dr.
14 Benjamin.

15 And we were provided with the same North Wilson
16 Avenue address that Investigator Barlow had discovered.
17 Investigator Dougherty was also given an e-mail address. And
18 on that same day, the same day he received the e-mail address,
19 he shot an e-mail to Dr. Benjamin and introduced himself,
20 explained why she was needed, means of contacting our office,
21 things of that nature. That went unanswered.

22 Having received no response, Investigator Dougherty
23 contacted the Medical Examiner's Offices in Orange County,
24 California, Los Angeles County, California, Ventura County,
25 California in an effort to locate a place of employment for Dr.

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1 Benjamin all with negative results.

2 Investigator Dougherty inquired with the National
3 Association of Medical Examiners, negative results. He
4 conducted a search but the California Physicians and Surgeons
5 database, and was able to obtain another address for Dr.
6 Benjamin, which ultimately proved not to be helpful.

7 Through the use of electronic databases, Investigator
8 Dougherty was able to identify neighbors, who lived in the
9 North Wilson Avenue apartment complex in hopes that he could
10 contact a neighbor who might be able to reach out to Dr.
11 Benjamin. That was unsuccessful. He actually contacted --
12 tried to find a manager for the unit to see if a manager could
13 reach out and contact Dr. Benjamin. What was fruitless.

14 Eventually he called the Pasadena Police Department
15 because this is in the City of Pasadena and requested that a
16 member of law enforcement respond to the North Wilson Avenue
17 address in an effort to personally contact her Dr. Benjamin.
18 On August 17th, a police officer by the last name of Harris,
19 H-a-r-r-i-s, with the Pasadena Police Department responded to
20 168 North Wilson Avenue, Apartment No. 304 in Pasadena.

21 Officer Harris contacted my investigator, Mr.
22 Dougherty, when he arrived there at the residence. No one
23 answered the door. Officer Harris left his card with a message
24 that if Dr. Benjamin received the card, she needs to
25 immediately contact our office. The very next day, which was

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1 yesterday, Investigator Dougherty received a response to his
2 e-mail from Dr. Benjamin.

3 Obviously, she had seen the card left by the police
4 department there. And the e-mail message, which I have, and I
5 can certainly provide it to the Court, but the e-mail message
6 stated, quote, Mr. Dougherty, apparently you did not receive my
7 prior e-mail. Please feel free to contact the Clark County
8 Coroner's Office and they will provide you with an available
9 medical examiner to testify. Obviously that individual will
10 need a transcript of my previous trial testimony. Regards, Dr.
11 Benjamin.

12 So there was never a phone call, never if you need to
13 reach me, never anything. She's obviously stonewalling us.
14 Investigator Dougherty immediately responded to that. I've
15 never received any other e-mails from you. He again reiterated
16 that she should contact me if she intended not to come so that
17 I could take it up to the Court.

18 Also, upon being informed that she had responded to
19 an e-mail, taking that same e-mail address, I drafted her an
20 e-mail and I explained to her that she was absolutely required
21 to be here, that we would accommodate her schedule in any way
22 we could, she could pick the day that she wanted to testify,
23 we'd bring her in in an afternoon. Still to this day I have
24 not had a response to that e-mail.

25 In addition, yesterday I -- I contacted and had a

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1 conversation with the coroner himself, Michael Murphy. I asked
2 Mr. Murphy if he would be willing to reach out to Dr. Benjamin
3 to attempt to persuade her to at least be somewhat cooperative
4 in our efforts to get her out here. He attempted to do that.
5 The contact information he had didn't work.

6 So this morning what I have is a -- a certificate for
7 attendance of out-of-state witness. And what I'd like to do is
8 just approach and have the Court sign this. This essentially a
9 compelling order which will allow us to try to compel her
10 through the -- the superior Court of Los Angeles County to come
11 here.

12 The problem that I see is there are other people who
13 can testify to this. And a superior Court judge could
14 recognize that and could certainly say well, I'm not going to
15 honor your request because you just have another expert look at
16 it. That's done in this jurisdiction as it is, I'm sure, in
17 California.

18 So I'm not sure at this point because I have no
19 jurisdiction over her. She's not here in Nevada. I'm not sure
20 that the passage of time is going to change this. I'm not sure
21 that if the Court were to sign the documents that I have, that
22 that is going to change it.

23 So when you put all that together, I -- I certainly
24 think that under the Mitchel case we have not acted in bad
25 faith. I mean, we have used extreme diligence in attempting to

1 procure her attendance here.

2 The other issue that Mitchel talks about is whether
3 the defense is going to be prejudiced in any way. And I would
4 submit to the Court that they're not, and for a number of
5 reasons. One, this is -- the information that is new
6 pathologist would testify to is nothing new to them. I mean,
7 they've had testimony, opinions from -- from doctors. I mean,
8 this issue has been fully litigated. They've cross-examined on
9 the issue. So it's not as though they're going to be surprised
10 by the testimony.

11 Now, I understand that a different forensic
12 pathologist is involved, different credentials. In fact, the
13 pathologist that we were assigned has never qualified as an
14 expert in the courts of our state. He is from another
15 jurisdiction. And so they may very well want to prepare for
16 that. But under the circumstances, what I would ask the Court
17 to do is to consider starting the trial on Wednesday. Give Ms.
18 Palm two full days that she would otherwise have planned on
19 being in Court here to prepare for that witness.

20 I will make that witness available to her so that she
21 can ask all the questions she needs to you of the witness. But
22 under the circumstances to -- to prevent us from calling the
23 medical examiner because the one that we intended to call is
24 out of the jurisdiction and -- and not willing to play ball, I
25 think is -- would be an extreme hardship. The Mitchel case

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1 says that the Court has -- it is within your jurisdiction, it
2 is not an abuse of your discretion, to allow us to call an
3 expert under the circumstances.

4 So -- and -- and if the Court allows us to do that,
5 we will certainly continue our efforts to procure the
6 attendance of Dr. Benjamin, but it's just not looking promising
7 at this point.

8 THE COURT: All right, Ms. Palm. Thank you, Mr.
9 Lalli.

10 MS. PALM: Your Honor, with that very long
11 explanation about their diligence (indiscernible) was that they
12 didn't even subpoena Dr. Benjamin until the 9th, which is 14
13 days from trial, which is already into the period. And the
14 Hernandez (phonetic) case, which I cited in my motion to
15 preclude her testimony or preclude Dr. Dutra's testimony, that
16 case says that they have to use diligence before the period
17 expires, which they are supposed to give notice.

18 They didn't do anything here until they'd already
19 blown the expert notice period. And that expert notice period
20 is important because it's already processed right. It's our
21 right to have a timely notice and not have to do everything at
22 the last minute like we've had to do everything else in this
23 case, and you know, we get all these late notices and argument
24 set after calendar call for everything.

25 It -- he did tell me last week that they were having

1 trouble finding Dr. Benjamin. And I did tell him I'm going to
2 have to object to any experts you'd want to put up because
3 you're outside your notice period. And still we didn't get
4 notice until just after calendar call. We have a due process
5 right no notice, and I don't think that the Court should give
6 them a break when they didn't exercise diligence before they
7 were supposed to give that notice.

8 Aside from that, there are problems. He told me that
9 Dr. Dutra was going to rely on what Dr. Benjamin did and not do
10 his own review. Is that still the case? I don't know.

11 MR. LALLI: Well, two things. There's obviously the
12 new case out from the Supreme Court that a -- a -- an expert
13 cannot reiterate another expert's opinion. Cannot reiterate
14 hearsay evidence. And what we have here is a doctor who would
15 be basing his opinions upon photographs, which can be
16 independently admitted into evidence, and upon an autopsy
17 report, which is a record of regularly recorded activity, which
18 can be admitted into evidence.

19 So he would be basing an opinion upon those things.
20 So the -- the case that Counsel's referring to is really not
21 going to come into play here.

22 MS. PALM: The case that he's referring to now is
23 Pulp versus State (phonetic). And what it says is that the
24 expert cannot rely on hearsay that wasn't subjected to
25 cross-examination. So, I mean, I know Dr. Benjamin, some

1 things were subjected to cross-examination, but I don't know if
2 this guy's going to come up with something that he apparently
3 learned from her that we never knew about before. That would
4 be a huge problem in this case.

5 And with the late notice, it's a little late to go
6 figure it out. Also, if they wanted to use Dr. Benjamin, what
7 she did, they should have noticed that they wanted to use her
8 trial testimony outside of trial testimony period. They can't
9 even do that now because they're so close to trial. They
10 couldn't do that time because they didn't show diligence in the
11 time period.

12 So what they're trying to do is make (indiscernible)
13 run out of all that and throw somebody new at us at the last
14 minute. If we have to pick between the Hobson's (phonetic)
15 choice of a late notice expert that we don't even know and I
16 don't have time to go investigate his background, and two days
17 is not going to be time in this case. And besides that, Mr.
18 O'Keefe wants his trial. His family's going to be here. We
19 have a lot of witnesses lined up. It would cause us a lot of
20 prejudice to have to go redo all of that.

21 So if we have to choose between the new expert, who
22 is just now being noticed that we don't know anything about and
23 Dr. Benjamin, I would rather have him just admit her trial
24 testimony. That would be less prejudice to us.

25 THE COURT: Mr. Lalli, on the issue of just admitting

1 prior trial testimony of Dr. Benjamin.

2 MR. LALLI: Well, it's -- it's insufficient. I mean,
3 the -- the -- the -- the case is -- is so important -- it is so
4 important that a jury understands the injuries that this woman
5 receives. The manner in which he she was beaten. And I
6 suppose the other remedy, if -- if -- if it's that huge of a
7 deal is to -- is to kick the case out three weeks. It would be
8 a minimal intrusion upon the defendant's speedy trial right.

9 And then, I guess, we, in spite of having two full
10 days, I can't imagine that every minute of everyday for the
11 next 21 days Ms. Palm would be investigating a reading of a 13
12 page CD and investigating it. I can't imagine she would be
13 doing that. And that's really a good faith argument that's
14 being presented to the Court.

15 But if -- if -- if -- if that is the option here,
16 well, then -- then I'd ask the Court alternatively to -- to --
17 to kick the case for three weeks and -- and -- and do it then.
18 But, you know, I've been doing this for a long time, and I've
19 never had an -- a professional expert witness, especially a
20 medical doctor stonewall me or our office in the manner in
21 which we're being stonewalled.

22 It's never -- it's never been an issue. Forensic
23 scientists come and forensic scientists go. And they always
24 come back to testify in cases. So to somehow suggest that we
25 should have known this is -- is -- is really -- is really not a

1 fair criticism of -- of what happened. And incidentally
2 subpoenas were not issued two weeks. They were issued
3 approximately 30 days ago.

4 We don't have the ability to issue subpoenas out any
5 further than that because of our staffing needs. The requests
6 will just sit there. We don't -- we don't have the manpower to
7 process those things any sooner, so --

8 THE COURT: Initially on did you -- did you state you
9 thought Dr. Benjamin was still here in town?

10 MR. LALLI: No, I didn't believe she was still here
11 in town.

12 THE COURT: All right.

13 MR. LALLI: What I would ask the Court to do is to --
14 to allow us to call Dr. Dutra. I will -- I will make him
15 available to the defense for interview, and I would ask the
16 Court to start the trial on Wednesday to give Ms. Palm two days
17 to do whatever she needs to do to prepare. And if she feels
18 that she is not prepared, she can certainly tell us, and -- and
19 -- and -- and we can decide where to go from there.

20 If the Court does that, if the Court fashions that
21 sort of a remedy, certainly it is protecting the defendant's
22 rights. The defendant would not be prejudiced under those
23 circumstances. For if there was prejudice, it would be so
24 miniscule that he would be entitled to no relief in the Supreme
25 Court.

1 And the Court is still -- would still be fair to the
2 State in giving us the opportunity to present our case.

3 THE COURT: Ms. Palm, I do find due diligence. The
4 issue of this case is, reading the motions, is self-defense,
5 and it's of paramount importance as to the injuries, the -- the
6 analysis of those injuries as far as self-inflict because
7 there's some argument that perhaps she may have fell -- you
8 know, fell on the knife herself. Self-defense or committed by
9 your client.

10 So, I mean, this is -- that's the crux of the entire
11 case is that -- or it's part of the -- is the injuries and how
12 they were sustained. And so I think our two alternatives are
13 that we can start on Wednesday of next week to give you ample
14 opportunity with the directive to the State that they will make
15 this person available at your convenience to -- to meet with
16 them.

17 If you don't feel that's sufficient time to do a
18 thorough investigation of their background and also to meet
19 with them because of other scheduling issues, we can continue
20 the trial. But we can do it on a very short basis.

21 THE CLERK: (Indiscernible).

22 MS. PALM: And your Honor, we have our experts lined
23 up. We have our witnesses lined up. His parents are elderly.
24 It's a big deal for them to travel. You know, we don't want to
25 change the trial date at all. So I guess, we'll just have to

1 make do and hopefully they'll give me access to their expert at
2 a time that works with me.

3 MR. LALLI: We will.

4 THE COURT: Okay, so that would be -- so we'll start
5 Wednesday --

6 MS. PALM: No.

7 THE COURT: Oh, you'll start --

8 MS. PALM: He wants to start Monday. That's when his
9 parents are going to be here, and it would be very difficult
10 for them to make other arrangements. It's been difficult to
11 get these arrangements.

12 THE COURT: All right.

13 MS. PALM: I mean, if -- if I have to fit it in, I'll
14 have to fit it in, but I'm saying we want to keep our trial
15 date.

16 THE COURT: Okay.

17 MR. LALLI: Your Honor, may I approach with the
18 certificate and the -- I think there's an order for payment of
19 witness fees. We're still going to pursue diligence to get Dr.
20 Benjamin here.

21 THE COURT: All right.

22 MR. LALLI: Thank you.

23 MS. PALM: And your -- and your Honor, there was one
24 other motion on today. I didn't know if you were continuing
25 that or not.

1 THE COURT: Which one's that?

2 MS. PALM: That is the motion on the victim's mental
3 health history. And one of the reasons I wanted to deal with
4 that is because I need to work that out with my experts still.
5 And we've continued it three times already. I know you said we
6 were going to continue the motion to suppress.

7 THE COURT: We can go forward on that one. It's just
8 the other ones. Go ahead, Ms. Palm.

9 MS. PALM: Well, your Honor, for all the reasons
10 stated in our -- our motion, we want to be able to present
11 records from Ms. -- Ms. Whitmarsh's mental health history
12 showing that she had anger issues, that she was on anger
13 management, that she had numerous prior suicide attempts with a
14 -- a cut or a self-mutilator, that she used knives and cutting
15 instruments for that.

16 The Court's aware, it's all the evidence that we
17 submitted as our Proposed Exhibit B during the last trial. But
18 she has this very long history dating back to the 1980s of
19 doing this. My client was aware of all of it. She has
20 self-reported going -- you know, being angry, screaming and
21 going berserk after arguments with her husband.

22 I think all of that is relevant to the many issues in
23 this case being, you know, did -- who brought the knife into
24 the bedroom is a huge issue in this case because if there's no
25 -- if there's nothing that we can show the jury why she might

1 have brought the knife into the bedroom, then they're going to
2 assume my client did it.

3 And I think it's very likely that she brought the
4 knife into the bedroom. I think it also explains all the
5 pounding noises the neighbors heard if she was having an anger
6 fit and slamming drawers and things in the bedroom, which was
7 over the Toliver's. And they reported hearing that noise like
8 no screaming going along with it.

9 It all makes sense when you know about her history,
10 so I think it's very relevant. I think all the cases that we
11 cited talking about, you know, this isn't necessarily the
12 victim's character for aggression, it's more of a mental health
13 illness and the effects of having that illness.

14 So other courts admit that kind of evidence because
15 it is so important to the defendant's defense to be able to
16 show what happened and what's the cause of death, what were the
17 circumstances. So, you know, I think that it -- the closest we
18 have to that in Nevada is the petty line of cases talking about
19 a self-defense straight up case, which this is not.

20 You know, Mr. O'Keefe is saying he defended himself,
21 but that there was an accident that caused the injury. But
22 even in those cases when a defendant knows about his -- the
23 victim's history and here Mr. O'Keefe did, he knew about all of
24 her history. He can talk about it, and then he can corroborate
25 it with independent evidence. Because if he can't do that,

1 then it's just his self-serving testimony for the jury to
2 consider and they're less likely to believe it.

3 Here I think it's just so probative on so many issues
4 and it's not really character evidence. It's evidence of a
5 mental illness in a specific manifestations. So if you do it
6 under that test or under the petty test, I think either way it
7 should come in.

8 Ms. Whitmarsh had anger problems and she had problems
9 that caused her to go get a knife when she was upset. That's
10 our defense in this case. So if Mr. O'Keefe cannot corroborate
11 that by expert testimony or by showing her medical records,
12 which corroborate that back to the 1980s, then I think he's
13 denied his right to present a defense.

14 THE COURT: Mr. Lalli.

15 MR. LALLI: Your Honor, at the previous trial the
16 Court excluded all of this evidence. Something that's --
17 that's -- that's a wonderful guide into how all this evidence
18 comes in is the Daniel (phonetic) case, which is cited at 119
19 Nevada 498. And it talks about how character of a victim is
20 utilized.

21 And it -- it cites NRS 480451. It sets forth the
22 rule that character evidence is normally not -- is normally not
23 admissible to show that a person acted in conformity therewith.
24 But there are exceptions.

25 The evidence of the character or trait of character

1 of the victim of a crime offered by an accused is admissible.
2 How do you admit that? Well, you admit it under the statute
3 the normal way by defendant's presenting evidence of the
4 victim's character by testimony as to reputation or in the form
5 of an opinion. That's how character evidence is normally
6 admitted.

7 So they're certainly, under Daniel in the statute,
8 they're certainly allowed to do that. Daniels also discusses
9 the petty case and the petty scenario as to when evidence of
10 the victim's character comes in. And what it specific talks
11 about are cases of self-defense. And what they say in Daniel
12 is, quote, however this Court has held that evidence of
13 specific acts showing that the victim was a violent person is
14 admissible if the defendant seeks to establish self-defense and
15 was aware of those acts.

16 So just general character evidence in the form of an
17 opinion or -- or reputation, they can offer that irrespective
18 of -- of whether the defendant says that he knew about things.
19 They have that right.

20 With respect to petty, there is a predicate to the
21 admissibility of that evidence. And that is he has to say that
22 he into you about it or through some manner of admissible
23 evidence, they have to establish in the presence of the jury
24 that the defendant knew about these acts, these specific acts.

25 And if he does -- and again, we're talking about acts

1 of violence against others, which would make his reasonable
2 belief of his right of self-defense more likely. If he says
3 that he knew about acts of violence toward others, then Ms.
4 Palm is absolutely correct under petty and under Daniel, they
5 can prove that up extrinsically, and I would certainly presume
6 one of the ways you can prove that up extrinsically is through
7 medical records.

8 So as a general proposition, I -- I don't totally
9 disagree with her analysis, except in two major points. One,
10 in all of the incidents we have here, we don't have a -- a
11 victim who is taking a knife and acting in in an aggressive
12 manner towards others. All of her aggressive actions are
13 inward. They are against herself.

14 Is it relevant that she tried to overdose on pills a
15 time or two? Certainly not. Not under any analysis is that
16 information relevant. Is it relevant that she might have cut
17 herself as people who suffer from depression do? I don't think
18 it is, but out of an abundance of caution I would ask the Court
19 to fashion some sort of remedy here where some of this evidence
20 can come in.

21 However, I was handed this morning medical records,
22 which apparently are lodged with the Court as a Court's exhibit
23 in the prior trial. And for the record, they're probably two
24 to three inches thick. And there's all kinds of information in
25 here that is not relevant under any scenario.

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1 And to just say well, yeah, send that whole packet of
2 information to the jury, that's just character assassination of
3 the victim, which certainly our Supreme Court does not intend
4 by all of this.

5 But my position, your Honor is this, based upon the
6 Daniel position -- case. In the defendant testifies and lays
7 the predicate, lays the foundation that he was aware of the
8 very specific acts, I am not opposed to the following evidence
9 coming in, but it's gotta be distilled from all of the other
10 mental health information that's in our victim's medical
11 records.

12 So one, that in October of 2001, after she cut both
13 wrists with a knife, she was reported to have her fourth
14 suicide attempt. So using a knife on herself on October 31st,
15 2001, I'm not opposed to that information coming in. And for
16 the record, that -- that fact is listed in the defendant's
17 motion at Page 9 on lines 21 and 22. That very specific fact
18 I'm not opposed to. On Page 10, roughly lines 19 and 20 there,
19 that she became angry, screaming, went berserk after an
20 argument with her husband and overdosed on pills. As long as
21 he is lay the predicate that he knew that, I'm not opposed to
22 that coming in.

23 And then finally, that on August 22nd, and this
24 information is provided in the defendant's motion on Page 11,
25 it's line -- roughly line two or three, that she stabbed her --

1 herself on her hands. She's -- she's a mutilator. She's a
2 self-mutilator, but that she did this on August 22nd, 2006.

3 I'm not opposed to those things coming in. There is
4 no case that says they do, but I think our Supreme Court, I
5 would not put it past them to expand Daniels to something like
6 that. But certainly, to have all of these medical records come
7 in and all of this information come in is overly prejudicial.
8 It's subject to unfair prejudice. It would confuse the jury,
9 and it's certainly not relevant.

10 THE COURT: Ms. Palm, what other records do you want
11 to come in?

12 MS. PALM: And your Honor, I gave him all the records
13 because he said that Phil Smith had not given him what he had.
14 And as the Court well knows, we had a joint order last time we
15 got the records, we gave them all to Phil Smith. So they have
16 those records, even though Mr. Lalli said he needed them again.
17 I did recopy the entire thing.

18 But what we wanted was what was referenced in that
19 exhibit, just every reference to her being -- having anger
20 control problems, going berserk, the references he talked about
21 and cutting herself. Those are the references we wanted. The
22 cuts with knives and scissors. I think overdosing is relevant
23 because we have evidence in this case that she had -- she was
24 on a large amount of pills that night also.

25 So any of the suicide cutting references and any of

1 the anger control problems --

2 THE COURT: Are those records bade stamped?

3 MS. PALM: No, they are not. And -- and -- and it's
4 the -- the stack we have is much smaller. I actually have a
5 very -- this is what we had last time that we were talking
6 about. It's very small, and that's in the Court's Exhibit B
7 from the last time. We can go through it and see what we can
8 agree on. But if -- if we're agreeable, you know, and I --
9 and --

10 THE COURT: Well, why don't we do -- why don't you
11 meet or discuss those records that you have in your hand, which
12 appear to only be about 20 pages or 25 pages, see if agree on
13 some of those. And we'll deal with the others probably when we
14 take a break -- our various breaks during the trial.

15 MS. PALM: And the other issue that I had was, you
16 know, I wanted her various diagnoses in. Specifically, that
17 she was bipolar and that she had the anger control problems
18 because then I can have an expert talk about who those
19 diagnoses mean. Court.

20 MR. LALLI: I mean, now what we're going to do is
21 we're going to have a -- a shrink come in, I guess, and analyze
22 someone who's dead after the fact.

23 THE COURT: Well, we're not having it at this point.
24 So I want counsel to meet with one another and perhaps we can
25 resolve some of those issues during our breaks on Monday.

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1 MR. LALLI: I'm certainly happy to do that, your
2 Honor.

3 THE COURT: But if you can get the -- the records to
4 me as soon as the ones you agree upon, the ones you disagree,
5 okay. And the other motions we'll hear tomorrow.

6 MS. PALM: Thank you, your Honor.

7 MR. LALLI: And that's at 8:15?

8 THE COURT: Yes.

9 (Court recessed at 9:42 a.m.)

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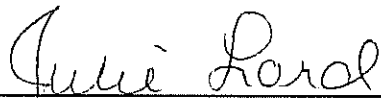
ROUGH DRAFT TRANSCRIPT

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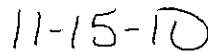
ACKNOWLEDGMENT

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



DATE

ROUGH DRAFT TRANSCRIPT

000992

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FILED IN OPEN COURT
AUG 19 2010 20

CHARLES J. SHORT
CLERK OF THE COURT

BY CAROL DONAHOO
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 BRIAN KERRY O'KEEFE,
14 #1447732)

15 Defendant.)

Case No. C250630
Dept No. XVII

**SECOND AMENDED
INFORMATION**

16 STATE OF NEVADA }
17 COUNTY OF CLARK } ss:

18 DAVID ROGER, District Attorney within and for the County of Clark, State of
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:


20 That BRIAN KERRY O'KEEFE, the Defendant above named, having committed the
21 crime of **MURDER OF THE SECOND DEGREE WITH USE OF A DEADLY**
22 **WEAPON (Felony - NRS 200.010, 200.030, 193.165)**, on or about the 5th day of
23 November, 2008, within the County of Clark, State of Nevada, contrary to the form, force
24 and effect of statutes in such cases made and provided, and against the peace and dignity of
25 the State of Nevada, did then and there wilfully, feloniously, without authority of law, and
26 with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing at

27 ///

28 ///

1 and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a
2 knife.

3
4 DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

5
6 BY 
7 CHRISTOPHER J. LALLI
Chief Deputy District Attorney
8 Nevada Bar #005398

9
10 In addition to any other Notice of Witnesses, names of witnesses known to the
District Attorney's Office at the time of filing this Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
12 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13 BALLEJOS, JEREMIAH	LVMPD #8406
14 BENJAMIN, JACQUELINE DR	ME 0081
15 BLASKO, KEITH	LVMPD #2995
16 BUNN, CHRISTOPHER	LVMPD #4407
17 COLLINS, CHELSEA	LVMPD #9255
18 CONN, TODD	LVMPD #8101
19 CUSTODIAN OF RECORDS	CDC
20 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21 CUSTODIAN OF RECORDS	LVMPD RECORDS
22 FORD, DANIEL	LVMPD #4244
23 FONBUENA, RICHARD	LVMPD #6834
24 HATHCOX, JIMMY	3955 CHINCHILLA AVE LVNV
25 HUTCHERSON, CHRISTOPHER	LVMPD #12996
26 IVIE, TRAVIS	LVMPD #6405
27 KYGER, TERESA	LVMPD #4191

1	KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV
2	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
3	MALDONADO, JOCELYN	LVMPD #6920
4	MORRIS, CHERYL	C/O DISTRICT ATTORNEY
5	MURPHY, KATE	LVMPD #9756
6	NEWBERRY, DANIEL	LVMPD #4956
7	PAZOS, EDUARDO	LVMPD #6817
8	RAETZ, DEAN	LVMPD #4234
9	SANTAROSSA, BRIAN	LVMPD #6930
10	SHOEMAKER, RUSSELL	LVMPD #2096
11	TAYLOR, SEAN	LVMPD #8718
12	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
13	TOLIVER, CHARLES	1013 N. JONES #101 LVNV
14	TOLIVER, JOYCE	1013 N. JONES #101 LVNV
15	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
16	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
17	WILDEMANN, MARTIN	LVMPD #3516

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DA#08F23348X/ts
LVMPD EV#0811053918
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

Alvin L. Shuman
CLERK OF THE COURT

THE STATE OF NEVADA,	.	CASE NO. C-250630
Plaintiff,	.	
vs.	.	DEPT. NO. 17
BRIAN KERRY O'KEEFE,	.	
Defendant.	.	Transcript of
.....	.	Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
MOTIONS HEARING

FRIDAY, AUGUST 20, 2010

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTOPHER LALLI, ESQ. Assistant District Attorney
FOR THE DEFENDANT:	PATRICIA PALM, ESQ. Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

000996

1 LAS VEGAS, NEVADA, FRIDAY, AUGUST 20, 2010, 8:38 A.M.

2 THE COURT: I appreciate everyone's patience. I had
3 to do Judge Barker's 8:00 o'clock calendar and his 9:00 o'clock
4 calendar and this morning. All right, we had a couple issues
5 to resolve.

6 The first item is the statement that the defendant
7 made to Officer, is it Ballejos. Am I pronouncing that
8 correctly?

9 MR. LALLI: Yes.

10 THE COURT: And at least according to the briefs, the
11 defendant was -- was in custody, had not been Mirandized and
12 the officer asked him his name and also he asked the name of
13 the female, what's your date of birth, blood type and perhaps
14 even social security number.

15 And in response to that the defendant said something
16 along the lines as, I didn't do this, man. She tried to stab
17 me. Is that the bottom line of that aspect of the motion, Ms.
18 Palm?

19 MR. LALLI: Yes.

20 MS. PALM: Well, and -- and also the, yeah, the whole
21 name issue where Ballejos is testifying he gave the false
22 names, which was downstairs. And he said it took him 30
23 minutes to get to that point. So that whole issue because they
24 made a big deal out of it in the last trial that he wasn't
25 forthcoming with Victoria's name.

1 THE COURT: Okay. But it's based upon --

2 MS. PALM: That he was in custody and not Mirandized.

3 THE COURT: Right, Miranda violation or --

4 MS. PALM: Yes.

5 THE COURT: Okay.

6 MR. LALLI: Yeah, it's based upon those -- the same
7 -- the same circumstances.

8 THE COURT: And I think the State's response was that
9 it was actually decided that this Arizona case we were talking
10 about the public safety exceptions; is that correct?

11 MR. LALLI: Yes, which stems from New York versus
12 Quarrels (phonetic), the United States Supreme Court case.

13 THE COURT: Wasn't at the time the inquiry was made
14 they already had been inside the apartment, they were aware
15 that there was one person in there and there wasn't any issue
16 of other individuals, other people needing assistance?

17 MR. LALLI: Well --

18 MS. PALM: That is correct, and they knew she was
19 dead --

20 MR. LALLI: Well --

21 MS. PALM: -- because she was declared dead two
22 minutes into it and -- and Newberry (phonetic) says that
23 actually in his statement also, by the time that O'Keefe was
24 taken downstairs they knew she was dead.

25 MR. LALLI: Well, your Honor, when you look at

1 Officer Conn's statement, for example, the defendant at one
2 point, as officers are poised to enter the room, Conn will
3 testify that they don't know the condition of this woman. And
4 it's a very dynamic scene at that point.

5 They're there, they're trying to persuade the
6 defendant to come out. And the defendant is telling the
7 officers she's dead, then he's saying no, she's alive, she's
8 dead, no, she's alive, get in here, get in here, she's alive.
9 And they very quickly rush in. I think as Ms. Palm made the
10 point during cross-examination in the trial, it was very quick,
11 and they pulled him out and get him onto the floor and then
12 take him out on the banister.

13 And it is in that period of time that the officer is
14 saying, you know, what's your name, who's that person inside.
15 And the defendant, like he does most times, doesn't even
16 respond to those questions.

17 So, I mean, one argument here is that these are
18 almost spontaneous statements that he's making, which are not
19 the product of interrogation. But he's just -- just starts
20 saying things like, I know you're mad at me. Well, they --
21 they never said anything to elicit that response.

22 They're asking her name so that paramedics can render
23 aid. They attempted to ascertain her status and things of that
24 nature. So I think when you look at Quarrels and you look at
25 the Arizona case that we cited, certainly there is no violation

1 here under the circumstances.

2 THE COURT: All right. Under the nature of these
3 statements and what the police officers knew at the time, I
4 don't believe this falls within the public safety exception.
5 So the statements the defendant made to Officer Ballejos
6 about --

7 MS. PALM: Thank you, your Honor.

8 THE COURT: -- I didn't do this, you tried to stab
9 me, et cetera is -- is excluded or suppressed.

10 MR. LALLI: Your Honor, what if -- I mean, an
11 alternative argument here is that they're spontaneous
12 statements. They're not -- the statements weren't -- I mean,
13 the -- he just starts saying things to them, I know you're mad
14 at me. Well, they weren't -- they didn't -- that's a
15 spontaneous statement. I mean, would the Court --

16 THE COURT: Well, my ruling was on a statement that
17 was on (indiscernible) page -- the statement that I had here
18 was when they asked who is she, date of birth, blood type, et
19 cetera, when he said I didn't do this, man, she tried to stab
20 me.

21 MR. LALLI: Okay, so --

22 THE COURT: And that's what I'm dealing with.

23 MR. LALLI: Okay.

24 THE COURT: Okay.

25 MR. LALLI: The other statement where he says, "I

1 know you're mad at me," I presume we're still allowed to elicit
2 that?

3 THE COURT: Yes.

4 MR. LALLI: Okay, thank you.

5 MS. PALM: And none of the name stuff?

6 THE COURT: Right. Now, I went through each of the
7 specific portions of the statement that Ms. Palm is seeking to
8 have excluded page by page and line by line. And does everyone
9 have the voluntary statement in front of them?

10 MR. LALLI: I didn't actually bring the statement
11 itself, your Honor.

12 THE COURT: Do you have yours, Ms. Palm?

13 MS. PALM: Yeah, I know I provided a copy of the full
14 statement to the Court, but what I have is just the issues that
15 I was -- I have my -- my motion here today. I don't have his
16 full statement.

17 THE COURT: Do you have that handy, Mr. Lalli, so you
18 can --

19 MR. LALLI: I don't, unfortunately.

20 MS. PALM: And -- and before we get to the specific
21 portions, I just want to make sure the Court understands, I was
22 moving to suppress the entire thing.

23 THE COURT: I understand.

24 MS. PALM: And -- and sorry, I take it --

25 THE COURT: I -- I -- I read through this entire

ROUGH DRAFT TRANSCRIPT

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1 matter, and the Court finds that even though there was
2 intoxication on behalf of the defendant that the Court finds
3 that under the totality of circumstances, his statement was
4 freely and voluntarily given. Have you found that Mr. Lalli?

5 MR. LALLI: I don't have it, your Honor.

6 THE COURT: Do you have the motion where at least the
7 identification of the specific statements --

8 MR. LALLI: I do have that.

9 THE COURT: Okay. Page 2 of the defendant's
10 statement, and this is on Page 17 of Ms. Palm's motion. She's
11 objecting to the statement of you've before in the system
12 before, right? You've talked to police officers?
13 Specifically, Mr. Lalli, why should that come in?

14 MR. LALLI: Well, your Honor, the Court in prior
15 rulings has admitted the defendant's prior conviction. So
16 there's certainly no harm in allowing that statement.

17 THE COURT: Ms. Palm.

18 MS. PALM: Well, I just think it, you know, I don't
19 know the -- the jurors are going to know about that prior
20 conviction, but I think that this is kind of makes it sound
21 like he's really familiar with the system versus one prior
22 conviction.

23 THE COURT: Can -- and counsel bear with me here.
24 You know, this trial was -- I don't even remember when this
25 trial -- I mean, I remember the trial. I don't remember

1 exactly when it was. Specifically why were we allowing in his
2 prior conviction, the domestic violence. I'm just refreshing
3 my memory.

4 MR. LALLI: Your Honor, there are a number of cases
5 that talk about domestic violence homicides and how juries have
6 the right to know the circumstances in which the relationship
7 occurred and fostered and created motive for the murder.

8 There are a long line of cases. But that was
9 litigated the last time and the ruling was that that
10 information was admissible. And even to the extent of allowing
11 a judgment of conviction.

12 MS. PALM: And your Honor, the ruling was limited,
13 just, you know, so the Court doesn't recall exactly. But it
14 was limited that the Court ruled that it would be admissible to
15 show motive and intent, and it was just going to be the
16 judgment of conviction, not underlying facts or anything. Just
17 the fact that he had been convicted and the name of the
18 conviction, the date of the conviction. And --

19 MR. LALLI: No --

20 MS. PALM: -- you know, I mean, we -- we did object
21 to it then. We still object to it now. I understand the
22 Court's ruling. This is a second degree case. I don't know
23 how much that would change it for the Court. But that's what
24 the ruling was before, that it was for motive and intent.

25 And then the Court had limited it to no other issue

1 with domestic violence was going to come in unless we open the
2 door. And the only way we could open the door was by talking
3 about their relationship prior to the time he went to prison.
4 So that's -- that's where things stood.

5 THE COURT: Okay.

6 MR. LALLI: Your Honor, what -- what -- what the
7 Court actually allowed in evidence is the Judgment of
8 Conviction, which is a domestic violence third offense. So in,
9 I think in crafting your ruling in that, the jury was apprized
10 of the fact that there was some ongoing domestic violence
11 there.

12 Certainly, that would imply multiple contacts with
13 law enforcement.

14 MS. PALM: Actually, no, it just says felony domestic
15 violence.

16 THE COURT: Well, on this particular section I'm
17 going to allow that statement to come in.

18 The next one is on Page 3, but apparently -- I'm
19 quoting the language. But apparently when the officers came
20 in, a struggle ensued. We're going to have those officers
21 testify that when they try to get him out of his bedroom, so
22 that -- I'm going to allow that statement in.

23 On Page 4, it -- it begins on the top of the page
24 with the answer and it goes down halfway to the bottom. I'm
25 just saying this, Mr. Lalli, since you don't have it in front

1 of you. You do have the -- I'm sorry, you do have the
2 statement that you're reading, correct?

3 MR. LALLI: No, unfortunately, I don't, and it's hard
4 for me, and I apologize, your Honor. It's hard for me to
5 understand the context of this. I've looked at -- I've read
6 the statement, obviously, I've watched the video.

7 THE COURT: Ms. Palm, do you have any objection to
8 Mr. Lalli looking over your shoulder so we can follow along on
9 the statement?

10 MS. PALM: Well, he -- he does have my motion.

11 MR. LALLI: Right.

12 THE COURT: Right, but it just has little snippets,
13 and I it's important that we have --

14 MS. PALM: No, I don't have the full --

15 THE COURT: -- it in context.

16 MS. PALM: -- thing. That's what I said. I don't
17 have his entire statement.

18 THE CLERK: I can go make a copy.

19 THE COURT: I thought I had a -- I think it will go
20 quicker if we can just run a quick copy so everyone --

21 MR. LALLI: Thank you.

22 THE COURT: So two copies. All right, I can tell you
23 right now the very last item is on Page 34 where Detective
24 Wildemann says, "You might want to open the door" -- I'm
25 assuming he's referring to the other officer there -- "because

1 he's a fucking nut." And what's the relevance of that, Mr.
2 Lalli?

3 MR. LALLI: Oh, I -- I don't have any objection to
4 taking that out.

5 THE COURT: Okay. All right. All right, that's out.
6 Ms. Palm, the statement of the defendant you provided to me,
7 I'm looking at my notes here, was missing Page 15.

8 MS. PALM: Oh, okay.

9 THE COURT: So I don't know exactly what the context
10 it is and --

11 MS. PALM: Is there anything in here that's cited on
12 Page 15?

13 THE COURT: Yes, it's on --

14 MS. PALM: Okay.

15 THE COURT: -- Page 18 of your motion.

16 MS. PALM: Okay. I'm sorry.

17 THE COURT: Ms. Palm, while we're waiting for the
18 statement to be copied, it seems that there's a couple items
19 here that could be interpreted as the police officer during
20 interviewing just sort of telling the defendant some things to
21 try to elicit information. You had objected to some as
22 hearsay. At one point the detective says, "No -- no neighbor
23 tells us that you were screaming for somebody to call the
24 police." And you object to that as hearsay.

25 And I don't recall the specific testimony in that

1 regard, but during an interview, I mean, oftentimes we have
2 police officers sort of telling a story to get someone to fess
3 up a little bit or to give more information. Well, we'll
4 address that in just a second here because I just wanted you to
5 know that it's a concern of the Court that they often say that,
6 they often make something up and obviously you're free to
7 cross-examine on that.

8 Okay, I think we're at Page 4. You can see I have
9 brackets --

10 MS. PALM: Um-h'm.

11 THE COURT: -- in there. That's the quoted language.
12 State, your response?

13 MS. PALM: And my concern here, Judge, is that it's
14 -- it refers to multiple domestic violences and the Court's
15 only let them know the one felony conviction. And it does not
16 say third offense. It just says felony conviction.

17 MR. LALLI: Well, I --

18 THE COURT: Where does it say multiple?

19 MR. LALLI: Yeah, I don't see that either.

20 MS. PALM: Domestic violences. It's multiple.

21 MR. LALLI: Your Honor, I don't think that warrants
22 suppression. I just don't -- and this is conversation that's
23 being directed by the defendant. I mean, he's the one who's
24 once again, not really responding to questions. Domestic --
25 he's the one who says domestic violences. What he -- and then

1 he says, I just want to put that question on the table -- on
2 the tape.

3 So he is going out of his way -- he wants to -- he
4 wants certain things put on -- on -- on the recording, on the
5 interview. So certainly there's no basis to suppress that.

6 MS. PALM: Your Honor, the basis is that it's more
7 prejudicial than probative, which is an everyday evidentiary
8 basis to suppress things.

9 THE COURT: I'm going to exclude the portion in the
10 brackets.

11 MS. PALM: Thank you.

12 THE COURT: The next item's on Page 6. I got out of
13 prison, she called me, I did all my probation thing. Top of
14 Page 6.

15 MR. LALLI: Your Honor, that's the prior. He's
16 talking about his prior, and he's talking about how she put him
17 in -- in prison.

18 THE COURT: Ms. Palm.

19 MS. PALM: Your Honor, please, looking at that again,
20 I'm not so concerned about that one. I'll withdraw.

21 THE COURT: So that's going to be allowed in -- to
22 remain in. Next one is Page 10, middle of the page. Ms. Palm,
23 your position?

24 MS. PALM: My position is it's more prejudicial than
25 probative. It's, you know, slurring the cops and I don't think

1 that it puts Mr. O'Keefe in a good light.

2 THE COURT: I had a note there, as you can see, I
3 wasn't quite clear of the context he was -- they're talking
4 about putting money in account to checking phone numbers, cell
5 phones. Mr. Lalli?

6 MR. LALLI: Your Honor, what he's doing is he's --
7 he's telling the police officers that he wants them to look at
8 certain things. And he's talking about how in his prior case
9 they didn't, and so he is voicing his displeasure with -- with
10 -- with the investigation basically.

11 And again, this is not -- these are spontaneous
12 statements that he -- that he makes. They're -- they're
13 certainly relevant to his state of mind, his anger, his
14 frustration that day. Anger, ill will, all those things are
15 certainly the -- the -- the touch tone -- or the touch tail
16 indicators of malice. He had just killed this woman.

17 And certainly his state of mind, how he's thinking,
18 how he's feeling at the time are certainly relevant.

19 THE COURT: Ms. Palm.

20 MS. PALM: Malice toward police officers in a prior
21 case for not collecting evidence that he had asked them to, is
22 not relevant to malice to killing a person in this case. I'm
23 concerned about just the language. I think it's prejudicial
24 for the jury to hear him saying "f'ing cops."

25 THE COURT: All right, I'll exclude the "f'ing cops"

1 portion.

2 MS. PALM: Thank you.

3 THE COURT: Page 12. I think here he's just saying I
4 already went through this. He's talking about his -- well,
5 actually I'm not sure what he's talking about. That's why I
6 had the word context there.

7 MR. LALLI: He's talking about his prior.

8 THE COURT: Okay. Ms. Palm?

9 MS. PALM: And you know, I -- I guess I'm not so
10 concerned about this. It's obvious he wasn't happy with his
11 prior. I -- I just -- you know, I guess I'm -- what we had
12 talked about before is we're not opening the door by anything
13 because it -- we weren't allowed to challenge this prior
14 because it is a conviction.

15 So, you know, if the State's not concerned about that
16 coming in, I guess, I'm not.

17 THE COURT: Okay, so that will remain in. Page 13.
18 The leads up questions or they're asking where was the car
19 parked. That's from Page 12. What color. And he says it's in
20 a particular spot. And he's talking about when he went to
21 jail, went to prison, I fought my cases. He's talking about
22 how he was compliant with the Court orders.

23 MS. PALM: And my concern with this, your Honor, is,
24 "We had a lot of shit happen, and I went to jail and I went to
25 prison, I fought my cases," because it refers to multiple

1 cases. Our ruling here was just the one felony conviction and
2 that there wasn't going to be any reference anything else
3 unless we opened the door, and that's what I'm concerned about.

4 THE COURT: From Mr. Lalli, anything to add?

5 MR. LALLI: Your Honor, again, I -- I think the Court
6 is allowing history of domestic violence. You know, that --
7 that's the real motive here. You'll recall Court is allowing
8 the testimony of Cheryl Morris who talks about the defendant
9 saying, "Yeah, she put me in prison for three years, I want to
10 kill her," or words to that effect.

11 This is entirely consistent with that. It's entirely
12 consistent with his frustration, his anger. This is why this
13 murder happened. And it's incredibly relevant as to his
14 intent. And I think if you --

15 THE COURT: Yeah, I'll going to --

16 MR. LALLI: -- exclude it, you're --

17 THE COURT: I'm going to allow it in.

18 MR. LALLI: -- you're hampering our case. Thank you.

19 THE COURT: Okay. Page 14, top page, it says, "I
20 went to prison, I lost everything, so when I got out of prison,
21 I did the right thing." Ms. Palm?

22 MS. PALM: I'm sorry, where -- where are we?

23 THE COURT: Page 14, top of 14.

24 MS. PALM: My concern about that is that he's talking
25 about that he litigates everything, and some people have a bias

1 against people who are litigious and who basically don't take
2 responsibility, they think they should. And so that's my
3 concern about that is it's referring that, you know, he's
4 always fighting everything --

5 MR. LALLI: Well --

6 MS. PALM: -- legally. I mean, it's a kind of a
7 comment on his -- his -- invoking his right to a trial or to --
8 to due process and it's kind of a comment on that and it's
9 prejudicial.

10 MR. LALLI: Well, I -- I thought, your Honor, we were
11 arguing on Page 14, "I went to prison, I lost everything."

12 THE COURT: Right.

13 MS. PALM: I'm --

14 THE COURT: That's the first section that you
15 identified. It's on Page 18 of your motion.

16 MS. PALM: And that's -- I -- I just have the I went
17 to prison, that was what I was concerned about.

18 MR. LALLI: A Judgment of Conviction tells the jury
19 that he went to prison.

20 MS. PALM: After a year and the Court order was --
21 okay. The main concern with that, your Honor, is if you look
22 in my closet, you'd be surprised about the reports I filed
23 about everything. That's what I'm really concerned about.

24 THE COURT: That's at the bottom of the page? Oh,
25 also bottom of that section. If you look in my closet --

1 MR. LALLI: Right.

2 THE COURT: -- you'd be surprised reports.

3 MS. PALM: Yes.

4 THE COURT: The first portion, I went to prison, I
5 lost everything, is going to come in. Bottom of that
6 paragraph, if you look in my closet -- if you look in my closet
7 all the way to the last time she accused me -- I wonder if that
8 goes to possibly motive, the last time she accused me --

9 MR. LALLI: It does.

10 THE COURT: -- Ms. Palm.

11 MR. LALLI: It does. He's obsessed with this.

12 THE COURT: Okay, I'm going to allow that statement.

13 MS. PALM: The last time she accused me?

14 THE COURT: I'm sorry?

15 MS. PALM: Are you cutting off, always the Supreme
16 Court, up to that? Because again, it's his exercising his
17 constitutional rights to appeal to the Supreme Court, and that
18 is sounding like multiple cases, which is not the Court's
19 ruling in this case. They get one Judgment of Conviction.

20 So if you want to -- is the Court saying the last
21 time she accused me? I understand that, but up to the Supreme
22 Court is what I'm asking for.

23 THE COURT: If -- the section i,s, "If you look in my
24 closet, Detective, you'd be surprised the reports, everything I
25 filed, I fought the -- fought the always Supreme Court." I'm

1 going to exclude that. "The last time she accused me of being"
2 is in.

3 MS. PALM: Thank you.

4 THE COURT: At the very bottom of the page you
5 identified was, "I was -- I was out, if you go into the shit,
6 my closet, spare bedroom, you'll find all these documents."
7 Mr. Lalli, why is that relevant?

8 MR. LALLI: Well, because it shows his obsession with
9 -- this is all about Victoria. This is all about her and
10 fighting her. It's totally consistent with his intent as
11 indicated to Cheryl Morris. It's relevant to whether this was
12 a malicious killing. It's relevant to the -- to his state of
13 mind.

14 MS. PALM: And your Honor, that is not the case he
15 went to prison for. The DNA case, he was actually acquitted of
16 the sexual assault. So it's kind of rambling here, but it's
17 not part of the Court's order of what's going to be admissible
18 in this case, what the Court said is the one prior felony
19 domestic violence.

20 THE COURT: I'm going to exclude that section where
21 in the bracket I was out to the word -- to the last portion,
22 did all the, and then you can finish his sentence. Well,
23 actually, it goes to Page 15, which I don't have, Ms. Palm. So
24 I can't --

25 MS. PALM: Okay.

1 THE COURT: If you can get that to me today, because
2 then I'll -- we'll just do a minute order or a memo to both of
3 your offices so you'll know this afternoon --

4 MS. PALM: Okay.

5 THE COURT: -- on Page 15. So let's go to Page 16.

6 MR. LALLI: Well, your Honor, just -- I'm --

7 THE COURT: Sure.

8 MR. LALLI: So you're saying that on Page 14, the
9 bottom of the first full paragraph there, the portion that the
10 Court has bracketed, "If you look at my closet, Detective,
11 you'd be surprised the reports, everything I filed, I fought
12 the Supreme Court," that's out?

13 THE COURT: Yes, and the last time she --

14 MR. LALLI: And then "The last time she accused me of
15 being" --

16 THE COURT: Yes, that's in.

17 MR. LALLI: -- that's in?

18 THE COURT: Right.

19 MR. LALLI: And then just going down, "accused me of
20 being jealous." And then where it says, "I was out, if you go
21 into, oh, shit my closet," and then all the way down to where
22 your bracket ends?

23 THE COURT: Yes.

24 MR. LALLI: "Did all the" -- and then yeah, we're
25 going to take a break.

1 THE COURT: Right, and I don't know what Page 15 --

2 MR. LALLI: Oh, okay.

3 THE COURT: -- says. And then Page 16, "The judge
4 and everybody told me to be careful of the woman." Mr. Lalli,
5 on that one?

6 MR. LALLI: It's relevant to -- to intent and motive.

7 THE COURT: Well, (indiscernible) "The judge, told me
8 to be careful of the woman."

9 MR. LALLI: Well, he's -- he's got a prior. He's got
10 a prior, so his -- I mean, normally or many times we have
11 defendants whose criminal records don't come before a jury.
12 That's not the case here. So a lot of the things that we're
13 normally concerned with just aren't applicable. And I'm not
14 sure that any judge told him, quote, "Be careful of the woman
15 you're fucking." I would be -- you know, certainly not in open
16 Court. I can envision some judges saying that outside of
17 Court, but certainly in Court.

18 So, I mean, it's also consistent with just the
19 nonsense that he's pushing in this interview. It's totally
20 consistent with that.

21 THE COURT: All right, Ms. --

22 MR. LALLI: It's relevant to his credibility.

23 THE COURT: Ms. Palm.

24 MS. PALM: Again, your Honor, I believe this is the
25 case that he was acquitted on the sexual assault. The -- the

1 Court has ruled they're -- you know, to keep this fair that's
2 what's coming in is the one prior felony (indiscernible) of
3 conviction. So I think it's just -- you know, it's just
4 exacerbating the prejudice that attaches to that when here we
5 have a second degree murder, so the weighing is a little bit
6 different.

7 THE COURT: I'm going to exclude that portion. Page
8 17. He was talking about his last attorney, Bucky Buchanan
9 (phonetic).

10 MS. PALM: And again, that -- when you're saying last
11 attorney, it sounds like there's multiple times he's had
12 attorneys and the jury here is only going to know about one.

13 THE COURT: Mr. Lalli?

14 MR. LALLI: Well, I mean, I'm not sure that it's
15 terribly probative one way or the other. And just as a
16 practical matter, it's -- it's quite difficult to -- to edit
17 these sorts of statements.

18 But certainly the portion at the beginning of the
19 brackets there, "But let's don't forget some factors that might
20 come up," I don't think there's any reason to eliminate that
21 sentence when he's talking, for instance, "My last attorney was
22 Bucky Buchanan, the one that wanted to bring records out,
23 mental ward, crazy."

24 Again, the jury is informed of a prior that he's had.
25 So I don't see any prejudice in -- in leaving that in. "Talk

1 to her husband that, I don't even know why you're not writing
2 this down." And that also is extremely important, "I don't
3 know why you're writing this down," around how he treats the
4 female detective during the course of the interview. That's
5 extremely relevant. So I just don't find any need at all to
6 exclude it.

7 THE COURT: I'm going to exclude the section from
8 "For instance" to the end of the paragraph.

9 MR. LALLI: Well, will the Court leave in, "I don't
10 even know why you're not writing this down," because he's
11 challenging the detective at that point? It's very clear he's
12 treating her differently than he's treating Detective
13 Wildemann, which is certainly relevant to his -- how he feels
14 about women. It's -- he's -- he's just killed a woman. It's
15 his ability to dominate women. That's what this case is about.

16 MS. PALM: You know what, your Honor, on second look
17 at that paragraph, I will withdraw my request to exclude that
18 answer.

19 THE COURT: All right, so it's in.

20 MR. LALLI: The entire section?

21 MS. PALM: That -- from -- from, "Let's stick to the
22 truth." to "all talking," that -- that answer, I'm fine with
23 that.

24 THE COURT: All right, Page 18. And that's where it
25 says, "Don't order her around."

1 MS. PALM: And you know, I think that this is an
2 improper opinion on the detective on what he's doing, and it --
3 it kind of invades the province of the jury. They can decide
4 for themselves if that's ordering her around. And I think it's
5 improper bad act. They're trying to make it sound like he's
6 doing something wrong, and he's just saying, "Check my phone."

7 I think that, you know, it's the detective opinion on
8 what he's doing and it's irrelevant and prejudicial.

9 MR. LALLI: I don't know how "Don't order her around"
10 could be construed as an opinion. He's directing him, "Don't
11 do something in the context of this interview." I mean, what's
12 the basis for excluding it? It's a statement -- it's -- it's
13 -- it's -- it's -- it's -- it's certainly not an opinion that's
14 being offered by the detective. It's the detective's attempt
15 to control this man who's acting like an absolute imbecile
16 during the course of -- of an interview.

17 THE COURT: I'm going to allow that statement in. At
18 the bottom, he made statements to her that she stabbed her then
19 you made different statements, and objection was hearsay, but
20 he made those statements to other officers; is that correct,
21 Mr. Lalli?

22 MR. LALLI: Yes.

23 THE COURT: I'm going to allow that statement in.
24 Next page, we can go to Page 24 where it says, the officer
25 says, "Stop acting ridiculous," and it says unintelligible as

1 far as the response.

2 MR. LALLI: Same response as the previous section,
3 your Honor.

4 MS. PALM: And -- and I have the same comment.
5 Again, these officers are trying to put their spin on, you
6 know, how they interpret his behavior. I think the jury can
7 interpret it for themselves. If they said, you know, "Stop
8 being such a frickin moron killer," would that be allowed in?
9 I mean, it's their opinion on what he's doing. The jury can
10 decide for themselves.

11 THE COURT: I'm going to allow that statement in.
12 Page 25, it says, "You're being utterly ridiculous."

13 MS. PALM: Same objection.

14 MR. LALLI: Same response.

15 THE COURT: I think it's just part of, you know, the
16 officer's investigative techniques, and Ms. Palm, you're free
17 to, you know, cross-examine him on that, so I'm going to allow
18 that in on Page 25.

19 We jump to Page 27, and it says did time of 22 months
20 in CCDC because the Judgment of Conviction is on the felony,
21 not on the gross misdemeanor.

22 I don't know if he's talking about just jail time
23 pending trial.

24 MR. LALLI: It -- you know, it's hard to tell, your
25 Honor, and -- and oftentimes folks who are in the criminal

1 justice system are -- you know, they -- they don't see the
2 significance in words like CCDC versus the prison. They don't
3 -- they don't -- we as lawyers, I mean, we obviously understand
4 those, while those are two huge things, and I just don't think
5 that there's really any prejudice in leaving in there.

6 We're not going to argue that based upon that he has
7 -- you know, he'd done time this CCDC in addition to -- to the
8 prior. I just don't think it's worth what is going to already
9 take a lot of time of now editing the statement. I -- I just
10 don't think there's sufficient prejudice in that. I think it's
11 also lost upon jurors.

12 MS. PALM: And I -- I --

13 THE COURT: Well, just in case some of them might
14 know, I'm going to exclude that --

15 MS. PALM: Thank you.

16 THE COURT: -- section.

17 MR. LALLI: Well, would the Court then consider just
18 allowing the CCDC? "So I did time, 22 months," and leave in
19 the CCDC?

20 THE COURT: Well, we don't know if he's referring to
21 the prison or to his jail time. No, I'm going to exclude that
22 -- that sentence --

23 MR. LALLI: Okay.

24 THE COURT: -- fragment. Go to Page 29. "You're
25 being ridiculous," I'm going to allow that in. (Indiscernible)

1 Page 29. And then we go to Page 31. I'm going to allow that
2 in. 32, I had some questions. Both counsel read that, get up
3 to speed on that one.

4 MS. PALM: Again, my -- my objections on this is, you
5 know, they're putting their spin on it. They're saying what a
6 normal rational person does and what he didn't to, and the
7 jury's going to hear from the officers what he did and he
8 didn't do and whether he was combative or not.

9 And then they had -- the whole normal person wants
10 that person helped. Well, that's for the jury to determine
11 what -- what his intentions were, and I think when the officers
12 are saying how they interpret that evidence, it's improper
13 opinion and vouching for the State's case. And then they talk
14 about having the standoff in the apartment for 15 minutes. It
15 was actually 13 minutes from the time of the call until he was
16 in custody. So it doesn't even state the facts right.

17 But I -- I just think when they're saying their
18 comment on -- on how that's all to be interpreted, it invades
19 the providence of the jury. It's inappropriate vouching. It's
20 inappropriate opinion and prejudicial. So I don't know why
21 that needs to come in when they're going to hear from the
22 officers anyway.

23 MR. LALLI: Your Honor, this is great interrogation
24 on behalf of the police officer. He's actually -- he's telling
25 this defendant, he is challenging the manner in which he

1 responded to law enforcement being there. If this was really
2 somebody that he loved, somebody that he cared about, wouldn't
3 he have invited these police officers in, hey come on in here
4 and help her?

5 And -- and his answer is so incredibly telling. He
6 doesn't say, well, yeah, maybe that would have made a
7 difference. He changes the whole subject. He -- he makes it
8 about him as opposed to the victim. Standoff, that's what
9 you're being told? I mean, that is incredibly telling of his
10 consciousness of guilt and -- and how he responded to police
11 officers when they arrived there.

12 THE COURT: I'm going to allow that in. It's
13 somewhat consistent with sexual assault cases where a detective
14 oftentimes will say, you know, like man up. It's not a comment
15 saying you're not being a man. It's just a technique and
16 again, Ms. Palm can clarify that on cross-examination. Page
17 34.

18 MS. PALM: 33 you mean?

19 THE COURT: Did I miss 33? I did. All right. All
20 right, Ms. Palm.

21 MS. PALM: "You do know, you do know it's time to
22 accept responsibility for what happened in there, okay."
23 Again, it's improper opinion, comment, they're telling him he
24 will has to accept responsibility. If he did something, maybe,
25 but that's for the jury to determine. If she did something to

1 herself or it's an accident, I mean, that's just -- that's
2 improper opinion and vouching for State's case.

3 THE COURT: Mr. Lalli.

4 MR. LALLI: Again, I don't see how "It's time for you
5 to accept responsibility," is opinion. It -- I'm not sure that
6 I haven't seen this in -- in almost every police interview that
7 I've read. Hey, you need to accept responsibility for what
8 happened here. It's absolutely proper.

9 THE COURT: I'm going to allow that in. Okay, we'll
10 go to Page 34. I'm going to allow those two sections in.
11 There's one at the bottom. I'm going to -- as I had mentioned
12 I'm already -- I'm excluding the question that says, "You might
13 want to open the door, actually he might be a fucking nut."
14 That's excluded.

15 MR. LALLI: Understood. Your --

16 MS. PALM: And I will send over the Page --

17 THE COURT: Page 15.

18 MS. PALM: -- 15 today (indiscernible).

19 THE COURT: If you can do it sooner than later
20 because --

21 MS. PALM: I'll do it as soon as I get back --

22 THE COURT: -- I have a all day evidentiary --

23 MS. PALM: -- to my office.

24 THE COURT: -- hearing starting at 11:00.

25 MR. LALLI: Your Honor, because I want to start

1 working on these editions, or the removals of this information,
2 can I just quickly make sure that I have -- have it all? I
3 think the first thing that the Court excluded is on Page 4
4 where it -- it -- it says could -- right at the very top where
5 it says, "both talking, could it be because they run my prior
6 record with me and sigh so-called fiance," and then all the way
7 down to where he says, "could that be possible," all that's
8 out?

9 THE COURT: Yes.

10 MR. LALLI: Okay.

11 THE COURT: I was hoping all of you were -- were
12 taking notes.

13 MR. LALLI: Well, no, I did, but --

14 THE COURT: Okay.

15 MR. LALLI: -- I'm -- I'm going to make these edits
16 and I just want to make sure that -- that I -- that I didn't
17 miss anything.

18 THE COURT: I have some notes as well, but perhaps
19 not as detailed as yours.

20 MR. LALLI: On the next thing that I have is on Page
21 10, "fucking cops."

22 THE COURT: Correct.

23 MR. LALLI: And I don't -- I don't have anything in
24 between, but just "fucking cops."

25 THE COURT: Right, that's out.

ROUGH DRAFT TRANSCRIPT

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1 MR. LALLI: And then the next thing that I have out
2 is on Page 14, bottom of the first paragraph, "if you look in
3 my closet, Detective, you'll be surprised the reports,
4 everything I filed, fought the always the Supreme Court,"
5 that's out?

6 THE COURT: Yes.

7 MR. LALLI: And then when we go down to the last
8 paragraph, "I was out, if you go into oh, shit my closet," all
9 the way down to, "did all the" on the very end of the page is
10 out.

11 THE COURT: Well, let's hold off on that because it
12 appears his sentence is finishing up on Page 15, which I don't
13 have. So I just want to --

14 MR. LALLI: Okay.

15 THE COURT: So the sooner I can get that, the sooner
16 I can contact both your offices.

17 MR. LALLI: Okay. And then -- but certainly
18 everything I've read there is out?

19 THE COURT: Yes.

20 MR. LALLI: On the next page, Page 16, "The judge and
21 everybody told me to be careful of the woman you're f'ing
22 looking for," that's out?

23 THE COURT: Yes.

24 MR. LALLI: "The woman you want to be with," that
25 whole sentence is out. And then on Page 17, all that's in. So

1 let's see here, the -- the next thing that I have is Page 27,
2 "Did time, 22 months in CCDC," that's out?

3 THE COURT: Correct.

4 MR. LALLI: And then the only other thing that I have
5 is the comment by Detective Wildemann, "You might want -- want
6 to open the door, actually might be an f'ing nut."

7 THE COURT: Right.

8 MR. LALLI: One other issue with respect to the
9 statement, there is approximately an hour, the officers start
10 the statement, they talk to him, he's not really being
11 cooperative, they stop, they leave for about an hour, and they
12 come back and they resume the interview. I don't know what Ms.
13 Palm's thought is on that hour in the middle there.

14 I mean, we can certainly leave it in or we can have
15 kind of two statements on one DVD that we admit into evidence.
16 I'm not sure.

17 MS. PALM: You know, can I confer with my client for
18 a minute.

19 THE COURT: All right. We're almost done.

20 UNIDENTIFIED SPEAKER: I have a prelim at 11:00 with
21 a four-year-old, Judge. I moved it back to 11:00.

22 THE COURT: Oh, no, we'll be --

23 MS. PALM: Okay. We're -- we're fine with taking
24 that break out so long as it shows that they're breaking.

25 MR. LALLI: It does.

1 MS. PALM: And then, I -- you know, there's stuff
2 before the transcript that I would like in when -- you know,
3 from the time they start filming until the end of the whole DNA
4 collection stuff. I don't want just the interview in. If
5 you're going to show the custody, then --

6 MR. LALLI: Okay, I'll -- I mean, I'll -- I mean sure
7 we can --

8 THE COURT: You can meet with her on that.

9 MR. LALLI: -- agree on something. But I was just
10 concerned about the middle section.

11 THE COURT: Anything else?

12 MS. PALM: We have lots of other stuff still.
13 Remember, we have the expert issue? Are you talking about
14 anything else on the statement?

15 THE COURT: On the statement.

16 MS. PALM: Oh, no, I have nothing else on the
17 statement.

18 MR. LALLI: No. We have the issue with respect to
19 Detective Wildemann. And, your Honor, I -- I went back and I
20 looked at the trial transcript, and what Detective Wildemann
21 say, he actually -- I don't think he ever even offered a lay
22 witness or an expert opinion in the case.

23 What he said is that, words to the effect of in -- in
24 homicide cases that I have investigated, it's not uncommon for
25 a stabber to cut himself. He doesn't look at the wound. He

1 doesn't say anything about it. He just -- he just makes that
2 statement. And the context of it was actually as a result of
3 some cross-examination.

4 MS. PALM: And that's not -- I don't remember it that
5 way. The transcript says, in his experience suspects in
6 stabbings tend to have wounds where Mr. O'Keefe's wounds were.
7 That's how I remember it. But regardless, they want to have
8 him testify to the wounds in this case. That's how they
9 noticed him and that's the opinion they want from him, and it's
10 not appropriate either lay or expert opinion from a detective.

11 MR. LALLI: Well, at this point, your Honor, we're
12 withdrawing the -- the notice of expert with respect to
13 Detective Wildemann. We still don't have a CV to --

14 THE COURT: Okay.

15 MR. LALLI: -- to present, and I just don't think
16 it's fair to -- to pursue that route. But I think certainly as
17 a detective, I mean, it's not even an opinion so much. It's
18 just a matter of him saying yeah, in stabbing cases that I've
19 worked on, it's not uncommon for the stabber to have injuries
20 on his hands.

21 THE COURT: In that regard, Ms. Palm.

22 MS. PALM: And in that regard, it's inappropriate lay
23 opinion and it's irrelevant what happens in other cases. You
24 know, this is something that a detective is not just qualified
25 to speak on. What they're trying to do is -- is say that these

1 are, you know, no defensive wounds, and it's inappropriate.

2 And the Lorer (phonetic) case says that. A
3 detective's opinion on the cause or nature of a defendant's
4 injuries is not appropriate lay or expert opinion or expert
5 testimony.

6 MR. LALLI: Well --

7 MS. PALM: So I don't know how they think they can
8 address it through Detective Wildemann.

9 MR. LALLI: What --

10 THE COURT: Well, you're not going to say it's
11 defense -- defensive in this case?

12 MR. LALLI: I'm sorry?

13 THE COURT: He's not saying -- making a statement
14 specifically to this case that --

15 MR. LALLI: No, he's not.

16 MS. PALM: Well, and -- but it -- what's the
17 relevance of other cases then? Why even bring it up? There's
18 no relevance to it.

19 MR. LALLI: There is relevance to it.

20 MS. PALM: Because he wants to say what happens --

21 THE COURT: One at a time. One at a time.

22 MR. LALLI: The relevance of it is is just that.
23 Oftentimes in stabbing cases you're going to have an individual
24 who cuts himself. And to say that Detective Wildemann as a
25 police officer can't testify to that, he's been a police

1 officer for over 22 years, homicide detective for almost 9
2 years, worked on over 200 homicide investigations.

3 THE COURT: How is this different, Ms. Palm, from a
4 homicide detective saying that someone gets shot and behind
5 them's a wall and it's not uncommon most find blood spatter on
6 the walls? Is that an expert opinion or is that opinion based
7 upon his -- his observations, his training and experience?

8 MS. PALM: Well, wounds are a different thing, and
9 that's what the Lorer case said. Wounds are a specific medical
10 issue that requires some kind of forensic background. And I
11 think it is different because they're trying to implication
12 that he should be a suspect because he has these wounds on his
13 hand.

14 I think it's -- you know, the jury can think about
15 that themselves. They can look at the wounds and think about
16 that. But he is not the person to, you know, talk about what
17 is common in cases because the implication is that he's part of
18 the commonality that he should be the suspect because of the
19 wounds on his hands.

20 MR. LALLI: Well --

21 THE COURT: No, I'm going to allow the testimony, but
22 he's not going to say "and that's what happened here."

23 MR. LALLI: Great, thank you, your Honor.

24 THE COURT: Okay.

25 MS. PALM: We also had in -- because they withdrew

1 the expert notice, we're back on the other act motion. And
2 there was one other item in the other act motion which was
3 references to prior trial because the Court had asked me to do
4 the order on it. And so I need to, you know, have -- have the
5 rest of them addressed.

6 We had objected to any reference to the prior trial.
7 The State had said that they agreed, they'll just say prior
8 testimony.

9 MR. LALLI: Prior testimony --

10 THE COURT: Prior hearing.

11 MR. LALLI: -- prior proceeding, things of that nay.

12 THE COURT: Yeah.

13 MS. PALM: So that will be the order?

14 THE COURT: Yes.

15 MR. LALLI: We won't tell the jury that he's been
16 convicted one time for this.

17 THE COURT: Right.

18 MS. PALM: And then the Court had said that they were
19 going to look at my discovery, proposed discovery order and
20 make any changes.

21 THE COURT: I believe either changes have been made
22 and signed or it's been signed.

23 MS. PALM: Okay.

24 THE COURT: So check with my law clerk.

25 MS. PALM: Okay.

1 THE COURT: I know I've signed it.

2 MS. PALM: And then --

3 THE COURT: Remember the scanning process is not one
4 day, two days or three days --

5 MS. PALM: Right.

6 THE COURT: -- we've been told. It's ten days.

7 MS. PALM: And then I still am waiting to meet with
8 their expert. I haven't been able to do that yet. I -- I
9 don't know.

10 MR. LALLI: This -- this afternoon is free.

11 MS. PALM: You have set it up? Okay.

12 THE COURT: All right, and on any, what I call
13 special jury instructions, if I could have those the first day
14 of trial if you have time. If not, the second day with cites
15 and without cites.

16 MS. PALM: Okay.

17 MR. LALLI: Oh, you want them with cites? Okay, very
18 good.

19 MS. PALM: And then I need to be able to tell my
20 experts what we're working with. I had given Mr. Lalli as well
21 as the Court's clerk a copy of the excerpts from the medical
22 records that we want to admit. And I need to work that out as
23 soon as possible because I have to let my experts know what
24 we're doing.

25 MR. LALLI: Well, I -- I received it yesterday late

1 afternoon, and I was at an event all last night, so I haven't
2 had a chance to really go through that stuff. But I --
3 obviously, it's I think a priority for both of us. We want to
4 know the status of that evidence --

5 THE COURT: All right.

6 MR. LALLI: -- so --

7 THE COURT: If you can -- if you know before 5:00
8 today, if you can fax it over.

9 MR. LALLI: The both of us --

10 THE COURT: No, because --

11 MR. LALLI: -- if we have an agreement?

12 THE COURT: -- I -- there was -- there was -- we had
13 a smaller stack of records and I think Ms. Palm was going to --
14 the two of you were going to meet to see which you don't object
15 to and perhaps there's a couple pages you do object to. And I
16 thought I was going to decide on Monday.

17 MS. PALM: Okay.

18 MR. LALLI: That was my understanding.

19 MS. PALM: All right.

20 MR. LALLI: But I think what we, Ms. Palm and I, had
21 actually discussed was a written stipulation because it is --
22 it is going to be extremely difficult to redact the medical
23 records. But we, I think, would have something
24 (indiscernible).

25 MS. PALM: Either way I could redact them or not, but

1 I gave him what I wanted and I copied the Court with it, so --

2 THE COURT: Okay.

3 MS. PALM: -- hopefully Monday we'll have a
4 resolution.

5 THE COURT: Okay.

6 MR. LALLI: Thank you.

7 MS. PALM: Thank you.

8 THE COURT: All right.

9 THE CLERK: Are you going to use all the old
10 exhibits?

11 MR. LALLI: The physical evidence, yes. The
12 photographs, no.

13 THE CLERK: You're going to bring me new exhibits,
14 then?

15 MR. LALLI: New photographs.

16 THE CLERK: Okay.

17 MS. PALM: I would like to use the --

18 THE CLERK: (Indiscernible).

19 MS. PALM: -- other photographs. That's how I
20 prepared.

21 THE CLERK: (Indiscernible) exhibits (indiscernible).

22 MS. PALM: Thank you.

23 MR. LALLI: Are they -- I'd like to go to the vault
24 and look at the exhibits. Is -- is there a time that those
25 will be called up and I'll go before then?

ROUGH DRAFT TRANSCRIPT

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1 THE CLERK: I can send an e-mail to Ann right now and
2 -- and go to the third floor records on the -- of this
3 building --

4 MR. LALLI: Yes.

5 THE CLERK: -- and ask (indiscernible) -- you know,
6 say that you want to look at the stuff in the vault and they'll
7 call Ann (indiscernible).

8 MS. PALM: Your Honor, what time are we convening
9 Monday?

10 THE COURT: 10:00.

11 MS. PALM: 10:00? Thank you.

12 MR. LALLI: Thank you.

13 THE COURT: All right, thank you. Actually, if
14 counsel could be here 15 minutes early so we can go over any
15 issues. Be here at 9:45. The jury will be --

16 MR. LALLI: May I approach (indiscernible).

17 THE COURT: Yes. And --

18 MR. LALLI: (Indiscernible).

19 THE COURT: Yeah. And I've got to do overflow.

20 (Off-record bench conference).

21 (Court recessed at 9:33 a.m.).

22

23

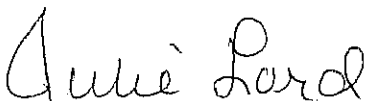
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ACKNOWLEDGMENT

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



DATE

ROUGH DRAFT TRANSCRIPT

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ORIGINAL

001
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FILED IN OPEN COURT
STEVE D. GRIERSON
CLERK OF THE COURT

AUG 23 2010

BY: *Carol Donahoo*
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

vs.

BRIAN K. O'KEEFE,
Defendant.

CASE NO: C250630

DEPT NO. XVII

DATE:

08C250630

J1

Jury Instructions
924136

TIME:



DEFENDANT'S PROPOSED JURY INSTRUCTIONS

COMES NOW Defendant, Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby submits to this Honorable Court his attached proposed and requested jury instructions.

Dated this 21st day of August, 2010.

PALM LAW FIRM, LTD.

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Attorney for Defendant O'Keefe

INSTRUCTION NO. _____

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis therein is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore others, but you are to consider all the instructions as a whole and regard each in light of all the others.

The order in which the instructions are given has no significance to their relative importance.

Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998).

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An Information is a formal method of accusing a person of a crime but is not evidence of his guilt.

In this case, Brian O'Keefe is charged by Second Amended Information with Second Degree Murder with Use of a Deadly Weapon. This charge encompasses the lesser charge of Involuntary Manslaughter.

The jury must decide if the State has met its burden of proving beyond a reasonable doubt that Brian O'Keefe is guilty of any offense, and if so, which offense.

Crawford v. State, 121 Nev. 746, 751, 121 P.3d 582, 586 (2005).

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The credibility or believability of a witness should be determined by the witness's manner on the stand, his or her relationship to the parties, fears, motives, interests or feelings, and opportunity to have observed the matter to which the witness testified; the reasonableness of the witness's statements and the strength or weaknesses of his or her recollections.

If you believe a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of the witness's testimony which is not proved by other evidence.

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence.

Quillen v. State, 112 Nev. 1369, 1381, 929 P.2d 893, 901 (1997).

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Evidence that Brian O'Keefe committed the felony offense of domestic battery, or is alleged to have made statements indicating an intent to harm Victoria Whitmarsh, and evidence that he is alleged to have indicated an ability to kill with a knife by cutting a person in the sternum area was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a propensity to commit any crime. Such evidence was received and may be considered by you only for the limited purpose of determining the issue of whether or not Brian O'Keefe had a motive or intent to commit the crime charged.

Neither the felony conviction, nor the other acts, if believed, necessarily establish proof of motive or intent to commit the crime charged. You must weigh this evidence in the same manner as you do all other evidence.

Fields v. State, 125 Nev. ___, 220 P.3d 724, 729 (2009) (trial court, absent waiver from defendant, must give a limiting instruction explaining the purpose for which bad act evidence is being admitted immediately prior to its admission and an instruction at the end of the case reminding jurors of the limited use of the evidence).

Harris v. State, 106 Nev. 667, 799 P.2d 1104 (1990) (addressing the use of felony convictions).

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INSTRUCTION NO. _____

The elements of second degree murder are: (1) an unlawful killing of a human being, and (2) with malice aforethought, either express or implied. The unlawful killing may be effected by various means.

NRS 200.010

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INSTRUCTION NO. _____

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse. The State has the burden of proving the intent to do a wrongful act beyond a reasonable doubt.

This requires that the State also disprove beyond a reasonable doubt that the killing was legally excused or justified by accident or self-defense.

If the State fails either to prove malice aforethought or to disprove accident and self-defense, it is your duty to return a verdict of Not Guilty of second degree murder.

NRS 200.010; Ybarra v. Wolff, 662 F. Supp. 44 (D. Nev. 1987) (government's burden); Collman v. State, 116 Nev. 687, 715, 7 P.3d 426, 444 (2000) (State's burden on malice); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

Express malice is that deliberate intention unlawfully to take away the life of another, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

NRS 200.020; Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000) (malice may be implied is the preferred instruction).

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INSTRUCTION NO. _____

The abandoned and malignant heart implied malice requires that the State prove beyond a reasonable doubt that Brian O'Keefe acted with an extreme recklessness regarding homicidal risk. That is, he must have intended to commit acts which caused the death of Victoria Whitmarsh, he must have known that his acts were likely to cause her death, and he must have consciously disregarded the risk to her life.

Collman v. State, 116 Nev. 687, 712-13, 716, 7 P.3d 426, 442, 444 (2000).

INSTRUCTION NO. _____

The abandoned and malignant heart implied malice requires that the State prove beyond a reasonable doubt that Brian O'Keefe acted with an extreme recklessness regarding homicidal risk. That is, he must have intended to commit acts which caused the death of Victoria Whitmarsh, he must have known that his acts were likely to cause her death, and he must have consciously disregarded the risk to her life.

INSTRUCTION NO. _____

Involuntary manslaughter is the unintentional killing of a human being without malice aforethought, but in the commission of a lawful act which might probably produce such a consequence in an unlawful manner.

If Brian O'Keefe unintentionally or accidentally killed Victoria Whitmarsh during a lawful act, but in doing so acted with a wanton or reckless disregard for human life that is not of the extreme nature that will support a finding of implied malice, then the crime is involuntary manslaughter and not second-degree murder.

NRS 200.070; United States of America v. Crowe, 563 F. 3d 969, ____ (9th Cir. 2009); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ____, 180 P.3d 657, 662 (2008) (defendant's entitlement to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is second degree murder or involuntary manslaughter, you must give the benefit of the doubt to the defendant and find it to be involuntary manslaughter rather than second degree murder.

Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, benefit of the doubt instruction, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitlement to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

An lawful act done without any intention of killing which unfortunately kills another, and which is not done with such extreme or wanton and reckless disregard for human life as would constitute malice aforethought or involuntary manslaughter is not unlawful and does not constitute second degree murder or manslaughter. If you have a reasonable doubt whether the death of Victoria Whitmarsh was caused by such a lawful act, you must give the benefit of the doubt to Brian O'Keefe and return a verdict of Not Guilty.

NRS 200.180; United States of America v. Crowe, 563 F. 3d 969, ____ (9th Cir. 2009) (definition of involuntary manslaughter recklessness); Ybarra v. Wolff, 662 F. Supp. 44 (D. Nev. 1987) (government's burden); Collman v. State, 116 Nev. 687, 715, 7 P.3d 426, 444 (2000) (State's burden on malice, definition of abandoned and malignant heart malice); Crawford v. State, 121 Nev. 746, 751, 752-53, 121 P.3d 582 (2005) (state's burden, definition of malice aforethought, and defendant's entitlement to significance of his theory instruction); Brooks v. State, 124 Nev. ____, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

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INSTRUCTION NO. _____

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and certain mental state in the mind of the actor. Unless the mental state is proved, the crime to which it relates is not committed.

CALJIC 3.31.5; NRS 193.190.

INSTRUCTION NO. _____

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and certain mental state in the mind of the actor. Unless the mental state is proved, the crime to which it relates is not committed.

INSTRUCTION NO. _____

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove motive on the part of a defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

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INSTRUCTION NO. _____

Brian O'Keefe is presumed innocent until the contrary is proved. This presumption places on the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that Brian O'Keefe committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of Brian O'Keefe, he is entitled to a verdict of Not Guilty.

NRS 175.211; Brooks v. State, 124 Nev. ___, 180 P.3d 657, 662 (2008) (defendant's entitled to significance instructions and instructions that are specifically tailored to the facts of the case).

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If you have a reasonable doubt as to the guilt of Brian O'Keefe, he is entitled to a verdict of Not Guilty.

The evidence which you are to consider in this case consists of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether a defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

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INSTRUCTION NO. _____

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

Prabhu v. Levine, 112 Nev. 1538, 930 P.2d 103 (1996).

INSTRUCTION NO. _____

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Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1987).

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INSTRUCTION NO. _____

The right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

However, where a person without voluntarily seeking, provoking, inviting, or willfully engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.

Culverson v. State, 106 Nev. 484, 797 P.2d 238 (1990).

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However, where a person without voluntarily seeking, provoking, inviting, or willfully engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.

INSTRUCTION NO. _____

When acting in self-defense a person may use the amount of force reasonably
necessary to defend themselves.

Runion v. State, 116 Nev. 1041, 13 P.3d 52, 59 (2000).

INSTRUCTION NO. _____

When acting in self-defense a person may use the amount of force reasonably necessary to defend themselves.

INSTRUCTION NO. _____

Actual danger is not necessary to justify force used in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. A person using even deadly force is justified if:

- 1) he is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
- 2) He acts solely upon these appearances and his fear and actual beliefs; and
- 3) A reasonable person in a similar situation would believe himself to be in like danger.

Such force is justified even if it develops afterward that the person using it was mistaken about the extent of the danger.

Runion v. State, 116 Nev. 1041, 13 P.3d 52, 59 (2000).

INSTRUCTION NO. _____

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- 2) He acts solely upon these appearances and his fear and actual beliefs; and
- 3) A reasonable person in a similar situation would believe himself to be in like danger.

Such force is justified even if it develops afterward that the person using it was mistaken about the extent of the danger.

INSTRUCTION NO. _____

Brian O'Keefe is entitled to use even deadly force in self-defense even though the danger to life or personal security may not have been real, if a person in the circumstances and from the viewpoint of Brian O'Keefe would reasonably have believed that he was in imminent danger of death or great bodily harm.

Pineda v. State, 120 Nev. 204, 88 P.3d 827 (2004).

INSTRUCTION NO. _____

Brian O'Keefe is entitled to use even deadly force in self-defense even though the danger to life or personal security may not have been real, if a person in the circumstances and from the viewpoint of Brian O'Keefe would reasonably have believed that he was in imminent danger of death or great bodily harm.

INSTRUCITON NO. _____

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find the State has failed to prove beyond a reasonable doubt that Brian O'Keefe did not act in self-defense, you must find him Not Guilty.

Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000).

INSTRUCITON NO. _____

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find the State has failed to prove beyond a reasonable doubt that Brian O'Keefe did not act in self-defense, you must find him Not Guilty.

Before you may consider evidence of the Statements of Brian O'Keefe made during his interrogation by Homicide Detectives, you must find that the State has established by a preponderance of the evidence that he made those statements voluntarily. Voluntariness under the law requires that the act be a product of rational intellect and free will. In determining voluntariness, you must consider the totality of circumstances present during the interrogation, including, Brian O'Keefe's physical condition, including intoxication, experience with the criminal justice system, age, education, the length of the detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep.

A defendant's intoxication will make a statement inadmissible only if the accused is intoxicated to the extent of being incapable of understanding the meaning of his comments. If you determine that Brian O'Keefe was so incapable, then you may not consider his interview with homicide detectives in your assessment of the evidence in this case.

Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005); Laursen v. State, 97 Nev. 568, 634 P.2d 1230 (1981).

INSTRUCTION NO. _____

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1
2
3 When you retire to consider your verdict, you must select one of you to act as
4 foreperson who will preside over your deliberation and will be your spokesperson here
5 in court.

6 During your deliberation, you will have all the exhibits which were admitted into
7 evidence, these written instructions and forms of verdict which have been prepared for
8 your convenience.

9 Your verdict must be unanimous. As soon as you have agreed upon a verdict,
10 have it signed and dated by your foreperson and then return with it to this room.

11 The verdict must represent the considered judgment of each juror. In order to
12 return a verdict must be unanimous.

13 It is your duty, as jurors to consult with one another and to deliberate with a view
14 to reaching an agreement, if you can do so without violence to individual judgment.
15 Each of you must decide the case for yourself, but do so only after an impartial
16 consideration of the evidence with your fellow jurors.

17 In the course of your deliberations, do not hesitate to reexamine your own views
18 and change your opinion if convinced it is erroneous. But do not surrender your honest
19 conviction as to the weight or effect of evidence solely because it is the opinion of your
20 fellow jurors, or for the mere purpose of returning a verdict.

21 You are the judges of the facts. Your sole interest is to ascertain the truth from
22 the evidence in this case.
23
24
25
26
27
28

INSTRUCTION NO. _____

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INSTRUCTION NO. _____

The non-flight of a person from the location immediately after the act occurred which resulted in a criminal charge is not sufficient in itself to establish innocence, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether the State has met its burden of proof to establish the elements of the offense charged.

CALJIC NO. 2.52

INSTRUCTION NO. _____

The non-flight of a person from the location immediately after the act occurred which resulted in a criminal charge is not sufficient in itself to establish innocence, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether the State has met its burden of proof to establish the elements of the offense charged.

INSTRUCTION NO. _____

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

NRS 193.220

INSTRUCTION NO. _____

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

INSTRUCTION NO. _____

If the evidence in this case is subject to two constructions of interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to the innocence, it is your duty to adopt the interpretation which will admit of the defendant's innocence, and reject that which points to guilt.

You will notice the rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, even if the reasonable deduction points to defendant's guilt, the entire proof must be beyond a reasonable doubt to support a verdict of guilty.

Crane v. State, 88 Nev. 684, 687, 504 P.2d 12 (1972); Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155 (1976).

INSTRUCTION NO. _____

If the evidence in this case is subject to two constructions of interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to the innocence, it is your duty to adopt the interpretation which will admit of the defendant's innocence, and reject that which points to guilt.

You will notice the rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, even if the reasonable deduction points to defendant's guilt, the entire proof must be beyond a reasonable doubt to support a verdict of guilty.

1
2 **VER**

3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 **STATE OF NEVADA,**

6 **Plaintiff,**

7 **vs.**

8 **BRIAN K. O'KEEFE,**

9 **Defendant.**

) **CASE NO: C250630**

) **DEPT NO. XVII**

) **DATE:**

) **TIME:**

10
11
12 **VERDICT**

13 **We, the jury in the above entitled case, find the Defendant BRIAN KERRY**
14 **O'KEEFE, as follows:**

15
16 **COUNT 1 – SECOND DEGREE MURDER WITH USE OF A DEADLY**
17 **WEAPON:**

18
19 ☐ **Guilty of Second Degree Murder with Use of a Deadly Weapon**

20 ☐ **Guilty of Second Degree Murder**

21 ☐ **Guilty of Involuntary Manslaughter**

22 ☐ **Not Guilty**

23
24
25 **Dated this ____ day of _____, 2010.**

26
27 _____
28 **Foreperson**

1 ORDR
2 PALM LAW FIRM, LTD.
3 PATRICIA PALM, ESQ.
4 NEVADA BAR NO. 6009
5 1212 CASINO CENTER BLVD.
6 LAS VEGAS, NV 89104
7 Phone: (702) 386-9113
8 Fax: (702) 386-9114
9 Email: Patricia.palmlaw@gmail.com
10 Attorney for Brian O'Keefe

FILED IN OPEN COURT
AUG 23 2010 20
CHARLES J. SHORT
CLERK OF THE COURT

BY CAROL DONAHOO
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRIAN K. O'KEEFE,

Defendant.

CASE NO: C250630

DEPT. NO: XVII

DATE:

TIME:

**ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION BY DEFENDANT
O'KEEFE FOR DISCOVERY**

This matter having come before the Court on August 12, 2010, on a Notice of Motion and Motion by Defendant O'Keefe for Discovery, to which an Opposition was filed by the State, and the Court having heard argument and been fully advised in the premises, and good cause appearing therefore;

IT IS HEREBY ORDERED that the Motion is GRANTED, in part, except as to the information sought in paragraph 8(a) – (c), pursuant to this Court's Order, the State need provide only information which is sufficient to identify any felony convictions of the

///

///

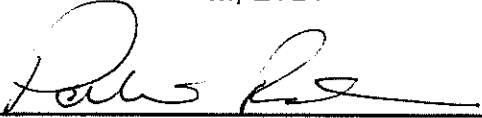
///

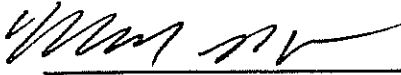
///

1 lay witnesses within the past ten (10) years and the last known addresses for the lay
2 witnesses, as to any additional information sought under paragraph 8(a)-(c), the Motion
3 is DENIED.

4 IT IS SO ORDERED this 23 day of August, 2010.

5
6
7
8 Respectfully submitted by:
9 PALM LAW FIRM, LTD.

10 
11 PATRICIA A. PALM
12 1212 Casino Center Blvd.
13 Las Vegas, NV 89104
14 (702) 386-9113
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28


District Judge

EP

COPY

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

Nov 23 10 21 AM '10

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 VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 1

PARTIAL TRANSCRIPT
(EXCLUDES VOIR DIRE)

MONDAY, AUGUST 23, 2010

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER LALLI, ESQ.
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

001099

1 LAS VEGAS, NEVADA, MONDAY, AUGUST 23, 2010, 10:21 A.M.

2 (Outside the presence of the prospective jury panel).

3 THE COURT: On the record outside. We are outside
4 the presence of the jury panel. Just so I'm clear, Ms. Palm,
5 the -- you have some items from the psyche reports or
6 hospitalization of the victim in this matter. And you've typed
7 some areas that you would like to get into or to have your
8 expert review and opine his view on these issues; is that
9 correct?

10 MS. PALM: Well, here's what it is, your Honor, we
11 started with about three inches of medical records from
12 numerous hospital admissions and then the court had asked us
13 well, can we agree to something.

14 This is what I reduced it down to, which is
15 substantially reduced. And I want actually the records in
16 themselves or if we can agree to a stipulation that has this
17 language that these things show in her medical records, because
18 otherwise, Mr. Lalli and I were talking, the records would
19 probably have to be heavily redacted.

20 But yes, these are the things that I want in whether
21 or not an expert testifies. And then I would like an expert to
22 be able to explain bipolar disorder, what that means and
23 agoraphobia, what that means and anxiety attacks, what that
24 means. Those things that are in this.

25 THE COURT: And there's -- there's items in here

1 about her trying to kill herself, cutting her -- cutting
2 herself.

3 MS. PALM: That's correct. And -- and then what Mr.
4 Lalli did was he highlighted the portions that he was agreeable
5 to. My problem is it takes out references to the numerous
6 suicide attempts, which I think are relevant. By the time of
7 the 2007 one, it was her seventh documented suicide attempts.
8 And if you look at what he's just got in here, it looks like
9 she's only had two. I think that's a big difference to five
10 years apart versus seven.

11 So that's one of my concerns. The other concern is
12 he's taken out the diagnoses of borderline personal traits,
13 depression, bipolar disorder. He has also taken out the
14 substantial mood swings, mood periods, high moods at problems
15 of anger and then again the diagnoses with that. And the final
16 suicide attempt from 2007 he doesn't even want mentioned.

17 So, I mean, what I felt like that I had reduced a lot
18 of records from many years to a very few records. But I think
19 that the suicide attempts are important. And I didn't even
20 include the 2002 hospitalization, in which she had -- the
21 records show that it was a overdose or she was in for drug
22 dependency.

23 But -- but my client actually took her to the
24 hospital for that. She had overdosed. So he knows about that
25 one. Also, I didn't even include that because it wasn't listed

ROUGH DRAFT TRANSCRIPT

001101

1 in the records as an overdose. It was just a drug treatment,
2 and you know, being fair and trying to limit it to what's
3 really relevant in this case, the numerous suicide attempts and
4 the various diagnoses she's had, I didn't include the drugs
5 because I didn't think that the court would think that the
6 drugs just being a drug addict by itself is -- is necessarily
7 all that relevant to all the issues in the case.

8 So that's why I made this -- you know, this reduced
9 list that I made, and -- and that's where my position is.

10 THE COURT: Just so I'm clear, is there a specific --
11 I mean, I read through -- is there a -- did I miss this, is
12 there a specific entry that says seven suicide attempts or is
13 that just that you added them up throughout the records?

14 MS. PALM: If you add them up --

15 THE COURT: Okay.

16 MS. PALM: -- based on the references in here, yes,
17 there are seven documented.

18 THE COURT: Okay.

19 MS. PALM: There's eight that he knows about.

20 THE COURT: Okay. All right, thank you. Mr. Lalli,
21 let's address first if we are allowing certain entries, whether
22 by stipulation or records. And those are the ones you've
23 identified and highlighted with yellow that you have no
24 objection to. How are -- I mean, is there an agreement as to
25 how we're going to admit that into evidence?

ROUGH DRAFT TRANSCRIPT

001102

1 MR. LALLI: Well, what I had proposed to Ms. Palm is
2 that it be in the form of a stipulation. A written stipulation
3 that can be read to the jury is -- is how my experience of how
4 stipulations are done with respect to specific fact.

5 If I could just hit rewind a little bit. Generally,
6 character evidence is not admissible to show that a person
7 acted in conformity therewith and -- number one. Number two,
8 it has never been the law in this state or the law in any state
9 that a victim can or should be subjected to complete in total
10 character assassination. It's -- it's simply not fair to the
11 victim. It's prejudicial in that it confuses the -- the facts
12 in controversy to the jury. And that's -- that's what's going
13 on here.

14 Suicide attempts don't equate to a danger or specific
15 acts of danger to somebody else, especially when the aggression
16 is inward. Depression and mood swings doesn't mean that this
17 person poses a physical risk or threat to someone else.
18 There's -- I'm sure there's probably 30 people with bipolar
19 disorder that are -- are walking around this courtroom right
20 now or court house -- court house right now.

21 So, I mean, that in conjunction with the concept or
22 the idea that medical records, particularly psychiatric
23 records, are very personal, very discrete, very private. And
24 it -- it's just a courtroom is not the proper place to just air
25 this woman's laundry. What -- what -- what the law says, what

1 Daniels and Petty (phonetic) say is that generally evidence in
2 the form of opinion or reputation, opinion or reputation are
3 admissible to show that it the victim was a violent person
4 which in other words would make it more likely that the victim
5 was the initial aggressor in a self-defense case.

6 This really is not even a self-defense case because
7 the defendant has never said that he killed this woman out of
8 fear that she would kill him first or hurt him first. He never
9 even said that. So we're not even arguably in a very technical
10 sense in a self-defense case. I'm not even sure they're
11 entitled to self-defense instructions.

12 Now let's -- let's move into the specific incidence
13 situation. That's when -- when -- when does this sort of
14 information specific incidence come before a jury? Well, as --
15 even as a predicate to that, he's -- he's gotta testify and
16 he's gotta -- to indicate that he knew it. But under the facts
17 of the case, your Honor has to use your discretion to determine
18 is this truly relevant to an issue of self-defense? The
19 reasonableness of his fears.

20 It's in the admissible as Ms. Palm suggests in her
21 argument to show that the victim acted in conformity therewith.
22 She's a suicidal person, therefore she tried to commit suicide
23 on this day. It's not relevant for that. The law is very
24 specific. In fact, there is no Nevada case that says inward
25 acts of aggression. Attempted suicides are relevant in

ROUGH DRAFT TRANSCRIPT

001104

1 self-defense cases when it's the victim who's doing it.

2 So I -- and I would also note that the court reviewed
3 this issue at the prior trial and made a determination that
4 none of it was admissible. However, out an abundance of
5 caution, out of appearing before the supreme court and -- and
6 going there, there are some things that are would not be
7 surprised if they were to extend our doctrines in this state.

8 And certainly, mere depression, bipolar disorder,
9 mood swings, suicide attempts in and of themselves would not be
10 included in that. There's no articulable legal standard that
11 would allow those items to come before a jury in this case.

12 Now, if you're talking about in this case attempts
13 where she's using implements to cut herself and it's the
14 defense -- it's the defendant's position that she introduced
15 the knife to controversy, I mean, I can -- I can understand how
16 perhaps our supreme court would extend current doctrines to
17 allow that in.

18 So I have highlighted the areas that I think best
19 suit that in spite of the fact that there's no case law to
20 support it and the court's already ruled that it was
21 inadmissible in the last trial. But the court is correct, the
22 information that I have highlighted is information that I am
23 willing to agree would be admissible.

24 THE COURT: All right. Excuse me. All right, thank
25 you, Mr. Lalli and Ms. Palm. I've reviewed the, I guess I'll

ROUGH DRAFT TRANSCRIPT

001105

1 call it a summary. And what we'll do, Ms. Palm, we'll have had
2 admitted as a court's exhibit, the sheet here, okay, for any
3 appellate purposes.

4 And so does everyone have their copy in front of
5 them.

6 MS. GRAHAM: Yes.

7 MS. PALM: Yes, Judge.

8 MR. LALLI: Yes.

9 THE COURT: Okay. On paragraph one, Mr. Lalli, the
10 first two lines are just setting forth that it -- that this
11 entry came from Monte Vista Hospital. Do you have any
12 objection to that information being admitted through a
13 stipulation?

14 MR. LALLI: No.

15 THE COURT: Okay. So from the word records to the
16 word herself, the court is going to allow. This is paragraph
17 one. From the word she to agoraphobia and -- and discharge
18 summary, the court is going to not allow that information. The
19 second paragraph it says when Victoria Whitmarsh was brought to
20 Sunrise Hospital, that -- that section will be admitted.

21 On the next paragraph down, it starts with she was
22 diagnosed, the court's going to allow that she had laceration
23 on both wrists. So the remaining portion would be disallowed
24 and again, hopefully the parties will work together and get a
25 stipulation with these items. The next paragraph --

1 MR. LALLI: I'm sorry, so the -- the -- the
2 paragraph --

3 THE COURT: Where it says she was diagnosed by Edwin
4 Decay (phonetic), MD.

5 MR. LALLI: Yes, that paragraph is out?

6 THE COURT: Right. However, the -- and we'll have to
7 work on the stipulation here where there's an entry that says
8 laceration --

9 MR. LALLI: I see.

10 THE COURT: -- on both wrists, that will be allowed
11 to come -- to come in.

12 MR. LALLI: Okay.

13 MS. PALM: I'll sorry, so it would be she was
14 diagnosed with laceration on both wrists, maybe?

15 THE COURT: Right. And then we'll come down to the
16 next paragraph where it says psychiatric eval by Dr. Decay
17 shows, that paragraph, okay.

18 MS. PALM: Um-h'm.

19 THE COURT: I'm going to allow that paragraph up
20 until the last phrase, she reported anxiety attacks. She
21 reported anxiety attacks is out, okay. The last paragraph on
22 Page 1 will not be admitted in. On Page 2, first paragraph
23 will come in.

24 MS. PALM: And your Honor, could we have the heading
25 that says the September 2006 Monte Vista from the first

1 paragraph --

2 THE COURT: Yes.

3 MS. PALM: -- because otherwise it doesn't --

4 THE COURT: Yes.

5 MS. PALM: -- really make sense.

6 THE COURT: Yes.

7 MS. PALM: Okay.

8 THE COURT: So then we're on paragraph one of Page 2,
9 that comes in. Paragraph two on Page 2 comes in. Paragraph
10 three is out. Paragraph four is in, excluding the last
11 sentence that says she's also had one other psychiatric
12 admission, that's out. The next paragraph is in. The final
13 paragraph on Page 2 is out.

14 First two paragraphs of Page 3 are out. Paragraph
15 three is in. And the last paragraph on Page 3 is out. And so
16 if parties can work together and prepare some type of
17 stipulation for that information. All right, and do the
18 parties have any proposed jury instructions for me to start
19 looking at?

20 MS. PALM: I filed mine this morning, your Honor.

21 THE COURT: Okay.

22 MR. LALLI: Your Honor, I -- I will have mine for the
23 court tomorrow morning.

24 THE COURT: All right.

25 MR. LALLI: And my -- my question is, I know the

1 court wanted cites. Does the court want cites on the --

2 THE COURT: Not on the what we call --

3 MR. LALLI: -- the murder instruction, for instance?

4 THE COURT: We're not supposed to call them stock, I
5 guess, but any what we'll call special instructions that you --
6 that you believe there will be some objections to.

7 MR. LALLI: Does --

8 THE COURT: If you can give us the cites on that. I
9 don't need the one for beyond a reasonable doubt.

10 MS. PALM: Oh, see, I try to look all that stuff up.

11 THE COURT: Okay.

12 MS. PALM: I thought you wanted cites on --

13 MR. LALLI: Would the court --

14 THE COURT: If you have them, great. I'm saying
15 you'll have them for next time, Ms. Palm, okay.

16 MR. LALLI: Well, I have a voluntary intoxication
17 instruction, for example.

18 THE COURT: All right.

19 MR. LALLI: I will attach cites to it. But the
20 Runion (phonetic) self-defense instructions, I --

21 THE COURT: Are you -- well --

22 MS. PALM: (Indiscernible) a couple (indiscernible)
23 instructions?

24 MR. LALLI: No.

25 THE COURT: If you'd just -- just cite Runion on

ROUGH DRAFT TRANSCRIPT

001109

1 that. I also need instruction in the event the defendant takes
2 -- instruction on voluntariness of confession.

3 MR. LALLI: Right.

4 THE COURT: I need that instruction. Instruction if
5 the defendant takes the stand. I'm assuming, Ms. Palm, you ma
6 I have that in your packet.

7 MR. LALLI: Okay.

8 THE COURT: All right.

9 MS. PALM: And -- and I do have another issue with
10 instructions, your Honor. And that is that before Cheryl
11 Morris takes the stand or before they get evidence of the prior
12 felony conviction, the court is supposed to instruct them on
13 the limited use of that evidence. I do have an instruction in
14 my packet which talks about it. I don't know if the court
15 wants to use that.

16 I've given them a copy of it. But they are --

17 THE COURT: All right.

18 MS. PALM: -- supposed to be instructed before it
19 comes in.

20 THE COURT: Yes. All right.

21 MR. LALLI: I would agree just (indiscernible) 4805
22 instruction.

23 THE COURT: Right. If you have one, State's
24 different than Ms. Palm's, or if you agree on hers, then that's
25 fine.

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1 MS. PALM: And -- and I have to make an -- or a
2 record of my objections --

3 THE COURT: Okay.

4 MS. PALM: -- during the jury voir dire.

5 THE COURT: Please do so.

6 MS. PALM: During the jury voir dire there was
7 reference to battered women's syndrome. I objected to that on
8 the basis that it's touching on the facts of the case. We
9 don't have any evidence of battered -- and also we don't have
10 any evidence of battered women's syndrome and we're not
11 planning to introduce such evidence, so I thought it was
12 improper.

13 And the second objection I made was improper currying
14 favor with the juror when Ms. Graham was talking about
15 (indiscernible) to I understand about following your kids
16 around. The third objection was to touching on the facts of
17 the case by talking about whether a neighbor should be getting
18 involved in a domestic violence dispute or not.

19 THE COURT: Who's going to handle that for the State?

20 MR. LALLI: Well, with respect to domestic violence,
21 asking jurors what they believe battered women's syndrome is,
22 battered women's syndrome, as I understand it, is the syndrome
23 by which women or certainly men find themselves in an
24 inescapable relationship. And they either keep returning to it
25 or they come back. And it is an acknowledged psychiatric

1 condition.

2 In this case we have a situation where a woman, in
3 spite of being battered to the point of having a defendant
4 suffer a felony conviction and go to prison for three years,
5 she went back to him. And the questions are designed to
6 discern whether jurors have a preconceived idea of whether that
7 exists, that such a syndrome exists, whether there are
8 situations where that happens or whether, you know, they have
9 the opinion that if -- if she went back, then she deserved to
10 be murdered.

11 And I think without asking to prejudge the evidence,
12 those are real issues, and I think it is fair for us to discern
13 where these jurors are coming from as they enter the -- this
14 case. I mean, ask them any specific questions that related to
15 the evidence in any way other than in a very generic way
16 discussing domestic violence.

17 And it -- my assessment is it's absolutely proper.
18 We did not elicit specific facts. We did not ask them how they
19 would prejudge evidence. We just asked them their feelings
20 about things.

21 THE COURT: At the time there was an objection by Ms.
22 Palm the attorneys approached the bench. And I think the main
23 objection was that -- at least what I interpreted was the
24 question was what's your understanding of battered wife
25 syndrome. There was an objection at that point. We had a

1 conference at the bench. And I believe the State had agreed to
2 move on and not ask any further jurors or that juror in
3 particular what their understanding of that it term meant.

4 MR. LALLI: That's correct.

5 THE COURT: Okay. And so I'm going to allow the
6 State to talk about the general issues of domestic violence
7 because that is relevant to the situation. However, the State
8 has agreed, I think --

9 MR. LALLI: We have.

10 THE COURT: -- not to ask anyone about what's their
11 understanding or for the State to try to define that term to
12 the jury. On the issue of Ms. Graham as a grandmother, that
13 surprised Ms. Graham, but -- okay.

14 MS. GRAHAM: Judge, you've known that.

15 MS. PALM: She's trying to curry favor over the
16 court, too.

17 THE COURT: Actually, Ms. Palm told me she was a
18 grandmother a couple years ago --

19 MS. GRAHAM: I know that.

20 THE COURT: -- if I recall.

21 MS. GRAHAM: I had the --

22 THE COURT: I'm not --

23 MS. GRAHAM: I had my second one during this trial
24 last year or 2008.

25 MR. LALLI: Well, I'm not a grandparent.

1 THE COURT: Okay. I am, by the way, as well. And so
2 Ms. Palm moved -- I mean, excuse me, Ms. Graham moved on, and
3 so I'm not -- I don't know if you're making a motion for
4 mistrial because of those issues.

5 MS. PALM: No, I'm not. I'm making a record of my
6 objection --

7 THE COURT: Okay.

8 MS. PALM: -- and --

9 THE COURT: Okay.

10 MS. PALM: -- you know, if it becomes cumulative
11 error --

12 THE COURT: Right.

13 MS. PALM: -- then I might.

14 THE COURT: And I think the one comment about
15 grandmother happened once and apparently it's only going to
16 happen -- that -- that's the extent of it. Domestic violence,
17 I'm going to allow those questioning. We're not going to talk
18 about any syndromes or anyone defining that, either party --
19 any of the attorneys are not going to define that term and
20 we're not going to ask any of the jurors to give us their
21 understanding of that term, okay. Anything else?

22 MS. PALM: And then, your Honor, with respect to
23 should neighbors get involved in domestic violence cases, that
24 kind of thing. I think that that's touching too much on the
25 facts of this case because they have neighbors getting involve

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1 in the case. And I don't think that's appropriate questioning
2 since, you know, well, one it's improper to touch on the facts
3 of the case.

4 And two, you know, I -- I am limited on I can't ask
5 about bipolar disorder and other facts of the case. I mean,
6 we're not supposed to go there, so I -- I think that they
7 should be held that standard.

8 MR. LALLI: Well, some people have pre-conceived
9 notions that -- and there's studies on this. This isn't stuff
10 that I'm just making up. They've got pre-conceived notions
11 that domestic violence is not a community issue. That the
12 courts and law enforcement have absolutely no business sticking
13 their nose into what happens behind closed doors.

14 And we absolutely have the right to inquire of these
15 jurors to determine whether they're going to have some
16 nullification issue with sitting in judgment of the defendant
17 because, you know, this happened between him and his old lady.
18 And some people are the mind set that we all have no business
19 inquiring into that sort of thing. So it's absolutely relevant
20 to assess that bias in the jurors.

21 THE COURT: Well, I think and also you had followed
22 up with some questions as far as if something was going on, I
23 think you were asking if they would be the type of person who
24 would call the police. That's two different questions. One,
25 is it is a community issue. And the second one, would you as a

1 -- I mean, you as an individual, as a neighbor, would you call
2 the police department on this situation?

3 MR. LALLI: They both really address the same issue,
4 your Honor.

5 MS. PALM: And my point would be, I think that they
6 could address the same issue by saying do you think domestic
7 violence ought to be a crime without saying should neighbors
8 call the police, should neighbors get involved. It's almost
9 vouching for the witnesses in this case by, you know, talking
10 about how they did the right thing.

11 THE COURT: So you would not object to them asking
12 whether or not domestic violence should be a crime?

13 MS. PALM: No, I think that's an appropriate
14 question.

15 THE COURT: You know, I -- in abundance of caution,
16 you know, obviously the State can ask that question if they so
17 choose. I am concerned about the question of would you call if
18 you saw domestic violence because that's exactly what we have
19 here with the individuals downstairs in the apartment complex.

20 MR. LALLI: Well, if -- if I may, your Honor, nobody
21 heard noise -- that scenario didn't happen here. We don't have
22 a situation where somebody heard something and they called the
23 police because of it. There are people who heard a disturbance
24 upstairs, they went up there perhaps out of a sense of civic
25 duty. More probably out of a sense of, at least initially,

1 they were being bothered and they didn't like it. They didn't
2 like the disturbance. But it was such that they went up there.
3 Not intending to call the police, but to tell the defendant to
4 be quiet.

5 And not until they went in there and saw that there
6 was a woman half dead that they -- or dead, certainly blood all
7 over the police that they called the police. So it is a
8 different -- it's not that situation. It's not that situation
9 at all.

10 THE COURT: Okay, I don't recall the specifics, so
11 I'm sure both --

12 MR. LALLI: I can represent as an officer of the
13 court that's my belief of what the evidence --

14 THE COURT: So it wasn't --

15 MR. LALLI: -- is going to be.

16 THE COURT: -- they heard someone's being thrown
17 against the wall or screaming out? It was like just loud
18 screaming and yelling and music or -- I -- I just don't recall.

19 MR. LALLI: It was -- it was banging upstairs that
20 went on over the course of about an hour. And when it reached
21 a crescendo, a downstairs neighbor went up -- upstairs quite
22 angry at first to tell this gentleman, the defendant, to knock
23 it off because he was trying to sleep. And the defendant
24 invites him in the room and -- and says go get her, referring
25 to our victim.

1 He walks into the bedroom with the defendant and sees
2 her victim on the ground. That's my belief of what the
3 evidence is going to be after talking to him. So it's quite a
4 different scenario than if you heard something, if -- you know,
5 if you believe something was going on, are you going to call
6 the police. That question is designed to elicit the level of
7 responsibility that these jurors have to their community. And
8 it's not prejudging the evidence.

9 MS. PALM: And -- and Judge, the -- the evidence was
10 that Charles Toliver's wife or Charles Toliver told his wife, I
11 don't remember which told the other, but I think he's beating
12 that girl up there before he goes upstairs. He was upset about
13 the noise, but that comment was made. And the way that the
14 State has -- has put the case together, I mean, at least last
15 time it was, you know, that they're concerned for this girl up
16 there because they hear this noise going on.

17 They're trying to make it sound like that the --
18 that's what the concern was, at least that's what they did
19 before. So -- and that was the evidence in the case. And I
20 think that they were not asking did you call the police. They
21 were asking would you get involved, either call the police or
22 get involved. So it's not just that they're asking about
23 calling the police and this case didn't involve anybody calling
24 the police. They're asking did -- would you get involved.

25 THE COURT: Is there a previous -- the Toliver's

1 previous testimony was that they thought the girl was getting
2 beat?

3 MS. PALM: That one of them made the comment to the
4 other one, I think he's beating her up there.

5 MS. GRAHAM: Judge, Mr. Lalli's correct in the fact
6 that Cooky Toliver (phonetic) went upstairs because he was
7 pissed because his first episode -- first he tried to get them
8 to be quiet by banging a broom on the ceiling. He was woken up
9 out of a deep sleep and he was mad, and he went up there to
10 confront the defendant.

11 He wasn't -- although Ms. Toliver said to him, this
12 has been going on for a minute, I think he's hurting that
13 little girl up there, Charles Toliver went up there with the
14 specific reason to -- the specific intent to tell defendant to
15 stop doing who he was doing. He didn't even call 911. The
16 Toliver's didn't even call 911. Mr. Toliver came out and
17 yelled to other neighbors to call 911 because they was so
18 surprised at what he saw when he walked up there and saw the
19 door wide open.

20 He had no idea that the defendant had just stabbed
21 and killed Victoria.

22 THE COURT: I don't think the -- the question to the
23 prospective as far as are you the type of person who call is --
24 is placing them in the position of the Tolivers or in this
25 particular case or personalizing so much for them, so I'm going

1 to allow that type of questioning.

2 MR. LALLI: Thank you.

3 MS. GRAHAM: Thank you, your Honor.

4 THE COURT: And we're going to have the other jury.
5 They'll be in here at 10:00 o'clock. They'll be on my left
6 side so they can start hearing the questions. We'll probably
7 just put them under oath before the other jury comes in and
8 explain to them why they're here. And then just continue on.
9 Hopefully we can get a jury picked tomorrow.

10 MS. PALM: So --

11 MR. LALLI: Well, we'll have to do -- I'm sorry.

12 MS. PALM: Is the court going to do your general
13 questions, then, first or are we going to start --

14 THE COURT: No, we're going to --

15 MS. PALM: -- and finish?

16 THE COURT: -- finish up here.

17 MS. PALM: Okay.

18 THE COURT: But I'll explain to them where we're at,
19 what we've done so far. And then we'll just move on.

20 MS. PALM: Okay. And then -- then finish that --

21 MR. LALLI: We'll need to --

22 MS. PALM: -- the -- the people who are sitting in
23 this area and then I'll take over.

24 THE COURT: Right. Once the State finishes, we have
25 two or three more in the front row --

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1 MR. LALLI: Yes.

2 THE COURT: -- and then you'll take over here. All
3 right, any other questions?

4 MR. LALLI: No, other than just the observation that
5 we'll have to reindicate to the new group that comes in who are
6 the witnesses are so that they have some knowledge of that.

7 THE COURT: Right.

8 MR. LALLI: That -- the introduction that's normally
9 done will have to be made to them.

10 MS. PALM: Thank you.

11 THE COURT: Yes.

12 MR. LALLI: Thank you, your Honor.

13 THE COURT: All right. Thank you.

14 MS. GRAHAM: And 9:45 Judge?

15 THE COURT: 9:45 for the attorneys, yes.

16 MS. GRAHAM: Thank you.

17 (Court recessed at 5:32 p.m., until Tuesday,
18 August 24, 2010).

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ACKNOWLEDGMENT

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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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

Nov 23 10 21 AM '10

Ann J. Schmitt
CLERK OF THE COURT

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 VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 2

PARTIAL TRANSCRIPT
(EXCLUDES VOIR DIRE)

TUESDAY, AUGUST 24, 2010

APPEARANCES:

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District Court

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001123

1 LAS VEGAS, NEVADA, TUESDAY, AUGUST 24, 2010, AT 10:04 A.M.

2 (Outside the presence of the jury).

3 THE COURT: We're outside the presence of the jury.

4 Ms. Palm, you wanted to put some items on the record.

5 MS. PALM: Yeah -- yes, thank you, your Honor. I was
6 a little bit -- I just need to make sure that I've got a clear
7 ruling on yesterday from the victim's mental health history. I
8 know what the court had said of the statement that we could
9 use. But subject to that ruling then, the implication is that
10 I also can't all experts to talk about Victoria Whitmarsh's
11 diagnoses and treatment, what those diagnoses mean and what the
12 manifestations of having those diagnoses could be.

13 And I just want to make sure that that's object the
14 record that subject to the court's ruling, excluding all those
15 other things out of what we wanted to admit, that I would then
16 be limited with my experts also.

17 THE COURT: Well, I'm going over my list here. Some
18 of those items, for example, on Page 1, paragraph two, it talks
19 about that she was depressed, she cut her wrists, there's
20 attempt suicide issues, she's tried to kill herself numerous
21 times. So they're free to address any of the items that I'm
22 allowing in as far as the records are concerned. So if that's
23 part of their opinion, they're free to voice that opinion.
24 Their opinion's based upon that information.

25 MS. PALM: Well, their opinion would be the

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1 diagnoses, which you're not allowing in. So that's why it's a
2 little confusing to me. I'm not sure what they would say other
3 than yes, this is in other record, and I really couldn't say --
4 I mean, I -- I'm understanding I'm not allowed to say and you
5 -- and she's been diagnosed with bipolar disorder, what is
6 bipolar disorder? What are the manifestations of bipolar
7 disorder?

8 THE COURT: Right, that --

9 MS. PALM: You know, I just need to clarify what the
10 court's ruling is because I have experts that I need to talk to
11 and I need to know, you know, if I can address that with my
12 client's testimony or any other witness.

13 THE COURT: Well, anything that I said is coming --
14 is allowed in, they can address those items.

15 MS. PALM: So they can say that she cut herself,
16 according to the records?

17 THE COURT: And -- and you'll see on paragraph two of
18 Page 2, they talk about mood swings, they talk about poor
19 appetite, anxiety, and there's some other issues that you may
20 be of interest to you. I have no idea, but they can address
21 any of those items that the court's allowing in.

22 So there are some, you know, psychological issues,
23 mood swings, irritability.

24 MS. PALM: Okay, but --

25 THE COURT: It says poor anger management. That's

1 also in there.

2 MS. PALM: Right. I'm just not sure how they would
3 -- what are you saying, that they can say yes, that she had
4 those things but they could not say what diagnosis was attached
5 to those things?

6 THE COURT: Well, for -- I'm not really sure what
7 you're saying because for example, it says here that she has
8 anxiety, low energy, that she has poor anger management skills,
9 impulsive behavior. So they can address those issues in there.

10 MS. PALM: Okay. I still -- I don't know what -- you
11 know, what they would -- would they not then be able to add
12 anything that's not in the portions that the court has said are
13 coming in? If they could just say that yes, these things are
14 in her record, then there's no point to call an expert because
15 they couldn't, you know, elaborate on it from --

16 THE COURT: Well, they --

17 MS. PALM: -- as (indiscernible) understand the
18 court's ruling.

19 MR. LALLI: Your Honor, are -- I -- as I interpret
20 the court's ruling, experts can talk about that evidence which
21 you are admitting and nothing more. So the court has excluded,
22 for instance, bipolar disorder, and I believe correctly. It
23 would certainly circumvent the court's ruling if an expert is
24 then allowed to come in and say well, she suffered from bipolar
25 disorder. That's just circumventing the order.

1 So I think Ms. Palm's interpretation of the order is
2 the correct one, an expert can only discuss those things that
3 will be contained in our stipulation and nothing more.

4 THE COURT: That's correct. Now, if they can form
5 some opinion, a proper opinion, Ms. Palm, then they're free to
6 address any of those issues.

7 MS. PALM: Thank you.

8 THE COURT: And there's --

9 MS. PALM: So --

10 THE COURT: -- numerous -- numerous identification in
11 here of suicide or cutting herself. You know, I'm not going to
12 tell you how they can couch their opinion, but, you know, if
13 they can draw some opinion from these items that are -- that
14 are allowed in, they're free to testify.

15 MS. PALM: Okay, so they -- they could opine to a
16 diagnosis bases on these items?

17 MR. LALLI: Well, I don't think there's sufficient
18 information on those two sheets of paper or three sheets to
19 reach an opinion. So I would certainly interpose objections on
20 speculation, things of that nature. I'm not sure -- and I'm
21 certainly not telling Ms. Palm how to do her case. I'm not
22 sure that an expert -- well, an expert could just, I mean,
23 testify as to what depression is or to what anxiety is or maybe
24 why people cut themselves.

25 THE COURT: There's things in here of anger outburst,

1 Ms. Palm. I'm not trying to highlight for -- things for you,
2 but --

3 MS. PALM: No, I understand that they can say she had
4 those things, but they can't put them in the context of a
5 mental health disorder. And -- and for the record, I'm not
6 sure if the court intend to do this or not, but with the 2006
7 admission, she also had a self-inflicted wrist laceration and
8 that's part of what the court took out. And I thought the
9 court was allowing us to have the lacerations.

10 THE COURT: And where was that? Which page and which
11 paragraph?

12 MS. PALM: The bottom of Page 1 where we took out the
13 entire paragraph. That's the only mention of her wrist
14 laceration with that admission.

15 THE COURT: I'm sorry, which paragraph?

16 MS. PALM: The bottom paragraph, records 2006
17 admission to Monte Vista, also has self-inflicted wrist
18 laceration, about the third line down. That is the only
19 reference to that laceration.

20 THE COURT: That --

21 MR. LALLI: Your Honor, I didn't --

22 THE COURT: If I excluded that, because that does
23 deal with the wrist lacerations, that that would be allowed in.

24 MS. PALM: Okay, thank you.

25 MR. LALLI: Your Honor, I didn't realize we were

1 going to revisit this issue, and I don't have my --

2 THE COURT: Well -- well --

3 MR. LALLI: -- don't have my materials for it.

4 THE COURT: -- actually, it was -- I think it's an
5 error of the court. I missed that identification, wrist
6 laceration.

7 MS. PALM: Thank you.

8 THE COURT: We're not going to argue on any other
9 issues.

10 MS. PALM: Okay, thank you.

11 THE COURT: All right.

12 MS. PALM: And then, you know, just so I'm clear, no
13 other evidence either aside from experts. Brian couldn't get
14 up and talk about the other suicide attempts he's aware of
15 anything, that he should keep his -- I just don't want to
16 violate the court's order. He should keep his testimony
17 limited to what's in the -- this document? It --

18 THE COURT: Well, we're -- because I thought these
19 documents here related to your experts testifying.

20 MS. PALM: No, my motion was to admit the evidence,
21 the evidence of her mental health history --

22 MR. LALLI: Your Honor --

23 MS. PALM: -- and --

24 MR. LALLI: Oh, I'm sorry.

25 MS. PALM: -- I wanted to admit her records, I wanted

1 to admit experts to testify about her diagnoses and what that
2 meant and I wanted to be able to talk about that evidence,
3 Brian could testify to what he knows. That was the motion.
4 The ruling as to this, I understand the court's ruling, and I'm
5 not -- I'm not telling you I'm not accepting it. I just am
6 trying to understand what the limitations would be on the other
7 evidence I introduced.

8 Now, I understand the experts, but I'm talking about
9 Brian's testimony, Mr. O'Keefe's testimony, how that should be
10 limited. Should it be limited to conform with what's
11 admissible in this -- in this excerpt order?

12 MR. LALLI: Well, your Honor, it's -- it's --
13 certainly the -- the defendant's testified before, and I -- I
14 mean, he didn't mention -- my recollection of reviewing his
15 testimony, and I've done that quite thoroughly, I don't recall
16 him testifying in a specific way to anything more than what is
17 contained in -- in our stipulation so --

18 MS. PALM: We had an order last time it wasn't
19 admitted (indiscernible).

20 MR. LALLI: Well, he still made references to the
21 victim being in mental health counseling and attempted suicide.
22 So maybe he violated your order the last time, I don't know.
23 But it is in his testimony. The -- it would be my position,
24 your Honor, that the defendant cannot testify that the victim
25 suffered from bipolar disorder. That would be again,

1 irrelevant under Daniel and under Petty and under our character
2 statutes.

3 Certainly, he could testify about any other specific
4 incidents of cutting, self-inflicted cutting that the victim
5 did or if he wants -- if they want to make an offer of proof as
6 to what else is out there, and I think certainly that would be
7 appropriate, but if they want to make an offer of proof as to
8 what is out there that he may testify to, then we can litigate
9 it just like we've litigated up to this point.

10 MS. PALM: Well, I mean, my offer of proof was in my
11 motion, which I filed back on July 21st. And it's incredible
12 to me that Mr. Lalli is talking about this at this point I need
13 to make an offer of proof. Mr. O'Keefe knows everything that
14 Ms. Whitmarsh went through, including all of her suicide
15 attempts.

16 He wasn't testifying to that last time. I think he
17 did make one slip when he did, but he was limited on testifying
18 to everything that he knew. So he's never been given that
19 opportunity. But we did litigate this last time. He does know
20 about all of it. I understand that if the court is saying you
21 cannot talk about the diagnoses because you're not a doctor and
22 I've limited you on diagnoses, but can he talk about all her
23 saw side attempts because it's in his mind when the stuff's
24 going on in the bedroom what she might be doing.

25 THE COURT: I think anything contained in the reports

1 that's coming in, he can testify about if he has that
2 knowledge, that foundation.

3 MS. PALM: Okay, so the two suicide attempts he can
4 say, you know, I know -- I know she's a cutter --

5 THE COURT: If she --

6 MS. PALM: -- and I know, you know, she's made these
7 two previous attempts and not talk about the other ones?

8 THE COURT: Whatever's contained in these reports --

9 MS. PALM: Okay.

10 THE COURT: -- he can -- if he knows about them.

11 MS. PALM: He was there.

12 THE COURT: Okay, well --

13 MS. PALM: He does know about them.

14 THE COURT: Then he can testify to those items.

15 MS. PALM: Okay. Thank you.

16 MR. LALLI: And just -- the -- the stipulation that
17 we received or the outline that I received is more inclusive
18 than the information contained in the motion that Ms. Palm is
19 referring to. So to suggest that we are presented with a
20 plethora of information a month and a half ago and -- and --
21 and somehow spaced it, I mean, that's just not what happened.

22 We received the -- the outline from Ms. Palm, I
23 believe last week at which it contained more information than
24 -- than was in the motion so --

25 THE COURT: I'm not faulting either side.

1 MR. LALLI: Thank you.

2 MS. PALM: Well, and -- and that's simply not true.
3 My motion had all the exhibits attached to it, referred to the
4 Exhibit B that we filed last time that had all her medical
5 records, so that's --

6 THE COURT: And I'm not going to be --

7 MS. PALM: -- simply not true.

8 THE COURT: I'm not faulting either side. And if
9 it's motions have been filed and opposition filed, they are
10 part of the record.

11 MS. PALM: Thank you, your Honor.

12 MR. LALLI: Thank you.

13 THE COURT: Okay.

14 MS. PALM: We -- we have just one scheduling thing.
15 I do have Dr. Grey flying in from Utah and Dr. -- or George
16 Schiro flying from Louisiana on Thursday because I thought we'd
17 be further along like we were last time. And then I also have
18 Lou DeSalvio who's about a ten minute witness that has to
19 testify on Thursday because he has a cancer in the family that
20 he's gotta leave for.

21 So, I mean, hopefully we can accommodate that with
22 our scheduling. But I -- I can't change doctors' flights at
23 this late hour.

24 THE COURT: I don't see why we couldn't do that. Do
25 you, Mr. Lalli?

1 MR. LALLI: I -- I don't other than I also have
2 witness limitations as well. So --

3 THE COURT: The court's inclined to work with
4 everyone's schedule and do what we can. And hopefully -- and
5 some of these days the jurors can stay later than 5:00.
6 Although, we're supposed to keep down our overtime. But
7 because of the nature of the case and that we are behind, I
8 mean, no fault of anybody, but you have to be thorough on
9 picking your jury.

10 If the jurors can stay until 5:30 or 6:00 we'll tell
11 you every single day, and then we'll give you as much advance
12 notice as possible so you can get more witnesses lined up --

13 MR. LALLI: Okay.

14 THE COURT: -- so we can get back on track.

15 MR. LALLI: Thank you, your Honor.

16 MS. PALM: Thank you.

17 THE COURT: All right, thank you.

18 (Court recessed at 5:09 p.m., until Wednesday,
19 August 25, 2010).

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ROUGH DRAFT TRANSCRIPT

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ACKNOWLEDGMENT

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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